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APPENDIX A

727 S.W.3d 400

SUPREME COURT OF KENTUCKY.

2024-SC-0006-DG

MISSIONARIES OF
SAINT JOHN THE BAPTIST, INC.,

Appellant,

v.

JOEL FREDERIC; CATHLEEN MATCHINGA; CHARLES
MEYERS; CITY OF PARK HILLS BOARD OF ADJUSTMENT;
ELIZABETH FREDERIC; JUSTIN ODOR; MARK KOENIG;
ROBERT SWEET; SHEILA BURKE TRUST; SHEILA
BURKE, IN HER CAPACITY AS TRUSTEE FOR THE
SHEILA BURKE TRUST; AND THOMAS MICHAEL,

Appellees.

December 18, 2025

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OPINION

Opinion of the Court by Chief Justice Lambert

The Protection of Religious Exercise in Land Use and by Institutionalized Persons Act (RLUIPA) is a federal law enacted to protect individuals and religious institutions from substantially burdensome or discriminatory land use regulations and to protect the religious rights of institutionalized persons. In this case, this Court must address as a matter of first impression whether the enforcement of a zoning ordinance to deny a church the ability to build a religious shrine constituted a violation of RLUIPA. After review, we affirm the Court of Appeals' ruling that RLUIPA was not violated under the facts of this case, although we do so on different grounds.

I. FACTUAL AND PROCEDURAL
BACKGROUND

a. Park Hills Board of Adjustment

In March 2021, Jordan Odor¹ submitted an application letter to Chris Schneider, the Principal Planner for the Planning and Development Services of Kenton County (PDS).² The letter was submitted by Odor on behalf of the Sheila Burke Trust (the

¹ It appears that Odor is the architect that created or took part in creating renderings of the grotto, though it is unclear from the record.

² PDS is an area planning commission created pursuant to Kentucky Revised Statutes (KRS) 147.610 – 147.710. It provides planning and zoning services to the Park Hills Board of Adjustment and other governmental entities in Kenton and Campbell Counties within the meaning of KRS Chapters 100 and 147. PDS is not authorized to take any “final action” within the meaning of KRS 100.347 as it relates to the issuance of conditional use permits or variances.

Burke Trust) and Missionaries of Saint John the Baptist, Inc. (St. John). St. John is a non-profit organization that owns real property in Park Hills, upon which sits Our Lady of Lourdes, a diocesan Catholic church.

Odor's letter requested that the Park Hills Board of Adjustment (the Board) issue a conditional use permit and setback variances so that St. John could build an outdoor grotto into a small hill next to its parking lot. The grotto was to consist of a shrine to the Virgin Mary, a plaza, a walking path, and a retaining wall. St. John sought to build the 16 ft. by 39 ft. grotto on a portion of land adjacent to the church's lot that was then-subject to a perpetual lease agreement between the Burke Trust and St. John; the lease was entered into with the mutually agreed intent to construct the grotto. St. John's property was located on Amsterdam Road, a collector street,³ while the land owned by the Burke Trust on which the grotto would be built was on Alhambra Court, a local street.⁴

The Odor letter acknowledged that the church was already classified as a "conditional use" because it was zoned in a district for single and two-family residential buildings; the church was constructed prior to the adoption of the Park Hills zoning code and has been used as a church for various

³ Section 7.0 of the Park Hills' zoning code defines collector street as a "[p]ublic [thoroughfare] which [serves] to collect and distribute traffic, primarily from local residential streets to arterial streets."

⁴ Section 7.0 of the Park Hills zoning code defines local street as "[f]acilities which are designed to be used primarily for direct access to abutting properties and leading into the collector street system."

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denominations ever since. The letter further acknowledged that “the creation of any type of accessory space to the existing church is not directly permitted by the current local zoning ordinance” because the ordinance required that churches be located adjacent to an arterial street ⁵ in order to obtain a conditional use permit. Specifically, Section 10.4 of the Park Hills zoning ordinance states, in relevant part:

A. PERMITTED USES:

1. Single - family residential dwellings (detached).
2. Two - family residential dwellings.
3. Planned Unit Development (PUD), as regulated by ARTICLE XI of this Ordinance.

...

C. CONDITIONAL USES: No building or occupancy permit shall be issued for any of the following, nor shall any of the following uses or any customary accessory buildings or uses be permitted until and unless the location of said use shall have been applied for and approved of by the Board of Adjustment, as set forth in SECTION 9.13:

⁵ Section 7.0 of the Park Hills zoning code defines arterial street as “[p]ublic thoroughfares which serve the major movements of traffic within and through the community[.]”

...

2. Churches and other buildings for the purpose of religious worship, provided they are located adjacent to an arterial street.

Notwithstanding the plain language of the ordinance, Odor requested that the Board approve: “the installation of a customary accessory structure (i.e. grotto) to the existing conditional use for a place of religious worship”; “the installation of a customary accessory structure (i.e. grotto) at a site located off a collector street rather than an arterial street”; and “variances . . . for conditionally permitted uses[.]” In addition to his letter, Odor submitted a site plan and drawings detailing the proposed grotto and several letters in support of the project from members of the community.

On April 8, 2021, Schneider sent the Board a one-page letter and five-page PDS staff report recommending that St. John’s request for a conditional use permit and variances be denied. PDS’s recommendation was based on the proposed project’s failure to satisfy the requirements of Section 10.4 of the zoning code which, as noted, permitted for conditional use “[c]hurches and other buildings for the purpose of religious worship, *provided they are located adjacent to an arterial street.*” (Emphasis added). In addition, Section 9.13 of the zoning code directs:

- A. The Board of Adjustment may authorize a conditional building and use to be located within any zone in which the particular conditional use is permitted by the use regulations of this ordinance, *if the evidence presented by*

the applicant is such as to establish, beyond any reasonable doubt:

1. That the proposed building and use at the particular location is necessary or desirable to provide a service or facility which will contribute to the general well being of the neighborhood or the community; and
2. That such building and use will not, under the circumstances of the particular case, be detrimental to the health, safety, or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity; and
3. *That the proposed building and use will comply with any regulations and conditions specified in this ordinance for such building and use.*

(Emphasis added). While PDS believed that the proposed project satisfied Section 9.13(A)1. and 2., it could not conclude that subsection 3.'s requirement had been met because “[c]hurches are required to [be] located adjacent to an arterial street[,]” and “Amsterdam Road is a collector street[.]” It advised the Board that being located on an arterial street was “a minimum requirement of the zoning ordinance for conditional use.”

As PDS recommended that the conditional use permit be denied, it further recommended that the variances be denied. However, it noted that if the Board wished to grant the variances, it must first find that granting the variances “will not adversely affect the public health, safety or welfare, will not alter the essential character of the general vicinity, will not cause a hazard or a nuisance to the public,

and will not allow an unreasonable circumvention of the requirements of the zoning regulations.” KRS 100.243(1).

On April 15, 2021, the Board held a public hearing regarding St. John’s requests. Schneider gave a presentation and explained PDS’s position that the requests should be denied consistent with the reasons provided in the PDS staff report. Father Sean Kopczynski presented his own presentation on behalf of St. John. When the hearing was opened to the public several members of the community voiced support for the project while several, including Joel Frederic, voiced their opposition. The most common reason raised in opposition was that traffic and parking in the neighborhood, which were already a problem, would be exacerbated.

The Board voted 4-1 to grant both the conditional use permit and the setback variances conditioned on the property being deeded to St. John’s within six months.⁶ The sole member that voted against granting St. John’s requests did so on the basis that the church was not located on an arterial street and concerns about increased traffic.

Four days after the public hearing, Schneider sent Odor, St. John, and the Burke Trust a barebones letter memorializing the Board’s decision to grant the

⁶ During the hearing the Board’s chairman expressed that he would be “much more comfortable” if the property was deeded to St. John “to eliminate a lot of controversy about what if.” Father Kopczynski stated that the Burke Trust intended to transfer the property in fee simple to St. John regardless of whether the project was approved and that they had already begun that process. The property was ultimately deeded to St. John on June 22, 2021.

conditional use permit and variances. The Board's findings were, in their entirety:

Request 1

Decision: To approve the conditional use permit for an accessory structure associated with a church.

- Basis:**
1. The proposed building and use at this particular location is necessary or desirable to provide a service or facility which will contribute to the general well being of the neighborhood or the community.
 2. The proposed building and use will not, under the circumstances of this particular case, be detrimental to the health, safety, or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity.
 3. *The proposed building and use will comply with any regulations and conditions specified in this ordinance for such building or use.*
 4. Based on testimony heard at the April 15, 2021 public hearing.

Request 2

Decision: To approve the variance requests to the rear and side yard setback requirements for an accessory use associated with a church with the condition that the portion of 917 Alhambra Court which contains the proposed accessory structure . . . is deeded over to 1101 Amsterdam Road within six months.

- Basis:**
1. The requested variances will not adversely affect the public health, safety [or] welfare, will not alter the essential character of the general vicinity, will not cause a hazard or nuisance to the public, and will not allow an unreasonable circumvention of the zoning regulations.
 2. Based on testimony heard at the April 15, 2021 public hearing.

(Emphasis added).

b. Kenton Circuit Court

Thereafter, Joel Frederic and his wife Elizabeth, who live directly across the street from the church, filed a complaint against the Board; Odor; the Burke Trust; Shelia Burke, as trustee of the Burke Trust; and St. John (collectively, the defendants)⁷ in Kenton Circuit Court. We note here that any recorded proceedings that may have occurred before the circuit court were not included in the record now before us.

Count one of the complaint was an appeal pursuant to KRS 100.347 under which the Frederics asserted that the Board violated the applicable ordinances in granting St. John's conditional use permit because the church's property was not adjacent to an arterial street. It further contended that the Board lacked the authority to grant variances to St. John pursuant to KRS 100.247 ("The board shall not possess the power to grant a variance . . . which is not permitted by the zoning regulation in the zone in question[.]"), and that the Board failed to consider that the expansion

⁷ The complaint also named PDS as a defendant, but it was later dismissed from the suit by agreed order as it was an unnecessary party.

of a nonconforming use was implicated under KRS 100.253 (“The board of adjustment shall not allow the enlargement or extension of a nonconforming use beyond the scope and area of its operation at the time the regulation which makes its use nonconforming was adopted[.]”). Count two of the complaint sought declaratory and injunctive relief.

The defendants filed a joint answer to the complaint asserting various defenses. Pertinent to our purposes herein, the defendants’ answer did not assert that the Board was compelled to grant St. John’s request under RLUIPA, 42 U.S.C.A.⁸ §§ 2000cc – 2000cc-5.

Roughly nine months later, the Frederics filed a motion for summary judgment which asserted identical arguments to those raised in their complaint. The defendants thereafter filed their own joint motion for summary judgment. Despite their initial acknowledgement before the Board that the church was not located on an arterial street, their motion for summary judgment changed course. They instead noted that the construction of the church pre-dated the zoning code and asserted, without any supporting evidence, that at the time the church was constructed Amsterdam Road was an arterial street. Based on this they argued, without any supporting case law or statutes, that an existing structure within a zone is not affected by subsequent zoning changes and are therefore “grandfathered in” until the existing use is abandoned. They further argued, again without any supporting law, “that since the church predated the zoning regulations it is exempt from the current

⁸ United States Code Annotated.

restrictions.” Or, stated differently, the zoning code simply did not apply to it.

The defendants further argued, for the first time, that RLUIPA applied. Their only argument was that there was no compelling reason to prevent the grotto’s construction and that the issue was “beyond the scope of government regulation.” The motion for summary judgment also asserted that the Board did not act arbitrarily in granting the conditional use permit or variances; that the Frederics failed to show they were aggrieved or injured by the Board’s ruling; and that the circuit court lacked the authority to grant the Frederics’ requested injunctive relief.

The Frederics’ reply did not assert that the defendants were precluded from raising RLUIPA due to their failure to assert it as an affirmative defense in their answer to the Frederics’ complaint. Instead, they responded to the argument on the merits and asserted that the zoning ordinance was a reasonable restriction that keeps traffic from churches to arterial streets in order to prevent non-arterial neighborhood streets from being overburdened, and thus that enforcement of the ordinance did not violate RLUIPA. As for the church’s existence pre-dating the zoning code, the Frederics argued that this simply made the church a non-conforming use which may be continued but cannot be expanded. KRS 100.253. They further argued that they had asserted an actual injury; that they were denied due process by the Board because they were not permitted to cross-examine anyone during the public hearing; and that injunctive relief could be issued to prevent the government from violating the law.

The circuit court granted summary judgment in favor of the defendants. It is not clear from the record

whether the circuit court held a hearing on the competing motions for summary judgment, or whether it issued its ruling based solely on the parties' filings. While the court found that the Frederics had standing and had alleged an actual injury, it further found that they failed to demonstrate the Board acted arbitrarily pursuant to *Am. Beauty Homes Corp. v. Louisville & Jefferson Cty. Planning and Zoning Comm'n*, 379 S.W.2d 450 (Ky. 1964). *American Beauty* provides a tripart test to determine whether an administrative body acted arbitrarily, namely: whether the body acted in excess of its granted powers, whether the litigants before the body were afforded procedural due process, and whether the body's decision was supported by substantial evidence. *Id.* at 456. First, regarding whether the Board acted in excess of its powers, the circuit court found:

The church building has existed on the property since 1930, at which time Amsterdam Road was an arterial street. Amsterdam Road was reconstructed and right-of-way acquired by the Commonwealth Department of Highways in 1955 but the road was never officially designated as being in the State Primary Road System. Park Hills zoning ordinance adopted in 1974 provides in § 10.4 that churches are permitted in the relevant zone provided they are adjacent to an arterial street, which is defined in § 7.0 as a public thoroughfare which serves the major movements of traffic within and through the community as identified in the comprehensive plan for the city. The right-of-way was transferred from the state back to the City of Park Hills, for that portion of the road within the city limits, in

2007. The Missionaries of St. John the Baptist obtained the property in 2015. At some point it appears that Amsterdam Road lost its designation as an arterial street, although it still meets that definition, but the church is grandfathered in as an accepted conditional use and any permits for accessory structures or variances are to be considered accordingly. *Wells v. Fiscal Court of Jefferson County*, 457 S.W.2d 498, 502 (Ky. 1970).⁹

It further held that the Board provided procedural due process via the public hearing and that substantial evidence supported its decision. The circuit court ruled in the defendants' favor, and it did not address RLUIPA.

c. Court of Appeals

The Frederics appealed the circuit court's ruling to the Court of Appeals, and a unanimous panel reversed. *Frederic v. City of Park Hills Bd. of Adjustment*, 2022-CA-0867-MR, 2023 WL 8286391 (Ky. App. Dec. 1, 2023). The court held that the Board acted arbitrarily under the *American Beauty* test because while it afforded the Frederics procedural due process, *id.* at *6, it exceeded its statutory authority in granting St. John a conditional use permit and variances. *Id.* at *4. It reasoned that the construction of the grotto on the Burke Trust

⁹ *Wells* upheld a decision of the Jefferson County Fiscal Court to re-zone a parcel of land from single-family residential to multi-family residential under KRS 100.213 and held that a parking garage was a valid accessory structure for the proposed apartment buildings. *Id.* at 502-03. It said nothing regarding the concept of "grandfathering in."

property “would constitute either a change or an expansion of the church’s preexisting nonconforming use[,]” and that the expansion of a preexisting nonconforming use is plainly prohibited by Section 19.6(D)(3) of the zoning code, which states: “The Board of Adjustment shall not allow the enlargement or extension of a nonconforming use beyond the scope and area of its operation at which time its use became nonconforming.” *Id.* It further held that KRS 100.253 likewise prohibited the expansion. *Id.* Based on this holding, the court declined to address whether the Board’s decision was supported by substantial evidence. *Id.* at *6.

As for RLUIPA, we first highlight that neither the Frederics’ appellant brief nor its reply brief before the Court of Appeals argued that the RLUIPA claim was not properly before the court due to the defendants’ failure to assert it affirmatively in their answer before the circuit court, and instead argued the issue on the merits at the summary judgment phase. The Court of Appeals accordingly addressed the defendants’ RLUIPA claim and held:

[T]he Sixth Circuit notes, there is “no substantial burden when, although the action encumber[s] the practice of religion, it d[oes] not pressure the individual to violate his or her religious beliefs.” *Living Water Church of God v. Charter Tp. of Meridian*, 258 F. App’x 729, 734 (6th Cir. 2007)

“RLUIPA’s history demonstrates that Congress intended to leave intact the traditional ‘substantial burden’ test, as defined by the Supreme Court’s free exercise jurisprudence.” *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 701 (E.D.

Mich. 2004) (citations omitted). Federal courts have identified two categories of alleged substantial burden upon free exercise of religion. *Id.* at 701. As to the first, “courts routinely find substantial burdens where compliance with the statute itself violates the individual’s religious beliefs and noncompliance may subject him to criminal sanctions or the loss of a significant government privilege or benefit.” *Id.* at 701-02. In the second, “courts have been far more reluctant to find a violation where compliance with the challenged regulation makes the practice of one’s religion more difficult or expensive, but the regulation is not inherently inconsistent with the litigant’s beliefs.” *Id.* at 702.

The Park Hills Zoning Ordinance falls squarely within the second category. The application of the ordinance to prohibit construction of the grotto may make practice of religion somewhat more difficult for the church’s congregation or the adherents of the Catholic faith broadly, but the Zoning Ordinance is not inherently inconsistent with their religious beliefs.

Id. at *6-*7 (internal citations omitted). The Court of Appeals accordingly concluded that enforcement of the Park Hills zoning ordinance did not constitute a violation of RLUIPA. *Id.* at *7.

St. John thereafter sought discretionary review of the Court of Appeals’ ruling from this Court, which we granted.

II. ANALYSIS

As a preliminary point of clarification, despite the majority of the proceedings below focusing on whether the Board acted arbitrarily under *American Beauty*, before this Court St. John has not challenged the Court of Appeals' holding that the Board exceeded its statutory authority in granting St. John's requested conditional use permit and variances. Accordingly, that holding must stand and we will address only the arguments raised by St. John concerning the application of RLUIPA.

A. Preservation

This Court must first address as a threshold matter whether St. John's RLUIPA claims were properly preserved for our review. The Frederics assert, for the first time in this litigation, that St. John's claims under RLUIPA were not properly preserved because it failed to raise it as an affirmative defense¹⁰ in its answer to the Frederics' circuit court complaint. CR¹¹ 8.03 ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense.").

St. John argues in response that the Frederics did not challenge its assertion of RLUIPA in either the circuit court or the Court of Appeals and instead responded to its arguments on the merits. Therefore, it contends, its RLUIPA defense was tried by the implied consent of the Frederics pursuant to CR

¹⁰ Although RLUIPA is most commonly asserted as a cause of action, the Act itself contemplates that it may be raised as a defense. 42 U.S.C.A. § 2000cc-2(a) ("A person may assert a violation of this chapter as a claim or defense in a judicial proceeding[.]").

¹¹ Kentucky Rule of Civil Procedure.

15.02, which provides that “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” We agree.

The appropriate time for the Frederics to challenge St. John’s use of RLUIPA as a defense was in their reply after St. John raised it for the first time in its motion for summary judgment. They did not. This Court has previously “determined that CR 15.02 is a tool for deciding cases on their merits rather than on the basis of gamesmanship.” *Kroger Co. v. Jones*, 125 S.W.3d 241, 246 (Ky. 2004) (citing *Nucor Corp. v. Gen. Elec. Co.*, 812 S.W.2d 136, 145–46 (Ky. 1991)). And, CR 15.02 “may be invoked even though the appellate level has been reached.” *Bowling Green-Warren Cty. Airport Bd. v. Long*, 364 S.W.2d 167, 171 (Ky. 1962). To dismiss St. John’s RLUIPA claims at this juncture would in effect allow the Frederics to, whether intentionally or unintentionally, hold their lack of preservation card in their back pocket until the eleventh hour and prevail on a technicality. Civil Rule 15.02 was clearly intended to prevent such an outcome.

Moreover, although no “trial” occurred, the circuit court’s grant of summary judgment was a resolution of the matter comparable to a trial, and CR 15.02 has been previously invoked in workers’ compensation cases, which never involve a jury or bench trial, but rather a hearing before an administrative law judge. *See, e.g., Kroger Co. v. Jones*, 125 S.W.3d 241, 246 (Ky. 2004). Finally, we perceive no prejudice to the Frederics by St. John’s invocation of CR 15.02: St. John’s intent to assert RLUIPA has been in the background of this litigation since its motion for

summary judgment, and the Frederics have asserted their arguments in opposition throughout these proceedings. *See Nucor*, 812 S.W.2d at 146 (“[T]he theory of implied consent does not turn on actual consent but on actual prejudice. The concept of actual prejudice is not related to winning or losing, but to being unable to present a defense which would have been otherwise available.”).

Accordingly, we hold that St. John’s RLUIPA defense was tried by the implied consent of the parties and is properly before us for decision.

B. Merits

The United States Congress enacted The Religious Freedom Restoration Act (RFRA), 42 U.S.C.A. §§ 2000bb-2000bb-4., in 1993 and its sister statute RLUIPA in 2000 “in order to provide very broad protection for religious liberty.” *Holt v. Hobbs*, 574 U.S. 352, 356, 135 S.Ct. 853, 190 L.Ed.2d 747 (2015). RFRA’s protections are much broader than RLUIPA’s, as it commands that the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the government demonstrates that the application of the burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.” 41 U.S.C.A. § 2000bb-1. (a)-(b).

Congress initially intended for RFRA to apply to both state governments pursuant to the Fourteenth Amendment and the federal government. However, in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), the United States Supreme Court held that Congress exceeded its

authority under the Fourteenth Amendment in making RFRA applicable to the states. Accordingly, while RFRA is still applicable to the federal government, it has no authority over the sovereign states. In response to *Flores*, Congress passed RLUIPA, which applies to the states and their subdivisions pursuant to Congress' authority under the Spending and Commerce Clauses. *Hobbs*, 574 U.S. at 357, 135 S.Ct. 853. Consequently, it has a very narrow application in only two areas: land use regulations that impose substantial burdens on religious exercise or otherwise discriminate against or place a religious entity on non-equal footing with a non-religious entity, and government practices that impose a substantial burden on the religious exercise of institutionalized individuals.

Kentucky has since enacted its own religious freedom statute, the Kentucky Religious Freedom Restoration Act (KRFRA) that is nearly identical in its broad application to RFRA as it states that “[g]overnment shall not substantially burden ¹² a person’s freedom of religion” unless “the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest.” KRS 446.350. However, although KRFRA would be applicable to the facts of this case, St. John has not raised any claims under KRFRA nor has it asserted any claims under the Kentucky or the United States Constitution. Our focus herein is therefore limited to RLUIPA.

¹² We note that this Court has never been called upon to define “substantial burden” under KRFRA.

This Court has not yet had occasion to address RLUIPA. We therefore begin with the language of the Act which provides, in relevant part:

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation¹³ 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.

(2) Scope of application

This subsection applies in any case in which—

...

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

42 U.S.C.A. § 2000cc(a).

¹³ The Act defines “land use regulation” as “a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land), if the claimant has an ownership ... interest in the regulated land[.]” 42 U.S.C.A. § 2000cc-5(5).

Accordingly, a RLUIPA claimant first bears the burden of demonstrating that a governmental land use regulation, such as a zoning ordinance, imposes a substantial burden on his, her, or its exercise of religion. If, and only if, a claimant demonstrates that a substantial burden exists does the burden shift to the government to demonstrate that the imposition of that burden furthers a compelling government interest and is the least restrictive means of furthering that interest. *See also* 42 U.S.C.A. § 2000cc-2.(B).

Thus, the first question we must address is whether St. John has demonstrated that a denial of its request for a conditional use permit and variances pursuant to the Park Hills zoning code constitutes a substantial burden on its religious exercise. The action St. John wishes to take—building a grotto that honors the Virgin Mary’s appearance at a grotto in Lourdes, France—constitutes a religious exercise. 42 U.S.C.A. § 2000cc-5.(7)(A) (“The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”). The dispositive issue, then, is whether the prevention of that pursuit constitutes a substantial burden.

The Act itself does not define substantial burden, and the United States Supreme Court has yet to define it under RLUIPA within the land use regulation context. This leaves us to look to the federal circuit courts for guidance, and we agree with the Frederics’ assertion that the Sixth Circuit’s jurisprudence as delineated in *Livingston Christian Schools v. Genoa Charter Twp.*, 858 F.3d 996 (6th Cir. 2017) should be our polestar.

In *Livingston*, the Sixth Circuit’s primary focus was formulating a workable standard to determine when a substantial burden had been imposed on the exercise of religion within the land use regulation context. It began that endeavor by discussing the only two cases from its circuit that addressed that inquiry, both of which were unpublished. *Id.* at 1002. One of those cases was *Living Water* which, the *Livingston* Court explained, “decline[d] to set a bright line test’ to determine whether a substantial burden exists,” and instead announced a “framework to apply to the facts before [it].” *Id.* at 1002 (quoting *Living Water*, 258 Fed.Appx. at 737). That framework asked: “[D]oes the government action place substantial pressure on a religious institution to violate its religious beliefs or effectively bar a religious institution from using its property in the exercise of religion?” *Livingston*, 858 F.3d at 1002 (quoting *Living Water*, 258 Fed.Appx. at 737).

In her concurring opinion in *Living Water*, Judge Moore cautioned that the framework established by the opinion was inadvisable “because the effective-bar prong was ‘so broad as to swallow the substantial-burden inquiry.’” *Livingston*, 858 F.3d at 1003 (quoting *Living Water*, 258 Fed.Appx. at 742 (Moore, J., concurring)). The *Livingston* Panel agreed with this assessment, as “the effective-bar prong would mean that, any time that a land use regulation completely barred the religious use of a property, a substantial burden would automatically exist.” *Livingston*, 858 F.3d at 1003. The court further noted that no other circuit had adopted the effective bar test, and that the test failed to consider factors that other circuits had considered under the substantial burden inquiry “such as whether a religious institution has ready alternatives to carry out its mission, or

whether the religious institution's inability to use available land was self-imposed." *Id.* The *Livingston* court accordingly declined to follow the *Living Water* framework and sought to establish its own. *Id.*

In doing so, it began from the principle that "not just any imposition on religious exercise will constitute a violation of RLUIPA," and that the burden must have "some degree of severity to be considered 'substantial.'" *Id.* It reasoned that "taking seriously the requirement that a burden be 'substantial' is necessary in order to avoid an interpretation of RLUIPA that would exempt religious institutions from all land-use regulations." *Id.* Relying on opinions from its sister circuits, the *Livingston* court then adopted several factors to be considered in determining whether a substantial burden exists. *Id.* at 1004-05.

The first factor is "whether the religious institution has a feasible alternative location from which it can carry on its mission." *Id.* at 1004 (citing *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 352 (2d Cir. 2007)). The second is "[w]hether the religious institution will suffer substantial delay, uncertainty, and expense due to the imposition of the regulation[.]" *Livingston*, 858 F.3d at 1004 (internal quotation marks omitted) (quoting *Westchester*, 504 F.3d at 349). The third is whether "a plaintiff has imposed a substantial burden upon itself . . . [f]or example when an institutional plaintiff has obtained an interest in land without a reasonable expectation of being able to use that land for religious purposes[.]" *Livingston*, 858 F.3d at 1004 (citing *Andon, LLC v. City of Newport News, Va.*, 813 F.3d 510, 515 (4th Cir. 2016); *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007)). And

the fourth factor was “whether there is evidence that the municipality’s decisionmaking (sic) process was arbitrary, capricious, or discriminatory.” *Livingston*, 858 F.3d at 1004.

In this case, St. John asserts arguments under the first three *Livingston* factors. It first makes several conclusory statements that it has no other feasible alternative locations for construction of the grotto. It has not asserted that it could not construct a smaller grotto or shrine on the property it already owned, i.e., not on the acquired Burke Trust property. Doing so would prevent St. John from running afoul of KRS 100.253, which only prevents “the *enlargement or extension* of a nonconforming use beyond the scope and area of its operation at the time the regulation which makes its use nonconforming was adopted[.]” (Emphasis added). Moreover, we conclude that St. John’s ability to build a smaller shrine or grotto than what it desires falls more into the category of a mere inconvenience than a burden with “some degree of severity[.]” *Livingston*, 858 F.3d at 1003 (citing *Int’l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011) (explaining that a substantial burden “must impose a significantly great restriction or onus upon [religious] exercise” (quoting *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004))); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (concluding that a substantial burden is “more than an inconvenience”). We cannot conclude this factor weighs in St. John’s favor.

Relying on *Catholic Healthcare Int’l, Inc. v. Genoa Charter Twp., Michigan*, 82 F.4th 442 (6th Cir. 2023), St. John next contends that denial of its requested conditional use permit and variance would cause it to

suffer substantial delay, uncertainty, and expense and that it has not imposed a substantial burden upon itself. In *Catholic Healthcare*, Catholic Healthcare, Inc. created a prayer trail with fourteen “stations of the cross” depicting the story of Jesus’ crucifixion on its 40-acre property; the trail could not be seen from outside the property. *Id.* The Township chose to treat the trail as the zoning equivalent of a church building and demanded that Catholic Healthcare apply for a special land use permit. *Id.* At a considerable expense, Catholic Healthcare submitted two such applications, both of which were denied. *Id.* The Township further demanded that the stations of the cross be removed from the trail, along with a stone altar and mural. *Id.* at 444-45. Catholic Healthcare sought a preliminary injunction from the Sixth Circuit pursuant to RLUIPA to allow it to restore all removed items from its prayer trail. *Id.* at 445.

Applying *Livingston*, the *Catholic Healthcare* Court first held that the religious institution had suffered substantial delay, uncertainty, and expense due to the imposition of the Township’s regulations. *Id.* at 449. It reasoned that “after two years of administrative proceedings and considerable expense, they remain unable to place the religious displays on their prayer trail.” *Id.* It further held that Catholic Healthcare had not placed the burden on itself. *Id.* It expounded that “[t]his factor reflects that, when a plaintiff has good reason to know in advance that its proposed usage will be subject to an onerous review process, the burdens of that process are not likely to count as substantial for the purposes of [RLUIPA,]” and that “here, the Township’s zoning ordinance gave plaintiffs little reason to expect the treatment they have received.” *Id.* In particular, Catholic Healthcare

would have had no reason to anticipate that the Township would consider the trail of religious displays a church building. *Id.*

Here, St. John—which bears the burden of proof—has presented no evidence of any expenses it incurred due to any mandate from the Board. Indeed, it concedes that in 2021 it “voluntarily” submitted an application for a grotto that was smaller in size than it originally intended. And, while it asserts that its saga to build the grotto began in 2017, the evidence before us begins with its 2021 application to the Board. Additionally, there can be no serious contention that St. John was uncertain of the likelihood that its applications would be denied pursuant to the applicable zoning ordinance.

St. John’s own application letter to the Board acknowledged that “the creation of any type of accessory space to the existing church *is not directly permitted by the current local zoning ordinance*” because the ordinance required it to be located adjacent to an arterial street to obtain a conditional use permit. (Emphasis added). For the same reason, it cannot be said that St. John has not imposed a burden upon itself under *Catholic Healthcare*. Unlike the claimants in that case, St. John had every reason to know, and in fact explicitly acknowledged, that building the grotto was not permitted by the ordinance.

We accordingly hold that prohibiting St. John’s request to build the grotto does not impose a substantial burden on St. John and accordingly does not run afoul of 42 U.S.C.A § 2000cc(a) of RLUIPA.

St. John further asserts that the ordinance is invalid on its face because it violates the “equal

terms” provision of RLUIPA, which directs: “No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.” 42 U.S.C.A § 2000cc(b). Unlike subsection (a) of 42 U.S.C.A § 2000cc, subsection (b) does not require St. John to prove a substantial burden was imposed. Rather, St. John need only prove that the Park Hills ordinance treats a religious assembly or institution on less equal terms with a nonreligious assembly or institution.

St. John’s sole argument under the equal terms provision of RLUIPA is that Section 10.4(C) of the Park Hills zoning ordinance requires churches and other buildings for the purpose of religious worship to be on an arterial street “while not requiring the same for cemeteries, nursery schools, public and parochial schools, public parks, playgrounds, golf courses, community recreation centers, libraries, and country clubs.” This assertion is not correct. Section 10.4(C) states in its entirety:

C. CONDITIONAL USES: No building or occupancy permit shall be issued for any of the following, nor shall any of the following uses or any customary accessory buildings or uses be permitted until and unless the location of said use shall have been applied for and approved of by the Board of Adjustment, as set forth in Section 9.13:

1. Cemeteries.
2. Churches and other buildings for the purpose of religious worship, provided they are located adjacent to an arterial street.

3. Institutions for higher education, *provided they are located adjacent to an arterial street.*
4. Institutions for human medical care - hospitals, clinic sanitariums, convalescent homes, nursing homes, homes for the aged, *provided they are located adjacent to an arterial street.*
5. Nursery school.
6. Police and fire stations, *provided they are located adjacent to an arterial street.*
7. Public and parochial schools.
8. Publicly owned and/or operated parks, playgrounds, golf courses, community recreational centers, including libraries.
9. Recreational uses other than those publicly owned and/or operated, as follows:
 - a. Golf courses.
 - b. Country clubs.

(Emphasis added). Clearly, the ordinance does not put churches and other buildings for the purpose of religious worship “on less than equal terms with a nonreligious assembly or institution.” 42 U.S.C.A. § 2000cc(b). Institutions for higher education, hospitals, sanitariums, convalescent homes, nursing homes, police stations, and fire stations must also be on an arterial street. Moreover, one of the categories St. John identifies as *not* being required to be on an arterial street are parochial schools, which *are* religious institutions. We consequently hold that the Park Hills ordinance does not violate 42 U.S.C.A. § 2000cc(b) of RLUIPA.

As a final note, we clarify that while this Court agrees with the outcome reached by the Court of Appeals in this case—that no RLUIPA violation occurred—we disagree with its application of *Episcopal Student* to conclude that the *reason* no violation occurred was that while “application of the ordinance to prohibit construction of the grotto may make practice of religion somewhat more difficult for the church’s congregation or the adherents of the Catholic faith broadly . . . the Zoning Ordinance is not inherently inconsistent with their religious beliefs.” *Frederic*, 2022-CA-0867-MR, 2023 WL 8286391 at *7. Instead, we reiterate that henceforth *Livingston* and its progeny will be the applicable standard for determining whether a substantial burden was imposed on the exercise of religion within the land use regulation context.

III. CONCLUSION

Based on the foregoing, the Court of Appeals’ holding that the Park Hills Board of Adjustment acted arbitrarily in granting St. John a conditional use permit and variances, which was unchallenged by St. John’s appeal, stands. In addition, the Court of Appeals’ holding that no violation of RLUIPA occurred is affirmed, albeit on different grounds. The Board’s grant of a conditional use permit and variances to St. John for the construction of a grotto is hereby vacated.

All sitting. Bisig, Conley, Goodwine, Keller and Nickell, JJ., concur. Thompson, J. dissents by separate opinion.

Thompson, J., DISSENTING.

While I agree with the majority opinion's conclusion that the Protection of Religious Exercise in Land Use and by Institutionalized Persons Act (RLUIPA) was not violated, this issue was the *only* issue presented by the motion for discretionary review filed by Missionaries of Saint John the Baptist, Inc. (the Church) and the *only* matter which should have been considered by this Court.

Since the singular issue to be determined by this Court was whether a RLUIPA violation had occurred, that is where all discussion should have been confined. I therefore must dissent with regard to the majority's repetition of the Court of Appeals' erroneous analysis of, and criticism of, the determinations made by the Park Hills Board of Adjustment (the Board) to authorize a variance and issue a conditional use permit.

I must write separately out of my real concern that the majority opinion's recitation of the procedural history in this matter—which should be understood as nothing more than dicta—will give even more litigious neighbors the false impression that this Court agreed with the Court of Appeals' erroneous, unnecessary and unreasonably broad determination of what constitutes an unlawful “enlargement or expansion of a nonconforming use” under Kentucky Revised Statutes (KRS) 100.253(2) or the identical local ordinance at issue. The majority opinion should in no way be read or interpreted as to restrict the authority of local boards of adjustment to exercise their discretionary authority in a manner that is both consistent with their authorizing ordinances and enabling statutes, and the overall will of the local citizenry they serve.

My fear is that, due to the dearth of caselaw in the Commonwealth on this issue, this Court's opinion may be viewed as an adoption of the Court of Appeals' erroneous analysis and henceforth serve to: (a) improperly limit the effectiveness and discretion of boards of adjustment to grant necessary and proper conditional use permits that are beneficial to the communities they serve; and (b) unlawfully restrict the vested property rights of landowners whose churches, residences, or businesses predate the adoption of, or amendments to, local zoning ordinances.

It is my conclusion that the Court of Appeals' determination that the planned grotto constituted an "enlargement or expansion" of "the church" mischaracterizes the nature of the intended walkway, path, patio, and statue as a matter of law and impermissibly limits *both* the legal authority granted to, and inherent discretion of, local boards of adjustment to grant conditional use permits and variances.

The genesis of the Court of Appeals' error was its obvious confusion regarding the true nature of the proposed grotto vis-à-vis our statutes and the Park Hills zoning ordinance. To begin, there are differences between a structure that serves as "a church" in the traditional sense of a building for worship with pews, a sanctuary and an altar, and "a church" in the broader sense which may incorporate a litany of additional separate or attached structures commonly found on many church campuses such as Sunday School classrooms, libraries, gyms, fellowship halls, staff offices and even private schools. Here, there was no structure to be constructed. There would have been no excavation or blasting, foundations being

poured, beams laid, framing constructed, trusses mounted, walls erected, heating and air-conditioning installed, or waste and water services dug and connected.

In this case, Missionaries of Saint John the Baptist, Inc., owns certain structures that have operated as “a church” in Park Hills since 1930, predating the creation of Park Hills’s zoning code. Those church buildings only became a “nonconforming use,” (a) *after* Park Hills adopted its zoning code, and (b) *after* Amsterdam Road on which the church is situated was designated a “collector street” instead of an “arterial street.”

Having become a “non-conforming use” through no fault or action of its own, the church could not thereafter be “expanded or extended” per KRS 100.253(2) which reads in relevant part, “*the board of adjustment shall not allow the enlargement or extension of a nonconforming use beyond the scope and area of its operation at the time the regulation which makes its use nonconforming was adopted[.]*” (Emphasis added).

The Court of Appeals decided that construction of a grotto “*would constitute a change or an expansion of the church’s nonconforming use,*” seemingly deciding that *any* new garden with a statue installed by the church—regardless of use, size or impact—equates with an impermissible “expansion.” No reasonable reading of the plain language of the statute supports such an overly broad interpretation.

First, a mere “change” is not prohibited by the statute. The statute specifically uses the terms “enlargement or extension.” So, what is an enlargement or an extension of a nonconforming use? The

statute offers no additional guidance,¹⁴ but I posit that the obvious answer lies in the *degree* to which a new structure or renovations would effectively “enlarge” the commercial utilization of the property in such a way that tangibly changes the property-owning entity itself which, in this case, has been a congregation’s meeting and worship place for the last ninety-five years. Adding a grotto should never be considered an enlargement of a church any more than the addition of a sandbox would be considered a statutory “enlargement” of a daycare facility.

The Courts of our Commonwealth should not entertain the notion that additions of yard art, statues, patios, porches, picnic areas, outdoor seating and the like are outlawed by statute despite a landowner obtaining permission from his or her local zoning authority.

Here, we are talking about a grotto that is dimensionally more akin to a patio and would take up less area than that encompassed by a modest children’s playground. The proposed grotto was not going to significantly, or in any way, alter the core use of “the church” by its presently existing congregation by changing or expanding the church’s function or altering its breadth of operations. Therefore, there would be no “enlargement or extension of [the church] beyond the scope and area of its operation”

¹⁴ Without the General Assembly offering a clear definition for this language, its interpretation and application should be left to the sound discretion of the agencies who are vested, by the local citizenry, with its implementation. Absent proof of a clear abuse of discretion, clear illegality or fraud, local Board of Adjustments’ determinations should be recognized as purely local/political matters into which our Courts should not, and are not allowed to, delve.

and KRS 100.253(2) should not be viewed as an impediment to the Board's decision to allow for its construction.

My interpretation of what ***does not*** constitute an "enlargement or extension" of a nonconforming use is grounded in both our rules for statutory construction and our caselaw.

To discern the meaning of a statute, Courts are to construe "[a]ll words and phrases . . . according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning." KRS 446.080(4). We also must "accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion." *Cosby v. Commonwealth*, 147 S.W.3d 56, 58–59 (Ky. 2004) (quoting *Bailey v. Reeves*, 662 S.W.2d 832, 834 (Ky. 1984)).

I assert the Court of Appeals reached just such an "unreasonable conclusion" and the construction of a mere grotto, by the Church, was no more prohibited by operation of KRS 100.253(2) than would the building of a gazebo, playground, or patio for the congregation's use and enjoyment.

A proper determination that the planned grotto is not an unlawful extension or enlargement of the Church is synchronous with published precedent in our Commonwealth. In *Board of Adjustments, Bourbon Cnty. v. Brown*, 969 S.W.2d 214, 215 (Ky. App. 1998), our Court of Appeals determined that an auction house, which was a nonconforming use, did not create an "impermissible extension or enlargement of a non-conforming use" in violation of

KRS 100.253(2), when it enclosed the front porch of its building with siding to add a bathroom for its customers *and* increased the number of auctions from two each week to three.

More pointedly, in *A.L. Carrithers & Son v. City of Louisville*, 250 Ky. 462, 63 S.W.2d 493, 497 (1933), our predecessor Court determined:

The extending the walls of the building so as to enclose space for the relocating the can-washing and by-products rooms **is not a vital and substantial change of the building in its characteristic or of the fundamental purpose of its creation, nor is it a change of such a nature as materially affects the realty itself, or its use, or the health, morals, or general welfare of the zoned district.** (citations omitted) . . . “Structural alterations” intended to be prohibited by the zoning ordinance are the changing an old building in such a way as to **convert it into a new or substantially different structure.**

(Emphasis added).

Nothing proposed by the Church in its application to construct a grotto constituted a “*vital and substantial change of the [Church] in its characteristic[,] or of the fundamental purpose of [the Church’s] creation, nor is it a change of such a nature as materially affects the realty itself, or its use, or the health, morals, or general welfare of the zoned district.*” *Id.* (emphasis added).

In this matter, the Board correctly interpreted Section 9.11(B) (1) of its ordinance, which mirrors KRS 100.253(2), to not prohibit a grotto. Its ultimate

decision to grant a permit for the grotto was also based upon its sound findings of fact; findings which were accepted by the circuit court and which the Court of Appeals was in no position to question. Specifically, the Board determined that “the proposed building and use at this particular location is necessary or desirable to provide a service or facility which will contribute to the general well-being of the neighborhood or the community,” and “the proposed building and use will not, under the circumstances of this particular case, be detrimental to the health, safety, or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity.”

It is my position that any restriction on the powers of local boards of adjustment, alleged to be found in our statutes, must be read conservatively and strictly in order to give proper deference the boards who are making determinations within their expertise on matters of purely local interest, enforcement, and control. The very purpose of boards of adjustment is the ability to allow local property owners, upon application and after review, to “vary” from strict enforcement of the terms of local ordinances “when it finds that there are ‘practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance.’”¹⁵

This discretionary authority is the whole *raison d’etre* of a board of adjustment:

¹⁵ Phillip P. Green Jr., *The Power of the Zoning Board of Adjustment to Grant Variances from the Zoning Ordinance*, 29 N.C. L. Rev. 245, 246 (1951), <http://scholarship.law.unc.edu/nclr/vol29/iss3/2>.

As in the case with many other administrative agencies, **the board's creation resulted from legislative recognition that it is almost impossible to draft an ordinance of this type which will deal fairly and equitably with all situations. The board's function is to handle 'hard cases'** in such a way as to minimize the possibility of their reaching the courts (and endangering the ordinance as a whole) or being turned into requests for amendment of the ordinance."

Id.

The overall purposes of local zoning ordinances, the interests of petitioning landowners and the interests of affected neighbors, are all much better served by locally controlled boards of adjustment than our Courts. The overarching goal of our statutes, when read as a whole instead of piecemeal, is to give boards of adjustment the flexibility, discretion *and authority* to address *local* issues just like the one presented here without litigating all the way through our circuit courts, the Court of Appeals and the Kentucky Supreme Court. This case presents us with an example of exactly what is *not* supposed to occur. The Park Hills Board of Adjustment agreed that the Church could build a grotto. Next, the Kenton Circuit Court (wherein Park Hills is situated) agreed that the Board could make that determination. Both the Board and the Circuit Court were, are, and remain answerable to local voters who are the final arbiters of what should and should not be built in their localities. The Park Hills Board of Adjustment is far more responsive to the residents of Park Hills and knows far better than the Court of Appeals or this

Court what serves the best interests of its city as a whole.

Boards of adjustment were, by their very nature, designed to make zoning ordinances “work” by allowing for appointed local bodies to readily make necessary and warranted “adjustments” via variances and conditional use permits, when strict adherence to an ordinance’s specific language would make for unworkable or arbitrary results, such as here when a church is not allowed to build a grotto.

Lastly my determination is further supported by the deference our Courts must give to the rights of owners of real property whose land-interests and long-standing activities pre-date later zoning regulations: specifically, those like the church here which has existed for almost one hundred years. As recognized by the United States Supreme Court, while a nonconforming use may be deemed to be undesirable by a portion of the community, that same use constitutes a legitimate, vested property right that clearly enjoys broad constitutional protection. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). *See also Darlington v. Board of Councilmen*, 282 Ky. 778, 140 S.W.2d 392 (1940).

Accordingly, I dissent as I cannot agree with the Court of Appeals’ determination that the Park Hills Board of Adjustment’s actions were either unlawful or unauthorized.

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APPENDIX B

2023 WL 8286391

COURT OF APPEALS OF KENTUCKY

No. 2022-CA-0867-MR

JOEL FREDERIC AND ELIZABETH FREDERIC,
Appellants,

v.

CITY OF PARK HILLS BOARD OF ADJUSTMENT;
CATHLEEN MATCHINGA; CHARLES MEYERS; JUSTIN
ODOR; MARK KOENIG; MISSIONARIES OF SAINT JOHN
THE BAPTIST, INC.; ROBERT SWEET; SHEILA BURKE
TRUST; SHEILA BURKE, IN HER CAPACITY AS TRUSTEE
FOR THE SHEILA BURKE TRUST; AND THOMAS MICHAEL,
Appellees.

December 1, 2023; 10:00 A.M

Discretionary Review Granted
by Supreme Court June 5, 2024

Attorneys and Law Firms

BRIEFS FOR APPELLANTS: Christopher Wiest,
Crestview Hills, Kentucky.

BRIEF FOR APPELLEES: Daniel R. Braun,
Covington, Kentucky.

BEFORE: ACREE, DIXON,¹ AND TAYLOR, JUDGES.

OPINION

ACREE, JUDGE:

Appellants, Joel and Elizabeth Frederic, appeal the Kenton Circuit Court's June 29, 2022 Order affirming the decision of the City of Park Hills Board of Adjustment (Board) granting both a conditional use permit and a setback variance to enable Appellee, Missionaries of Saint John the Baptist, Inc. (Saint John), to construct a grotto behind the Our Lady of Lourdes church. Appellants argue the conditional use permit and setback variance are impermissible under the city's zoning ordinance. We agree, and reverse.

BACKGROUND

Saint John owns property on Amsterdam Road in the City of Park Hills, Kentucky and there operates Our Lady of Lourdes, a Catholic church. Appellants own a residence on Park Drive in the City of Park Hills, and one side of their property is across the street from Saint John's property. Appellees Sheila Burke and the Sheila Burke Trust owned land adjacent to the church.

On March 18, 2021, Appellees Jordan Odor, acting on behalf of Saint John, and the Sheila Burke Trust applied to Kenton County Planning and Development Services for a conditional use permit for the construction of a grotto behind the church. In their briefs, Appellants describe the proposed grotto as "large"; Appellees describe it as "small." The grotto would include a shrine, plaza, walking path, and retaining

¹ Judge Donna Dixon concurred in the Opinion prior to her retirement effective November 20, 2023. Release of this Opinion was delayed by administrative handling.

wall. The church also requested a variance for its rear and side yard setbacks.

The City of Park Hills Board of Adjustment held a public hearing on the application on April 15, 2021. The Board approved both the conditional use permit and the setback variances on the condition that a portion of the land owned by Appellees Sheila Burke and the Sheila Burke Trust be deeded to the church. Burke and the Burke Trust deeded the land to Saint John on June 22, 2021.

Appellants appealed the Board's decision to the circuit court pursuant to KRS² 100.347. The circuit court affirmed, concluding Appellants "have not met their burden of persuading this court that the [Board] acted arbitrarily or in any way outside of its regulatory authority." Appellants appealed the circuit court's decision, which is now before us for our review.

STANDARD OF REVIEW

"[J]udicial review of administrative action is concerned with the question of *arbitrariness*." *Am. Beauty Homes Corp. v. Louisville & Jefferson Cnty. Plan. & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964) (emphasis original). An administrative agency's decision is arbitrary if the agency acted in excess of its statutory power, if a party affected by an administrative action was not afforded procedural due process, or if the administrative decision was not supported by substantial evidence. *Id.* (citations omitted). "Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative

² Kentucky Revised Statutes.

value to induce conviction in the mind of a reasonable person.” *Bowling v. Nat. Res. & Env’t Prot. Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994) (citing *Kentucky State Racing Comm’n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972)).

ANALYSIS

First, we must determine whether the Board acted in excess of its statutory authority in granting the requested conditional use and variances. We conclude that it did.

Appellants argue that, because boards of adjustment are prohibited by statute from both granting variances which contradict zoning regulations and from enlarging or extending a previously existing nonconforming use, the Board exceeded its statutory authority in granting Appellees’ requests.

As Appellees note, KRS 100.237 authorizes the board to “approve, modify, or deny any application for a conditional use permit.” KRS 100.237(1). However, this power is not without limitation. Variances are not permitted where such variance would violate applicable zoning regulations. KRS 100.247 prohibits the board from exercising “power to grant a variance to permit a use of any land, building, or structure which is not permitted by the zoning regulation in the zone in question, or to alter density requirements in the zone in question.” KRS 100.247. This means “one cannot obtain a variance for the use if the property is not permitted by the zoning regulation or alters the density requirements.” *Louisville & Jefferson Cnty. Plan. Comm’n v. Schmidt*, 83 S.W.3d 449, 451 (Ky. 2001) (citing KRS 100.247).

Additionally, while nonconforming uses which pre-date applicable zoning regulations may continue once

the regulations are adopted, a board of adjustment may not enlarge or expand that nonconforming use. KRS 100.253 is determinative of the issue and says:

(1) The lawful use of a building or premises, existing at the time of the adoption of any zoning regulations affecting it, may be continued, although such use does not conform to the provisions of such regulations, except as otherwise provided herein.

(2) The board of adjustment shall not allow the enlargement or extension of a nonconforming use beyond the scope and area of its operation at the time the regulation which makes its use nonconforming was adopted, nor shall the board permit a change from one (1) nonconforming use to another unless the new nonconforming use is in the same or a more restrictive classification, provided, however, the board of adjustment may grant approval, effective to maintain nonconforming-use status, for enlargements or extensions, made or to be made, of the facilities of a nonconforming use, where the use consists of the presenting of a major public attraction or attractions, such as a sports event or events, which has been presented at the same site over such period of years and has such attributes and public acceptance as to have attained international prestige and to have achieved the status of a public tradition, contributing substantially to the economy of the community and state, of which prestige and status the site is an essential element, and where the enlargement or extension was or is designed to

maintain the prestige and status by meeting the increasing demands of participants and patrons.

KRS 100.253(1)-(2).

The church is located in an R-1EE zone, which is governed by Section 10.4 of the Park Hills Zoning Ordinance. Section 10.4 says:

A. PERMITTED USES:

1. Single-family residential dwellings (detached).
2. Two-family residential dwellings.
3. Planned Unit Development (PUD), as regulated by ARTICLE XI of this Ordinance.

B. ACCESSORY USES:

1. Customary accessory buildings and uses.
2. Fences and walls, as regulated by ARTICLE XVI of this Ordinance.
3. Home occupations, subject to the restrictions and limitations established in SECTION 9.23 of this Ordinance.
4. Signs, as regulated by ARTICLE XV of this Ordinance.

C. CONDITIONAL USES: No building or occupancy permit shall be issued for any of the following, nor shall any of the following uses or any customary accessory buildings or uses be permitted until and unless the location of

said use shall have been applied for and approved of by the Board of Adjustment, as set forth in SECTION 9.13:

.....

2. Churches and other buildings for the purpose of religious worship, provided they are located adjacent to an arterial street.

Park Hills, Ky., Zoning Ordinance § 10.4(A)-(C).

Section 19 of the Zoning Ordinance governs the Board, and Section 19.6 provides the Board's powers with respect to dimensional variances and nonconforming uses. Section 19.6, Subsection B provides:

- B. DIMENSIONAL VARIANCE CANNOT CONTRADICT ZONING REGULATIONS:** The Board of Adjustment shall not possess the power to grant a dimensional variance to permit a use of any land, building, or structure which is not permitted by this Ordinance in the zone in question, or to alter the density requirements in the zone in question.

Park Hills, Ky., Zoning Ordinance § 19.6(B). Further, Subsection D provides:

- D. CHANGE FROM ONE NONCONFORMING USE TO ANOTHER:** No change from one nonconforming use to another will be granted by the Board of Adjustment, unless and until:
1. The Board of Adjustment shall find that the new nonconforming use is in the same or more

restrictive classification of use as the prior nonconforming use. In the determination of the same or more restrictive classification of use, the applicant shall establish and the Board of Adjustment shall find:

- a. That the new nonconforming use shall generate less vehicular traffic (automobile and truck) than the prior nonconforming use;
- b. That the new nonconforming use is of a nature which will emit less noise and air pollution than the prior nonconforming use;
- c. That the new nonconforming use will be more in character with the existing neighborhood than the prior nonconforming use, in that it is more in conformance with the area – wide comprehensive plan as adopted by the Kenton County and Municipal Planning and Zoning Commission, and also, more in conformance with the uses permitted in the zone in which the use is located, than the prior nonconforming use.

....

3. The Board of Adjustment shall not allow the enlargement or extension of a nonconforming use beyond the scope and area of its operation at which time its use became nonconforming.

Park Hills, Ky., Zoning Ordinance § 19.6(D)(1), (3).

The Zoning Ordinance defines an “arterial street” as “[p]ublic thoroughfares which serve the major movements of traffic within and through the community, as identified in the adopted comprehensive plan for the city of Park Hills.” Park Hills, Ky., Zoning Ordinance § 7.

As relevant to this appeal, the Zoning Ordinance also defines “collector streets” as “[p]ublic thoroughfares which serve to collect and distribute traffic, primarily from local residential streets to arterial streets.” *Id.* It also defines “local streets” as “[f]acilities which are designed to be used primarily for direct access to abutting properties and leading into the collector street system.” *Id.*

According to a report zoning staff provided to the Board, Amsterdam Road is a collector street. Therefore, the church is not located on an arterial street as the Zoning Ordinance requires. Because the church came into existence prior to implementation of the Zoning Ordinance, it constitutes a preexisting nonconforming use.³

³ Appellees argue in their brief that, because the church is a preexisting nonconforming use, Park Hills’ Zoning Ordinance is not violated because the church is not located next to an arterial street. However, Appellant does not contest the church’s status as such or argue that the nonconforming use must be discont-

We agree with Appellants that the Board failed to follow Park Hills' zoning ordinances and, therefore, acted outside the bounds of its statutory authority. First, Appellant is correct that construction of the grotto in the rear of the church property would constitute either a change or an expansion of the church's preexisting nonconforming use. If construction of the grotto constitutes a change in the nonconforming use, under Section 19.6(D)(1) of the Zoning Ordinance, the Board was required to find that the new nonconforming use – in this case, the grotto – would generate less vehicular traffic, create less noise and air pollution, and be more in line with the character of the neighborhood than the previous nonconforming use.

Expansion of preexisting nonconforming uses is plainly prohibited by Section 19.6(D)(3) of the Zoning Ordinance, which says, “[t]he Board of Adjustment shall not allow the enlargement or extension of a nonconforming use beyond the scope and area of its operation at which time its use became nonconforming.” Construction of a grotto – large or small – in the rear of the church property, for both the church membership and the public to use, constitutes an expansion of both the scope and area of the nonconforming use. KRS 100.253(2) prohibits the church from doing so.

Additionally, a majority portion of the planned grotto is to be constructed on the former Sheila Burke Trust property. This land was residential property prior to the church acquiring it. This land was not used previously for the preexisting nonconforming

inued. The continued operation of the church is not a subject of this appeal.

use of a church. And the fact that acquisition of this land was necessary to construct the grotto further illustrates the grotto would constitute an enlargement of the church's preexisting nonconforming use in terms of both scope and area, which KRS 100.253(2) prohibits.

Appellees offer *Board of Adjustments, Bourbon County v. Brown*, 969 S.W.2d 214 (Ky. App. 1998), to support the notion that minor or modest expansions of preexisting nonconforming uses have been upheld by reviewing courts. In *Brown*, we determined the enclosure of a porch to construct restroom facilities for auction house patrons, as well as an increase of weekly auctions from two to three, did not constitute an impermissible enlargement of a nonconforming use. *Id.* at 217. However, the auction house proprietors in *Brown* also sought to construct a parking lot on nearby land, which the Bourbon County Board of Adjustments determined was not a permissible use under the county's zoning ordinance; the Board's determination as to the parking lot was affirmed by the circuit court, but not challenged on subsequent appeal. *Id.* at 215.

However, the construction of the grotto is unlike the expansions of preexisting nonconforming uses in *Brown*. In that case, the square footage of the auction house's operations was not increased, *id.* at 217, while the construction of the grotto will require such increase. The grotto – which would largely be constructed on adjacent land which was never used for a nonconforming purpose – is more akin to the parking lot in *Brown* than the construction of restrooms or the increased weekly auctions. We do not agree with Appellees that construction of the grotto would con-

stitute the same sort of minor or modest expansion as was present in *Brown*.

Appellees also cite to *A. L. Carrithers & Son v. City of Louisville*, 250 Ky. 462, 63 S.W.2d 493 (1933), again for the proposition that minor expansions of preexisting nonconforming uses can be permissible. However, circumstances in that case are distinct from the current case. In *A. L. Carrithers & Son*, the appellant, a corporation, had operated a milk business since 1909, and in 1931 a health inspection required the business to either cease manufacturing butter or to enlarge its plant in order to relocate a component of the operation into the enlarged space. *Id.* at 494-95. This expansion violated a section of Louisville's zoning code prohibiting structural alterations to buildings constituting preexisting nonconforming uses, and so the board of adjustments denied the appellant's application. *Id.* As the then-highest Kentucky court concluded, extending the building's walls for relocation of parts of the butter production process was not "a change of such a nature as materially affects the realty itself, or its use, or the health, morals, or general welfare of the zoned district." *Id.* at 497 (citations omitted). And because the zoning code did permit such structural alterations when required by law or ordinance, and the milk business was required to expand its building following an inspection, the expansion of the building's walls was a permissible enlargement of a preexisting nonconforming use. *Id.*

We believe the grotto to be unlike the expansion of the plant in *A. L. Carrithers* for several reasons. First, the church was under no requirement pursuant to law or ordinance to construct the grotto in the same way the milk plant in *A. L. Carrithers* was

required to expand following a government inspection. *Id.* at 494. Further, unlike the building expansion in *A. L. Carrithers*, construction of the grotto would fundamentally affect the realty and its use. Though the square footage of the preexisting nonconforming use in *A. L. Carrithers* did increase, the construction of the grotto is too dissimilar for *A. L. Carrithers* to provide an applicable rule.

Appellants also argue the Board's decision was arbitrary because they were denied due process during the administrative action. Specifically, they argue they were denied due process because they were not permitted to cross-examine Odor, the church's representative. "When making a zoning decision, the legislative body must provide a party whose constitutional interest is at stake 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Huxol v. Daviess Cnty. Fiscal Ct.*, 507 S.W.3d 574, 580 (Ky. App. 2016) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976)). Ordinarily, all that is required is that the legislative body conduct a hearing, take and weigh evidence, consider the evidence, create findings of fact, enter an order supported by substantial evidence, and respect subsequent judicial review of its decision. *Id.* (citing *Hilltop Basic Res., Inc. v. Cnty. of Boone*, 180 S.W.3d 464, 468 (Ky. 2005)). "However, in zoning cases where a decision is made following a trial-type adjudicatory hearing, the parties also have the additional right to cross-examine witnesses." *Id.* (citing *Kaelin v. City of Louisville*, 643 S.W.2d 590, 591-92 (Ky. 1982)).

As Appellees note, Appellant Joel Frederic was present at the hearing and commented on the application. Though Frederic did not attempt to ask

questions of Odor himself, other hearing attendees did. The Board never barred anyone from asking questions, and each attendee was given the opportunity to question testimony. In our view, Appellants are unable to demonstrate that they were denied the opportunity to cross examine Odor.

Appellants additionally argue the Board's decision was arbitrary because it was not supported by substantial evidence. As the circuit court determined, the administrative record demonstrates substantial evidence supported the Board's decision, including findings that the grotto "will comply with any regulations and conditions specified in the applicable ordinances and will not allow an unreasonable circumvention of the zoning regulations." However, as discussed above, the Board acted beyond the bounds of its statutory authority in granting the church's application. Therefore, we do not need to examine whether the evidence relied upon by the Board in making its decision was substantial.

Finally, Appellees argue the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C.⁴ § 2000cc *et seq.*, prohibits the Board from preventing the construction of the grotto. We note that the circuit court made no reference to RLUIPA in its Order.

As a "general rule," the statute provides:

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 govern-

⁴ United States Code.

ment demonstrates that the 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 government interest.

42 U.S.C. § 2000cc(a)(1). However, as the Sixth Circuit notes, there is “no substantial burden when, although the action encumber[s] the practice of religion, it d[oes] not pressure the individual to violate his or her religious beliefs.” *Living Water Church of God v. Charter Tp. Of Meridian*, 258 F. App’x 729, 734 (6th Cir. 2007) (citing *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988)).

“RLUIPA’s history demonstrates that Congress intended to leave intact the traditional ‘substantial burden’ test, as defined by the Supreme Court’s free exercise jurisprudence.” *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004) (citations omitted). Federal courts have identified two categories of alleged substantial burden upon free exercise of religion. *Id.* at 701. As to the first, “courts routinely find substantial burdens where compliance with the statute itself violates the individual’s religious beliefs and noncompliance may subject him to criminal sanctions or the loss of a significant government privilege or benefit.” *Id.* at 701-02 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)). In the second, “courts have been far more reluctant to find a violation where compliance with the challenged regu-

lation makes the practice of one's religion more difficult or expensive, but the regulation is not inherently inconsistent with the litigant's beliefs." *Id.* at 702 (citing *Braunfeld v. Brown*, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961)).

The Park Hills Zoning Ordinance falls squarely within the second category. The application of the ordinance to prohibit construction of the grotto may make practice of religion somewhat more difficult for the church's congregation or the adherents of the Catholic faith broadly, but the Zoning Ordinance is not inherently inconsistent with their religious beliefs. Accordingly, we find the Park Hills Zoning Ordinance imposes no substantial burden on the religious exercise of any Appellee and, therefore, the ordinance does not constitute a violation of RLUIPA.

CONCLUSION

For the foregoing reasons, we reverse the Kenton Circuit Court's June 29, 2022 Order affirming the decision of the City of Park Hills Board of Adjustment.

ALL CONCUR.

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APPENDIX C

COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
FOURTH DIVISION

Case No. 21-CI-766

ELIZABETH FREDERIC & JOEL FREDERIC

Plaintiffs,

v.

CITY OF PARK HILLS, KENTUCKY, BOARD OF
ADJUSTMENT & JORDAN ODOR & SHEILA BURKE TRUST
& SHEILA E. BURKE & PLANNING AND DEVELOPMENT
SERVICES OF KENTON COUNTY & MISSIONARIES OF
ST. JOHN THE BAPTIST, INC.

Defendants.

ORDER

This matter is before the court on appeal, pursuant to KRS §100.347, from a decision of the Park Hills Board of Adjustment. The court has reviewed the pleadings of the parties, the applicable law and the entire record of the case.

The Frederics own property and reside at 1001 Park Drive. The side of their property is across the street from property owned by the Missionaries of Saint John the Baptist at 1101 Amsterdam Road on which is located a church known as Our Lady of Lourdes. All of the relevant property is in Park Hills, Kenton County.

The Church, through Jordan Odor acting on their behalf, applied for a conditional use permit for an accessory structure associated with a church and for variances to the rear and side yard setback requirements to accommodate the accessory structure, a proposed grotto. The Board approved both requests, upon the condition that a small portion of land behind and adjacent to the church property which was then owned by Sheila Burke and the Sheila Burke Trust be deeded over to the Church. That land was transferred to the Missionaries of St. John the Baptist, Inc., on June 22, 2021.

The court will first address the issue of standing as it was raised by the defendants. The Frederics assert that allowing the building of the grotto at the rear of the parking lot of the church will cause additional noise and parking problems in the neighborhood. It is impossible to say with certainty whether or not these nuisances will occur, however unlikely they may seem, but that is not for this court to determine. KRS §100.347(1) provides, “Any person or entity claiming to be injured or aggrieved by any final action of the board of adjustment shall appeal from the action to the Circuit Court of the county in which the property, which is the subject of the action of the board of adjustment, lies.” Neighboring property owners who assert that a zoning action would result in immediate and irreparable injury—loss or damage by being deprived of the use, value and enjoyment of their property — are generally considered to have standing under this statute. *Seiller Waterman, LLC v. Bardstown Capital Corp.*, 643 S.W.3d 68, 82 (Ky. 2022).

In an appeal of an administrative action by an agency, the circuit courts are to provide review, not reinterpretation. *Kentucky Unemployment Insurance*

Commission v. King, 657 S.W.2d 250 (Ky.App. 1983). Thus, when substantial evidence exists in the record to support an administrative agency's action, the circuit court has no authority to overturn it. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298 (Ky. 1972). This court's review of the action of the Board is limited to a determination of whether the administrative body acted arbitrarily in making its determination. *Prestonia Area Neighborhood Association v. Abramson*, 797 S.W.2d 708, 709 (Ky. 1990); *City of Henderson Civil Service Commission v. Zubi*, 631 S.W.2d 632 (Ky. 1982). The test for arbitrariness is based on the absence of substantial evidence to support the action in question, or on the presence of proof so overwhelming that relief must be granted to the claimant. *Williams v. Cumberland Valley National Bank* 569 S.W.2d 711 (Ky.App. 1978); *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). The court is not to "reinterpret or to reconsider the merits of the claim, nor to substitute its judgment for that of the agency." *Curd v. Kentucky State Board of Licensure for Professional Engineers & Land Surveyors*, 433 S.W.3d 291, 303 (Ky. 2014), citing *Louisville/ Jefferson County Metro Government v. TDC Grp., LLC*, 283 S.W.3d 657, 663 (Ky. 2009).

The three prongs of this issue are whether the action was in excess of the power of the board, whether the parties were afforded procedural due process and whether substantial evidence supports the decision. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky. 1964); *Hougham v. Lexington-Fayette Urban Co. Govt*, 29 S.W.3d 370 (Ky. App. 1999).

The Frederics argue that the action was in excess of the power of the Board in that the Church itself is a non-conforming use because it is a church not adjacent to an arterial street and, therefore, no variance can be given to the land use requirements. The church building has existed on the property since 1930, at which time Amsterdam Road was an arterial street. Amsterdam Road was reconstructed and right-of-way acquired by the Commonwealth Department of Highways in 1955 but the road was never officially designated as being in the State Primary Road System. Park Hills zoning ordinance adopted in 1974 provides in §10.4 that churches are permitted in the relevant zone provided they are adjacent to an arterial street, which is defined in §7.0 as a public thoroughfare which serves the major movements of traffic within and through the community as identified in the comprehensive plan for the city. The right-of-way was transferred from the state back to the City of Park Hills, for that portion of the road within the city limits, in 2007. The Missionaries of St. John the Baptist obtained the property in 2015. At some point it appears that Amsterdam Road lost its designation as an arterial street, although it still meets the definition, but the church is grandfathered in as an accepted conditional use and any permits for accessory structures or variances are to be considered accordingly. *Wells v. Fiscal Court of Jefferson County*, 457 S.W.2d 498, 502 (Ky. 1970)

Procedural due process by an administrative body such as the Board includes “a hearing, the taking and weighing of evidence if such is offered, a finding of fact based upon a consideration of the evidence, the making of an order supported by substantial evidence, and, where the party’s constitutional rights are involved, a judicial review of the administrative

action.” *Morris v. City of Catlettsburg*, 437 S.W.2d 753, 755 (Ky. 1969). A hearing before an administrative agency that has investigative, prosecutorial and adjudicative functions is not violative of due process. *Jones v. Cabinet for Human Resources, Division for Licensure & Regulations*, 710 S.W.2d 862, 865 (Ky.App. 1986), citing *Board of Education of Pulaski County v. Burkett*, 525 S.W.2d 747 (Ky. 1975) and *Winthrow v. Larkin*, 421 U.S. 35 (1975). The Board provided the requisite notices and held a public hearing on the matter with the required functions, and the record reflects that due process was afforded to the plaintiffs.

In making its findings, the Board is not held to strict judicial standards. *McKinstry v. Wells*, 548 S.W.2d 169 (Ky. App. 1977). However, it must make adjudicative findings of fact, sufficient to afford a basis for judicial review, that are based on substantial evidence, that is, evidence which has sufficient probative value to induce conviction in the minds of reasonable people. *Bourbon County Board of Adjustment v. Curran*, 873 S.W. 2d 836 (Ky. App. 1994). The record before this court contains the application including detailed plans of the proposed use, and the notice of the decision of the Board based upon testimony at a public hearing held on April 15, 2021. The notice specifically states that the bases for the decisions were; that the proposed use is necessary or desirable to provide a service or facility which will contribute to the general well being of the neighborhood or the community; that the proposed use will not adversely affect the public health, safety, or general welfare of persons residing or working in the vicinity, nor be injurious to the property or improvements in the vicinity, nor alter the essential character of the general vicinity, nor cause a hazard or

nuisance to the public; that the proposed use will comply with any regulations and conditions specified in the applicable ordinances and will not allow an unreasonable circumvention of the zoning regulations. Upon review of the record as a whole, the court determines that the decision of the Board is supported by substantial evidence

Plaintiffs have not met their burden of persuading this court that the Park Hills Board of Adjustment acted arbitrarily or in any way outside of its regulatory authority. *Allen v. Woodford County Board of Adjustments*, 228 S.W.3d 573, 577 (Ky.App. 2007), as modified (July 13, 2007).

IT IS, THEREFORE, ORDERED AND ADJUDGED that the decision of the City of Park Hills Board of Adjustment rendered on April 19, 2021, is hereby **AFFIRMED**. This is a final and appealable order and there is no just cause for delay.

SO ORDERED this the 29th day of June 2022.

/s/ Patricia M. Summ
PATRICIA M. SUMME, JUDGE

Copies to:

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APPENDIX D

Planning and Development
Services of Kenton County

Serving the community of communities since 1961

April 19, 2021

Jordon Odor
Elevar Design Group
555 Carr Street
Cincinnati, OH 45203

RE: BOA2103-0003

The Park Hills Board of Adjustment heard your request for the noted case on Thursday, April 15, 2021. After considering the testimony provided, members of the Board acted as detailed on the following page.

Thank you for your cooperation through this process. Feel free to contact me if you have any questions about the Board's action or steps you may want to take now.

If you choose, you may file an appeal of the Board's action with the Circuit Court within 30 days according to Kentucky Revised Statutes 100.347.

Chris Schneider, AICP
Principal Planner

Attach

cc: Sheila Burke Trust
Missionaries of Saint John the Baptist, Inc.

BOA2103-0003

Location: 917 Alhambra Court and 1101 Amsterdam Road, Park Hills

Requests: 1) A conditional use permit for an accessory use associated with a church.
2) Variance requests to the rear and side yard setback requirements for a conditional use.

Request 1

Decision: To approve the conditional use permit for an accessory structure associated with a church.

- Basis:**
1. The proposed building and use at this particular location is necessary or desirable to provide a service or facility which will contribute to the general well being of the neighborhood or the community.
 2. The proposed building and use will not, under the circumstances of this particular case, be detrimental to the health, safety, or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity.
 3. The proposed building and use will comply with any regulations and conditions specified in this ordinance for such building or use.
 4. Based on testimony heard at the April 15, 2021 public hearing.

Request 2

Decision: To approve the variance requests to the rear and side yard setback requirements for an accessory use associated with a church with the condition that the portion of 917 Alhambra Court which contains the proposed accessory structure as identified in the submitted plans is deeded over to 1101 Amsterdam Road within six months.

- Basis:**
1. The requested variances will not adversely affect the public health, safety of welfare, will not alter the essential character of the general vicinity, will not cause a hazard or nuisance to the public, and will not allow an unreasonable circumvention of the zoning regulations.
 2. Based on testimony heard at the April 15, 2021 public hearing.

Result of

BOA Action: The applicant is permitted to construct a grotto on the site as identified in their submitted plans subject to the stated condition and required building and zoning permits.

APPENDIX E

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21C. Protection of Religious Exercise in
Land Use and by Institutionalized Persons
42 U.S.C.A. § 2000cc

§ 2000cc. Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule

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.

(2) Scope of application

This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States,

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or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

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APPENDIX F

Baldwin's Kentucky Revised Statutes Annotated
Title IX. Counties, Cities, and Other Local Units
Chapter 100. Planning and
Zoning Board of Adjustment

KRS § 100.247

100.247. Variance cannot contradict zoning regulation

The board shall not possess the power to grant a variance to permit a use of any land, building, or structure which is not permitted by the zoning regulation in the zone in question, or to alter density requirements in the zone in question.

APPENDIX G

Baldwin's Kentucky Revised Statutes Annotated
Title IX. Counties, Cities, and Other Local Units
Chapter 100. Planning and
Zoning Board of Adjustment
KRS § 100.253

100.253 Existing nonconforming use, continuance; change; effect of nonconforming use of ten years' duration; application

- (1) The lawful use of a building or premises, existing at the time of the adoption of any zoning regulations affecting it, may be continued, although such use does not conform to the provisions of such regulations, except as otherwise provided herein.
- (2) The board of adjustment shall not allow the enlargement or extension of a nonconforming use beyond the scope and area of its operation at the time the regulation which makes its use nonconforming was adopted, nor shall the board permit a change from one (1) nonconforming use to another unless the new nonconforming use is in the same or a more restrictive classification, provided, however, the board of adjustment may grant approval, effective to maintain nonconforming-use status, for enlargements or extensions, made or to be made, of the facilities of a nonconforming use, where the use consists of the presenting of a major public attraction or attractions, such as a sports event or events, which has been presented at the same site over such period of years and has such attributes and public acceptance as to have attained international prestige and to have achieved the status

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of a public tradition, contributing substantially to the economy of the community and state, of which prestige and status the site is an essential element, and where the enlargement or extension was or is designed to maintain the prestige and status by meeting the increasing demands of participants and patrons.

- (3) Any use which has existed illegally and does not conform to the provisions of the zoning regulations, and has been in continuous existence for a period of ten (10) years, and which has not been the subject of any adverse order or other adverse action by the administrative official during said period, shall be deemed a nonconforming use. Thereafter, such use shall be governed by the provisions of subsection (2) of this section.
- (4) The provisions of subsection (3) of this section shall not apply to counties containing a city of the first class, a consolidated local government, an urban-county government, or a city with a population equal to or greater than twenty thousand (20,000) based upon the most recent federal decennial census.

APPENDIX H

Park Hills Zoning Ordinance § 9.13

SECTION 9.13 CONDITIONAL USES:

- A. **DETERMINATION:** The Board of Adjustment may authorize a conditional building and use to be located within any zone in which the particular conditional use is permitted by the use regulations of this ordinance, if the evidence presented by the applicant is such as to establish, beyond any reasonable doubt:
1. That the proposed building and use at the particular location is necessary or desirable to provide a service or facility which will contribute to the general well being of the neighborhood or the community; and
 2. That such building and use will not, under the circumstances of the particular case, be detrimental to the health, safety, or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity; and
 3. That the proposed building and use will comply with any regulations and conditions specified in this ordinance for such building and use.
- B. **CONDITIONAL USE PERMITS:** In accordance with KRS 100.237, the Board of Adjustment shall have the power to hear and decide applications for conditional use permits to allow the proper integration into the community of uses which are specifically named herein which may be suitable only in specific locations in the zone only if certain conditions are met.

1. The Board of Adjustment may approve, modify, or deny any application for a conditional use permit. If it approves such permit, it may attach necessary conditions such as time limitations, requirements that one or more things be done before the request can be approved, or conditions of a continuing nature. Any such conditions shall be recorded in the Board's minutes and on the conditional use permit, along with a reference to the specific section in the zoning regulation listing the conditional use under consideration. In addition, said conditional use permit shall be recorded in the office of the County Clerk and one copy of said permit attached to the deed for the property for which it is issued. The Board shall have the power to revoke conditional use permits, or variances for noncompliance with the condition thereof. Furthermore, the Board shall have a right of action to compel offending structures or uses removed at the cost of the violator and may have judgment in personam for such cost.
2. Granting of a conditional use permit does not exempt the applicant from complying with all of the requirements of this Ordinance, the building code, housing code, and other regulations of the city of Park Hills.
3. In any case where a conditional use permit has not been exercised within twelve (12) consecutive calendar months from date of issuance, if no specific time limit has been set, such conditional use permit shall not revert to its original designation, unless there has been a public hearing. Exercised as set forth in this section, shall mean that binding contracts for the

construction of the main building or other improvement has been let; or in the absence of contracts that the main building or other improvement is under construction to a substantial degree, or that prerequisite conditions involving substantial investment shall be under contract, in development, or completed. When construction is not a part of the use, exercised shall mean that the use is in operation in compliance with the conditions as set forth in the permit.

4. The Zoning Administrator shall review all conditional use permits, except those for which all conditions have been permanently satisfied, at least once annually and shall have the power to inspect the land or structure where the conditional use is located in order to ascertain that the landowner is complying with all of the conditions which are listed on the conditional use permits.

If the landowner is not complying with all of the conditions listed on the conditional use permit, the Zoning Administrator shall report the fact in writing to the chairman of the Board of Adjustment. The report shall state specifically the manner in which the landowner is not complying with the conditions on the conditional use permit, and a copy of the report shall be furnished to the landowner at the same time that it is furnished to the chairman of the Board of Adjustment.

The Board shall hold a hearing on the report within a reasonable time, and notice of the time and place of the hearing shall be furnished to the landowner at least one week

prior to the hearing. If the Board of Adjustment finds that the facts alleged in the report of the Zoning Administrator are true and that the landowner has taken no steps to comply with them between the date of the report and the date of the hearing, the Board of Adjustment may authorize the Zoning Administrator to revoke the conditional use permit and take the necessary legal action to cause the termination of the activity on the land which the conditional use permit authorizes.

5. Once the Board of Adjustment has completed a conditional use permit and all the conditions required are of such type that they can be completely and permanently satisfied, the Zoning Administrator, upon request of the applicant, may, if the facts warrant, make a determination that the conditions have been satisfied, and enter the facts which indicate that the conditions have been satisfied and the conclusion in the margin of the copy of the conditional use permit which is on file with the county clerk, as required in KRS 100.344. Thereafter, said use, if it continues to meet the other requirements of this Ordinance, will be treated as a permitted use.

APPENDIX I

Park Hills Zoning Ordinance § 10.4

**SECTION 10.4 R-1EE (SINGLE AND TWO -
FAMILY RESIDENTIAL - ONE EE) ZONE**

A. PERMITTED USES:

1. Single - family residential dwellings (detached).
2. Two - family residential dwellings.
3. Planned Unit Development (PUD), as regulated by ARTICLE XI of this Ordinance.

B. ACCESSORY USES:

1. Customary accessory buildings and uses.
2. Fences and walls, as regulated by ARTICLE XVI of this Ordinance
3. Home occupations, subject to the restrictions and limitations established in SECTION 9.23 of this Ordinance.
4. Signs, as regulated by ARTICLE XV of this Ordinance.

C. CONDITIONAL USES: No building or occupancy permit shall be issued for any of the following, nor shall any of the following uses or any customary accessory buildings or uses be permitted until and unless the location of said use shall have been applied for and approved of by the Board of Adjustment, as set forth in SECTION 9.13:

1. Cemeteries.
2. Churches and other buildings for the purpose of religious worship, provided they are located adjacent to an arterial street.

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3. Institutions for higher education, provided they are located adjacent to an arterial street.
 4. Institutions for human medical care - hospitals, clinic sanitariums, convalescent homes, nursing homes, homes for the aged, provided they are located adjacent to an arterial street.
 5. Nursery school.
 6. Police and fire stations, provided they are located adjacent to an arterial street.
 7. Public and parochial schools.
 8. Publicly owned and/or operated parks, playgrounds, golf courses, community recreational centers, including libraries.
 9. Recreational uses other than those publicly owned and/or operated, as follows:
 - a. Golf courses.
 - b. Country clubs.
- D. AREA AND HEIGHT REGULATIONS FOR PERMITTED USES: No building shall be erected or structurally altered hereafter, except in accordance with the following regulations:
1. Minimum Lot Area:

Single - family - Seven thousand five hundred (7,500) square feet.

Two - family - Eleven thousand five hundred (11,500) square feet.
 2. Minimum Lot Width at Building Setback Line:

Single - family - Sixty (60) feet.

Two - family - Eighty (80) feet.

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3. Minimum Front Yard Depth:

Single and two - family - Thirty (30) feet.

4. Minimum Side Yard Width on Each Side of Lot:

Single and two - family - Seven (7) feet.

5. Minimum Rear Yard Depth:

Single and two - family - Twenty - five (25) feet.

6. Maximum Building Height:

Single and two - family - Thirty - five (35) feet.

E. AREA AND HEIGHT REGULATIONS FOR CONDITIONALLY PERMITTED USES: No conditional building and/or use shall be erected or structurally altered hereafter, except in accordance with the following regulations:

1. Minimum Lot Area - Twenty - two thousand five hundred (22,500) square feet.

2. Minimum Lot Width at Building Setback Line - One hundred fifty (150) feet.

3. Minimum Front, Side (on each side of lot), and Rear Yard Depths - Fifty (50) feet.

4. Maximum Building Height - Thirty - five (35) feet or two and one - half (2-1/2) stories.

F. OTHER DEVELOPMENT CONTROLS:

1. Off - street parking and loading and/or unloading shall be provided in accordance with ARTICLE XIII and ARTICLE XIV of this Ordinance.

2. No outdoor storage of any material (usable or waste) shall be permitted in this zone, except within enclosed containers.

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3. No lighting shall be permitted which would glare from this zone onto any street, road, highway, deeded right-of-way, or into any residential zone.
4. Screening and landscaping shall be provided, as regulated by SECTION 9.16 of this ordinance. In no case shall the minimum planting strip be required to exceed the minimum setback requirement established for this zone.

APPENDIX J

Park Hills Zoning Ordinance § 19.6

SECTION 19.6 DIMENSIONAL VARIANCES; CHANGE FROM ONE NONCONFORMING USE TO ANOTHER; CONDITIONS GOVERNING APPLICATIONS; PROCEDURES:

A. DIMENSIONAL VARIANCES: Before any dimensional variance is granted, the Board of Adjustment must find all of the following, which shall be recorded along with any imposed conditions or restrictions in its minutes and records and issued in written form to the applicant to constitute proof of the dimensional variance. Such dimensional variance shall not be granted by the Board of Adjustment unless and until:

1. A written application for a dimensional variance (including the required fee per SECTION 20.0 of this Ordinance) is submitted demonstrating:
 - a. That specific conditions and circumstances exist which are unique to the applicant's land and do not exist on other land in the same zone.
 - b. That the manner in which the strict application of the provisions of this Ordinance would deprive the applicant of a reasonable use of the land in the manner equivalent to the use permitted other land owners in the same zone.
 - c. That the unique conditions and circumstances are not the result of actions of the applicant taken subsequently to the adoption of this Ordinance.

- d. Reasons that the dimensional variance will preserve, not harm the public safety and welfare, and will not alter the essential character of the neighborhood.
 - e. That granting the dimensional variance requested will not confer on the applicant any special privilege that is not conferred by this Ordinance to other lands, structures or buildings in the same zone. No nonconforming use of neighboring lands, structures, or buildings in the same zone shall be considered grounds for the issuance of a dimensional variance.
2. Notice of public hearing shall be given in accordance with SECTION 19.2 of this Ordinance.
 3. The public hearing shall be held. Any person may appear in person, or by agent, or by attorney.
 4. Prior to granting a variance:
 - a. The Board of Adjustment shall make findings that the requirements of this section have been met by the applicant for a variance.
 - b. The Board of Adjustment shall further make a finding that reasons set forth in the application justify the granting of a variance and that the variance is the minimum variance that will make possible the reasonable use of the land, building, or structure.
 5. In granting any dimensional variance, the Board of Adjustment may prescribe appro-

priate conditions and safeguards in conformity with this Ordinance. Violation of such conditions and safeguards, when made a part of the terms under which the dimensional variance is granted, shall be deemed a violation of this Ordinance and punishable under SECTION 17.9 of this Ordinance.

- B. DIMENSIONAL VARIANCE CANNOT CONTRADICT ZONING REGULATIONS: The Board of Adjustment shall not possess the power to grant a dimensional variance to permit a use of any land, building, or structure which is not permitted by this Ordinance in the zone in question, or to alter the density requirements in the zone in question.
- C. DIMENSIONAL VARIANCE RUNS WITH LAND: A dimensional variance applies to the property for which it is granted and not to the individual who applied for it. A dimensional variance also runs with the land is transferable to any future owner of land, but it cannot be transferred by the applicant to a different site.
- D. CHANGE FROM ONE NONCONFORMING USE TO ANOTHER: No change from one nonconforming use to another will be granted by the Board of Adjustment, unless and until:
 - 1. The Board of Adjustment shall find that the new nonconforming use is in the same or more restrictive classification of use as the prior nonconforming use. In the determination of the same or more restrictive classification of use, the applicant shall establish and the Board of Adjustment shall find:
 - a. That the new nonconforming use shall generate less vehicular traffic (automobile

and truck) than the prior nonconforming use;

- b. That the new nonconforming use is of a nature which will emit less noise and air pollution than the prior nonconforming use;
 - c. That the new nonconforming use will be more in character with the existing neighborhood than the prior nonconforming use, in that it is more in conformance with the area - wide comprehensive plan as adopted by the Kenton County and Municipal Planning and Zoning Commission, and also, more in conformance with the uses permitted in the zone in which the use is located, than the prior nonconforming use.
2. Any change of nonconforming use granted, permitted, or allowed by the Board of Adjustment shall conform to and be governed by this Ordinance, including, but not limited to, parking requirements, sign regulations and yard requirements, and all other pertinent ordinances of the city of Park Hills.
 3. The Board of Adjustment shall not allow the enlargement or extension of a nonconforming use beyond the scope and area of its operation at which time its use became nonconforming.
 4. The Board of Adjustment, in granting, permitting, or allowing a change of nonconforming uses, may attach such conditions thereto as it may deem necessary and proper and the action, limitations, and conditions imposed, if any, shall be in writing, directed to the applicant, with a copy to be furnished to the city clerk, Building Inspector, and Administrative Of-

ficer. Violations of any of the conditions, as may be set for by the Board of Adjustment, shall be deemed a violation of this chapter and subject to the penalties described in this Ordinance.

5. The change of nonconforming use, as may be granted, permitted, or allowed by the Board of Adjustment, applies to the subject property and not to the individual who applied and, therefore, cannot be transferred by the applicant to a different property.
6. Unless otherwise specified at the time the change of nonconforming use is granted, permitted, or allowed, it applies to the subject property for an indefinite period of time. However, in the case where the change of nonconforming use has not occurred within a year after the date of granting thereof, then, without further action, the change of nonconforming use permit shall be null and void and reapplication to the Board of Adjustment shall have to be made.
7. The procedures for applying to the Board of Adjustment for a change in nonconforming use and the fees charged for such applications shall be the same as provided by SECTION 20.0, A., 2. of this Ordinance.
8. Notice of public hearing shall be given in accordance with SECTION 18.2 of this Ordinance.
9. The public hearing shall be held. Any person may appear in person, by agent, or by attorney.

10. Prior to granting a change from one nonconforming use to another, the Board of Adjustment shall make findings that the requirements of this and other applicable sections of this Ordinance have been met by the applicant.

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APPENDIX K

COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
DIVISION NO. FOUR

Case No. 21-CI-00766

ELIZABETH FREDERIC AND JOEL FREDERIC,

Appellants / Plaintiffs,

vs.

CITY OF PARK HILLS BOARD OF ADJUSTMENT,
CHARLES MEYERS, MARK KOENIG, ROBERT SWEET,
CATHLEEN MATCHINGA AND THOMAS MICHAEL, ET AL.,

Appellees / Defendants.

BRIEF OF THE APPELLEES/DEFENDANTS:
IN SUPPORT OF THEIR MOTION
FOR SUMMARY JUDGMENT

Now come the Appellees/Defendants, City of Park Hills Board of Adjustment; Charles Meyers, Mark Koenig, Robert Sweet, Cathleen Matchinga and Thomas Michael, all in their official capacities as members of the City of Park Hills Board of Adjustment (herein referred to collectively as the Board); Jordan Odor (herein referred to as Odor); the Sheila Burke Trust; Sheila E. Burke as Trustee (herein referred to jointly as the Burke Trust); and, Missionaries of Saint John the Baptist, Inc. (herein referred to as St. John's); by and through the City Attorney for the City of Park Hills (herein referred to as the City), and hereby submit their Brief in support

of the their Motion for Summary Judgment, as follows:

Nature of Appeal

This is an appeal from the determination of the Board granting and approving a conditional use permit for an accessory use associated with a church (herein referred to as the “grotto”) and a variance request associated therewith, pursuant to Section 10.4 of the City’s zoning code regarding Conditional Uses, for the property owned by St. John’s at 1101 Amsterdam Road and the property owned by the Burke Trust located at 917 Alhambra Court, both adjacent to the other and located within the City of Park Hills.

On March 18, 2021, Odor, on behalf of St. John’s and the Burke Trust, filed an application with Planning and Development Services of Kenton County (PDS) which undertakes planning and zoning related matters on behalf of the City of Park Hills and appeals for the Board. PDS makes recommendations only (a copy of their Staff Report is made a part of the record herein) to the Board which acts upon the same at a public hearing which was held, with proper notice having been provided, on April 15, 2021. In essence, the request was made for a conditional use permit to construct a “grotto” (shrine, plaza, walking path, retaining wall) upon the Burke Trust property as a permissible accessory use associated with a church (Le. St. John’s) and a variance request for rear and side yard setbacks. If approved it was agreed that the triangular portion of 917 Alhambra Court would be consolidated with the St. John’s property, which it subsequently was, by deed dated June 22, 2021. (See attached Exhibit “A”). Such fulfilled that condition of PDS.

Inaccurate Recommendation of PDS

In its recommendation, PDS acknowledged that the Board could authorize the conditional use after considering various determinations which were assessed and found to be acceptable by the Board and completely within their prerogative. However, PDS's eventual overall unfavorable recommendation was partially based upon the more simplistic assumption that the location of the church was not adjacent to an arterial street, asserting it is a zoning requirement herein, and not upon the actual crux of the request. This assumption was incorrect and does not form a basis for its adverse recommendation. Note that thereafter, PDS clearly indicated that although their recommendation was unfavorable, the Board could still approve and grant the conditional use request, along with the variances, if they found the other factors to be accordance with the request and zoning code, which the Board ultimately did. (See under Additional Information, page 5 of the PDS Staff Report filed of record.) Thus, pursuant to Section 9.13, Conditional Uses, of the City's zoning code, the proper determination was made to allow the same. The use is not expressly prohibited.

For the Plaintiffs/Appellants (herein referred to as the Frederics') to argue that the arterial connection was not established has no factual validity herein and purports to be more of a mere grasping at straws. PDS may have indicated such in its recommendation but such was mistakenly based upon the current status of the law not applicable in this instance.

Historically, according to the Kenton County Property Valuation records, the church building was originally built in 1930. (See attached Exhibit "B"). It was undertaken in two stages. The basement level

first which acted as the church. The old cornerstone of the building indicates the “Zion Ev. Lutheran Church” was established in 1937. (See attached Exhibit “C”). The next level was completed in the 1950’s. The building was later sold but remained in continuous use as a church. St. John’s acquired the property in 2015. The current Section 250.01 of the official zoning code of the City was adopted on March 10, 2012. Its predecessor dates from 1974, both well beyond the existence of the church.

The church predates the zoning code and existed at a time when Amsterdam Road was an arterial street being one of the main thoroughfares through the City. The subsequent designation as a collector street and the later adoption of the City zoning code, occurring long after the original establishment of both, stands to invalidate the initial recommendation made by PDS.

Under Kentucky zoning law, an existing structure (i.e. church) within a zone and the conditions thereon are not affected by subsequent changes thereto and is thus “grandfathered” in (the appropriate language for and a common occurrence in zoning law) until such time that the use may be abandoned. The church has always operated under one denomination or another since the time of construction. Thus, having been “grandfathered” in, there is no violation of the City’s zoning code for failure to be adjacent to an arterial street. Section 10.4, 2. of the City’s zoning code has no applicability. The only remaining determination then is whether or not the grant of the conditional use permit for the “grotto” as a permissible accessory use associated with a church (being St. John’s) along with the variances granted in accordance therewith,

is based upon the proper findings of the Board. The answer is simply “yes.”

The City’s zoning code does not classify roads as arterial or collector though a definition exist in the current code which did not exist at the time of the church’s construction. By its nature as a main thoroughfare in the City it was arterial. As a point of fact, in 1955 the Kentucky Transportation Cabinet performed highway improvements which it would not otherwise undertake to a non-arterial roadway despite it having never actually being furnished a state route number or designation, yet clearly acted as such. (See reference in attached Exhibit “D”). Only in late 2006, by virtue of Park Hills Resolution No. 13-2006 when the Kentucky Transportation Cabinet transferred ownership a Amsterdam Road to the City, did its character change. (See attached Exhibit “E”). Therefore, it did not become a collector street until such time, again well after the church had been established and “grandfathered” in. The bottom line is that since the church predated the zoning regulations it is exempt from the current restrictions. There are no violations of the provisions of KRS Chapter 100.

Standard of Judicial Review

Having failed to indicate any legal basis for the Board having acted in contradiction to the zoning code, it is for this Court to determine, based upon the record submitted, whether or not the Board acted arbitrarily or capriciously in rendering its overall decision being appealed herein. Failing such, its decision must stand and the Court must uphold the same.

All due process was afforded, the matter is not “de novo” and must be based solely upon the Record as submitted. The Board asserts that the Frederics’ failed to present any evidence that the Board acted arbitrarily or capriciously in rendering its decision. It was clearly within their prerogative to do so based upon the testimony presented and upon which they based their decision.

It is well established that a court’s review of the action of an administrative agency is limited to review. *Jones v. Cabinet for Human Resources, Division for Licensure & Regulations*, Ky. App., 710 S.W.2d 862 (1986). A reviewing court may not substitute its judgment for that of an administrative agency even though it might have reached a different result. *Kentucky State Racing Commission v. Fuller*, Ky., 481 S.W. 2d 298 (1972). The decision that the request for conditional and accessory use is a legislative one and as such, may not be overturned on review by this Court absent such a finding. *Prestonia Area Neighborhood Ass’n. v. Abramson*, Ky., 797 S.W.2d 708 (1990). The Frederics’ have failed to meet the burden of demonstrating that the Board’s decision was either unlawful nor supported by substantial evidence. The Court must act solely upon the Record provided which, due to its length alone, is replete with sufficient indications that all parties were afforded the opportunity to properly address the underlying issues and the Board had ample testimony and evidence to properly and reasonably render its decision. Thus, the actions of the Board were not arbitrary or capricious and clearly met the requirements set forth in the seminal case of *American Beauty Homes Corp. v. Louisville & Jefferson Co. Planning and Zoning Comm.*, Ky., 379 S.W.2d 450 (1964). This is the standard of review by

the Court. The scope of judicial review of a zoning action taken by a public body is limited to determining whether the action was arbitrary, which ordinarily involves the considerations of (1) whether the action under attack was in excess of the powers granted to the public body; (2) whether the parties were deprived of procedural due process by the public body; and, (3) whether there is a lack of evidentiary support in the findings of the public body. The Appellees/Defendants assert there was not. *Allen v. Woodford County Board of Adjustment*, Ky.App., 228 S.W.3d 573 (2007) in citing *Fuller*.

The actions and determination of the Board were within the scope of their granted powers; procedural due process was afforded; an administrative hearing was held; testimony and evidence presented; a record kept; and, based upon the same there is a clear determination that the administrative action taken by the Board had substantial evidentiary support. As such, the Board could not have acted arbitrarily or capriciously and its decision must be upheld. It was therefore legally and properly rendered and this appeal must fail and the Appellees/Defendants be granted summary judgment. Courts generally avoid weighing the evidence considered by the agency (herein, the Board (and uphold agency determinations if there is no evidence of arbitrary conduct. See *Puryear v. Greenville, Ky.*, 432 S.W.2d 437 (1968). The City and the Board continue to assert there is no arbitrary conduct evidenced herein.

Judicial review of an administrative action is “concerned with, the question of arbitrariness” as established in the *American Beauty Homes* case. The Court must further determine whether the decision of the administrative agency was arbitrary or clearly

erroneous, which is defined as “unsupported by substantial evidence.” *Danville-Boyle County Planning and Zoning Comm’n v. Prall*, Ky., 840 S.W.2d 205, 208 (1992). Substantial evidence is “evidence of substance and relative consequence having the fitness to induce conviction in the minds of reasonable men.” *Owens-Corning Fiberglass Corp. v. Golightly*, Ky., 976 S.W.2d 409.414 (1998). “If there is any substantial evidence to support the action of the administrative agency, it cannot be found to be arbitrary and will be sustained. *Taylor v. Coblin*, Ky., 461 S.W.2d 78, 80 (1970).

The Board of Adjustment Findings and
Determination Were Proper

The hearing conducted before the Board lasted well over 2 hours. After the initial presentation the general public was afforded the opportunity to make comment. There were several persons who did, both pro and con, though more in the former. Through the testimony presented, the Board determined, as a requirement, that the granting of the variance did not adversely affect anyone in the community. The Board’s determination was clearly supported by substantial evidence. It considered all factors in play in granting the conditional use permit and the “grotto” as an accessory use to the church with the variances. And it in no way exhibited favoritism towards the applicant property owners or their status as the Frederics’ would have this Court believe. Finally, at the conclusion the Board made comment, deliberated and considered all matters presented. Then, by a majority vote of 4-1, the Board approved the request and the applicant allowed to proceed, pending this appeal which has temporarily halted all measures at construction. But again, absent the

Board having been arbitrary or capricious in their ruling, the decision must stand.

Religious Claim

Both federal and state laws protect the Appellees/Defendants when it comes to religious shrines erected on their property. The Religious Land Use and Institutionalized Persons Act (RLUIPA) has application herein. The RLUIPA, codified as 42 USC Sec. 2000 et. seq., was created to address the inequities of subjective law use decisions by local communities who routinely deny religious entities the right to use land for religious purposes. It prevents discrimination in zoning laws that substantially interfere with religious exercise. Thus, to rule against the Board's determination herein would be volitive thereof. Part of its purpose is to prohibit zoning laws that discriminate against churches and burden their ability to exercise religious beliefs. Again, in this instance, the "grotto" would qualify. There was "no compelling reason" to prevent the "grotto" from proceeding to construction upon land now owned by St. John's as all issues were addressed before the Board. There was no impact upon any laws which existed for its prevention. The Board could not have limited via local land use regulations the land use for a religious purpose and it is a legitimate.

The issues attempted to be brought upon appeal are benign and thus allowable. There were no substantial issues of real concern. The church building was not being expanded; the property was acquired; it is not being utilized for any commercial purpose; it is not going to be operated as a tourist attraction; parking was addressed; it is open to the

public of any denomination; and, any increase in traffic is speculative and without foundation.

One queries that if this were a park, or secular, would this land use impact be as much of a concern if a religious belief (in particular the nature of St. John's) wasn't involved? It is merely beyond the scope of governmental regulation. There must be a balance between governmental interest and religious practice. What is the degree of interference or impact herein as a result of the Board's determination? Appellees/Defendants assert is it very limited. (By way of analogy the Court' attention is directed to the decision in *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir., 1988.)

Failure to Claim Actual Injury/Lack of Standing

Under KRS 100.347(3) it has been determined that it is mandatory for a party to allege in its complaint on appeal to the circuit court that the party has been injured or aggrieved by the final action of the legislative body. A mere allegation as to such should not suffice. An appeal from an administrative decision such as the one herein is a matter of legislative grace, not a right. Therefore, failure to follow strictly the statutory guidelines for the appeal is fatal. Under KRS 100.347(3) a party must claim in the complaint to be injured or aggrieved and allege facts supporting such a claim. The failure to do so requires dismissal of the case. *Spencer County Preservation, Inc. v. Beacon Hill, Ky. App.*, 214 S.W.3d 327 (2007). Although surmised from their pleadings that the Frederics' allege to have been injured or aggrieved by virtue of not liking the Board's determination, there is no actual assertion that they have suffered the same.

Other Issues

To address other issues raised by the Frederics' in their brief, which have no bearing or basis for inclusion herein.

All due process procedures were properly followed. There is no permissible cross-examination of the applicant during the hearing. The conduct of the meeting is to have the applicant (or PDS) indicate the request, state its position, for the Board to then solicit comments from the public on either side of the issue, ask questions, deliberate and make a determination. This is not a trial.

Bias or conflicts of interest amongst any of the Board members were addressed during the hearing and having no legal basis for recusal were not plead in the Complaint.

This Court cannot grant injunctive relief. It shall either affirm the Board's determination or set it aside. Nothing would prevent the Appellees/Defendants from re-filing.

Statements or indications of alleged facts or legal assertions made by Odor in his application were just that, statements of his belief in support of his application and not necessarily of actual fact. He cannot be held to that standard. He is free to allege whatever he desires without being bound by the same. The actual determinations and applicability of the law is for the Board to decide.

There is also a myriad of self-serving statements in the Affidavit of Joel Frederic not addressed in the brief or the Complaint and should be disregarded. The Appellees/Defendants could have merely done the same. It is not for the Court to consider. The Record herein speaks for itself.

Finally, a regurgitation of all the applicable zoning code sections (as properly set forth) in question and the alleged violations thereof do not necessarily comport that the actions of the Board were unlawful or in violation thereof. Each was considered in making its determination, which is a permissible action and the purpose undertaken by this administrative body. The Board thoroughly vetted the comments and request and, as is their duty, made findings and determinations which were not inconsistent therewith based upon the lengthy hearing process and then made a sound and reasonable conclusion based upon substantial evidence submitted.

Conclusion

The idea argued by the Frederics' (and others at the hearing) that the construction of the "grotto" would lend itself to a potentially commercial tourist attraction is absurd. From review of the diagrams it is clearly small in character and size; meant to be a simple, quiet place for mediation and worship; non-disruptive to the neighborhood; no flashing lights or music; and, in keeping with the church grounds. The "grotto" will provide a home to the statue of the Blessed Virgin Mary that has been on the upper porch of the house at 1107 Amsterdam Road for years and will only move about 100 feet further into a more fitting setting. Without sounding blasphemous the idea that it could become the next Fatima or Lourdes is preposterous. In addition, there is nothing to substantiate that the "grotto" would create any increase in traffic detrimental to the neighborhood. As such no violation of Section 19.6 of the City's zoning code concerning dimensional variances has occurred.

As for parking, St. John's has spaces available and in order to seek appeasement both St. John's and the

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APPENDIX L

IN THE KENTON CIRCUIT COURT
KENTON COUNTY, KENTUCKY
CASE NO: 21-CI-____

Electronically Filed

ELIZABETH FREDERIC AND
JOEL FREDERIC
1001 Park Drive
Park Hills, KY 41011

APPELLANTS/PLAINTIFFS

v.

CITY OF PARK HILLS BOARD OF ADJUSTMENT,
CHARLES MEYERS, MARK KOENIG, ROBERT
SWEET, CATHLEEN MATCHINGA, AND THOMAS
MICHAEL In their official capacities as members of
the City of Park Hills Board of Adjustment

AND

JORDAN ODOR
Elevar Design Group
555 Carr Street
Cincinnati, OH 45203

AND

SHEILA BURKE TRUST c/o Sheila E. Burke,
Trustee 917 Alhambra Court
Park Hills, KY 41011

AND

SHEILA E. BURKE, in her capacity as
Trustee for the SHEILA BURKE TRUST
917 Alhambra Court
Park Hills, KY 41011

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AND

PLANNING AND DEVELOPMENT
SERVICES OF KENTON COUNTY
c/o Sharmili Reddy
1840 Simon Kenton Way, Suite 3400
Covington, KY 41011-2999

AND

MISSIONARIES OF SAINT
JOHN THE BAPTIST, INC
c/o Father Shannon M. Collins (Agent)
1101 Amsterdam Road
Our Lady of Lourdes Parish
Park Hills, KY 41011

DEFENDANTS/APPELLEES

PLAINTIFFS' COMPLAINT/PETITION/APPEAL
PURSUANT TO KRS 100.347(1) AND FOR
DECLARATORY AND INJUNCTIVE RELIEF

This action is, primarily, an appeal under KRS 100.347(1).

Parties

1. The Plaintiffs/Appellants are Joel Frederic and Elizabeth Frederic, a married couple who reside at 1001 Park Drive, Park Hills, KY 41011. Mr. and Mrs. Frederic own the property at 1001 Park Drive, Park Hills, KY 41011.
2. The Defendants/Appellees include the City of Park Hills Board of Adjustments, in its official capacity, and the individual board members, Charles Meyers, Mark Koenig, Robert Sweet, Cathleen Matchinga, and Thomas Michael, the current incumbent board members, in their

official capacities (all collectively denoted the “Board of Adjustment Defendants”).

3. The Defendants/Appellees also includes Jordan Odor (“Odor”), the applicant, acting on behalf of the affected property owners.
4. The Defendants/Appellees include the Sheila Burke Trust (“Burke Trust”), and Sheila Burke in her capacity as Trustee for the Burke Trust, which owns 917 Alhambra Court, Park Hills, Kentucky (“917 Alhambra”), one of the two properties subject to the Board of Adjustment action challenged herein, and Missionaries of St. John the Baptist, Inc. (“St. Johns”), which owns 1101 Amsterdam Road, Park Hills, Kentucky, (“1101 Amsterdam”) the second property subject to the Board of Adjustment action herein.
5. The Defendant Planning and Development Services of Kenton County (“PDS”) is the authorized administration and coordinating agent for the City of Park Hills for the processing and management of the zoning ordinance, as well as the Board of Adjustment Process, and, while it may not be a necessary party, its inclusion in this action is helpful in implementing any decision of the Court.

The Park Hills Zoning Ordinance, Comprehensive Plan, Factual Background of the Board of Adjustment Process in this matter, and Aggrieved Party Status

Zoning Background

6. Both 917 Alhambra and 1101 Amsterdam are zoned R1-EE under the City of Park Hills zoning map.

7. A copy of the entire Park Hills, Kentucky zoning ordinance is available online, at https://www.pdskc.org/portals/pdskc/documents/zoning.pdf/park_hills/phord.pdf.
8. Section 10.4 of the Park Hills, Kentucky zoning ordinance, governing R1-EE zones, provides the following conditional use:

C. **CONDITIONAL USES:** No building or occupancy permit shall be issued for any of the following, nor shall any of the following uses or any customary accessory buildings or uses be permitted until and unless the location of said use shall have been applied for and approved of by the Board of Adjustment, as set forth in Section 9.13:

...

2. Churches and other buildings for the purpose of religious worship, provided they are located adjacent to an arterial street.

E. **AREA AND HEIGHT REGULATIONS FOR CONDITIONALLY PERMITTED USES:** No conditional building and/or use shall be erected or structurally altered hereafter, except in accordance with the following regulations:

1. Minimum Lot Area - Twenty - two thousand five hundred (22,500) square feet.
2. Minimum Lot Width at Building Setback Line - One hundred fifty (150) feet.
3. Minimum Front, Side (on each side of lot), and Rear Yard Depths - Fifty (50) feet.
4. Maximum Building Height - Thirty - five (35) feet or two and one - half (2-1/2) stories.

9. Section 7.0 of the Park Hills, Kentucky zoning ordinance, governing definitions, provides the following definition for arterial streets:
STREET, ARTERIAL: Public thoroughfares which serve the major movements of traffic within and through the community, as identified in the adopted comprehensive plan for the city of Park Hills.
10. Neither 917 Alhambra, nor 1101 Amsterdam are located adjacent to an arterial street.
11. Section 9.13 of the Park Hills Zoning Ordinance provides:

SECTION 9.13 CONDITIONAL USES:

A. DETERMINATION: The Board of Adjustment may authorize a conditional building and use to be located within any zone in which the particular conditional use is permitted by the use regulations of this ordinance, if the evidence presented by the applicant is such as to establish, beyond any reasonable doubt:

1. That the proposed building and use at the particular location is necessary or desirable to provide a service or facility which will contribute to the general well being of the neighborhood or the community; and
2. That such building and use will not, under the circumstances of the particular case, be detrimental to the health, safety, or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity; and
3. That the proposed building and use will comply with any regulations and conditions specified in this ordinance for such building and use.

12. Section 19.6 of the Park Hills Zoning Ordinance provides, in relevant part:

B. DIMENSIONAL VARIANCE CANNOT CONTRADICT ZONING REGULATIONS: The Board of Adjustment shall not possess the power to grant a dimensional variance to permit a use of any land, building, or structure which is not permitted by this Ordinance in the zone in question, or to alter the density requirements in the zone in question.

13. Section 19.6 of the Park Hills Zoning Ordinance further provides that non-conforming uses may not be expanded, or changed unless the use causes less vehicular traffic, less noise, and is more in character with the neighborhood. It further provides that: “The Board of Adjustment shall not allow the enlargement or extension of a nonconforming use beyond the scope and area of its operation at which time its use became nonconforming.”

The Conditional Use and Variance Request

14. On or about March 18, 2021, Odor, on behalf of St. Johns and the Burke Trust, caused an application for a Conditional Use Permit and Variance requests to be made to PDS for 917 Alhambra and 1101 Amsterdam, which handles administrative matters on behalf of the City of Park Hills, Kentucky, related to planning and zoning, including the handling and coordination of Board of Adjustment appeals for the City of Park Hills Board of Adjustments. A true and accurate copy of same is attached as **Exhibit 1**, as part of the PDS staff report, and is incorporated into this Complaint in full.

15. In that application, Odor, for himself as the applicant, and on behalf of the Burke Trust and St. Johns as property owners, acknowledges the non-compliance, stating: “Regarding the property’s location being adjacent to a ‘collector street’ versus an ‘arterial Street’, we believe that this requirement should be waived due to the facts that this church’s existence predates the 1974 official zoning ordinance and official map.”
16. Odor likewise acknowledges non-compliance with the Zoning Ordinance’s requirements for the conditional use: “We also believe that granting variances for the area and height regulations will not adversely affect anyone in the community.”
17. The staff report from PDS, concerning the conditional use request, notes that the use does not comply:
 - c. That the proposed building and use will comply with any regulations and conditions specified in this ordinance for such building and use.

The proposed grotto will not comply with all the specified conditions for this type of conditional use. Churches are required to located adjacent to an arterial street. Amsterdam Road is a collector street and this requirement is not being met.
18. In terms of the variance requests, the PDS Report noted that:
 - ii. The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant;

The strict application of the regulations would deprive the applicant of the reasonable use of the land Without the approval of the variances the applicant would not be able to construct the grotto as proposed

19. The foregoing conclusion by PDS at Paragraph 18 was baseless, in that there was, has been, and will continue to be full use of the land in question by the property owners, and the denial of same is not an unnecessary hardship.
20. In terms of the variance requests, the PDS Report also concluded that:

The circumstances are the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought.

The reason for this request is not the result of action taken by the applicant prior the adoption of the zoning regulations.
21. As opposed to appropriately applying the language and requirements of KRS 100.243, including the requirement that “The board shall deny any request for a variance arising from circumstances that are the result of willful violations of the zoning regulation by the applicant subsequent to the adoption of the zoning regulation from which relief is sought,” the PDS staff report inappropriately looked at whether the request was a result of the applicants’ actions prior to the adoption of the zoning regulations, rather than after the adoption of the zoning regulations. This legal error failed to recognize that the applicant (and property owners) sought to engage in uses expressly prohibited by the Park Hills Zoning Ordinance, as set forth herein.

22. The PDS staff recommended disapproval of the conditional use permit, because, among other things, such approval was unlawful.

The Plaintiffs/Appellants

23. As previously set forth, the Plaintiffs/Appellants are residents at 1001 Park Drive, Park Hills, KY 41011. Their property sits immediately across the street from the property that was the subject of the Conditional Use and Variance requests by Odor, on behalf of St. Johns and the Burke Trust.
24. On April 15, 2021, the Park Hills Board of Adjustments held a meeting to consider the foregoing Conditional Use and Variance requests by Odor, on behalf of St. Johns and the Burke Trust.
25. The Plaintiffs/Appellants spoke and gave testimony at that hearing. Plaintiffs/Appellants along with other Park Hills residents observed at that hearing that they would be injured and/or aggrieved by the granting of the Conditional Use and Variance requests by Odor, on behalf of St. Johns and the Burke Trust because: (i) the expansion of the non-conforming use and construction proposed by the applicant and property owners would increase traffic congestion on the streets and parking areas, which, during services, after services, and before services, is already congested, overflowing, and spilling over to streets, including the streets and public parking areas around the Plaintiffs/Appellants' property; (ii) the expansion of the non-conforming use and construction proposed by the applicant and property owners would increase noise on their property, which is already a problem during services, after

services, and before services; (iii) the lighting concerns from the construction in question would likely affect their property as well; they observed that all of these issues would injure and/or aggrieve them.

26. As a factual matter, the approval of Odor's request for a Conditional Use and Variance will injure and/or aggrieve Plaintiffs/Appellants Joel Frederic and Elizabeth Frederic, because it will cause (i) the expansion of the non-conforming use and construction proposed by the applicant and property owners that would increase traffic congestion on the streets and parking areas, which, during services, after services, and before services, is already congested, overflowing, and spilling over to streets, including the streets and parking areas of the Plaintiffs/Appellants' property; (ii) the expansion of the non-conforming use and construction proposed by the applicant and property owners that would increase noise on their property, which is already a problem during services, after services, and before services; (iii) the lighting concerns from the construction in question would likely affect their property as well; they observed that all of these issues would injure and/or aggrieve them.
27. At the BOA hearing, a traffic study in connection with this proposal was requested, but the Applicant, Odor, on behalf of St. Johns and the Burke Trust, refused to conduct same and the BOA likewise ignored this request.
28. That parking is already congested even without the erection of a grotto cannot be seriously contested as the Church operating on the St. John's property directs its parishioners on its

website to park in the parking lot “located behind the city hall / fire / police department right across from the church * * * and that [t]here are also two to three spaces at the end of the driveway of our rectory (1107-1109 Amsterdam Road). At the far end of Trolley Park, there are four spaces available. * * * We hope to obtain more property in the near future in order to accommodate additional vehicles.” <https://www.ourladvoflourdes.info/times-location/> (last visited 5/13/21).

29. At the hearing, the Applicant, Odor, on behalf of St. Johns and the Burke Trust in self-serving statements with no basis in fact summarily opined that the proposed grottos is not meant to be a tourist attraction and that parking, traffic, lighting, noise, hours of operation, and hill stability would not adversely impact residents and Plaintiff/Appellants and would not cause a loss in property values, but the BOA failed to implement or consider mitigation measures for the conditional use, including, without limitation, a reduction in scope of the construction, lighting and noise restrictions, and a limitation on the hours the facility could be used.
30. Instead, on April 15, 2021, the Park Hills Board of Adjustments approved Odor’s request for a Conditional Use and Variance, a true and accurate copy of which is attached as Exhibit 2. It is from this approval that Plaintiffs/Appellants take appeal.

COUNT I — Appeal, KRS 100.347

31. Plaintiffs/Appellants reincorporate the foregoing as if fully set forth herein.

32. Pursuant to KRS 100.347(1):

(1) Any person or entity claiming to be injured or aggrieved by any final action of the board of adjustment shall appeal from the action to the Circuit Court of the county in which the property, which is the subject of the action of the board of adjustment, lies. Such appeal shall be taken within thirty (30) days after the final action of the board. All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review. The board of adjustment shall be a party in any such appeal filed in the Circuit Court.

33. Pursuant to KRS 100.347(4):

(4) The owner of the subject property and applicants who initiated the proceeding shall be made parties to the appeal. Other persons speaking at the public hearing are not required to be made parties to such appeal.

34. Plaintiffs/Appellants are injured or aggrieved, as set forth herein, by the final action of the Park Hills Board of Adjustment, have taken this appeal within the 30 days after final board action, have named the board of adjustment as a party, and have named the owners of the subject properties and the applicants, all as required by KRS 100.347. They thus bring this appeal pursuant to KRS 100.347.

35. The standard of review is set forth in *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky. 1964), which held that the overriding concern of the reviewing court is

whether the administrative body's action was arbitrary. In determining arbitrariness, the court must determine: (1) whether the agency *exceeded* its statutory authority; (2) whether the parties were afforded procedural due process; and (3) whether the agency decision was supported by substantial evidence. *See, also, Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 467 (Ky. 2005).

36. KRS 100.247 prohibits variances to land usage requirements, and, instead, the zoning ordinance must be complied with.
37. The Park Hills Board of Adjustments exceeded its statutory authority as provided in *American Beauty Homes Corp.*, when it granted the Conditional Use and/or Variance to the Applicant (on behalf of the owners), because, among other things, the property was not located adjacent to an arterial street as required for the Conditional Use to be granted, and because no variance can be given to land use requirements under KRS 100.247. *Keogh v. Woodford County Bd. Of Adjustments*, 243 S.W.3d 369 (Ky. App. 2007).
38. The Park Hills Board of Adjustments further exceeded its statutory authority as provided in *American Beauty Homes Corp.*, when it granted the Conditional Use and/or Variance to the Applicant (on behalf of the owners), because, among other things, it inappropriately applied the zoning ordinance and failed to give effect to KRS 100.243, by not considering that the expansion of a non-conforming use was implicated, and this was solely due to the actions and desires of the Applicant and property owners to expand the non-conforming use, all in contra-

vention of the Park Hills Zoning Ordinance, and KRS 100.253.

39. The Park Hills Board of Adjustments decision was not supported by substantial evidence, as required by *American Beauty Homes Corp.*, because, among other things, there was insufficient evidence to support any of the findings made by the Board.
40. The Park Hills Board of Adjustments denied the Plaintiffs/Appellants procedural due process, as required by *American Beauty Homes Corp.*, because, among other things, it did not permit them to cross examine the applicant.

COUNT II — DECLARATORY
AND INJUNCTIVE RELIEF

41. Plaintiffs/Appellants reincorporate the preceding paragraphs as if fully set forth herein.
42. Plaintiffs/Appellants further seek declaratory relief that, pursuant to the City of Park Hill: Zoning ordinances and Kentucky law, that conditional use for churches cannot be granted unless the property sits adjacent to an arterial street, that 917 Alhambra and 1101 Amsterdam properties do not sit adjacent to a arterial street, that the church use thereon therefore a non-conforming use, and that such use cannot be expanded under KRS 100.253.
43. Plaintiffs/Appellants seek injunctive relief prohibiting the Board of Adjustment Defendants from any future approvals of any conditional use approvals for any expansion of the 917 Alhambra and 1101 Amsterdam, absent a zoning text amendment that would permit such use.

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WHEREFORE, Plaintiffs/Appellants, Joel and Elizabeth Frederic pray:

- The decision of the Park Hills, Kentucky, Board of Adjustments granting a Conditional Use Permit and Variance to the Applicant/Property Owners, be reversed; and
- Declaratory Relief, as prayed for herein; and
- Injunctive Relief, requiring compliance by the Park Hills, Kentucky, Board of Adjustments with the Park Hills, Kentucky, zoning ordinance and Kentucky law; and
- Such other relief as this Court may find just and proper.

Respectfully submitted,

/s/Christopher Wiest
Christopher Wiest (KBA 90725)
25 Town Center Blvd, STE 104
Crestview Hills, KY 41017
513-257-1895 (v)
chris@cwiestlaw.com

Attorney for Plaintiffs / Appellants

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[PDS LOGO]

Planning and Development
Services of Kenton County

Serving the community of communities since 1961

TO: Park Hills Board of Adjustment Members
FROM: Chris Schneider, AICP Principal Planner
SUBJECT: BOA2103-0003
DATE: April 8, 2021

Staff has published notice for a public hearing of the Park Hills Board of Adjustment at **6:30 PM on Thursday, April 15, 2021** *via video conference due to covid-19 restrictions*. We submit this case review and recommendation for your consideration prior to the hearing.

The applicant will explain his/her reasons for this request during the hearing and address how he/she believes it meets legal requirements established in law. Staff will lay out the case, provide our findings and a recommendation, and address your comments and/or questions.

If you need additional information or clarification prior to then, don't hesitate to contact me.

cs

cc: Jordan Odor, Applicant
Sheila E Burke Trust, Owner
Missionaries of Saint John the Baptist, Inc.

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[PDS LOGO]

BOARD OF ADJUSTMENT: VARIANCES

Case No: BOA2103-0003
Jurisdiction: 1101 Amsterdam Road and 917
Alhambra Court, Park Hills
Applicant: Jordan Odor on behalf of Sheila Burke
Trust and Missionaries of Saint John
the Baptist, inc.
Staff Review: Chris Schneider, AICP, Principal
Planner

GENERAL CASE INFORMATION

1. **Request:** A conditional use permit for an accessory use associated with a church. Variance requests to the rear and side yard setback requirements for a conditional use.
2. **Location:** 1101 Amsterdam Road and 917 Alhambra Court, Park Hills

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SITE LOCATION AND BACKGROUND

1. The site is located adjacent to the intersection of Amsterdam Road and Cleveland Avenue. The site located at 1101 Amsterdam Road is approximately 0.57 acres and the site located at 917 Alhambra Court is approximately 1.1 acres. Amsterdam Road is identified as a collector street and Alhambra Court is identified as a local street.
2. The site located at 917 Alhambra Court has a single-family residential unit. The site located at 1101 Amsterdam contains a church and associated parking.

ANALYSIS — Current Zoning

	ZONING	MIN LOT	MAX
SITE: CURRENT	R-1EE	22,500 sq. ft.	NA
NORTH OF THE SITE	R-1E	7,500 sq. ft.	5.8 du/na
SOUTH OF THE SITE	R-1EE	22,500 sq. ft.	NA
EAST OF THE SITE	R-1EE	22,500 sq. ft.	NA
WEST OF THE SITE	R-1EE	22,500 sq. ft.	NA

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The site in question is currently zoned R-1EE (Single and Two — Family Residential — One EE) which conditionally permits churches and other buildings for the purpose of religious worship based on the following standards:

- a. Must be located adjacent to an arterial street.
- b. Minimum lot area — 22,500 square feet;
- c. Minimum lot width at building setback line — 150 feet;
- d. Minimum front, side, and rear yard depth — 50 feet; and
- e. Maximum building height — 35 feet or 2 1/2 stories.

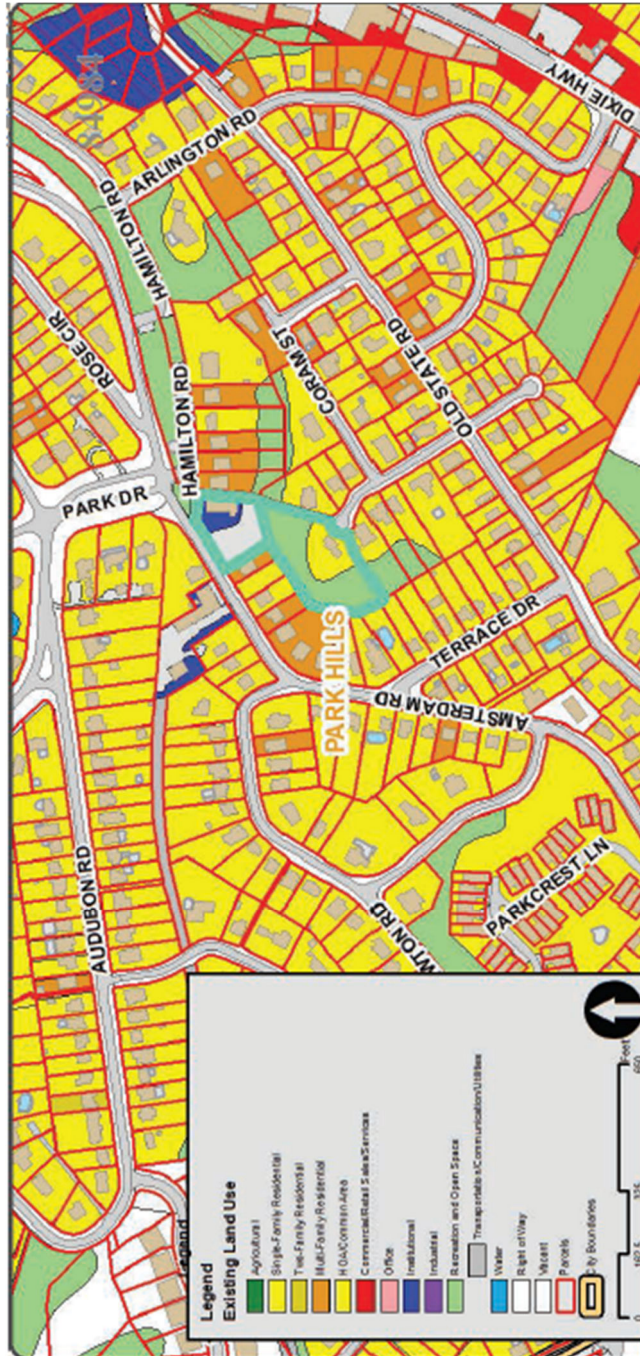


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ANALYSIS — Current Land Use

	DESCRIPTION
SITE: CURRENT	Institutional, Residential, Recreation and Open Space
NORTH OF THE SITE	Residential
SOUTH OF THE SITE	Residential, Recreation and Open Space
EAST OF THE SITE	Residential
WEST OF THE SITE	Residential

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SUBMISSION MATERIALS

The applicant has submitted the following information and materials (attached):

- a. a letter detailing the nature and reasons for the submitted requests; and
- b. a site plan and drawings detailing the proposed request.
- c. Letters from the community.

Petition Review

1. The submitted site plan and application materials show the following (see attached):
 - a. The construction of a grotto, plaza, associated walking path, and retaining wall.
 - b. The grotto will be located on the current property of 917 Alhambra Court. The applicant has indicated that a triangular portion of 917 Alhambra, where the grotto is located, will be consolidated with the property located at 1101 Amsterdam Road if the request is approved.
 - c. The proposed grotto and plaza will be located approximately 30 feet from the new property line adjacent to 916 Alhambra Court, 23 feet from the new property line adjacent to 917 Alhambra Court, and 16 feet from the existing property line adjacent to 1107-1109 Amsterdam Road.
 - d. Existing parking is located on the church property at 1101 Amsterdam Road.
2. Section 10.4 of the Park Hills Zoning Ordinance permits the following conditional uses:

- a. Churches and other buildings for the purpose of religious worship, provided they are located adjacent to an arterial street.
- 3. Section 9.13 of the Park Hills Zoning Ordinance state the board of adjustment may authorize a conditional use if the evidence submitted by applicant is such as to establish, beyond any reasonable doubt:

- a. That the proposed building and use at the particular location is necessary or desirable to provide a service or facility which will contribute to the general well being of the neighborhood or the community; and

The proposed grotto at this location is a desirable accessory use to the church and will provide a service which will contribute to the general well-being of the community.

- b. That such building and use will not, under the circumstances of the particular case, be detrimental to the health, safety, or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity; and

The proposed grotto will not be detrimental to the health, safety, or general welfare of those working or residing in the general vicinity.

- c. That the proposed building and use will comply with any regulations and conditions specified in this ordinance for such building and use.

The proposed grotto will not comply with all the specified conditions for this type of conditional use. Churches are required to be located adjacent to an arterial street. Amsterdam Road is a collector street and this requirement is not being met.

4. KRS 100 states the following:
 - a. Before any variance is granted, the board of adjustment must find that the granting of the variance will not adversely affect the public health, safety, or welfare, will not alter the essential character of the general vicinity, will not cause a hazard or a nuisance to the public, and will not allow an unreasonable circumvention of the requirements of the zoning regulations. In making these findings, the board shall consider whether:
 - i. The requested variance arises from special circumstances which do not generally apply to land in the general vicinity, or in the same zone;

The requested variance does arise from special circumstances which do not generally apply to land in the general vicinity. The applicant has indicated that a portion of 917 Alhambra Court will be consolidated with 1101 Amsterdam to ensure the grotto is located on the church property. This increase in land increases the setback distance of the grotto but the full setback requirement for a conditional use and the relatively narrow lot create a special circumstance.

- ii. The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant; and

The strict application of the regulations would deprive the applicant of the reasonable use of the land. Without the approval of the variances the applicant would not be able to construct the grotto as proposed.

- iii. The circumstances are the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought.

The reason for this request is not the result of action taken by the applicant prior the adoption of the zoning regulations.

RECOMMENDATION: Unfavorable recommendation on the conditional use for an accessory structure associated with a church and on the variance request for the side and rear yard setback requirements of a conditional use.

**SUPPORTING INFORMATION/BASES
FOR STAFF RECOMMENDATION**

- 1. The proposed conditional use is a desirable accessory use to the church and will provide a service to the general vicinity. However, it is not located adjacent to an arterial street which is a minimum requirement of the zoning ordinance for this conditional use. Since the conditional use is not permitted in this location, the variances for

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the setbacks for a conditional use should also be denied.

ADDITIONAL INFORMATION

1. While staff is recommending unfavorable, if the Board approves the conditional use request, then the variances could also be granted. For the variances, the Board must find the variances:
 - a. will not adversely affect the public health, safety, or welfare;
 - b. will not alter the essential character of the general vicinity;
 - c. will not cause a hazard or a nuisance to the public, and;
 - d. will not allow an unreasonable circumvention of the requirements of the zoning regulations.

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elear
DESIGN GROUP

March 18, 2021

Planning and Development Services of
Kenton County
Attn: Chris Schneider, Principal Planner
1840 Simon Kenton Way, Suite 3400, 4th Floor,
Covington, Kentucky 41011

RE: BOA Submission Letter (Park Hills Grotto)

Dear Mr. Schneider,

1101 Amsterdam Rd in Park Hills, currently owned and operated by Missionaries Of SaintJohn The Baptist Inc., is a property that has long-standing use as a building for the purpose of religious worship since the 1950's. This church is zoned in a district for single and two-family residential buildings, which categorizes the church as a conditional use. The owner is currently in a perpetual lease agreement with a neighboring property with mutually agreed intent to improve a specific portion of the parcel at 917 Alhambra Court directly adjacent to 1101 Amsterdam Rd for the purpose of creating an outdoor Grotto that will complement the existing church property.

This outdoor grotto is accessory to the primary church use and will create a natural space for reflection to benefit the users of the church and visitors of the church grounds. This grotto will not add to the number of staff, users or parking spaces required for the church. Rather, it is an upgrade to the grounds that will turn the existing unused site into a beautiful asset for this property while beautifying the neighboring community. This grotto would

be constructed for use by the existing parishioners primarily before and after mass and will not cause additional traffic to the site - it isn't intended to increase membership, attendance or frequency of use of the property. This space will not result in nuisance sound or light for the area. It can be most likely compared to a sacred, elaborate garden with two small statues (as shown in the drawing elevations) and space for reflection and repose.

Board of Adjustment action is being requested because the creation of any type of accessory space to the existing church is not directly permitted by the current local zoning ordinance in Park Hills, Kentucky. The owner is therefore requesting BOA action for the following items:

1. Approval of the installation of a customary accessory structure (i.e. grotto) to the existing conditional use for a place of religious worship.
 - a. ZONING ORDINANCE - PARK HILLS, KY - ARTICLE X ZONES - SECTION 10.4 (R-1 EE) - SUBSECTION C
2. Approval of the installation of a customary accessory structure (i.e. grotto) at a site located off of a collector street rather than arterial street as defined by the local authority having jurisdiction.
 - a. ZONING ORDINANCE - PARK HILLS, KY - ARTICLE X ZONES - SECTION 10.4 (R-1 EE) - SUBSECTION C - ITEM #2
3. Approval of variances for the following area and height regulations for conditionally permitted uses:

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- a. ZONING ORDINANCE - PARK HILLS, KY -
ARTICLE X ZONES - SECTION 10.4
(R-1 EE) - SUBSECTION E - ITEM #2
 - i. Minimum Lot Width at Building Setback
Line - One hundred fifty (150) feet
- b. ZONING ORDINANCE - PARK HILLS, KY -
ARTICLE X ZONES - SECTION 10.4
(R-1 EE) - SUBSECTION E - ITEM #3
 - i. Minimum Front, Side (on each side of the
lot), and Rear Yard Depths Fifty (50) feet.

As stated above, we believe that granting a conditional use permit for this proposed grotto will allow the church to improve their grounds in a way that will be desirable to the church and to the community. Regarding wellbeing of the neighborhood and community, this will not cause any nuisance in any way. Regarding safety, this proposed space has been designed to be inclusive and accessible as an asset to the surrounding area.

This church is not the only property listed as non-compliant with the zoning code on this street. In fact, some of the other non-compliant properties located either adjacent to or within 500 feet of this property are not even listed as options for a conditional use. For example, there are multiple four-family residential apartments that are located in close proximity on Amsterdam road. Regarding the property's location being adjacent to a "collector street" versus an "arterial street", we believe that this requirement should be waived due to the facts that this church's existence predates the 1974 official zoning ordinance and official map. Also, Amsterdam road is positioned in a way where it becomes a street of choice during peak traffic conditions which results in the same use

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as an arterial street. Finally, there are other conditional-use buildings on this street that would also be required to be located only on an arterial street. For example, the police department is located directly across the street from this church, but according to ARTICLE X ZONES - SECTION 10.4 (R-1 EE) - SUBSECTION C - ITEM #6, police and fire stations are allowed as conditional use provided that they are located adjacent to an arterial street, which this station is not.

We also believe that granting variances for the area and height regulations will not adversely affect anyone in the community. By nature of the Park Hills zoning ordinance, many of the properties adjacent to this property in question are not in accordance with the zoning ordinance. The setback distances mentioned in this code do not reasonably allow for new construction in this area as the requirements are not in proportion to the common lot sizes for this portion of Park Hills. Strict application of the zoning code would deprive this owner of the ability to fully utilize the property to its highest and best use.

Thank you for your consideration in the approval of the above conditional use and variance requests.

Sincerely,

/s/Jordan Odor
Jordan Odor

130a

Sheila E. Burke

917 Alhambra Court,
Park Hills, Kentucky 41011
859 261-2266

March 17, 2021

Dear MSJB, City of Park Hills Board of Adjustments,
and Kenton Co. PDS:

This correspondence is to inform the Board of Adjustments of Park Hills confirmation of my continuing support for the proposed Grotto of the Missionaries of Saint John the Baptist.

I believe the Grotto will absolutely be an asset and beautiful addition to our community. I am so looking forward to the greatly needed peace the Grotto will offer our community.

Respectfully,

/s/Sheila E. Burke
Sheila E. Burke

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JMJ

March 18, 2021

MSJB, City of Park Hills Board of Adjustments, and
Kenton County PDS:

I am writing to inform the Board of Adjustments of
Park Hills of my hearty support for the proposed
Grotto of the Missionaries of St. John the Baptist. I
think this Grotto will indeed be an asset and a
beautiful addition to our community and city.

Sincerely,

/s/Mark LeBlanc
Mark LeBlanc

owner of:
916 Alhambra Ct.
Park Hills, KY 41011

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March 17, 2021

City of Park Hills
1106 Amsterdam Road
Park Hills, KY 41011

RE: MSJB, City of Park Hills Board of Adjustment,
and Kenton County PDS

Dear Committee Members:

I am hopeful that construction of the proposed Grotto on the property of Our Lady of Lourdes Parish, 1101 Amsterdam Road, will go forward as planned. My residence at 1100 Amsterdam Road is situated directly across from the Church and adjacent properties. As such, I have a neighborly relationship with Our Lady of Lourdes and the Missionaries of Saint John the Baptist.

I have for the past 52 years enjoyed proximity to the structure itself which has housed several denominations throughout the years, first as a Lutheran congregation, followed by two Faith communities. Although a life-long Roman Catholic and parishioner of Saint Agnes Parish for the past 72 years, I have appreciated my relationships with these diverse faith communities and their many contributions to Park Hills.

I believe any Park Hills resident recognizes the investment made by Our Lady of Lourdes to the structural restoration of the church and improvements in landscaping. I know that I appreciate the extensive improvements to the property and have many friends and visitors who have commented on the charm the church has lent to the community. We have the Missionaries of Saint John the Baptist and their dedicated parishioners to thank for this. We

133a

have more good neighbors as a result of their presence.

Now, as they begin the next phase of improvements with the addition of the Grotto, as an invested neighbor, I lend my unqualified support. In fact, it is a privilege to do so.

I wish the priests and members of Our Lady of Lourdes every success in moving forward with their project.

Sincerely,

/s/Veronica Mitchell
Veronica Mitchell

134a

March 16,

Dear Park Hills Board:

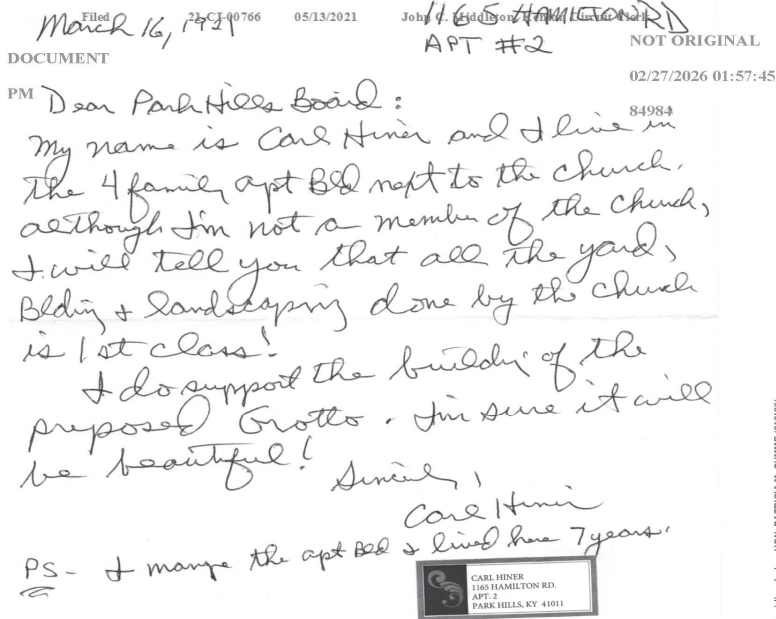
My name is Carl Hiner and I live in the 4 family apt Bld next to the church, although I'm not a member of the church, I will tell you that all the yard building & landscaping done by the church is 1st class!

I do support the building of the proposed Grotto, I'm sure it will be beautiful!

Sincerely,
Carl Hiner

PS - I manage the apt bld & lived here 7 years.

CARL HINER
1165 HAMILTON RD.
APT. 2
PARK HILLS, KY 41011



Residing Judge: HON. PATRICIA M. SUMME (61823)

135a

JMJ

March 17, 2021

MSJB, City of Park Hills Board of Adjustments, and
Kenton County PDS:

I am writing to inform the Board of Adjustments of
Park Hills of my hearty support for the proposed
Grotto of the Missionaries of St. John the Baptist. I
think this Grotto will indeed be an asset and a
beautiful addition to our community and city.

Sincerely,

/s/Sr. Theresa LeBlanc

Sr. Theresa LeBlanc

916 Alhambra Ct.

Park Hills, KY 41011

136a

3/17/2021

To the board of Adjustments of Park Hills, I am the neighbor that resides at 1117 Amsterdam Rd. I have watched the improvements of the houses that are next to me owned by the church. It has been a pleasure to notice the improvements done to the properties. The hillside next to the steps behind the church, In my opinion was a mess & a useless space. The church has put a lot of time & effort clearing & cleaning the hillside. It is a wonderful change of scenery. I think the grotto would be a beautiful addition to the property & would blend in w/the surrounding woods nicely.

Thank you,
[Signature Illegible]

Filed	21-CI-00766	05/13/2021	John C. Middleton, Kenton Circuit Clerk	3/17/2021 ORIGINAL
DOCUMENT				02/27/2026 01:57:45
PM				84984
				To the board of Adjustments of Park Hills, I am the neighbor that resides at 1117 Amsterdam Rd. I have watched the improvements of the houses that are next to me owned by the church. It has been a pleasure to notice the improve- ments done to the properties. The hillside next to the steps behind the church, In my opinion was a mess & a useless space. The church has put a lot of time & effort clearing & cleaning the hillside. It is a wonderful change of scenery. I think the grotto would be a beautiful addition to the property & would blend in w/ the surrounding woods nicely.
Filed	21-CI-00766	05/13/2021	John C. Middleton, Kenton Circuit Clerk	Thank You, [Signature]

Printing Job: KON PATRICIA W. SUMME (6/1/21)
COM: SOURCE OF FONTS

137a

OUR LADY OF LOURDES - GROTTTO

1101 AMSTERDAM ROAD, PARK HILLS, KY 41011

03.18.2021

BOA APPLICATION SET

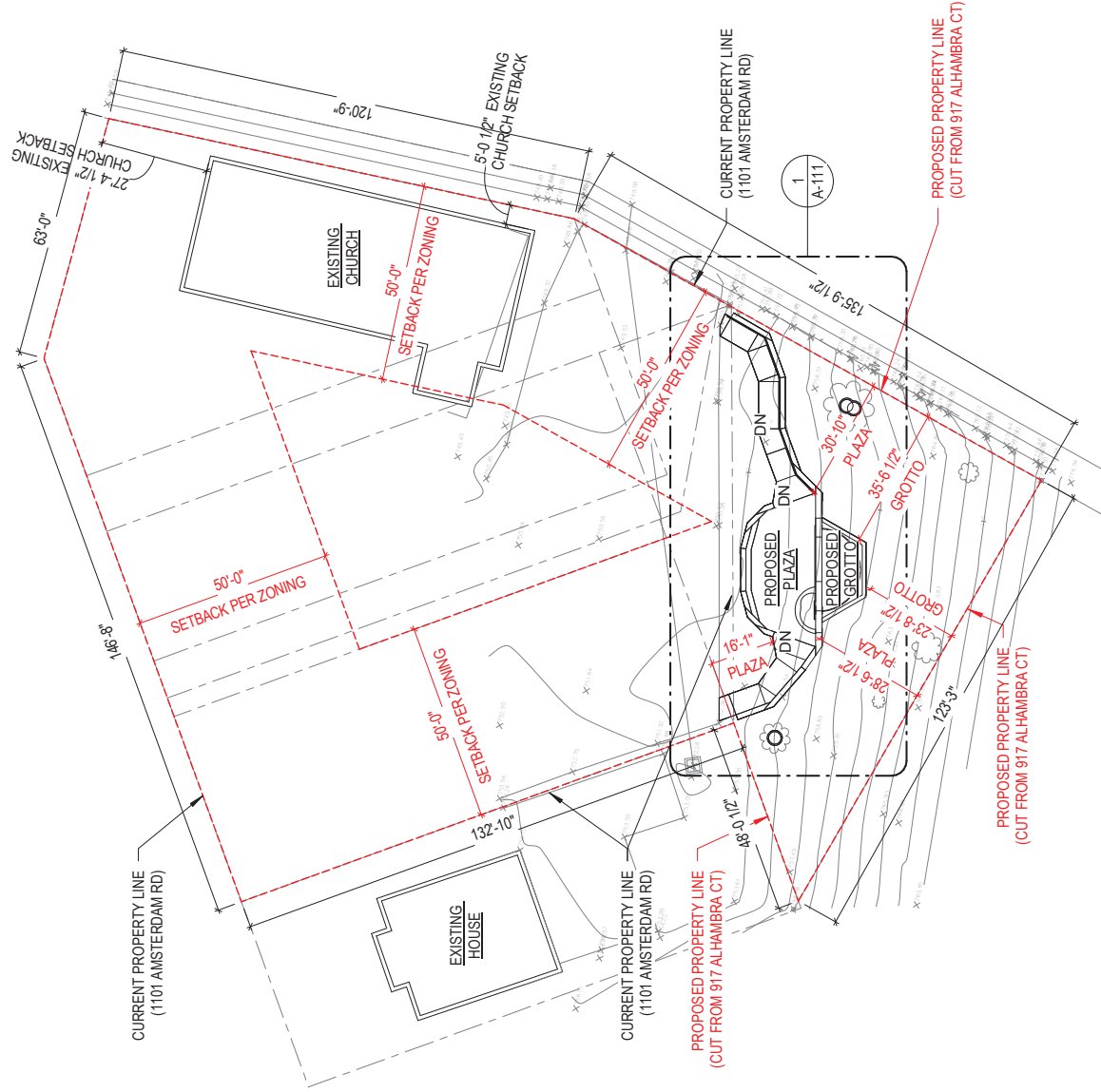
eleva
DESIGN GROUP

138a

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LOT AREA:
CURRENT PROPERTY AREA
 (1101 AMSTERDAM RD): 24,956 SF
PROPOSED PARCEL AREA
 (CUT FROM 917 ALHAMBRA CT): 6,406 SF
TOTAL PROPOSED AREA: 31,362 SF



03.18.2021
ARCHITECTURAL SITE PLAN
 SCALE: 1" = 30'-0"

DOCUMENT
PM

Filed

21-CI-00766

05/13/2021

John C. Middleton, Kenton Circuit Clerk

NOT ORIGINAL

02/27/2026 01:57:45

84984



elevation
DESIGN

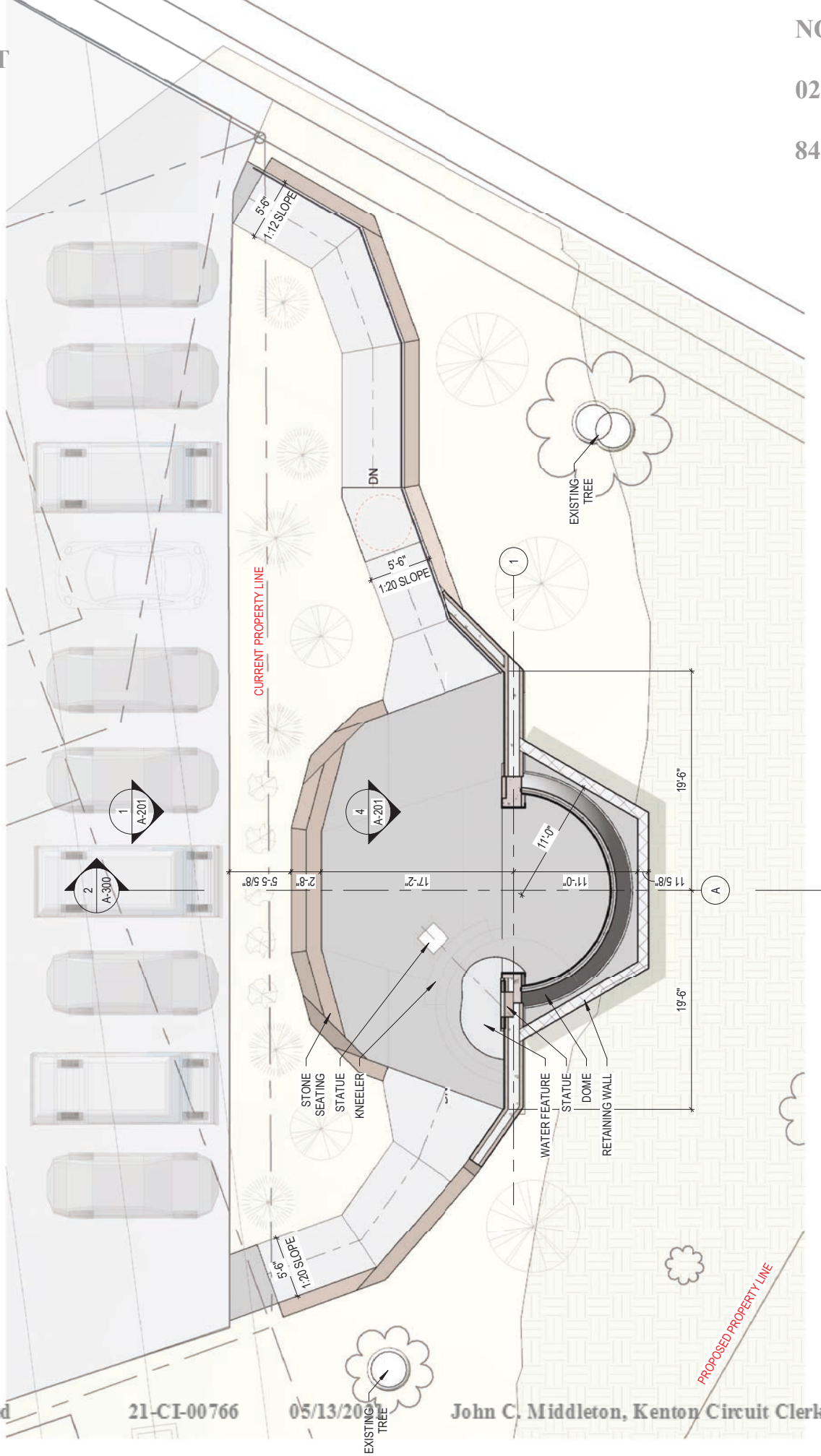
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21-CI-00766

05/13/2021

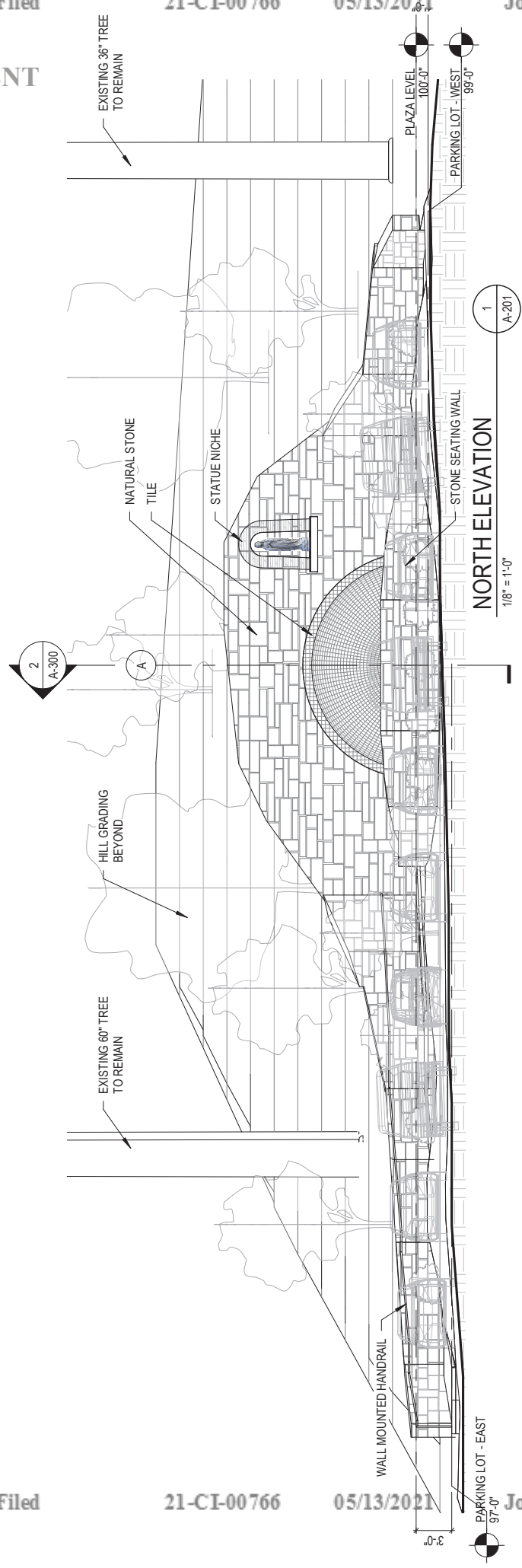
John C. Middleton, Kenton Circuit Clerk



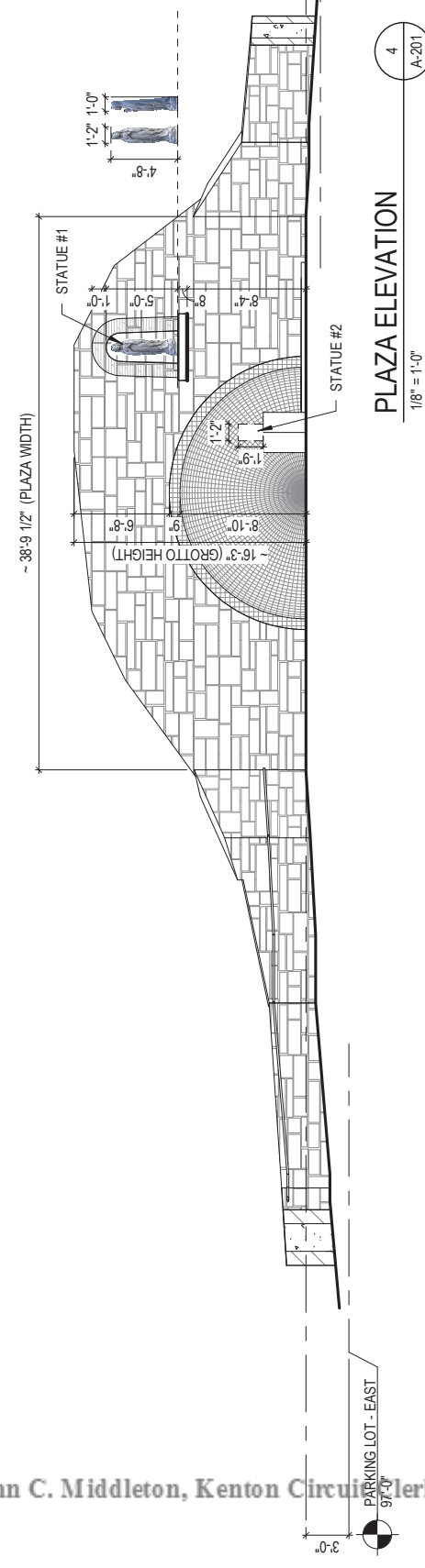
PLAZA FLOOR PLAN

SCALE: 1/8" = 1'-0"

03.18.2021



NORTH ELEVATION
1/8" = 1'-0"



PLAZA ELEVATION
1/8" = 1'-0"

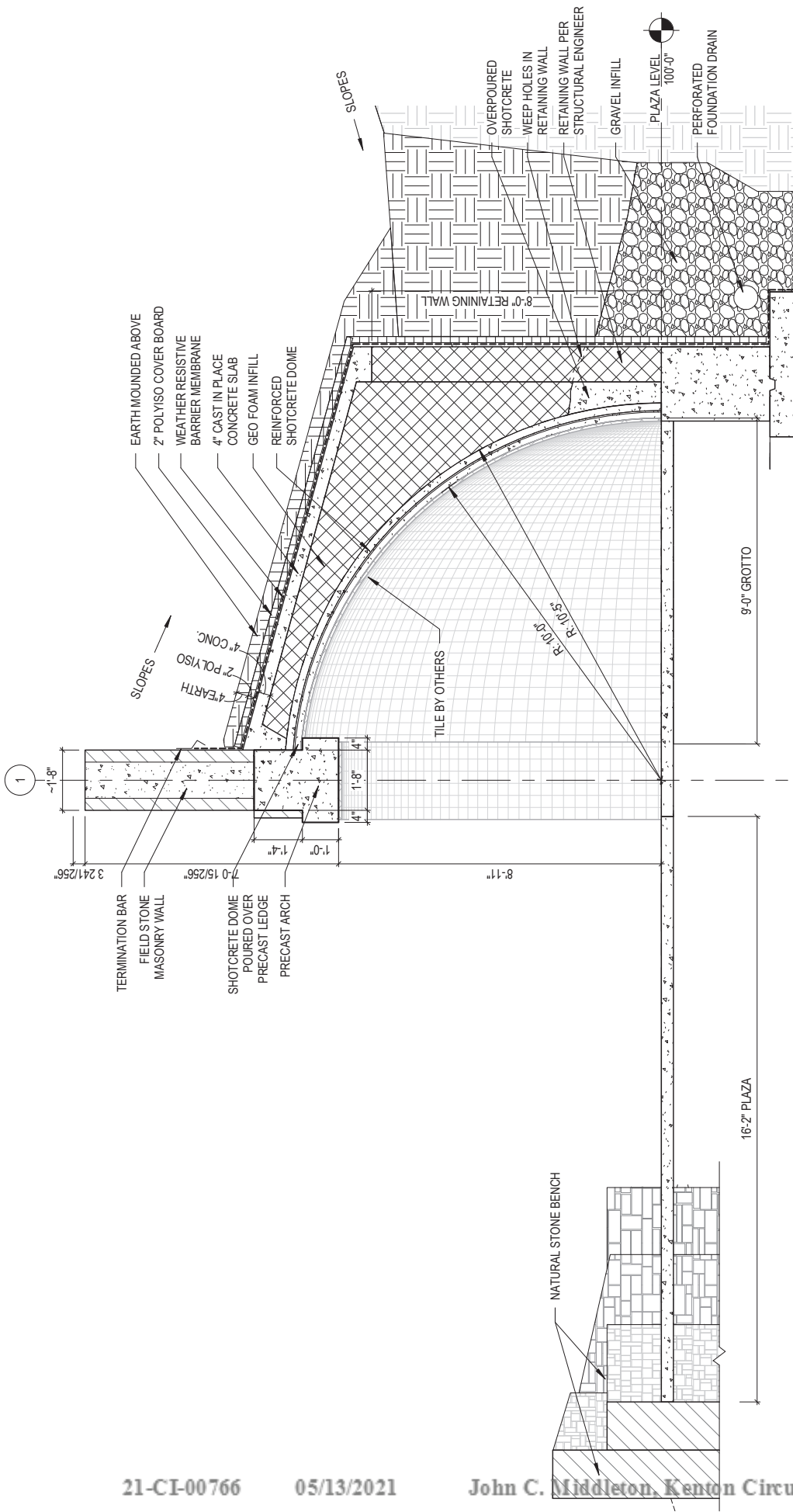
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PM

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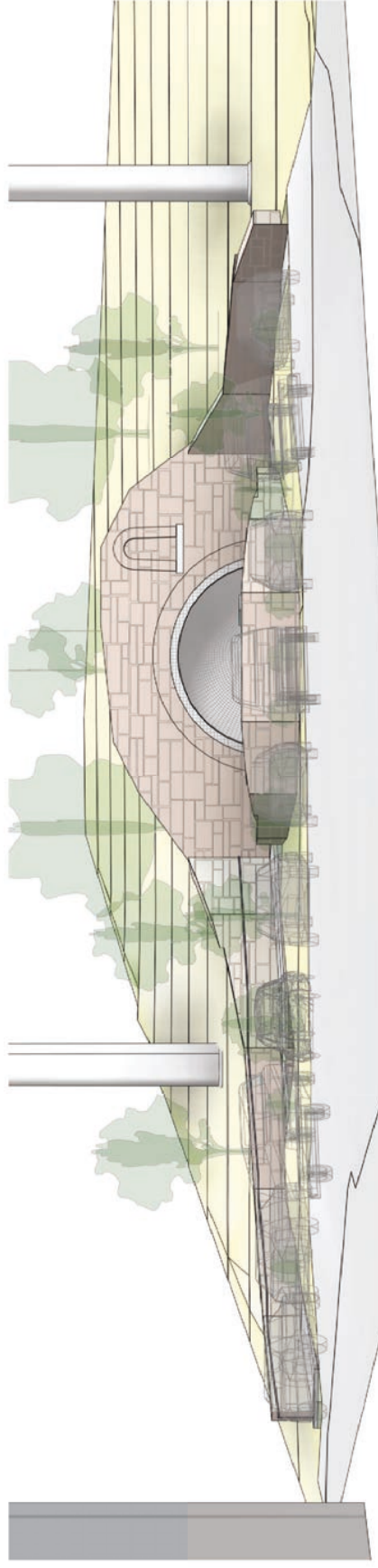
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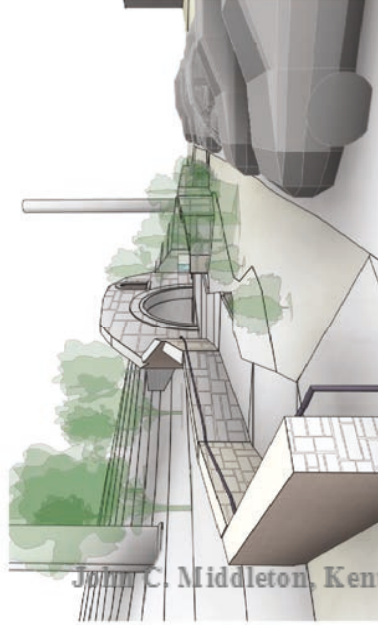
DOMES SECTION

SCALE : 3/8" = 1'-0"

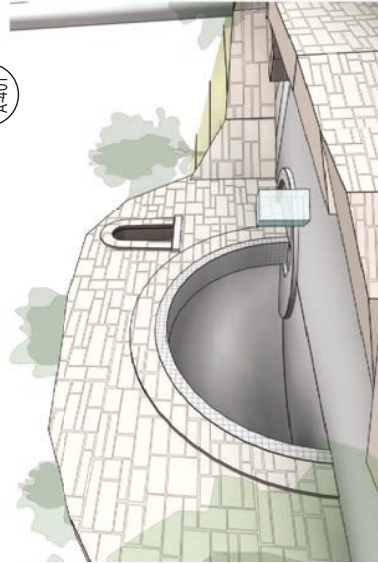
03.18.2021



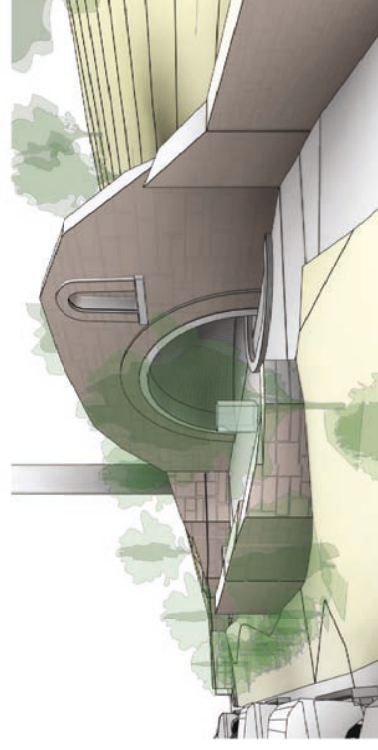
VIEW - FROM STREET
1
A-401



VIEW - EAST WALK
3
A-401



VIEW - FROM SEATING
4
A-401



VIEW - WEST WALK
2
A-401

NOT ORIGINAL
02/27/2026 01:57:45



03.18.2021
PERSPECTIVES
SCALE :

144a

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[PDS LOGO]

Planning and Development
Services of Kenton County

Serving the community of communities since 1961

April 19, 2021

Jordon Odor
Elevar Design Group
555 Carr Street
Cincinnati, OH 45203

RE: BOA2103-0003

The Park Hills Board of Adjustment heard your request for the noted case on Thursday, April 15, 2021. After considering the testimony provided, members of the Board acted as detailed on the following page.

Thank you for your cooperation through this process. Feel free to contact me if you have any questions about the Board's action or steps you may want to take now.

If you choose, you may file an appeal of the Board's action with the Circuit Court within 30 days according to Kentucky Revised Statutes 100.347.

/s/Chris Schneider
Chris Schneider, AICP
Principal Planner

Attach

cc: Sheila Burke Trust
Missionaries of Saint John the Baptist, Inc.

BOA2103-0003

Location: 917 Alhambra Court and 1101 Amsterdam Road, Park Hills

Requests: 1) A conditional use permit for an accessory use associated with a church.
2) Variance requests to the rear and side yard setback requirements for a conditional use.

Request 1

Decision: To approve the conditional use permit for an accessory structure associated with a church.

- Basis:**
1. The proposed building and use at this particular location is necessary or desirable to provide a service or facility which will contribute to the general well being of the neighborhood or the community.
 2. The proposed building and use will not, under the circumstances of this particular case, be detrimental to the health, safety, or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity.
 3. The proposed building and use will comply with any regulations and conditions specified in this ordinance for such building or use.
 4. Based on testimony heard at the April 15, 2021 public hearing.

Request 2

Decision: To approve the variance requests to the rear and side yard setback requirements for an accessory use associated with a church with the condition that the portion of 917 Alhambra Court which contains the proposed accessory structure as identified in the submitted plans is deeded over to 1101 Amsterdam Road within six months.

Basis: 1. The requested variances will not adversely affect the public health, safety of welfare, will not alter the essential character of the general vicinity, will not cause a hazard or nuisance to the public, and will not allow an unreasonable circumvention of the zoning regulations.
2. Based on testimony heard at the April 15, 2021 public hearing.

Result of BOA Action: The applicant is permitted to construct a grotto on the site as identified in their submitted plans subject to the stated condition and required building and zoning permits.

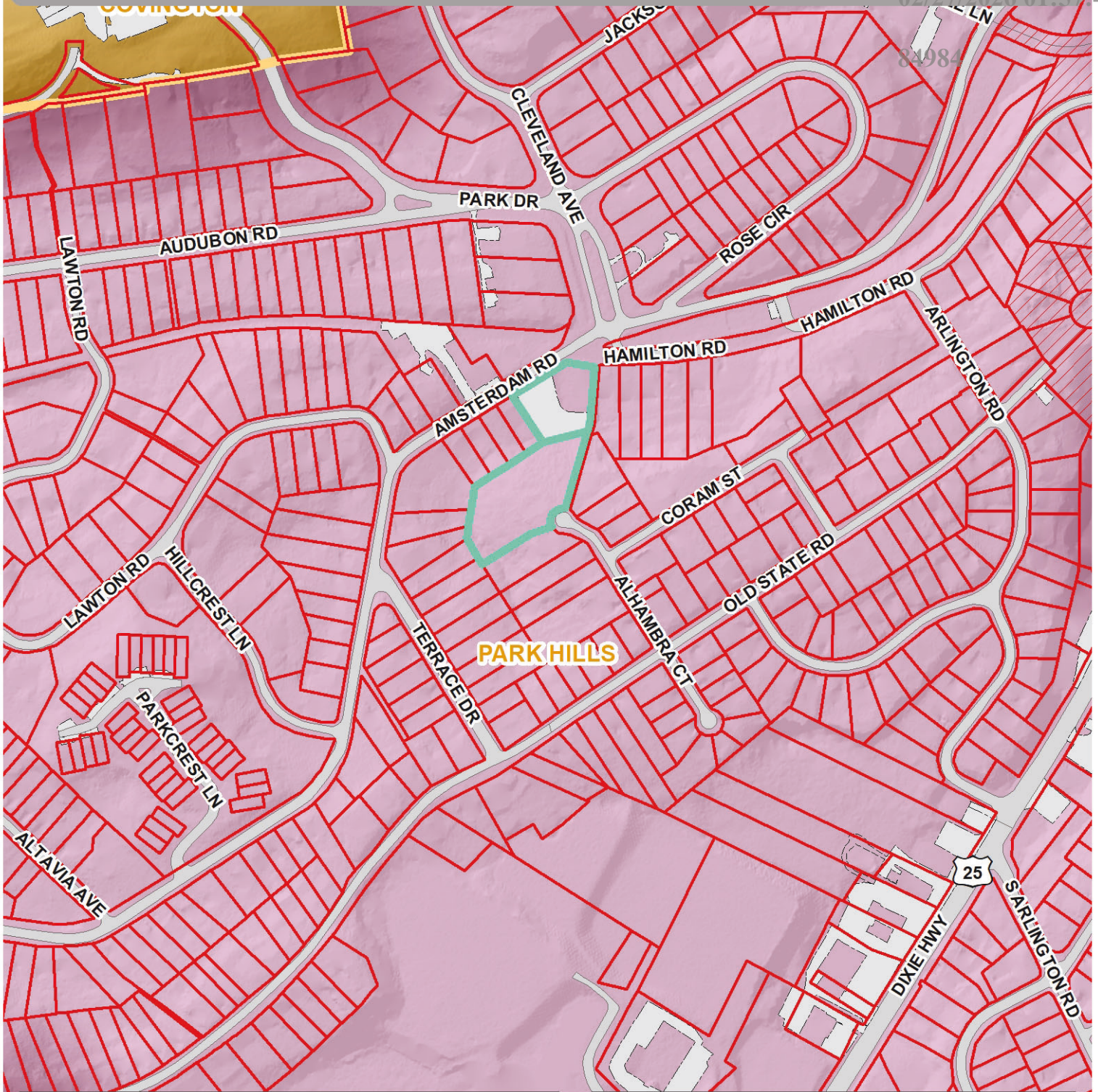
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BOA2103-0003

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Building	Roads	Utilities	Topography
Building	Paved Road	Sewer	Index Contour
Pool	Upaved Road	Sewer Structure	Intermediate Contour
Tank	Bridges	Water Pipe	Creek / Stream
Concrete Pad	Paved Parking	Water Hydrant	River / Lake
Recreation	Unpaved Parking		
Ball Fields	Railroad		
General Rec	Boundaries		
Tee/Green	Parcel		
	Zoning		

1:4,000

↑

85 100 Feet

1840 Simon Kenton Way, Suite 3400
Covington, KY 41011-2999
859.331.8980
Office hours M-F 8-5
www.linkgis.org

Parcel data provided by CCPVA, PCPVA and LINK-GIS.

Date: 4/1/2021

These GIS data are deemed reliable and every effort has been made to ensure their accuracy. They are, however, provided "as is" without warranty of correctness, timeliness, reliability, or completeness. Map elements do not represent a legal survey of land. Use of these data for any purpose should be with an acknowledgement of their limitations, including the fact that they are dynamic in nature and in a constant state of maintenance. Further investigation may be necessary.