No. 25-1131

IN THE

Supreme Court of the United States

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.,

Petitioner,

v.

JOEL FREDERIC AND ELIZABETH FREDERIC,

Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED: MARCH 18, 2026
CERTIORARI GRANTED: OCTOBER 1, 2026

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KENTON CIRCUIT COURT

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Docket No. 21-CI-00766

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JOEL FREDERIC, ET AL.,

v.

CITY OF PARK HILLS BOARD OF ADJUSTMENT,

———

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
05/13/2021	**Document Filed** COMPLAINT / PETITION AP *COMPLAINT*
07/22/2021	**Document Filed** DESIGNATION OF RECORD
07/22/2021	**Document Filed** EXHIBIT *#1 PDS REC.*
07/22/2021	**Document Filed** EXHIBIT *#2 JORDAN ODOR APPL*
07/22/2021	**Document Filed** EXHIBIT *#3 LETTERS IN SUPPORT*
07/22/2021	**Document Filed** EXHIBIT *#4 BOA APPL SET*

DATE	PROCEEDINGS
07/22/2021	**Document Filed** EXHIBIT *#5 JORDAN ORDR PRESENTATION BROCHURE*
07/22/2021	**Document Filed** EXHIBIT *#6 FLASH DRIVE*
02/25/2022	**Document Filed** AFFIDAVIT AP *AFFIDAVIT JOEL FREDERIC*
02/25/2022	**Document Filed** EXHIBIT AP *PSD STAFF REPORT*
02/25/2022	**Motion Filed** MOTION FOR SUMMARY JUDGMENT ATTORNEY FOR PLAINTIFF
03/28/2022	**Document Filed** BRIEF
04/04/2022	**Document Filed** REPLY AP *REPLY IN SUPPORT OF BRIEF/MSJ*
06/29/2022	**Document Filed** ORDER - OTHER JUD
07/14/2022	**Document Filed** NOTICE OF APPEAL AP

DATE	PROCEEDINGS
07/14/2022	**Document Filed** EXHIBIT AP *COPY OF ORDER BEING APPEALED*
09/12/2022	Notice of Certification

COURT OF APPEALS OF KENTUCKY

Docket No. 2022-CA-0867

JOEL FREDERIC, ET AL.,

v.

CITY OF PARK HILLS BOARD OF ADJUSTMENT, ET AL.,

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
07/14/2022	NOTICE OF APPEAL
09/12/2022	NOTICE OF CERTIFICATION
10/25/2022	APPELLANT BRIEF FILED
11/28/2022	APPELLEE BRIEF FILED
12/13/2022	REPLY BRIEF FILED
12/01/2023	OPINION REVERSING BY JUDGE ACREE
01/04/2024	DISCRETIONARY REVIEW FILED IN KY. SUPREME COURT
06/05/2024	DISCRETIONARY REVIEW GRANTED BY KY. SUPREME COURT
12/18/2025	SUPREME COURT OPINION
01/08/2026	FINALITY IN SUPREME COURT
01/12/2026	FINALITY

SUPREME COURT OF KENTUCKY

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Docket No. 2024-SC-0006

———

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.,

v.

JOEL FREDERIC, ET AL.,

———

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
01/04/2024	MOTION FOR DISCRETIONARY REVIEW FILED
01/10/2024	RESPONSE TO MOTION FOR DISCRETIONARY REVIEW FILED
01/11/2024	RESPONSE TO MOTION FOR DISCRETIONARY REVIEW FILED BY PARK HILLS BOARD OF ADJUSTMENT
06/05/2024	ORDER GRANTING DISCRETIONARY REVIEW (ORAL ARGUMENT)
10/04/2024	APPELLANT(S) BRIEF FILED - APPEAL PERFECTED
12/23/2024	APPELLEE(S) BRIEF FILED ON BEHALF OF JOEL AND ELIZABETH FREDERIC
04/08/2025	REPLY BRIEF FILED
07/02/2025	SCHEDULING ORDER SETTING ORAL ARGUMENT

DATE	PROCEEDINGS
12/18/2025	OPINION OF THE COURT BY CHIEF JUSTICE LAMBERT AFFIRMING
01/08/2026	FINALITY
04/01/2026	SCOTUS - NOTICE OF WRIT OF CERTIORARI
10/09/2026	SCOTUS - NOTICE OF OTHER ACTIVITY

ELEVAR
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 Saint John 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:
    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 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

Filed 21-CI-00766 05/13/2021 John C. Middleton, Kenton Circuit Clerk

OUR LADY OF LOURDES - GROTTO

1101 AMSTERDAM ROAD, PARK HILLS, KY 41011

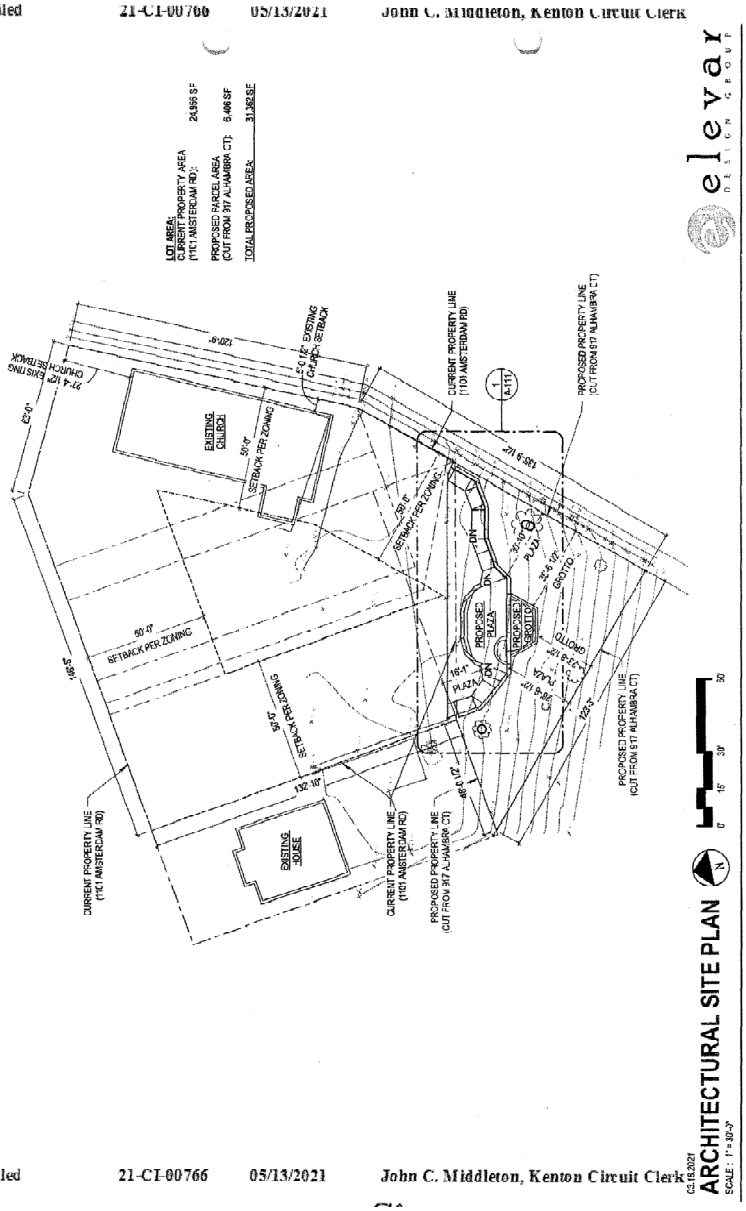
03.18.2021

elevar

BOA APPLICATION SET

Filed 21-CI-00766 05/13/2021 John C. Middleton, Kenton Circuit Clerk

Filed 21-CI-00766 05/13/2021 John C. Middleton, Kenton Circuit Clerk



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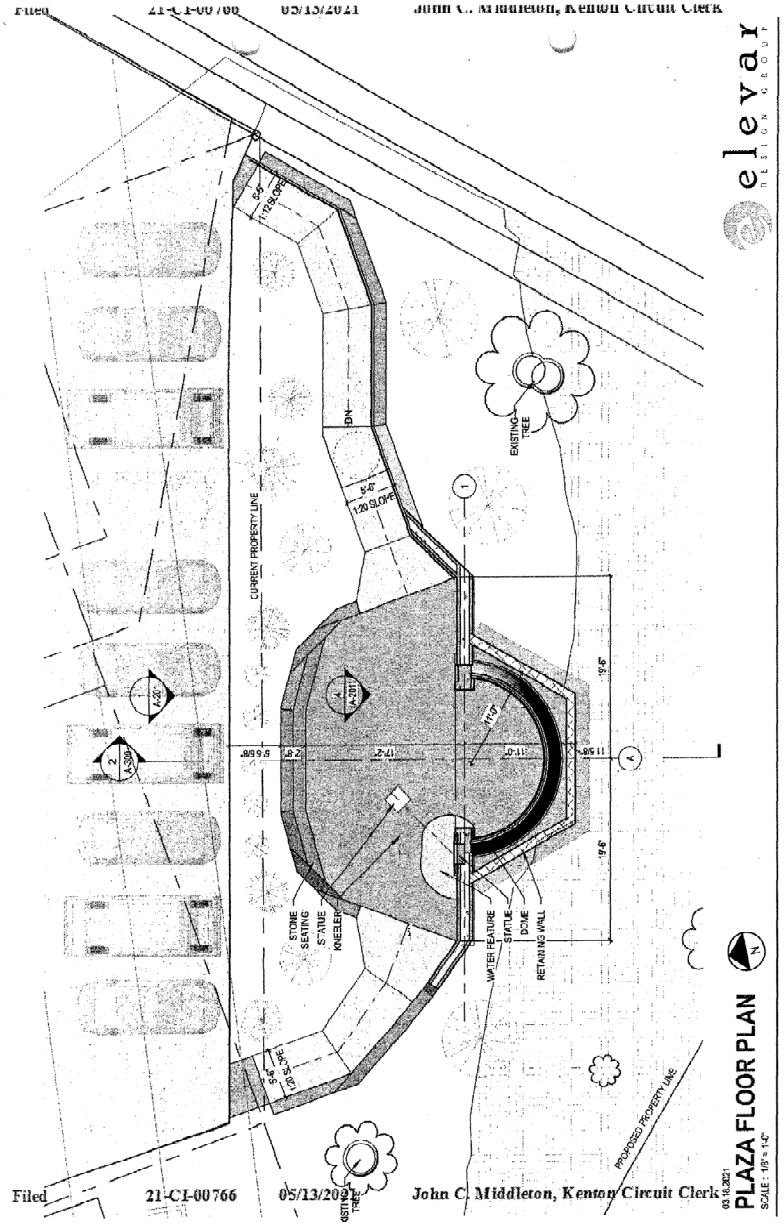
Filed 21-CI-00766 05/13/2021 John C. Middleton, Kenton Circuit Clerk
elevar
DESIGN GROUP
CURRENT PROPERTY LINE
EXISTING TREE
STONE SEATING
STATUE KNEELER
WATER FEATURE
STATUE
DOME
RETAINING WALL
PROPOSED PROPERTY LINE
PLAZA FLOOR PLAN
SCALE : 1/8" = 1'-0"
03.16.2021
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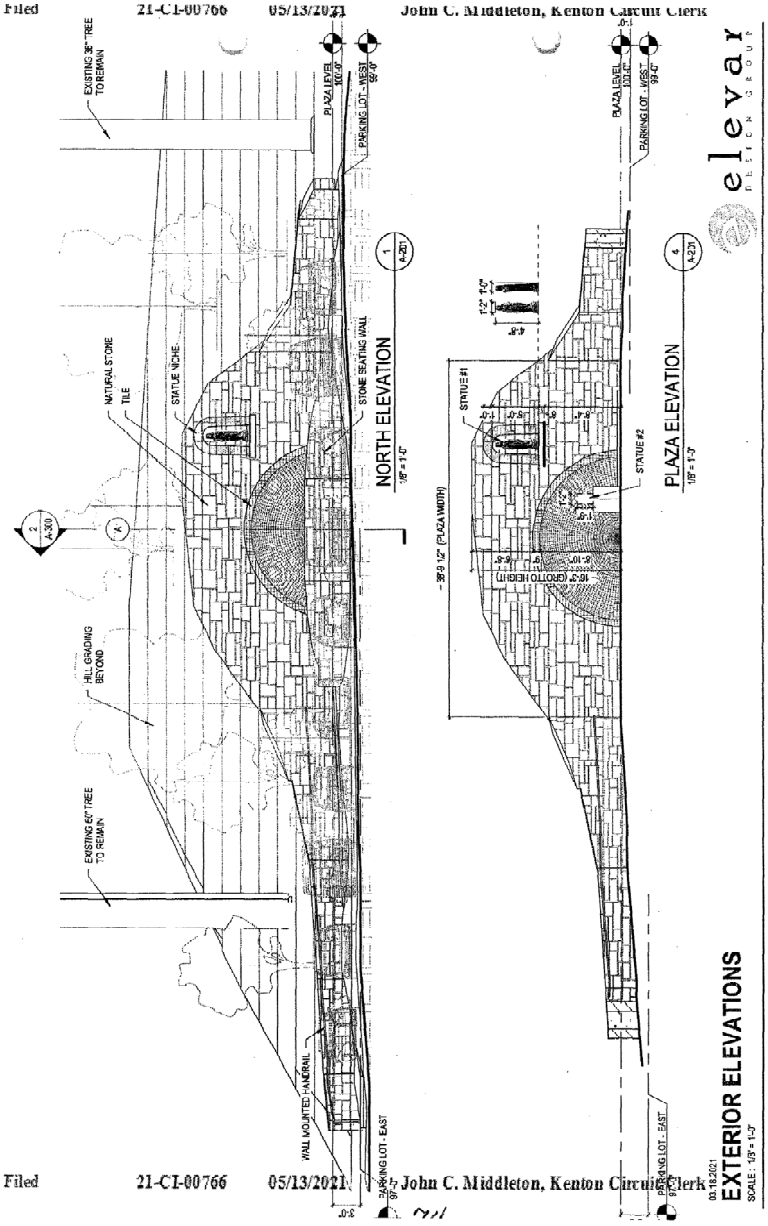

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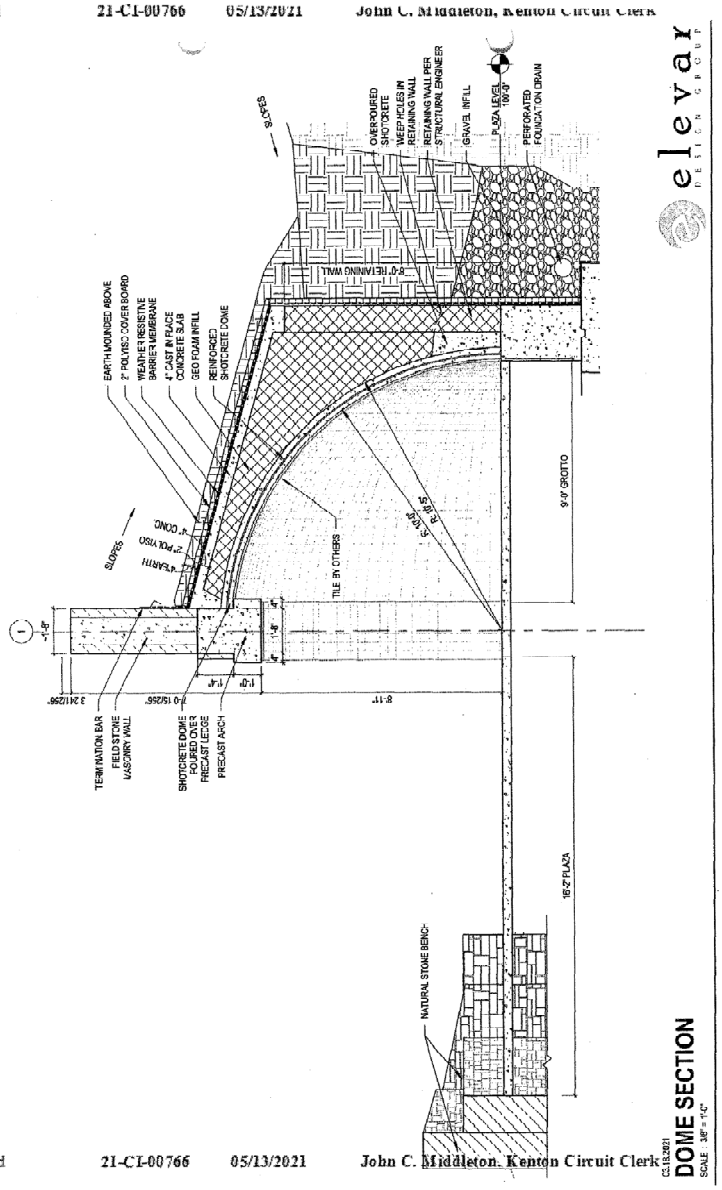

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Filed 21-CI-00766 05/13/2021 John C. Middleton, Kenton Circuit Clerk

17

Video of Park Hills Board of Adjustment Meeting
(Apr. 15, 2021)

(lodged with the Clerk)

COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
DIVISION IV

Case No. 21-CI-00766

ELIZABETH FREDERIC and JOEL FREDERIC

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

and

SHEILA BURKE TRUST

and

SHEILA E. BURKE, in her capacity as Trustee for the Sheila Burke Trust

and

PLANNING AND DEVELOPMENT SERVICES OF KENTON COUNTY

and

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.

Defendants / Appellees

DESIGNATION OF RECORD

Comes now the Defendant, Planning and Development Services of Kenton County ("PDS"), through counsel, and hereby submits and files of record the Record on Appeal consisting of the following:

1. PDS Recommendation BOA2103-0003;
2. Jordan Odor Application;
3. Letters of Recommendation from Public-at-Large;
4. BOA Application Set submitted by Elevar Design Group;
5. Jordan Odor Presentation Brochure; and
6. A copy of the digital recording of the Board of Adjustment Meeting on Thursday,

April 15, 2021.

/s/THOMAS R. NIENABER
THOMAS R. NIENABER
SKEES, WILSON & NIENABER, PLLC
7699 Ewing Boulevard, PO Box 756
Florence, KY 41022-0756
Phone: (859) 371-7407
Fax: (859) 371-9872
Email: tnienaber@fuse.net

CERTIFICATE OF SERVICE

The undersigned, Thomas R. Nienaber, counsel for PDS, hereby certifies that a true and exact copy of the foregoing Designation of Record has been duly served upon the following by US Mail, postage prepaid on this the 22nd day of July, 2021:

CHRISTOPHER WIEST
25 Town Center Blvd, Ste 104
Crestview Hills, KY 41017
Phone: 513.257.1895
Email chris@cwiestlaw.com

Attorney for Plaintiffs/Appellants

HON. DANIEL R. BRAUN
526 Greenup Street
Covington, KY 41011
Phone: 859.491.5055
Email: braunnkylaw@aol.com

Attorney for City of Park Hills

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

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

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

/s/THOMAS R. NIENABER
THOMAS R. NIENABER
SKEES, WILSON & NIENABER, PLLC
7699 Ewing Boulevard, PO Box 756
Florence, KY 41022-0756
Phone: (859) 371-7407
Fax: (859) 371-9872
Email: tnienaber@fuse.net

PARK HILLS
BOARD OF ADJUSTMENT

April 15, 2021
6:30 PM



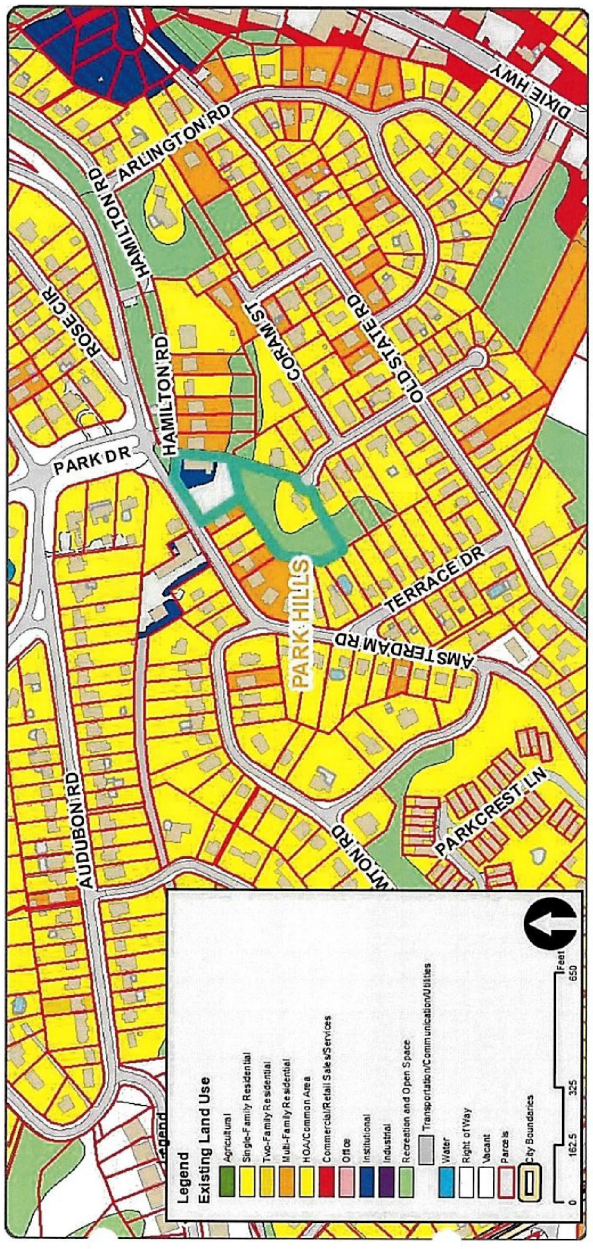


12.1

1.34

Park Hills Board of Adjustment

Park Hills Board of Adjustment


DIXIE HWY
ARLINGTON RD
HAMILTON RD
ROSE CIR
CORAM ST
OLD STATE RD
PARK DR
PARK HILLS
TERRACE DR
AMSTERDAM RD
AUDUBON RD
PARKCREST LN
Legend
Existing Land Use
Agricultural
Single-Family Residential
Two-Family Residential
Multi-Family Residential
HOA/Common Area
Commercial/Retail Sales/Services
Office
Institutional
Industrial
Recreation and Open Space
Transportation/Communication/Utilities
Water
Right of Way
Vacant
Parcels
City Boundaries
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162.5
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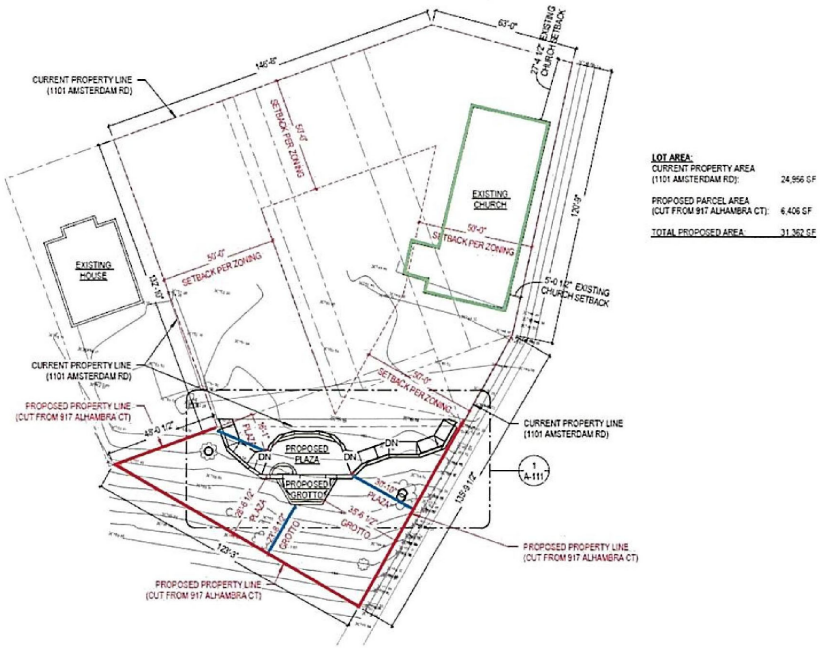
650

Google



- Construction of a grotto
- For use by existing parishioners before and after mass.
- An approximate 16 ft by 39 ft plaza with grotto.
- Associated sidewalk and stone wall.
- 30’ setback to the east.
- 23’ setback to the south.
- 16’ setback to the north.

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IN THE KENTON CIRCUIT COURT
KENTON COUNTY, KENTUCKY

Case No: 21-CI-766
Electronically Filed

JOEL FREDERIC, et. al.

Appellants / Plaintiffs

v.

CITY OF PARK HILLS BOARD OF ADJUSTMENT, *et. al.*

Appellees / Defendants

AFFIDAVIT OF JOEL FREDERIC

Comes now Joel Frederic, being duly sworn and over the age of 18, and competent to testify in the matters set forth herein, swears and deposes as follows, based on personal information and belief:

1. My name is Joel Frederic, my wife is Elizabeth Frederic, and we are a married couple who reside at, and own the property at 1001 Park Drive, Park Hills, KY 41011,
2. Our 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 (the "Church Property").
3. 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. De-

spite living immediately across the street from the Church Property, Appellees/Defendants failed to notify me of the hearing either formally or informally.

4. When I learned of the hearing, I wrote a letter in opposition, testified at that hearing, and asked the Board of Adjustments to uphold the Kenton County Planning and Development Services' recommendation to deny the Appellees/Defendants Conditional Use and Variance request. Myself and other residents testified at that hearing that we 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 parking areas of our property; (ii) the expansion of the non-conforming use and construction proposed by the applicant and property owners would increase noise on our property, which is already a problem during services, after services, and before services and is otherwise not aligned with the identity of the community, only serves to benefit the Church parishioners, and does not contribute to the general wellbeing of the community; (iii) the lighting concerns from the construction in question would likely affect our property as well; we observed that all of these issues would injure and/or aggrieve us.

5. The dimensions of the proposed grotto is in fact far larger than the size of grottos built by other

Churches, all of which are within walking distance, have larger congregations, ample parking, and are served by an arterial street and none of which are encircled by properties zoned residential (e.g., Church of St. Agnes, the Sisters of Notre Dame, and Covington Catholic High School).

6. The parking lots intended to serve nearby parks are regularly filled with parishioners attending services, and as recently as October 31, 2021 a Church parishioner illegally parked in my front yard, and I emailed Mayor Kathy Zembrodt and requested that parishioners not park in my front yard.

7. As a factual matter, the approval of Odor's request for a Conditional Use and Variance will injury and/or aggrieve my wife and I in all of the ways we testified to in Paragraph 4.

8. At the hearing, I objected to the conflict of interest/bias in allowing, Thomas Michael, a parishioner of the Church seeking the Conditional Use and Variance, to vote and asked that he be recused. Michael noted on the record that he did not have a financial interest in the transaction and therefore he could vote on matter, but this is not a correct statement of the law in Kentucky as it applies to conflicts of interest.

9. 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.

10. The Church Property is in a neighborhood and completely encircled by residential homes, and mitigation measures for the conditional use, in-

cluding, without limitation, a reduction in scope of the construction, lighting and noise restrictions, and a limitation on the hours the facility should have been implemented, but this did not occur.

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

12. 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.

13. Neither the Church Property, 917 Alhambra, nor 1101 Amsterdam are located adjacent to an arterial street.

FURTHER AFFIANT SAYETH NAUGHT

/s/Joel Frederic
Sworn and Subscribed this 25th day
of February, 2022

/s/Harry Samuel Lind
Notary Public

PDS
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.

PDS

Staff Report April 8, 2021

BOARD OF ADJUSTMENT: VARIANCES

Case No: BOA2103-0003

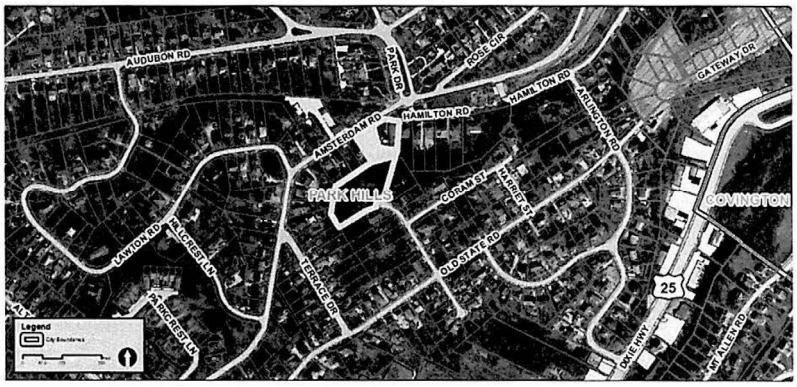
Jurisdiction: 1101 Amsterdam Road and 917 Alhambra Court, Park Hills

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



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 SIZE	MAX DENSITY
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

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:

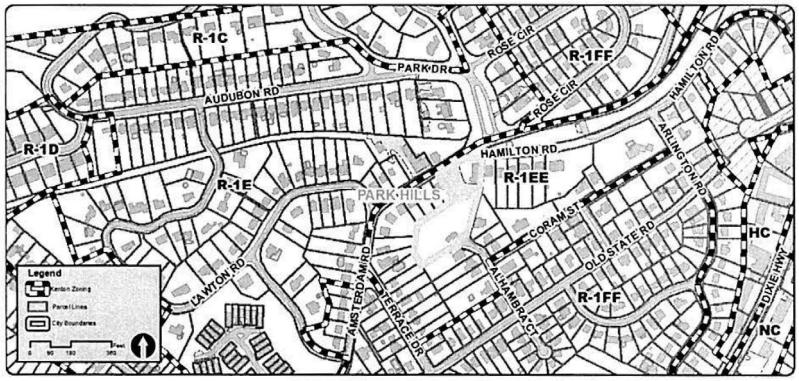
a. Must be located adjacent to an arterial street.

b. Minimum lot area — 22,500 square feet;

c. Minimum lot width at building setback line — 150 feet;

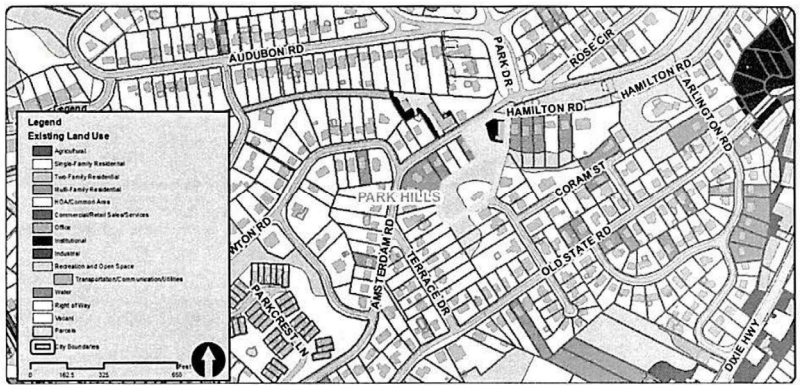
d. Minimum front, side, and rear yard depth — 50 feet; and

e. Maximum building height — 35 feet or 2 1/2 stories.



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



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 is the evidence submitted by applicant is such to 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 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 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.

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

* * *

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

* * *

IN THE KENTON CIRCUIT COURT
KENTON COUNTY, KENTUCKY

Case No: 21-CI-766
Electronically Filed

ELIZABETH FREDERIC, *et. al.*

Plaintiffs/Appellants

v.

CITY OF PARK HILLS BOARD OF ADJUSTMENTS, *et. al.*

Defendants/Appellees

PLAINTIFFS/APPELLANTS REPLY BRIEF/REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs/Appellants, Elizabeth Frederic and Joel Frederic, through Counsel, submit this combined brief/motion for summary judgment.

I. FACTS

For the first time, Defendants make certain factual assertions that are: (i) contained nowhere in the record; (ii) not substantiated by any evidence; and (iii) are ultimately irrelevant to the determination of this matter. We would be remiss, however, in not objecting to the unauthenticated, hearsay, attachments at Exhibit A through E of Defendants' Brief, and do so now. *See, also,* KRE 901; KRS 802; *Gallenstein v. Strunk,* 2018 Ky. App. Unpub. LEXIS 194 (Ky. App.

2018); *Rossi v. CSX Transp., Inc.,* 357 S.W.3d 510, 515-516 (Ky. App. 2010).

Defendants contend that the PDS staff finding was "inaccurate," but they do not actually grapple with the facts. They claim that the Church predated Park Hills' zoning (making it a non-conforming use). Of course, Kentucky law permits the use to continue, but does not permit the use to be expanded. KRS 100.253(1) ("[t]he 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"); KRS 100.253(2) ("The board of adjustment shall not allow the enlargement or extension of a

* * *

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).

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 contravention of the Park Hills Zoning Ordinance, and KRS 100.253 ("The board of adjustment shall not allow the en-

largement 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").

Defendants argue that this Court must defer to the Board of Adjustments. On factual matters, that is true. But on legal issues, and clear disregard of statutory mandates? The Kentucky Supreme Court sees it differently: "one cannot obtain a variance for the use if the property is not permitted by the zoning regulation or alters the density requirements," *Schmidt,* 83 S.W.3d 449, 451 (Ky. 2001), *citing* KRS 100.247.

RLUIPA

Next, Defendants contend that the Religious Land Use and Institutionalized Persons Act ("RLUIPA") somehow control this appeal or matter. 42 U.S.C. 2000cc, *et. seq*. They fail to develop that argument. RLUIPA provides, in relevant part:

> (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. 42 U.S.C. 2000cc.

The Act, however, contains a narrowing scope that Defendants do not address at all, namely:

> (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, 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.

There is no suggestion here that any of those subsections applied to *this use, in this area.*

The United States Court of Appeals for the Sixth Circuit has addressed what constitutes a RLUIPA claim, and what does not. In *Living Water Church of God v. Charter Twp. Meridian,* 258 Fed. Appx. 729 (6th Cir. 2007). In that case, the Sixth Circuit addressed a conditional use permit for a church within the meaning of RLUIPA.

We do not deal here with permitting a church generally, but rather an accessory structure, a grotto. And, as the Sixth Circuit explained in *Living Water Church of God,* "government's action in constructing

a road and permitting timbering through a portion of a National Forest traditionally used by Native American tribes for religious purposes did not impose a substantial burden because the government's action did not coerce individuals into 'violating their religious beliefs; nor would . . . governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Id.* Generally speaking, there is "no substantial burden when, although the action encumbered the practice of religion, it did not pressure the individual to violate his or her religious beliefs." *Id.*

In the land use context, "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable." *Id.* Again, the Church here has operated, as a church, with religious practice and services, for decades. It cannot be said that the denial of an expansion, and construction of a grotto, renders the use of the real property for the purpose of religious worship "effectively impracticable." In fact, "RLUIPA cannot stand for the proposition that a construction plan is immune from a town's zoning ordinance simply because the institution undertaking the construction pursues a religious mission." *Id.* Ultimately, the Sixth Circuit found no RLUIPA violation, even though the church in that case "cannot construct its ideal building." So too here. The zoning ordinance, as written, is a reasonable restriction. It keeps traffic from churches, schools, and similar uses to main arterial streets, and for good reason: so neighborhood streets are not over-

burdened. *See, also, Livingston Christian Schs. v. Genoa Charter Twp.,* 858 F.3d 996 (6th Cir. 2017) (no RLUIPA violation for denial of conditional use permit where church was able to operate in its present location).

Further, the City's zoning ordinance generally permits churches, just not in this particular zone and location — they restrict them to main thoroughfares, so that the roads can handle the traffic (just like they do schools and other uses that involve a gathering of people). Such restrictions further the Government's compelling interests in traffic management and road safety and are the least restrictive means of furthering those interests. No matter how this issue is handled, RLUIPA is not violated by enforcement of the plain language of the zoning ordinance.

Actual Injury/Standing

Defendants next contend that the Frederics have failed to allege an actual injury to have standing, *citing Spencer County Preservation, Inc. v. Beacon Hill,* 214 S.W.3d 327 (Ky. App. 2007). The Court of Appeals in that case was clear that "a person or entity must claim in its complaint on appeal to be injured or aggrieved by a final action of a legislative body to pursue an appeal to the circuit court." and must "offer [a] factual allegation to support such claim." *Id.* at 329-330.

Here, Plaintiffs alleged that they owned and resided at 1001 Park Drive, Park Hills, KY 41011. (Pl.'s Compl., ¶1). "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." *Id.* at ¶23. 25. The Plaintiffs/Appellants spoke and gave

testimony at that hearing. *Id.* at ¶25. They plead that they "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 parking areas of 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

* * *

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

[Filed: Nov 28, 2022]

No. 2022-CA-0867

JOEL AND ELIZABETH FREDERIC,

Appellants,

vs.

CITY OF PARK HILLS BOARD OF ADJUSTMENT, *et al.,*

Appellees.

APPEAL FROM THE KENTON CIRCUIT COURT
CASE NO. 21-CI-00766

BRIEF OF APPELLEES CITY OF PARK HILLS BOARD OF ADJUSTMENT, ET AL

/s/ Daniel R. Braun
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Counsel for all Appellees

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this Brief was sent via US Mail to:

Christopher Wiest, Attorney for the Appellants, 25 Town Center Blvd., Suite 104, Crestview Hills, KY 41017 this 21 day of November, 2022.

/s/Daniel R. Braun
Daniel R. Braun

* * *

The right to continue established uses by a property owner, free from government intervention, is based in constitutional law and enjoys broad constitutional protection. See *Dempsey, supra.* The standard of review in zoning cases reflects the constitutional implications of such regulations. As stated in *Crain v. City of Louisville,* 182 S.W.2d 787, 790 (Ky.1944):

> "We are committed to the sound principal that the court will not interfere with a decision of the Board of Adjustments and Appeals where a factual matter is involved unless it seems to have been abused. But as there is no substantial conflict in the evidence as to the character of use to which the property is sought to be put, it is a matter of judicial construction. Too strict an interpretation in respect of the application to an asserted prohibited use ought not to be given a zoning ordinance, for our Kentucky Bill of Rights declares acquiring and protecting property as one of the great and essential principles of liberty and free government

and as an inherent an inalienable right." (internal citations and quotations omitted).

e. Applicability of the Religious Land Use and Institutionalized Persons Act ("RLUIPA").

The constitutional protections afforded to religious institutions are bolstered by both federal and state laws: The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et. seq.* (the "RLUIPA").

RLUIPA, 42 U.S.C. § 2000cc *et seq.,* relating to land use regulations, establishes a "general rule" that:

> "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 government interest; and (B) is the least restrictive means of furthering that compelling government interest. 42 U.S.C. § 2000cc(a)(1). This "general rule" is carefully circumscribed to apply only to cases in which:
>
> (A) the substantial burden is imposed on 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, 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 to make, individualized assessments of the proposed uses for the property involved. 42 U.S.C. § 2000cc(a)(2). Where applicable, the statute imposes three requirements for local land use regulations to prevent discrimination against or exclusion of religious uses:
>
> (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 non-religious 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." 42 U.S.C. §2000cc(b).

The U.S. 6th Circuit Court of Appeals has adopted a substantial burden analysis: (1) whether there are feasible alternative locations to conduct the institution's religious exercise; (2) whether the religious institution will suffer "substantial 'delay, uncertainty, and expense' due to the imposition of the regulation"; and (3) whether any burden is self-imposed. *Livingston Christian Schools vs. Genoa Charter*

Township, 858 F.3d 996 (6th Cir. 2017). Under the First Amendment's "Free Exercise" protections, religious justifications for such an exemption cannot be denied unless the City could demonstrate a compelling state interest for the denial and that the denial represents the least restrictive means available to further that interest. *Id.*

The facts of the entire story of *Livingston Christian Schools, supra* has bearing on this case. In *Livingston,* the Livingston Christian Schools' previous facility no longer could support its needs. The School found a new home at Brighton Church of the Nazarene, which was centrally located in Genoa Township, Michigan. Livingston Christian applied for a special use permit through Genoa Township to move to the new location. However, Genoa Township refused to approve a permit to allow Livingston Christian to operate its school at the Brighton Church, effectively precluding the School from existing anywhere in the town. Immediately following the board's decision to deny Livingston Christian's permit, the school filed a federal lawsuit under RLUIPA and various Constitutional grounds. The Federal District Court ruled that the School's religious liberty had not been "substantially burdened" by the town's decision. The Court of Appeals also ruled against the School holding there was no substantial burden to the Schools' religious liberty because the School could have remained in the facilities they had in Pickney. The School then sought discretionary review. The Supreme Court declined to hear the case. Along the way the Courts stated that Genoa Township should have attempted to work with the School.[3]

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[3] St. John had previously submitted plans to the Board. The Board had reservations regarding the original plans. St. John

If the board's members had an issue with traffic patterns or School start times, they should have tried to address those issues. After the lawsuit concluded a newly elected Board of Adjustments worked with the School. The School then reapplied for the permit, made a few minor changes and everything was eventually approved. But in the end, it cost Genoa Township taxpayers hundreds of thousands of dollars in legal fees.

Another case that shows the potential dangers in denying and restricting the use of property owned by religious organizations is *Fortress Bible Church v. Feiner,* 694 F.3d 208 (2d Cir. 2012). In *Fortress,* the Fortress Bible Church purchased property in the Town of Greenburgh, New York to construct a larger religious facility than it had been operating. The Church required three discretionary land use approvals from the Town: (1) site plan approval; (2) a waiver of the landscaped parking island requirement and (3) a variance to allow the structure to be located closer to one side of the property. When the Church submitted its application to the Town's Board, the Board required the Church to undergo New York's State Environmental Quality Review Act (SEQRA). The Church provided all of the information required of it under the SEQRA process. However, the Town continued to request new information and raised new issues under SEQRA for the Church to address. The Town eventually stopped the review process altogether and denied the Church's application. The Church sued and, after a twenty-six day trial, the Federal District Court found the Town had substantially burdened the Church's religious exercise

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scaled the size of the grotto down in an attempt to work with the Board. (R. at flash drive)

in violation of RLUIPA by forcing the Church to continue to exercise its religion from a facility incapable of accommodating all of its religious practices. The Court also found violations of the Fourteenth Amendment's Equal Protection Clause and state law. The U.S. 2nd Circuit Court of Appeals affirmed the lower Court's decision finding that the Town had violated RLUIPA's "substantial burden" provisions, as well as the free exercise and equal protection provisions of the U.S. and New York constitutions, by denying an application by Fortress Bible Church to build a new facility to house the Church and its School. It is worthy of note that shortly thereafter, the Town of Greenburgh agreed to pay Fortress Bible Church $6.5 million to settle claims that the Town violated RLUIPA by denying the Church's application to construct a house of worship and religious school, making it the largest settlement in RLUIPA's history.

Other communities have had to pay large legal bills and settlements after losing RLUIPA lawsuits: The Village of Mamaroneck, N.Y. paid out $4.75 million to the Westchester Hebrew Day School in 2008 after denying the construction of a new school building. The village also had to pay more than $900,000 in legal fees. The village ended up having to raise taxes 4.3 percent to pay for the settlement. In another situation the Village of Airmont, N.Y. paid out more than $450,000 in legal fees after losing battle to keep a Jewish congregation from building a school with accessory housing for Hasidic Jewish men. The village eventually settled the lawsuit and agreed to let the project move forward. As another example, the Township of Bridgewater, N.J. had to pay nearly $8 million in 2014 to settle a lawsuit filed by the Al Fatah Center's proposal to construct a mosque.

Based on the outcomes of similar cases, the City herein could have potentially been subject to paying out millions in settlements and legal fees by potentially running afoul of the RLUIPA.[4]

f. Due Process – the Frederics claim regarding cross-examination.

This brings us to the Frederics due process claim. Appellants assert the Board failed to afford them due process because there was no opportunity for them to cross-examine witnesses during the hearing. The Frederics cite *Kaelin* v. *City of Louisville,* 643 S.W.2d 590 (Ky. 1982) in support of their belief they were entitled to cross-examine the applicant and/or the property owner at the hearing before the Board.

* * *

[4] Religious freedoms were discussed by the Board during discussions of the application during the hearing (R. at flashdrive).

COMMONWEALTH OF KENTUCKY
SUPREME COURT

Docket No. ___

KENTUCKY COURT OF APPEALS
No. 2022-CA-0867-MR

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.,

Movant,

v.

JOEL FREDERIC AND ELIZABETH FREDERIC,

Respondents.

MOTION FOR DISCRETIONARY REVIEW

* * *

Comes now the Movant, Missionaries of Saint John the Baptist, Inc. ("Saint John"), by counsel, pursuant to RAP 44, and hereby moves this Court to grant discretionary review of the Opinion of the Kentucky Court of Appeals rendered December 1, 2023. That Opinion reversed the final Order of the Kenton Circuit Court, the Honorable Patricia M. Summe presiding, entered June 29, 2022, which Order affirmed the City of Park Hills Board of Adjustment decision to grant a conditional use permit and setback variance for Saint John to build a shrine (in the form of a grotto) honoring the Blessed Virgin Mary. Pursuant to RAP 44(C), Movant states as follows:

1. The name of the Movant is Missionaries of Saint John the Baptist, Inc., a Kentucky non-profit corporation.
2. Movant is represented by Sarah Benedict, Esq., 204 Overland Ridge, #128, Walton, KY 41094, and by Thomas W. Breidenstein, Esq., 855 Greenville Ave., Suite 300, Cincinnati, OH 45246.
3. The names of the Respondents are Joel Frederic and Elizabeth Frederic (who are neighbors of the Movant).
4. Respondents are represented by Christopher Wiest, Esq., 25 Town Center Blvd., Suite 104, Crestview Hills, KY 41017.
5. The date of the final disposition Opinion of the Court of Appeals sought to be reviewed is December 1, 2023.
6. No supersedeas bond or bail bond on appeal has been executed.
7. No Party to the preceding has a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

MATERIAL FACTS

Movant Saint John is a fraternity of Roman Catholic priests stemming from the spiritual legacy of the Congregation of the Priests of Mercy, which was originally founded in Lyon, France, in 1808, by the Very Reverend, Jean Baptiste Rauzan. Saint John owns and operates a diocesan Catholic Church known as Our Lady of Lourdes located at 1101 Amsterdam Road within the City of Park Hills, Kentucky, in the diocese of Covington. The Respondents live in the

general neighborhood, approximately 330 feet from Saint John's property.

The church building was constructed in 1930, at which time Amsterdam Road was classified as an "arterial" street. *Elizabeth Frederic, et al. v. City of Park Hills, et al.*, No. 21-CI-766 (Kenton Cir. Ct. filed June 29, 2022). In 1955, the Amsterdam Road right-of-way was acquired by the Commonwealth Department of Highways, without being designated in the State Primary Road System. In 1974, Park Hills adopted a zoning ordinance, designating Saint John's property within an R-1EE zoning district. Section 10.4 of the zoning ordinance lists churches as a conditional use in the R-1EE district, provided the church is located adjacent to an arterial street. Arterial streets are defined in Section 7.0 of the Park Hills Zoning Ordinance 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."

Not all conditional uses in the R-1EE zoning district are required to be located on an arterial street. For example, cemeteries, nursery schools, public and parochial schools, parks, playgrounds, golf courses, community recreation centers, libraries and country clubs are all listed as conditional uses in the R-1EE district. These additional conditional uses are *not* limited to location on an arterial street, as is the case with churches.

The Amsterdam Road right-of-way was transferred back to the City of Park Hills in 2007, and the church is currently located within residential zone R1-EE, which is predominantly a zoning district that permits single-family and two-family dwellings. Movant Saint John acquired the property in 2015, *Elizabeth*

Frederic, et al. v. City of Park Hills, et al., No. 21-CI-766 (Kenton Cir. Ct. filed June 29, 2022), but the church building and property have been used for the purpose of religious worship without interruption since at least the 1950's, *see* exhibit 2 (attached per RAP 44(F)). At some point, Amsterdam Road lost its designation as an arterial street, according to the Planning and Development Services of Kenton County ("PDS") and Kentucky Department of Transportation, but the Kenton County Circuit Court indicated that it "still meets the definition" of an arterial street. *Elizabeth Frederic, et al. v. City of Park Hills, et al.*, No. 21-CI-766 (Kenton Cir. Ct. filed June 29, 2022).

On March 18, 2021, Saint John applied for a conditional use permit and setback variance to build a shrine behind the Our Lady of Lourdes Church building, near the rear of the property. Saint John's purpose for the shrine is to honor the Blessed Virgin Mary, who appeared in a grotto (cave) in Lourdes, France on February 11, 1858. After the 1858 apparition of the Virgin Mary, the image of Our Lady of Lourdes has been widely copied and reproduced *via* Catholic shrines and often in garden landscapes throughout the world. Saint John's proposed shrine in Park Hills includes a statue of Our Lady of Lourdes, a patio, a walking path, and a retaining wall.

Saint John applied for the conditional use permit to construct the shrine as an accessory use associated with a church and submitted a variance request for rear and side yard setbacks. The conditional use and setback variance requests were made to PDS, which handles administrative matters related to planning and zoning on behalf of Park Hills. PDS coordinates and reviews applications made to the City of Park

Hills Board of Adjustment (the "Board"), makes recommendations, and records Board meetings.

After proper notice, the Board conducted a public hearing on April 15, 2021. PDS made recommendations to the Board of denial of the conditional use and variance requests, stating that the church is not on an arterial street as required by Section 10.4. During the nearly two-hour public hearing, Respondent Joel Frederic spoke against the Our Lady of Lourdes shrine. His alleged injuries include a fear of increased traffic, lighting, and noise. *See* Complaint, pp. 7-8. Mr. Jordan Odor, who applied for the permit and variances on behalf of Saint John, countered that parking, traffic, lighting, noise, hours of operation, and hillside stability would not adversely impact *any* nearby residents – including Respondents – and would not cause a loss in property value. The Board also received information that "the church is not the only property listed as noncompliant with the zoning code on this street." Exhibit 2. The permit application explained that the City's police and fire station building across the street, and "multiple four-family residential apartments that are located in close proximity on Amsterdam road," are all nonconforming. *Id.* The Board voted 4-1 to approve Saint John's shrine on the condition that a small parcel of land behind the church be transferred to the Movant. (The written decision and order of the Board in Case No. BOA2103-0003 is attached per RAP 44(F)). Saint John promptly complied with this condition.

Respondents appealed the Board's decision in the Kenton County Circuit Court on May 14, 2021, arguing *inter alia* that the Board acted outside its authority and Respondents would be injured by the shrine of Our Lady of Lourdes due to traffic, noise, and

lighting. *See* Complaint, pp. 7-8. The Kenton County Circuit Court affirmed the Board's decision, and the Respondents appealed. The Kentucky Court of Appeals reversed the trial court's ruling, finding that the Respondents were afforded due process, but that the Board acted outside of its authority – and therefore acted arbitrarily – because the church property is a preexisting nonconforming use, the shrine is an impermissible expansion of that use, and Amsterdam Road is not an arterial street. *Frederic v. City of Park Hills Board of Adjustment*, No. 2022-CA-0867, 2023 Ky. App. LEXIS 100 (Ky. Ct. App., Dec. 1, 2023). The Court of Appeals also found that the Park Hills Zoning Ordinance imposed no substantial burden on the religious exercise of Saint John, and therefore the ordinance does not constitute a violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C.4 § 2000cc et seq.. *Id.*

QUESTIONS OF LAW INVOLVED

Movant Saint John respectfully requests the Court to review this case and make determinations on the following questions of law:

1. Whether under RLUIPA, the factors outlined in *Livingston Christian Schools v. Genoa Charter Township*, 858 F.3d 996, 1003 (6th Cir. 2017) is the correct standard in evaluating relevant RLUIPA cases in Kentucky.
2. Whether under the RLUIPA "substantial burden" inquiry, building a shrine (in the form of a grotto) is a religious exercise, and it is irrelevant if a RLUIPA claimant can engage in other forms of religious exercise.

REASONS TO GRANT DISCRETIONARY REVIEW

Movant Saint John respectfully requests this Court to grant discretionary review because matters of religious exercise under RLUIPA have far-reaching impact in the Commonwealth, and because the Kentucky Court of Appeals misapplied federal law.

I. An Issue of Far-Reaching Impact

The United States Congress enacted RLUIPA, in relevant part, to apply a strict scrutiny standard of review to land use regulations that substantially burden religion. "After hearings in which Congress heard that religious assemblies and institutions were disproportionately affected, and in fact were often actively discriminated against, in local land use decisions, Congress passed RLUIPA unanimously in 2000." U.S. Dep't of Justice, STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE LAND USE PROVISIONS OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA) (2018), https://www.justice.gov/crt/page/file/1071246/download. The United States Department of Justice stated that "Congress further heard testimony that zoning authorities often placed excessive burdens on the ability of congregations and individuals to exercise their faiths without sufficient justification, in violation of the Constitution." *Id.* On September 22, 2000, President Clinton signed RLUIPA into law.

Given RLUIPA's importance and Congress's intent to protect religious exercise, this Court should grant discretionary review to clarify the proper RLUIPA standard in the local zoning context, which would guide local zoning boards, city councils, fiscal courts, Circuit Courts, Courts of Appeal, churches, and individuals throughout the Commonwealth of Kentucky.

II. The Court of Appeals Misapplied Federal Law

Movant Saint John also asks this Court to grant discretionary review because the Kentucky Court of Appeals misapplied federal law. The lower court erred in finding that the Board's decision was arbitrary because RLUIPA prohibits the Board from preventing the construction of the shrine under the facts of this case. RLUIPA states, in relevant part, the following:

> 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 the imposition of the burden . . . (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc (emphasis added).

There appears to be little argument that a zoning board's denial of a conditional use permit would constitute a land use regulation. RLUIPA defines a "land use regulation" as "zoning or landmarking law, or the application of such law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), and if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest." 42 U.S.C. § 2000cc-5(5); *see also Guru Nanak Sikh Society v. County of Sutter*, 326 F. Supp. 2d 1140, 1152 n.5 (E.D. Cal. 2003) ("[T]he County's denial of plaintiff's conditional use permit application is 'precisely the

type of "individualized assessment" contemplated' by RLUIPA." (quoting *Elsinore Christian Center v. City of Lake Elsinore*, 270 F. Supp.2d 1163, 1169 (C.D. Cal. 2003))).

There further appears to be little debate that honoring the Virgin Mary by building a shrine to replicate the apparition of Our Lady of Lourdes in France is a religious exercise. The RLUIPA statute provides that the term "religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." §2000cc-5(7)(A). "RLUIPA's definition of religious exercise covers most any activity that is tied to a religious group's mission[.]" *Living Water Church of God v. Charter Twp. Meridian*, 258 F. App'x 729, 736 (6th Cir. 2007). The Supreme Court of the United States has also noted that this provision of RLUIPA pointedly "bars inquiry into whether a particular belief or practice is 'central' to a [person's] religion." *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005). The religious exercise at issue in this case, therefore, is building a shrine to honor the Blessed Virgin Mary as she appeared at Lourdes, France in 1858. The shrine would be a place for meditation and prayer for the parishioners of Our Lady of Lourdes.

The main contention in this case regarding RLUIPA is whether the ordinance or denial of a conditional use permit would cause a "substantial burden" upon Movant Saint John's religious exercise of honoring Our Lady of Lourdes by building a shrine, which includes a statue, patio, walking path, and retaining wall. Respondents and the Kentucky Court of Appeals incorrectly relied upon *Living Water Church of God v. Charter Twp. Meridian*, *supra*, an unpublished case that explicitly "decline[d] to set a

bright line test" to determine whether a substantial burden exists, and merely "look[ed] for a framework to apply to the facts before [it]." 258 F. App'x at 737. In a more recently published Sixth Circuit opinion, the court clarified that *Living Water* was limited to the facts of that case. *See Livingston Christian Schools v. Genoa Charter Township*, 858 F.3d 996, 1003 (6th Cir. 2017) (declining to follow the *Living Water* framework because the facts were materially different and "*Living Water* was apparently trying to avoid creating a precedent").

The *Living Water* case regarded whether a government action made the church's mission too burdensome when it merely "increased expense to accomplish its goal of building a larger church and school." 258 F. App'x at 741. Here, the facts are materially different. The Board's decision to deny the permit would have altogether prohibited the church's religious exercise of building a shrine, not merely making it more expensive. The shrine is integral to the veneration of the Blessed Virgin Mary as she appeared in Lourdes, France, and the apparition is one of Saint John's sincerely held religious beliefs. The ability to honor the Blessed Virgin Mary and engage in meditation and prayer to her in the setting of the shrine is integral to the parish beliefs. The Board in this case made the proper decision under RLUIPA. However, the Court of Appeals' Opinion has the effect of prohibiting Saint John's religious exercise, which is error under RLUIPA.

The *Livingston Christian Schools* standard, which is more appropriate in this case, contains three factors in determining whether there is a substantial burden under RLUIPA: (1) whether the religious institution has a feasible alternative location from

which it can carry on its mission; (2) whether the religious institution will suffer "substantial 'delay, uncertainty, and expense'" due to the imposition of the regulation; and (3) whether the institution imposed a burden upon itself.

A. THERE ARE NO FEASIBLE ALTERNATIVE LOCATIONS FOR THE SHRINE

The Court of Appeals held that "[t]he application of the ordinance to prohibit construction of the shrine 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." *Frederic v. City of Park Hills Board of Adjustment*, No. 2022-CA-0867, 2023 Ky. App. LEXIS 100 (Ky. Ct. App., Dec. 1, 2023) (emphasis added). This incorrectly conflates the practice of religion generally, and religious exercise under RLUIPA. As stated above, religious exercise includes almost any activity that is connected to a religious group's mission, whether it is considered "central" to that belief system or not. *See Holt v. Hobbs*, 574 U.S. 352, 361-62 (2015) ("RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise . . . not whether the RLUIPA claimant is able to engage in other forms of religious exercise."). Here, members of Saint John and the Our Lady of Lourdes Church want to exercise their religion by building a shrine in honor of Our Lady of Lourdes, the church's namesake, for the purpose of prayer.

If the Board had denied the permit (as the Court of Appeals suggests it should), the denial would have the effect of a complete prohibition of Saint John's religious exercise, with no feasible alternatives to

build the shrine. Kentucky law prohibits major expansions of preexisting nonconforming uses, and the Court of Appeals ruled that this shrine would be a major expansion. Assuming *arguendo* that the church use is nonconforming without recourse of a conditional use permit, then denying the permit would result in prohibiting the construction of the shrine on Saint John's property entirely. Saint John would have no feasible alternatives.

B. A DENIAL OF THE BOARD WOULD HAVE CAUSED SUBSTANTIAL DELAY, UNCERTAINTY, AND EXPENSE DUE TO THE IMPOSITION OF THE REGULATION

At the date of this filing, it has been over two years, and the shrine has not been constructed, despite significant expenses incurred in architectural fees, engineering fees, and numerous services, materials and tools being contracted and ordered. The Board's denial of the application in 2021 would have resulted in a similar delay of Saint John's efforts to exercise its religion by building a shrine, and substantially increased construction costs. In fact, as stated above, it would have likely not merely delayed but prohibited altogether the construction of the shrine, despite Saint John investing significant time, money, and energy.

C. SAINT JOHN DID NOT IMPOSE THE BURDEN UPON ITSELF

The U.S. Court of Appeals for the Sixth Circuit stated in *Livingston* that other courts "have held that, when a plaintiff has imposed a burden upon itself, the government cannot be liable for a RLUIPA substantial-burden violation." 858 F.3d at 1004. The

court proffered an example of "when an institutional plaintiff has obtained an interest in land without a reasonable expectation of being able to use that land for religious purposes, the hardship that it suffered when the land-use regulations were enforced against it has been deemed an insubstantial burden." *Id.* The court then cited two cases where religious institutions had prior knowledge from the board that their applications would be denied. *Id.* Here, Saint John had a reasonable expectation that the property could be used for religious worship by building a shrine, unlike the cases cited by the Sixth Circuit.

In the City of Park Hills, churches in the R-1EE zoning district may be granted a conditional use permit "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." *Elizabeth Frederic, et al. v. City of Park Hills, et al.*, No. 21-CI-766 (Kenton Cir. Ct. filed June 29, 2022). As indicated by the Kenton Circuit Court:

> 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. . . . 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 Am-

> sterdam 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.

The Kentucky Court of Appeals, on the other hand, based its determination that Amsterdam Road is not an arterial street on a "report zoning staff provided to the Board." *Frederic v. City of Park Hills Board of Adjustment*, No. 2022-CA-0867, 2023 Ky. App. LEXIS 100 (Ky. Ct. App., Dec. 1, 2023). Yet, as the Kenton Circuit Court stated, Amsterdam Road "still meets the definition" of an arterial street pursuant to §7.0 of the Park Hills city ordinance. *Elizabeth Frederic, et al. v. City of Park Hills, et al.*, No. 21-CI-766 (Kenton Cir. Ct. filed June 29, 2022). Given that it was determined that the road met the plain text of the ordinance, the Board granted Saint John's conditional use permit, and the Kenton Circuit Court agreed, Saint John had a reasonable, good-faith belief that it could build its shrine. An *ex post facto* Court of Appeals decision cannot render unreasonable Saint John's belief at the time of purchase and application to the Board.

Therefore, there is a substantial burden on Movant's religious exercise of building a shrine in honor of Our Lady of Lourdes. Specifically, the complete prohibition of allowing Saint John to build its shrine, without a viable alternative, constitutes a substantial burden.

D. THE GOVERNMENT WOULD HAVE FAILED STRICT SCRUTINY

The lower courts did not reach the issue of strict scrutiny. The Kenton Circuit Court ruled in favor of the Movants based on non-RLUIPA issues, negating the need to address the federal statute. On the other hand, the Kentucky Court of Appeals found against Movant regarding RLUIPA's substantial burden test, which does not activate a strict scrutiny standard. As indicated above, denying the Movant's permit in 2021 would have placed a substantial burden on Saint John's religious exercise. Because a substantial burden would have existed, the Board would have had to satisfy strict scrutiny before denying Saint John's permit. Otherwise, the Board's decision would have been arbitrary and beyond its authority.

The Board could not have satisfied a strict scrutiny standard in 2021. As indicated above, when the government substantially burdens a person's religious exercise, it must show that the action "is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc. Respondents argued before the Board that they were concerned with traffic, noise, and lighting if the church were permitted to build a shrine. Yet, the Court of Appeals for the Third Circuit stated that "[t]raffic flow is undoubtedly a legitimate government interest, . . . and so is noise control . . . . But to say that these interests are 'legitimate,' 'valid,' or 'strong' is not to say that they are necessarily 'compelling.'" *U.S. v. Marcavage*, 609 F.3d 264, 287 (3d. Cir. 2010).

Even action taken toward the elimination of the alleged nonconforming use is not a compelling government interest in this particular case. It is well known

that in property law, "nonconforming uses of property are tolerated, [but] the overriding policy of zoning is aimed at their eventual *elimination*." *P.M.S. Assets v. Zoning Board of Appeals*, 774 N.E.2d 204, 205 (N.Y. 2002) (emphasis added). In this case, however, there are no other churches within the City of Park Hills. If the government's theoretical interest, in this case, would have been to eliminate the alleged nonconforming use by preventing expansion, then the municipality's goal would have been to disallow all churches from operating within the city.

A governmental interest in eliminating all churches from a city is not compelling, and various courts have found that the goal of total exclusion of churches from neighborhoods is arbitrary and unreasonable. As a general matter, "[c]hurches . . . and other institutions dedicated to religious objectives . . . are favored for reasons ranging from their unique contribution to the public welfare to constitutional guarantees of freedom of worship." *City of Rapid City v. Kahler*, 334 N.W.2d 510, 512 (S.D. 1983). "Thus, for example, it is an 'almost universal rule that churches and their attendant uses are permitted in residential areas . . . .'" *Great Lakes Society v. Georgetown Charter Township*, 761 N.W.2d 371, 412 (Mich. Ct. App. 2008) (quoting *Corporation of Presiding Bishop v. Ashton*, 448 P.2d 185 (Idaho 1968)). And "churches need not be established only in sparsely settled areas." *Id.* (citing *O'Brien v. City of Chicago*, 105 N.E.2d 917 (Ill. App. Ct. 1952) ("[W]herever the souls of men are found, there the house of God belongs.")).

In 1956, the Michigan Supreme Court restated a principle from the Northwest Ordinance of 1797 that "[r]eligion, morality and knowledge [are] necessary to good government and the happiness of mankind . . . ."

Roman Catholic Archbishop of Detroit v. Village of Orchard Lake, 53 N.W.2d 308, 310 (1952). Consistent with this well-settled principle, courts have concluded that churches cannot be completely excluded from a municipality. *See Great Lakes Society*, 761 N.W.2d at 412. *Cf. Diocese of Rochester v. Planning Board of Brighton*, 136 N.E.2d 827, 835 (N.Y. 1956) ("It is well established in this country that a zoning ordinance may not wholly exclude a church or synagogue from any residential district."); *Western New York District, Inc. v. Village of Lancaster*, 841 N.Y.S.2d 740 (N. Y. 2007) ("Since a municipality's power to regulate land use is derived solely from its right to use its police powers to promote these goals, such total exclusion [of a church from a residential area] is beyond the scope of the localities' zoning authority."). Here, therefore, it is unclear how a government interest to eliminate the only church in the City of Park Hills would constitute a compelling governmental interest under RLUIPA.

Because the government did not have a compelling interest, narrow tailoring is irrelevant. Nonetheless, complete prohibition of the Movant's shrine would not have been narrowly tailored to serve an alleged government interest. The Board was not permitted to deny the application to prevent traffic, noise, or lighting because it could have set certain conditions accommodating those concerns. In addition, as stated above, the government does not have a compelling interest in completely eliminating all churches and accessories from the City. The Board properly satisfied RLUIPA when it granted Saint John a conditional use permit, and the Board's decision was not arbitrary because the opposite conclusion would have violated RLUIPA. The Court of Appeals erred in ruling otherwise.

CONCLUSION

The Court of Appeals erred in determining that the Board's decision was arbitrary because the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C.4 § 2000cc et seq., is implicated in this case and this statute prohibits the Board from preventing the construction of the shrine. Given RLUIPA's importance and Congress's intent to protect religious exercise, this Court should grant discretionary review to clarify the proper RLUIPA standard in the local zoning context. Granting review and providing clarification will impact and guide numerous local governments, lower courts, churches, and individuals throughout the Commonwealth of Kentucky.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of Movant Saint John's Motion for Discretionary Review was served on counsel for Respondents, Christopher Wiest, Esq., 25 Town Center Blvd., Suite 104, Crestview Hills, KY 41017 (*chris@cwiestlaw.com*), on Daniel R. Braun, Esq., 767 Hurstborne Ln., Edgewood, KY 41017 (*braunnkylaw@aol.com*), on Thomas R. Nienaber, Esq., Skees Wilson Nienaber PLLC, 7699 Ewing Blvd., P.O. Box 756, Florence, KY 41022 (tnienaber@fuse.net), and on Kate Morgan, Clerk of Court of Appeals, 669 Chamberlin Ave., Suite B, Frankfort, KY 40601 (*katemorgan@kycourts.net*), on this, the 2nd day of January 2024, *via* electronic mail at the e-mail addresses listed, *via* the Court's e-filing system, and *via* first class U.S. mail, postage prepaid.

/s/ Sarah E. Benedict
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/s/ Thomas W. Breidenstein
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WORD COUNT CERTIFICATION

This Motion complies with the word limit of RAP 44(D) because, excluding the parts of the document exempted by said rule, this Motion contains 4,425 words. Even including parts of the document exempted by said rule, the number of words is 4,731.

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COMMONWEALTH OF KENTUCKY
SUPREME COURT

Case No.: 2024-SC-0006

Received: 2024-SC-0006 10/04/2024
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Appeal from Kenton Circuit Court
Honorable Patricia M. Summe,
Chief Circuit Judge Case No. 21-CI-00766
Court of Appeals Case No. 2022-CA-0867

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.,
Appellant,

v.

JOEL FREDERIC AND ELIZABETH FREDERIC,
Appellees.

OPENING BRIEF OF APPELLANT MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.

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Certificate of Service on the following page

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* * *

government authority. For example, . . . [RLUIPA] prohibits governments from enacting a land-use regulation that imposes a substantial burden on the 'religious exercise' of [an] institution unless the imposition of the burden is the least restrictive means of furthering a compelling government interest.").

Here, the Board's denial of Saint John's Permit would have caused a substantial burden on its religious exercise, triggering RLUIPA preemption under 42 U.S.C. § 2000cc(a). This record further forecloses a finding that Permit denial is the least restrictive means of furthering any compelling governmental interest. The Board, therefore, correctly granted Saint John's Permit in this case; denial of Saint John's Permit would have violated RLUIPA.

Independently, the Board's denial of Saint John's permit based on a facially unequal zoning ordinance would have also violated RLUIPA. And it is "obvious" that "[i]f [a] decision is erroneous as a matter of law, it is inherently arbitrary." *Board of Adjustments v. Brown*, 969 S.W.2d 214, 216 (Ky. App. 1998) (citing

American Beauty Homes Corp. v. Louisville & Jefferson Cnty. Plan. and Zoning Comm., 379 S.W.2d 450 (Ky. 1964)).

II. DENIAL OF SAINT JOHN'S PERMIT WOULD HAVE CAUSED A SUBSTANTIAL BURDEN ON ITS RELIGIOUS EXERCISE

RLUIPA applies when an institution uses its land to engage in religious exercise and the government causes a substantial burden on that activity. *See* 42 U.S.C. §§ 2000cc(a)(1), 2000cc–5(7). "RLUIPA guarantees an 'expansive protection for religious liberty.'" *Johnson v. Baker*, 23 F.4th 1209, 1214 (9th Cir. 2022) (quoting *Holt v. Hobbs*, 574 U.S. 352, 358 (2015)). The statute "arose from the embers of . . . efforts to require the States to respect the faith-based practices of their citizens." *Haight v. Thompson*, 763 F.3d 554, 559 (6th Cir. 2014). Specifically, Congress enacted RLUIPA in response to the Supreme Court of the United States' invalidation of the Religious Freedom Restoration Act of 1993 ("RFRA") as applied to the states.[4] *Haight*, 763 F.3d at 559-60.

"Congress [also] heard testimony that zoning authorities often placed excessive burdens on the ability of congregations and individuals to exercise their faiths without sufficient justification[.]" U.S. DEP'T OF JUST., STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE LAND USE PROVISIONS OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA) (2018), https://www.justice.gov/crt/page/file/1071246/download. To ensure enhanced protection, the United States Con-

[4] Unlike RFRA, which was "a law applicable to *all* state laws," RLUIPA is applicable only to state government action involving "inmates and land use." *Haight*, 763 F.3d at 559 (emphasis added).

gress enacted RLUIPA, and President Clinton signed it into law on September 22, 2000. *See Holt*, 574 U.S. at 357– 58.

A religious person or institution has the "initial burden" of showing that the proposed government action "implicates [its] religious exercise," and the action "substantially burden[s] that exercise of religion." *Johnson*, 23 F.4th at 1214 (quoting *Holt*, 574 U.S. at 360-61). "[T]he burden then shifts to the government to show that the [action] was 'in furtherance of a compelling governmental interest' and 'the least restrictive means of furthering that compelling governmental interest.'" *Id.* (citing *Holt*, 574 U.S. at 362). If the government fails to survive strict scrutiny, the institution's religious exercise must be permitted. *See id.* Here, constructing a shrine is a religious exercise, and wholly prohibiting its construction is a substantial burden. Because the Board disclaimed that it had any government interest (much less a *compelling* government interest) in preventing the shrine and otherwise lacked grounds to satisfy strict scrutiny, the Court of Appeals' decision should be reversed.

a. Constructing a Shrine in Honor of "Our Lady of Lourdes" on Church Property is a Religious Exercise

To qualify for protection under RLUIPA, an institution must be engaged in religious exercise. *See generally Calvary Christian Ctr. v. City of Fredericksburg*, 832 F. Supp. 2d 635, 642 (E.D. Va. 2011). A religious exercise under RLUIPA "capaciously" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Holt*, 574 U.S. at 358 (citing 42 U.S.C. § 2000cc-5(7)(A)); *see also Johnson*, 23 F.4th at 1215 (stating

that RLUIPA's plain text "prohibits courts from peering into the centrality of a religious practice or whether a particular practice is necessary to the religion" (citing 42 U.S.C. § 2000cc-5(7)(A))).

The Supreme Court of the United States has distinguished cases involving RLUIPA from those involving constitutional rights by clarifying that "[u]nder [First Amendment] cases, the availability of alternative means of practicing religion is a relevant consideration, but RLUIPA provides greater protection." *Holt*, 574 U.S. at 361 (finding that a lower court "improperly imported a strand of reasoning from cases involving [individuals'] First Amendment rights"). *See also Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) ("[W]e take religious claimants as we find them, assessing . . . the government's actions on the individual claimant's ability to engage in a religious exercise, *as he understands that exercise* and the terms of his faith." (emphasis added)).

RLUIPA states that "[t]he *use*, *building*, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5(7)(B) (emphasis added). And "RLUIPA's definition of religious exercise covers most any activity that is tied to a religious group's mission[.]" *Living Water Church of God v. Charter Twp. Meridian*, 258 F. App'x 729, 736 (6th Cir. 2007).

Here, Saint John's mission and sincere belief is that it is God's will for it to construct the "Our Lady of Lourdes" grotto next to Our Lady of Lourdes Church to honor the Blessed Virgin Mary. Constructing the shrine on its property is Saint John's exercise of religion. It is irrelevant whether Saint John could

continue to practice its Catholic beliefs in other ways. *See Holt*, 574 U.S. at 358*; Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). No party throughout this matter has questioned whether Saint John's religious exercise has been "sincerely based on a religious belief[.]" *Holt*, 574 U.S. at 360-61 (citing *Hobby Lobby*, 573 U.S. at 717 n.28). The main issue, therefore, is that the Board's denial of Saint John's Permit would have constituted a substantial burden on this exercise.

b. The Board's Denial of Saint John's Permit to Construct a Shrine Would Have Constituted a Substantial Burden

The religious exercise in this case is constructing a shrine (in the form of a grotto) in accordance with the church's namesake—Our Lady of Lourdes—on church property. Denying Saint John's ability to construct its shrine, as Appellees suggest, would act as a complete prohibition of Saint John's religious exercise under RLUIPA. Because it would "effectively bar" Saint John's religious exercise, it necessarily constitutes a "substantial burden." *See Haight*, 763 F.3d at 559 ("The greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice).").[5]

It is, therefore, "strange" to think about whether the Board's denial would merely "burden[], substantially or otherwise, this aspect of [Saint John's] requests" because it would "effectively bar" Saint John's exercise. *Id.* at 564-65. Nonetheless, the Board's denial of Saint John's Permit would also sat-

[5] To clarify, a "complete bar" is sufficient but not necessary to constitute a substantial burden, and Saint John does not contend otherwise.

isfy the "lesser restriction" of a substantial burden, contrary to the findings of the Court of Appeals in this case.

Other than finding that a complete bar of a religious exercise is sufficient (but not necessary) to constitute a substantial burden, courts have used various tests to determine whether state or local action constitutes a substantial burden on religious exercise. Because "RLUIPA does not define 'substantial burden,' and the term has not been delineated by the Supreme Court of the United States[,] . . . what constitutes a 'substantial burden' on religious exercise under RLUIPA has confounded federal courts[.]" *New Life Evangelistic Center. v. City of St. Louis*, 564 S.W.3d 665, 683 (Mo. Ct. App. 2018) (citing *Roman Catholic Bishop v. City of Springfield*, 724 F.3d 78, 94-95 (1st Cir. 2013)).

Federal courts focus on the facts of each particular religious adherent to evaluate substantial burdens on religious exercise. In general, courts have found a substantial burden if state or local action either (1) directly coerces or puts substantial pressure on the religious institution to change its behavior; or (2) causes substantial delay, uncertainty, and expense.[6]

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[6] Courts that have mentioned the coercion or substantial pressure tests include the Second, Third, Fourth, Fifth, Sixth, Eleventh, and D.C. Circuits. *See, e.g.*, *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007); *Davis v. Wigen*, 82 F.4th 204, 211-12 (3d Cir. 2023); *Pendleton v. Jividen*, 96 F.4th 652, 656 (4th Cir. 2024); *Lozano v. Collier*, 98 F.4th 614, 621 (5th Cir. 2024); *Mustin v. Wainwright*, No. 23-3671, 2024 U.S. App. LEXIS 21896, at *10 (6th Cir. Aug. 27, 2024); *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 830-31 (11th Cir. 2020); *Priests for Life v. United States Dep't of Health and Hum. Servs.*, 808 F.3d 1, 6 (D.C. Cir. 2015). The Second and Sixth Circuits have mentioned some

Saint John satisfies the substantial burden standard regardless of which test this Court applies.[7]

As detailed below, the Board's denial of Saint John's Permit would completely bar Saint John's religious exercise. In the alternative, denial of Saint John's Permit would (1) directly coerce or put substantial pressure on Saint John to change its behavior; and (2) cause substantial delay, uncertainty, and expense.

i. Denial of Saint John's Permit Would Have Acted as a Complete Prohibition of its Religious Exercise, Constituting a Substantial Burden

A complete prohibition of Saint John's shrine would be the ultimate substantial burden on religious exercise. RLUIPA does not define the term "substantial burden." *See* 42 U.S.C. § 2000cc-5. When a provision lacks a definition, courts generally employ tools of "[s]tatutory construction [which] 'begins with the language of the statute.'" *Leming v. Secretary of*

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form of the "substantial delay, uncertainty, and expense" test. *See, e.g.*, *Westchester Day School*, 504 F.3d at 349; *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1004 (6th Cir. 2017).

[7] The Seventh Circuit also created the "effectively impracticable" test, but abandoned this test after the Supreme Court of the United States issued its opinions in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) and *Holt v. Hobbs*, 574 U.S. 352 (2015). *See Jones v. Carter*, 915 F.3d 1147, 1149 (7th Cir. 2019) ("We recognized . . . that *Holt* and *Hobby Lobby* 'articulate[d] a standard much easier to satisfy' than our former search for something rendering the religious exercise 'effectively impracticable.'"). Nonetheless, Saint John satisfies this test because the Board's Permit denial would have constituted a complete prohibition of religious exercise as articulated below.

Health and Hum. Servs., 98 F.4th 1107, 1111 (Fed. Cir. 2024) (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). "In matters of statutory construction[,] the duty of [a court] is to give effect to the intent of Congress, and in doing so [a court's] first reference is of course to the literal meaning of words employed." *Flora v. United States*, 357 U.S. 63, 65 (1958). "In interpreting RLUIPA, [courts] must construe its text 'in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.'" *Johnson v. Baker*, 23 F.4th 1209, 1214 (9th Cir. 2022) (quoting 42 U.S.C. § 2000cc-3(g)).

The term "burden" is generally defined as (1) "[a] duty or responsibility"; (2) "[s]omething that is oppressive"; or (3) "[a] restriction on the use or value of land." *Burden*, BLACK'S LAW DICTIONARY 190 (7th ed. 1999). "'Substantial,' in turn, is defined as 'considerable in quantity' or 'significantly great.'" *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (quoting *Substantial*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1170 (10th ed. 2002)). Therefore, the plain, unambiguous meaning of the text shows that a substantial burden is a "significantly great restriction" on an institution's religious exercise "whether or not compelled by, or central to, a system of religious belief." *See* 42 U.S.C. § 2000cc-5(7)(A).

Here, Saint John's religious exercise is constructing its shrine—the "Our Lady of Lourdes" grotto—on its property next to Our Lady of Lourdes Church. The Board's denial of the Permit would have resulted in Saint John's inability to build its shrine, as conceded by the Frederics and as determined by the Kentucky Court of Appeals. *See Frederic v. City of*

Park Hills Bd. of Adjustment, No. 2022-CA-0867, 2023 Ky. App. LEXIS 100, at *10 (Ky. App. Dec. 1, 2023) (stating that the church is "prohibited" under the zoning ordinance from "[c]onstruction of a grotto — large or small — in the rear of the church property" then (incorrectly) determining that RLUIPA does not "prohibit[] the Board from *preventing the construction of the grotto*" (emphasis added)). Applying the literal meaning of RLUIPA's plain text, a complete prohibition of religious exercise is necessarily a "significantly great" burden on that exercise.

Case law supports a finding that a complete prohibition is a substantial burden. The United States Court of Appeals for the Third Circuit recently stated that "[t]here can hardly be a more substantial burden on a religious practice or exercise than its outright prohibition." *Davis v. Wigen*, 82 F.4th 204, 212 (3d Cir. 2023); *see also Meyer v. Teslik*, 411 F. Supp. 2d 983, 989 (W.D. Wis. 2006) ("It is difficult to imagine a burden more substantial than banning an individual from engaging in a specific religious practice"). *Cf. Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007) ("When a municipality denies a religious institution the right to expand its facilities, it is more difficult to speak of substantial pressure to change religious behavior, because in light of the denial the renovation *simply cannot proceed*." (emphasis added)).

The court in *Johnson v. Baker* illustrates how a near-total ban constitutes a substantial burden on religious exercise. 23 F.4th 1209 (9th Cir. 2022). In *Johnson*, the religious person was a prisoner within the Nevada Department of Corrections. 23 F.4th at

1212.[8] The prisoner contended that his religious exercise was the use of *scented* oil during daily prayers. *Id.* at 1213. The state prevented the prisoner from using scented oil daily because the oil was only available in the prison chapel, and the prison did not allow scented oil in individual cells. *Id.* The state insisted its regulation was valid because the prisoner could use scented oil once a week and use unscented baby oil during the rest of his prayers. *Id.* at 1212-13. Unpersuaded, the district court found that the state's prohibition acted as an "outright ban" on the prisoner's religious exercise. *Id.* at 1213. The state appealed. *Id.* at 1214.

The Ninth Circuit explained that "RLUIPA guarantees an 'expansive protection for religious liberty.'" *Id.* at 1214 (quoting *Holt*, 574 U.S. at 358). And the state "grossly missed the mark" by contending "that the use of scented oil for [the prisoner's] prayers [was] not *really that important to his worship practice*—[and] just a mere preference." *Id.* at 1215. The court then correctly found that "[o]f course, when a regulation 'outright bans' religious exercise, it amounts to a substantial burden." *Id.* at 1215 (quoting *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008)).

The Ninth Circuit stated that "importantly, the 'availability of alternative means of practicing religion' has no bearing on the 'substantial burden' inquiry." *Id.* at 1216 (quoting *Holt*, 574 U.S. at 361). It was irrelevant that the state allowed the prisoner to use *unscented* prayer oil for all of his prayers. *Id.* The

[8] RLUIPA protects against substantial burdens on religious exercise regarding prisoner inmates as well as land-use matters. *See* 42 U.S.C. §§ 2000cc to 2000cc-5.

state "regulation constitute[d] a 'substantial burden' on [the prisoner's] *particular religious exercise*," because the state action "limit[ed] his use of *scented* oil . . . to a paltry one out of 35 prayers per week." *Id.* (emphasis added).

Similarly, in *Haight v. Thompson*, the United States Court of Appeals for the Sixth Circuit found that barring access to a religious exercise intrinsically constituted a substantial burden under RLUIPA. 763 F.3d 554, 565 (6th Cir. 2014). In *Haight*, five death-row inmates filed suit under RLUIPA for a variety of religious-based reasons. 763 F.3d at 558. The relevant issue on appeal was whether RLUIPA gives inmates "a right to buffalo meat and other traditional foods for a faith-based once-a-year powwow." *Id.* at 558-59.

Importantly, the court stated that under the circumstances of that case "it [was] strange to think . . . in terms of the prison burdening, substantially or otherwise, this aspect of the inmates' ceremonial requests. For the prison *barred access to the foods altogether*." *Id.* at 565 (emphasis added). "The greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)." *Id.* It was irrelevant that the state allowed prisoners "to have some traditional foods . . . but not others[.]" *Id.* "When prison officials 'place[] substantial pressure on an adherent to modify his behavior and to violate his beliefs,' or 'effectively bar' his sincere faith-based conduct, they necessarily place a substantial burden on it." *Id.* (citations omitted). The prison's denial of the inmates' specific food request effectively barred their religious exercise and required them to "'modify [their] behavior' by performing less-than-complete powwows with less-than-complete meals." *Id.*

Here, like *Haight*, it is "strange" to think about this "burdening, substantially or otherwise, this aspect of [Saint John's] requests" because the Board's denial of the Permit would "effectively bar" Saint John's religious exercise. 763 F.3d at 565. Yet, it is undisputed that it is Saint John's sincere faith-based conduct to construct the "Our Lady of Lourdes" shrine next to Our Lady of Lourdes Church, and denial of the Permit would "effectively bar" this exercise.[9]

Further, the proposed local action in this case is even more onerous than *Johnson v. Baker*, 23 F.4th 1209 (9th Cir. 2022). Unlike the prisoner's ability in *Johnson* to use scented oil a "paltry" one time per week, the Board's denial of Saint John's land use Permit in this case would have constituted a complete prohibition. It is the equivalent of prohibiting altogether the prisoner's use of scented oil in *Johnson*, not just restricting the prisoner's use to one time per week. And "[o]f course," state action that "'outright bans' religious exercise, . . . amounts to a substantial burden." *Johnson*, 23 F.4th at 1215.

Because denial of the Permit would constitute a complete prohibition of Saint John's religious exercise, this Court should find that it necessarily constitutes a "substantial" burden, which would have required the Board to satisfy strict scrutiny for a denial of the Permit. The ability or inability to engage in other forms of religious exercise does not change this

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[9] *See also In re Young*, 82 F.3d 1407 (8th Cir. 1996) (finding a substantial burden under RFRA when a trustee of a bankrupt church attempted to recover donations because it would "effectively prevent the debtors from tithing" for that year even though in that case "tithing [was a] religiously motivated, but not religiously compelled, practice"), *reinstated by* 141 F.3d 854 (8th Cir. 1998).

analysis. The plain text of RLUIPA and various court opinions support this conclusion. Alternatively, the Board's denial of Saint John's Permit would also constitute a substantial burden according to standards employed by various federal courts. Specifically, the Board's denial of Saint John's Permit would (1) coerce and put substantial pressure on Saint John to change its behavior; and (2) cause substantial delay, uncertainty, and expense, as demonstrated below.

ii. Denial of Saint John's Permit Would Have Amounted to Coercion and Inflicted Substantial Pressure on Saint John

The Board's denial of Saint John's Permit would amount to coercion and substantial pressure on Saint John to modify its behavior. Then-Judge Gorsuch of the United States Court of Appeals for the Tenth Circuit illustrated something akin to coercion and substantial pressure in *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014). He stated that "at the very least" the state creates a substantial burden when it "(1) *requires* the [religious adherent] to participate in an activity prohibited by a sincerely held religious belief, (2) *prevents* the [religious adherent] from participating in an activity motivated by a sincerely held religious belief, or (3) places *considerable pressure* on the [religious adherent] to violate a sincerely held religious belief[.]" *Id.* at 55 (emphasis added).

The Eleventh Circuit also explained that governmental coercion or substantial pressure is sufficient but not necessary to constitute a substantial burden. *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 830-31 (11th Cir. 2020) ("This latter form of conduct, our decision made clear, is *sufficient* to demonstrate a substantial burden—but it is not, contrary to the district court's assumption here, *nec-*

essary."). *Cf. Holt*, 574 U.S. at 361-62 (holding that preventing a prisoner from growing a beard "*easily satisfied*" the substantial burden test under RLUIPA because the prisoner either had to shave or potentially undergo "serious disciplinary action" (emphasis added)).

In this case, the Board's Permit denial would have prevented Saint John from constructing its shrine on its property which is "an activity motivated by a sincerely held religious belief," satisfying *Yellowbear*'s standard. *See* discussion *supra* Section II.b.i. The Board's denial would also satisfy *Yellowbear*'s standard by placing "considerable pressure" on Saint John to violate its sincerely held religious belief. The court in *Yellowbear* stated that this final test is satisfied "for example, by presenting an illusory or Hobson's choice where the only realistically possible course of action available to the [religious adherent] trenches on sincere religious exercise." *Yellowbear*, 741 F.3d at 55.[10]

Saint John's only "realistic possible course of action" in the face of a denial by the Board would be to not exercise its religion, i.e., not construct the shrine,

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[10] *Yellowbear* uses the terms "belief" and "exercise." 741 F.3d at 55. The language of RLUIPA regards a substantial burden on religious *exercise* not on religious belief. 42 U.S.C. § 2000cc(a)(1). And a religious adherent in land use cases need not show "pressure to violate . . . *beliefs*." *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 555-56 (4th Cir. 2013) (emphasis added). "[S]ubstantial pressure on the adherent to *modify its behavior*" is sufficient under this standard. *Id.* (emphasis added)). Nonetheless, Saint John sincerely believes it is God's will to construct the shrine next to Our Lady of Lourdes Church, and it is irrelevant whether a religious exercise is "central" or even "compelled" by an adherent's religious beliefs. *See Holt*, 574 U.S. at 358, 360 (citing 42 U.S.C. § 2000cc-5(7)(A)).

or to build the shrine and face civil penalties or the shrine's destruction. *See, e.g.*, *Harrison v. City of Park Hills*, No. 2011-CA-000372-MR (Ky. App. Mar. 29, 2013) (discussing a $19,600 debt that landowners owed in penalties and fines by failure to comply with the zoning ordinance which led to a foreclosure action); PARK HILLS, KY., ZONING ORDINANCE art. XVII, § 17.0 (1974) ("In addition to the foregoing, the Zoning Administrator shall have the authority to order discontinuance of . . . structures, signs, fences, or additions, alterations, or structural changes thereto[.]"). As the court in *Yellowbear* indicated, this action "at the very least" constitutes a substantial burden. 741 F.3d at 55. Because Saint John is faced with this Hobson's choice, the Board's denial of Saint John's Permit "at the very least" would have constituted a substantial burden.

The Kentucky Court of Appeals' determination to nullify the Board's decision and to thus prohibit the grotto is incorrect. The Court of Appeals relied heavily upon *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004). In *Episcopal Student Foundation*, the Eastern District of Michigan found that—under the facts of that case—the religious adherent was not subject to coercion or substantial pressure. 341 F. Supp. 2d at 709. It also determined that the city's denial of the church's "application to demolish its existing facility" did not act as a total bar to the church's religious exercise. *Id.*

Here, Saint John satisfies both standards analyzed in *Episcopal Student Foundation*, but the Kentucky Court of Appeals applied neither test. Instead, the Court of Appeals appears to have applied a "loose," generalized categorization created by the *Episcopal*

Student Foundation court based on First Amendment cases. 341 F. Supp. 2d at 701-02 ("Along these lines, cases addressing alleged infringements of one's free exercise of religion may be loosely . . . categorized into two camps.").[11]

Similarly, the Court of Appeals referenced *Living Water*, an unpublished and outdated Sixth Circuit opinion, where the Sixth Circuit expressly "decline[d] to set a bright line test by which to 'measure' a substantial burden and, instead, look[ed] for a framework to apply to the facts before [it]." 258 F. App'x at 737. The *Living Water* framework was akin to the coercion and substantial pressure test. *See Frederic v. City of Park Hills Bd. of Adjustment*, No. 2022-CA-0867, 2023 Ky. App. LEXIS 100, at *15 (Ky. App. Dec. 1, 2023) ("[N]o 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." (quoting *Living Water*, 258 F. App'x at 734)).

The second part of the framework asked whether government action "effectively bar[red] a religious institution from using its property in the exercise of its religion[.]" *Living Water*, 258 F. App'x at 737. The Court of Appeals did not address the second part of the framework. *See Frederic*, 2023 Ky. App. LEXIS 100, at *15-17. The Court of Appeals also did not clar-

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[11] *Episcopal Student Foundation* and *Living Water* also predate *Holt* and *Hobby Lobby*. *Cf. Walker v. Scott*, No.13-3153, 2015 U.S. Dist. LEXIS 122467, at *5 (C.D. Ill. Sept. 15, 2015) (stating that in *Holt* and *Hobby Lobby*, "the Supreme Court 'articulate[d] a standard much easier to satisfy' than the longstanding jurisprudence interpreting RLUIPA in light of a prisoner's First Amendment rights" (citations omitted) (alteration in the original)); *Jones*, 915 F.3d at 1149 (same).

ify that the Sixth Circuit currently applies the substantial burden test as outlined in *Catholic Healthcare International, Inc. v. Genoa Charter Township*, 82 F.4th 442 (6th Cir. 2023). *See* discussion *infra* Section II.b.iii.

Nonetheless, Saint John satisfies the substantial pressure test as detailed above. The Court of Appeals found that "large or small" the Board was required to "prohibit construction of the grotto[.]" *Id.* at *10, 16. Therefore, the Court of Appeals should have found that the Board's denial of Saint John's Permit would have acted as a complete bar to Saint John's religious exercise, and "at the very least" would have amounted to coercion and substantial pressure. *See Yellowbear*, 741 F.3d at 55. As stated in the following section, it also constitutes a substantial burden under the "substantial delay, uncertainty, and expense" test.

iii. Denial of Saint John's Permit Would Have Caused Substantial Delay, Uncertainty, and Expense

Another test that some courts employ is the "substantial delay, uncertainty, and expense" test. Perhaps most relevant in this case is the United States Court of Appeals for the Sixth Circuit's variation. Relevant factors include (1) "whether the religious institution has a feasible alternative location from which it can carry on its mission"; (2) "whether the religious institution will suffer 'substantial delay, uncertainty, and expense' due to the imposition of the regulation"; and (3) whether the institution "has imposed a burden upon itself." *Livingston Christian Schs. v. Genoa Charter Township*, 858 F.3d 996, 1004 (6th Cir. 2017).

An opinion published in 2023 illustrates the Sixth Circuit's interpretation of its own test. In *Catholic Healthcare International, Inc. v. Genoa Charter Township*, the religious organization's "mission [was] to further the work of Saint Padre Pio—the patron saint of healing." 82 F.4th 442, 445 (6th Cir. 2023). Catholic Healthcare International, Inc. (the "Church") informed the Genoa Charter Township (the "Township") via email that it planned to create an outdoor prayer trail on the Church's own property. *Id.* at 444-45. The Township responded by stating that it would treat the Church's request as the construction of a building, requiring a permit application and approval. *Id.* at 445. The Church asked the Township to allow it to proceed without a permit, but the Township refused. *Id.*

The Church "proceeded to create the prayer trail anyway, with the Stations of the Cross, [a] mural, and a stone altar[.]" *Id.* The Church then "submitted a special land-use application for permission to build a 6,000-square-foot chapel, a driveway, and a parking lot, along with the prayer trail." *Id.* at 446. The Township denied the Church's permit request to construct a church building and "demanded that [the Church] remove the religious displays [on its prayer trail] from [its] property." *Id.* at 446. The Township stated that the church building "'and outdoor accessory structures' was 'not consistent' with the Township's 'Master Plan[.]'" *Id.* The Church again refused to remove its religious displays and filed suit in federal court, requesting declaratory and injunctive relief. *Id.*

In the meantime, the county road commission approved a separate permit for the Church's "field driveway" but barred it from using the driveway for

"organized gatherings." *Id.* The Township then filed suit in state court for a temporary restraining order to "requir[e] [the Church] to remove the displays" and to bar "any 'organized gatherings' on [the Church's] property." *Id.* The state court issued the restraining order. *Id.* And the federal district court "declined to enter an injunction allowing [the Church] to restore [its] religious displays," but allowed it "to hold organized gatherings on [its] property." *Id.* at 447. The parties then filed an interlocutory appeal and cross-appeal in the Sixth Circuit. *Id.*

The issue on appeal was whether the Church was "likely to succeed on the substantive merits of [its] RLUIPA claim," and more specifically, whether requiring it to apply for a land-use permit for its religious displays was a substantial burden. *Id.* at 448-49. The Sixth Circuit began by stating that a substantial burden is one that has "some degree of severity" and "more than an inconvenience." *Id.* at 449 (quoting *Livingston*, 858 F.3d at 1003). The Sixth Circuit then turned to "whether 'the religious institution will suffer substantial delay, uncertainty, and expense due to the imposition of the regulation.'" *Id.* (quoting *Livingston*, 858 F.3d at 1004). The court found that the Church "undisputedly . . . suffered all those things: after two years of administrative proceedings and considerable expense, [it] remain[ed] unable to place the religious displays on [its] prayer trail." *Id.*

The Sixth Circuit then addressed whether the Church "imposed a burden upon itself." *Id.* (quoting *Livingston*, 858 F.3d at 1004). It explained that this factor involved whether the Church had "good reason to know in advance" that its prayer trail—consisting of the Stations of the Cross, a mural, and a stone al-

tar—would be subject to a permit application process. *Id.* But the Sixth Circuit found that the Township's zoning ordinance gave the Church "little reason to expect the treatment they have received." *Id.*

Specifically, the zoning ordinance did not indicate that *structures* on the prayer trail would be treated the same as a *building*, requiring a permit. *Id.* The Sixth Circuit defined the word "church" as "a structure '*wherein*' people gather to worship." *Id.* (emphasis added). The court then stated that "[t]he ordinance's definition of 'church' comports with the term's ordinary meaning." *Id.* "The ordinance therefore gave [the Church] no reason to think the Township would treat [the Church's] trail [with] religious displays as a church [building]," requiring a permit. *Id.* The fact that the Township provided notification via email that the Church required a permit to construct its prayer trail was irrelevant. *Id.* at 450. Therefore, the Sixth Circuit found that the Church could likely prove that the Township substantially burdened its religious exercise. *Id.*

The Sixth Circuit then analyzed the Township's conditional approval of the Church's permit for a "field driveway," which barred the Church from using the driveway to host "organized gatherings on its property." *Id.* The court explained that the "ban on its face substantially impair[ed]" the Church's "ability to use the property to further its religious mission." *Id.* The Township's argument that the Church could instead host gatherings "at a church in Brighton, Michigan" was unpersuasive because the alternative property lacked "a secluded prayer trail on a wooded, 40-acre parcel of land" like the Church's property. *Id.* The Sixth Circuit, therefore, found that the Church was likely to succeed on the merits of its RLUIPA ar-

gument because "a ban on organized gatherings on [the Church's] property would (and [did]) substantially burdened [its] religious exercise." *Id.* at 450-51.

Judge Eric Clay's concurrence in *Catholic Healthcare* is also informative in at least two respects. 82 F.4th at 451-55 (Clay, J., concurring). First, Judge Clay explained that the Church in *Catholic Healthcare* had a "mission" to create a "prayer campus," and "[n]o other feasible alternative location [was] identified from which [the Church could] carry out *this* religious mission." 82 F.4th at 453 (emphasis added). Second, Judge Clay distinguished *Living Water Church of God v. Charter Township Meridian*, 258 F. App'x 729 (6th Cir. 2007). He stated that, in *Living Water*, "the land use regulation at issue related only to the *size* of the building which the [religious adherent] could build as its religious school," but the Township in *Catholic Healthcare* "prevent[ed] [the Church] from installing the religious display on the property at all, rather than, for instance, dictating the number or size of the religious displays." *Catholic Healthcare*, 82 F.4th at 453-54 (emphasis added).

Here, this case is not about the size of the grotto,[12] it is about how the Board could not have completely prohibited the shrine without an independent and particularized compelling government interest. *See* 42 U.S.C. § 2000cc(a)(1)(B). Saint John's "mission" is materially the same as creating a prayer campus in *Catholic Healthcare*, 82 F.4th at 453. Saint John's shrine is a replica of a grotto in Lourdes, France where the Blessed Virgin Mary appeared in the form

[12] As stated above, Saint John already reduced the grotto's planned radius from thirty to ten feet. Flash Drive, Ex. 6, at 00:31:50-00:33:56.

of an apparition. *See* CATHOLIC NEWS AGENCY, *supra* note 1. This apparition of the Blessed Virgin Mary is called "Our Lady of Lourdes," which is the church's namesake. *See Frederic*, 2023 Ky. App. LEXIS 100, at *1. During the apparition, the Blessed Virgin Mary requested Saint Bernadette "to tell the priests to build a chapel" next to the grotto. CATHOLIC NEWS AGENCY, *supra* note 1. Likewise, the priests of Saint John believe it is God's will to build this shrine—a smaller replica of the French grotto—on its property next to Our Lady of Lourdes Church. *See* r. at 230.

All of the Sixth Circuit factors support a finding of a substantial burden in this case. Saint John has no feasible alternative location from which it can carry on this particular mission, and neither party has stated otherwise. *Cf.* r. 223-26. Saint John's property is unique because it contains the church building next to the site of the proposed shrine. *See* Times of Celebrations, Lourdes Sanctuaire (2012), https://www.dom.edu/sites/default/files/pdfs/RCAS_Adm-Aid/StAbroad_Sanctuary_LadyLourdes_depliant_saison.pdf (showing the proximity of the grotto in Lourdes, France to the Basilica, which is a special type of church in Catholicism).

The Board's denial would have also caused Saint John to suffer substantial delay, uncertainty, and expense. The Board knew that Saint John originally planned to construct a larger grotto, and Saint John voluntarily submitted approval for a smaller version. Flash Drive, Ex. 6, at 01:32:25-01:32:45 (indicating that the board member was "relieved that it is a smaller version of what was first mentioned," and that the shrine "fits so well with the Community"); *see also id.* at 00:31:50-00:33:56 (discussing the reduction in size). Saint John also conducted a geotech-

nical study to satisfy Park Hills residents and the Board. *See id.* at 00:34:58-00:36:06 (depicting Father Sean's presentation answering concerns and stating that the geotechnical study found that the shrine will not cause "a weakening of the hillside"). After the initial informational city council meeting in 2017,[13] Saint John was finally able to present its reduced shrine for Board approval in 2021. *See* r. at 117. Yet, after years of administrative meetings and Saint John's considerable effort, the Frederics insist that the Board should have prevented Saint John from constructing the shrine altogether.

However, the Frederics fail to acknowledge that a complete bar on the ability to build the grotto is, *a fortiori*, creating substantial delay, uncertainty, and expense because it would completely prevent Saint John's religious exercise. And even under the Sixth Circuit's standard, Saint John would have suffered (as it is now suffering) substantial delay, uncertainty, and expense from a denial from the Board. Indeed, instead of only waiting two years like in *Catholic Healthcare*, Saint John had been waiting for four years by the time it appeared before the Board, making considerable preparations and plan amendments—as well as a geotechnical study—in the meantime.[14] After Saint John meticulously downsized its plans, ensured the shrine would not cause a weakening of the hillside, and addressed traffic, lighting, noise, parking, and nearby property values,

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[13] Flash Drive, Ex. 6, at 00:31:50-00:33:56; PARK HILLS CITY COUNCIL, CAUCUS MEETING, *supra* p. 3.

[14] Now, it has been more than seven years since Saint John initially presented its plans to the City of Park Hills to build its shrine in 2017. *See* PARK HILLS CITY COUNCIL, CAUCUS MEETING, *supra* p. 3.

the Board properly approved Saint John's Permit. Further delay, uncertainty, and expense—let alone a complete and unconditional denial—would have certainly amounted to a substantial burden.

Saint John has also not imposed a burden upon itself. This factor pertains to whether or not the religious adherent had good reason to know *in advance* that its land-use application would be denied. *See Livingston*, 858 F.3d at 1004. Here, on the contrary, Saint John had an expectation that its application and permit would be granted. That expectation was undoubtedly reasonable as the Board *did* grant its permit. *See* r. at 230.

Additionally, the plain text of the Park Hills zoning ordinance supports a finding that Saint John did not know in advance that its shrine would be prohibited. The ordinance conditionally authorizes the construction of "[c]hurches and other *buildings* for the purpose of religious worship, provided they are located adjacent to an *arterial* street." PARK HILLS, KY., ZONING ORDINANCE art. X, § 10.4 (1974) (emphasis added). Yet, as explained below, the ordinance does not require cemeteries, nursery schools, public and parochial schools, public parks, playgrounds, golf courses, community recreation centers, libraries, and country clubs to be located on an arterial street. *Id.* Thus, the zoning ordinance is arbitrarily unequal towards religion on its face. *See infra* Part IV.

Additionally, like *Catholic Healthcare*, Saint John's shrine is not a "church," and the plain text of the zoning ordinance failed to confirm whether Saint John's shrine would be considered a "building." The Park Hills Zoning Ordinance defines a "building" as "[a] structure *enclosed within* exterior walls or firewalls, for the shelter, housing, support, or enclosure of per-

sons, animals, or property of any kind." PARK HILLS, KY., ZONING ORDINANCE art. VII, § 7.0 (1974) (emphasis added). Moreover, fences, walls, and customary residential accessory structures (like patios) are permitted uses in the R-1EE zoning district under the zoning code. PARK HILLS, KY., ZONING ORDINANCE art. X, § 10.4(B) (1974). Saint John's proposed shrine includes statues of the Blessed Virgin Mary and Saint Bernadette measuring approximately 4.83 feet and two feet tall, respectively, Flash Drive, Ex. 6, at 00:30:20-00:30:40, as well as a patio, walking path, and retaining wall, r. at 183. *See also* R. at 117 (comparing Saint John's shrine "to a sacred, elaborate garden with two small statues . . . and space for reflection and repose"). Therefore, it was reasonable for Saint John to believe that its shrine was not a "building" and that it would be a permissible accessory at the time of its application.

The meaning of the word "arterial" in the zoning code also failed to confirm *in advance* that Saint John's grotto would be prohibited, despite the Court of Appeals' subsequent opinion. The ordinary meaning of the word "arterial" before the enactment of the Park Hills zoning ordinance was defined as "of, relating to, or constituting through-traffic facilities." *Arterial*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 49-50 (7th ed. 1967). Alternatively, it meant "a through street or arterial highway," while "highway" was defined as "a public way; *esp*: a main direct road." *Id.* at 50, 393. The Park Hills Zoning Ordinance defines "arterial streets" 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 art. VII, § 7.0 (1974).

As multiple board members indicated during Saint John's Permit application meeting, "if something happens on the interstate," traffic increases on Amsterdam Road (the road where this church is located), Flash Drive, Ex. 6, at 01:34:52-01:39:52, indicating that Amsterdam Road is a "main public through street" under the plain definition of "arterial." Additionally, the Kenton County Circuit Court stated in this case that Amsterdam Road "still meets the definition" of an arterial street pursuant to §7.0 of the Park Hills city ordinance. *Elizabeth Frederic, et al. v. City of Park Hills, et al.*, No. 21-CI-766 (Kenton Cir. Ct. filed June 29, 2022). Therefore, Saint John did not know in advance that its shrine would be prohibited. On the contrary, the Board granted Saint John's Permit requests, which Saint John reasonably expected. And the Kenton County Circuit Court upheld that decision. *Id.* Saint John has not imposed its burden upon itself. Thus, each of the Sixth Circuit factors supports Saint John in this case.

The Board's Permit denial would have amounted to a substantial burden under all major tests employed by federal courts. Consequently, this Court should hold that the Board's Permit denial would have amounted to a "substantial burden" under RLUIPA. Because it would have been a substantial burden, the Board was required to have grounds to satisfy strict scrutiny, which the Board undoubtedly lacked under the facts of this case as explained below. *See* 42 U.S.C. § 2000cc(a).

III. THE BOARD LACKED GROUNDS TO SHOW THAT PROHIBITING THE SHRINE WAS THE LEAST RESTRICTIVE MEANS OF FURTHERING A COMPELLING GOVERNMENTAL INTEREST

Denial of the Permit application would have amounted to a substantial burden on Saint John's religious exercise. Such a denial would trigger enhanced protection under RLUIPA, requiring the Board to show that denial of Saint John's Permit was the least restrictive means of furthering a compelling government interest. *See* 42 U.S.C. § 2000cc(a)(1). In this case, the Board admitted during litigation that "[t]here was 'no compelling reason' to prevent the 'grotto' from proceeding to construction[.]" R. at 203.

When the government lacks a compelling interest, it is "unnecessary to explore" whether government action was the least restrictive means of furthering a hypothetical interest. *Mahoney v. Babbitt*, 105 F.3d 1452, 1459 (D.C. Cir. 1997). *Cf. Catholic Healthcare*, 82 F.4th at 455 (Clay, J., concurring) ("The Township does not identify the governmental interests . . . let alone explain why its presumed interests are compelling."). Because the Board conceded it had no compelling interest in preventing the construction of Saint John's grotto in this case, there are no grounds to satisfy strict scrutiny and the Court of Appeals' decision must be reversed. *Cf. Fox v. Washington*, 949 F.3d 270, 282-83 (6th Cir. 2020) (indicating that a government actor is "limited to raising the justifications it cited at the time it made the decision"); *Haight*, 763 F.3d at 562 (same).

The Frederics nonetheless contend that the "zoning ordinance generally" protects the government's "compelling interests in traffic management and road

safety and [is] the least restrictive means of furthering those interests." *See* r. 225-26.[15] But government interests cannot be created *post hoc*. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022) ("Government 'justification[s]' for interfering with First Amendment rights 'must be genuine, not hypothesized or invented *post hoc* in response to litigation.'" (alteration in original) (citation omitted)); *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1268 (10th Cir. 2008) ("governmental interest found nowhere but in the defendants' litigating papers" not compelling). Here, an alleged government interest in traffic safety and management—disclaimed by the Board and fabricated for this litigation by the Frederics—cannot possibly be a sincere compelling governmental interest.

Mere "speculation is insufficient." *Fulton v. City of Philadelphia*, 593 U.S. 522, 542 (2021). For an interest to be compelling, there must be an "'actual problem' in need of solving." *Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 799 (2011). Thus, "[i]n analyzing a RLUIPA claim, courts cannot 'rely on "broadly formulated interests,"' but rather must 'scrutinize[] the asserted harm' as it applies to particular religious claimants." *Catholic Healthcare*, 82 F.4th at 454 (alteration in original) (quoting *Fulton*, 593 U.S. at 541); *see also Holt*, 574 U.S. at 363 ("RLUIPA requires us to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants[.]'" (quoting *Hobby Lobby Stores, Inc.*, 573 U.S. at 726-27 (alteration in original))).

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[15] The zoning ordinance does not even rationally protect the Frederics' alleged government interest as detailed *infra* Part IV.

Here, the Frederics fail to explain how constructing the shrine would cause traffic safety concerns in the area. It is especially unclear how traffic safety is a true compelling governmental interest when there is no evidence that other similar secular structures—like the piazza in an adjacent public park—increase traffic safety concerns. *See Catholic Healthcare*, 82 F.4th at 455 (stating that "[i]t is hard to imagine a compelling interest" when other structures are not treated the same as religious); *see also* Flash Drive, Ex. 6, at 00:40:01-00:40:20 (The "diameter [of] this [grotto] will be roughly the same—not much difference in square footage—as that simple little piazza in Trolley Park."). If the Park Hills government was truly concerned with traffic, it would have also prohibited the piazza in the adjacent public park to protect Park Hills residents.

On the contrary, the Board properly considered whether Saint John's shrine would cause "a significant increase in traffic" in this particular area but concluded that traffic was an insufficient reason to deny Saint John's Permit. *See* Flash Drive, Ex. 6, at 01:44:49-01:45:50. Saint John's Permit application stated that the shrine "will not add to the number of staff, users, or parking spaces required for the church[,]" and "will not cause additional traffic to the site[.]" R. at 117. During the Board meeting, Father Sean explained that "religious fervor in America is dying down" and he was unaware "of any shrine that's getting overloaded [with visitors]. . . . people are [not] running to go to these shrines." Flash Drive, Ex. 6, at 00:34:14-00:34:55. Three board members determined that traffic in the area "ebbs and flows." *Id.* at 01:31:00-01:46:05. As one Board member explained, he was ultimately "not convinced that the addition of this grotto is going to significantly affect

the traffic as regards [to] the church one way or the other[.]" *Id.* He also stated that traffic is not a reason for the Board "to block the church from building this[.]" *Id.* The Board, therefore, lacked a compelling interest to deny the Permit.

The Frederics also independently fail to satisfy strict scrutiny because they cannot show that completely banning Saint John's religious exercise is the least restrictive way of accomplishing their alleged compelling governmental interest in traffic safety. *See* r. 225-26. And "[u]nder strict scrutiny, 'so long as the government can achieve its interests in a manner that does not burden religion, it must do so.'" *Catholic Healthcare*, 82 F.4th at 454 (quoting *Fulton*, 593 U.S. at 541). *Cf. Reed v. Town of Gilbert*, 576 U.S. 155, 172 (2015) (analyzing "narrow tailoring" in the free speech context and stating that "[t]he Town similarly has not shown that . . . limiting temporary directional signs [was] *necessary* to eliminate threats to traffic safety, but that limiting other types of signs [was] not" (emphasis added)); *Mintz v. Roman Catholic Bishop*, 424 F. Supp. 2d 309, 323-25 (D. Mass. 2006) (deciding that parking and traffic congestion were not sufficient reasons to deny a building permit for the construction of a parish center).

Here, the Frederics have failed to explain why other less restrictive methods of traffic control would be insufficient for grotto visitors but suitable to manage traffic traveling to the adjacent public park or other secular Park Hills attractions that might draw a few visitors. *See* discussion *infra* Part IV. Therefore, the Frederics have failed to show that prohibiting the shrine on Saint John's property is the "least restrictive means of furthering [a] compelling governmental interest." *See* 42 U.S.C. § 2000cc(a). Because the gov-

ernment could not have satisfied strict scrutiny, the Court of Appeals' decision must be reversed, and the Board's Permit approval reinstated. As detailed in the following section, the Park Hills zoning ordinance also impermissibly treats religious and secular land uses unequally in violation of RLUIPA.

IV. THE ZONING ORDINANCE VIOLATES RLUIPA'S EQUAL TERMS CLAUSE

This Court should find in favor of Saint John for the reasons stated above: denial of Saint John's permit would have undoubtedly amounted to a

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KENTUCKY SUPREME COURT

Case No. 2024-SC-0006
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On Appeal From The Kenton Circuit Court,
Case No. 21-CI-766
Court of Appeals Case 2022-CA-0867

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.,

Appellants,

v.

JOEL AND ELIZABETH FREDERIC,

Appellees,

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, SHEILA BURKE TRUST,
SHEILA E. BURKE, in her capacity as Trustee,

Appellees Below.

APPELLEES BRIEF OF JOEL AND ELIZABETH FREDERIC

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CERTIFICATE OF SERVICE AND RECORD

This is to certify that true and accurate copies of the foregoing Appellees' Brief were served by ordinary mail to: Hon. Patricia Summe, 230 Madison Ave, Covington, KY 41011; Hon. Kate Morgan, Court of Appeals Clerk, 360 Democrat Dr, Frankfort, KY 40601; Hon. Dan Braun, Counsel for the Appellees Below, 526 Greenup St, Covington, KY 41011-2522; and by email and ordinary mail to Hon. Sarah Benedict, 312 Walnut St., Ste. 3200, Cincinnati, OH 45202 (sbenedict@bakerlaw.com) and Hon. Thomas Breidenstein, 855 Greenville Ave., Ste. 300, Cincinnati, OH 45246 (tom@breienstein.legal) on this 23 day of December, 2024. Pursuant to C.R. 76.12(6), I certify that I checked out the record in this case on September 14, 2022, and returned the record to the Circuit Clerk's office on September 16, 2022.

/s/Christopher D. Wiest
Christopher Wiest, *Counsel for Appellees*

The Court of Appeals appropriately applied the law, and in fact relied on a case, that, in turn, relied on applicable United States Supreme Court precedent. *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004), *citing Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Braunfeld v. Brown*, 366 U.S. 599 (1961).

5. Applying the *Livingston* and *Catholic Healthcare* tests demonstrates that there is no substantial burden here

Appellant suggests that this Court adopt the tests set forth in *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996 (6th Cir. 2017) and *Catholic Healthcare Int'l, Inc. v. Genoa Charter Twp.*, 82 F.4th 442 (6th Cir. 2023). Those cases apply the same test.

We agree that this Court should adopt that test if it reaches the question of substantial burden. *Livingston Christian Schs.* involved a special use permit denial. And the Sixth Circuit found no RLUIPA violation. 858 F.3d 996. It is curious that *Living Water Church of God v. Charter Township of Meridian*, 258 F. App'x 729 (6th Cir. 2007) actually presented, in some respects, a *more favorable test* to religious institutions than that ultimately adopted in *Livingston Christian Schs.*, which Appellant advocates for here.

The Sixth Circuit in *Livingston*, 858 F.3d 996 and *Catholic Healthcare Int'l, Inc.*, 82 F.4th 442 adopted factors that, as applied here, plainly weigh against Appellant.

Feasible alternative locations: First, the *Livingston* Court looked at "whether the religious institution has a feasible alternative location from which it can carry on its mission?" *Livingston*, 858 F.3d 996 at 1004.

Where "plaintiffs have had access to other properties close to the property affected by the challenged land-use regulation, the courts have generally found that no substantial burden exists." *Id.* at 1005; *see, also, World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009) (concluding that there was no substantial burden when the plaintiff was denied permission to demolish a historic building on its property and construct a new building, given that the plaintiff owned other empty space on its campus where it could construct the building); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 100 F. App'x 70, 73, 77 (3d Cir. 2004) (concluding that the plaintiff had not demonstrated a likelihood of success on a substantial-burden claim when the plaintiff was denied a variance for property that it had purchased, reasoning that the plaintiff was able to fully operate at a rented location just across the street from the property at issue); *see, also, Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227-28 (11th Cir. 2004) (concluding that walking a few additional blocks was not a substantial burden where the zoning ordinance required the plaintiff, an Orthodox Jewish synagogue whose members' beliefs forbade them from using motorized vehicles on the Sabbath, to be located a few blocks away from its desired location).

In *Livingston*, the Sixth Circuit found that this factor did not favor the applicant because it "put forth only conclusory evidence that the Pinckney property is inadequate, and [the applicant] did not allege that any of its core religious functions cannot be carried out at Pinckney." 858 F.3d 996 at 1004. And this factor was further not met where there was available property zoned within 12 miles of the location that

the religious institution wished to construct. *Id.* at 1008.

Moreover, this factor is not met where a city permits religious institutions within city limits, but places restrictions on where they may be located. *Id.* at 1010. ("In the present case, unlike in Islamic Center, there is no evidence that the Township's zoning ordinance has completely banned religiously oriented schools from its borders (or banned them unless they can obtain zoning exceptions)"). Thus, "[w]hen a religious institution has an available alternative outside of a desired jurisdiction, and where the distance from the desired location to the alternative property is reasonably close, the artificial boundaries of a particular jurisdiction become less important." *Id.* at 1011.

The unrebutted affidavit of Mr. Frederic irrefutably established that not only are there other properties in Park Hills, Kentucky, that permit the construction of a grotto, but also that that such properties already have grottos and the Court may take judicial notice of the same. (Affidavit Frederic at ¶ 5, R. 177, Vol. II). Indeed, St. Agnes, the Sisters of Notre Dame, and Covington Catholic High School all have grottos, and while St. Agnes is located immediately adjacent to Park Hills in Fort Wright, Kentucky, all are located on arterial streets that adequately can serve parking and congestion concerns). *Id.* Plainly, institutional zones exist within the limits of the City of Parks Hills along Dixie Highway, where land can be purchased, and the desired use conducted (in fact two parcels of that land, in Park Hills, with religious connections, *already* contain shrines and grottos).[4] Appellant presented no evidence to demon-

[4] https://www.wcpo.com/news/insider/park-hills-kentucky-catholic-grotto-a-planned-grotto-draws-opposition-over-its-size-and-

strate that other properties are not located within 12 miles (or even a couple miles) that permit church uses and the construction of a grotto.

In fact, a review of Kenton County's GIS system reveals that the proposed location here[5] is within a few miles of a variety of land in Covington, Kentucky that readily can accommodate the grotto construction without creating significant burdens in a residential neighborhood that is already burdened by traffic and parking concerns.

Livington reviewed other cases where a substantial burden was found. 858 F.3d 996 at 1006. But "[i]n each of the cases ruling in the plaintiffs' favor, the plaintiffs had *demonstrated* that they were unable to carry out some core function of their religious activities due to the inadequacy of their current facilities." *Id.* (emphasis added). And the Court explained that the demonstration was performed by way of the presentation of *evidence*. *Id.*; *See, also*, 42 U.S.C. § 2000cc-2(b) (burden of proof on religious claimant to present prima facie case).

In *Livington*, the Sixth Circuit found insufficient the fact that the religious claimants put forward "only conclusory evidence that the Pinckney property is inadequate, and LCS did not allege that any of its core religious functions cannot be carried out at

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the-likelihood-of-crowds (last accessed 12/12/2024) ("For the most part, everyone is OK with the idea of a grotto. There are several nearby, albeit smaller in stature. The Church of St. Agnes, the Sisters of Notre Dame and Covington Catholic High School all have grottos with the Mother Mary. *Opponents just want a much smaller footprint that is simply for parishioners.*")

[5] https://linkgis.org/mapviewer/ (last accessed 12/12/2024).

Pinckney." 858 F.3d 996, 1006. Here, Appellant has presented no evidence *whatsoever*.

Add to that the fact that Park Hills permits churches and other larger institutional uses in a variety of zones,[6] provided they are located adjacent to an arterial street. And Park Hills permits outright churches in institutional zones. See id. at § 10.11.

No one – not the City of Park Hills – and not the Appellees – have restricted or desires to restrict the ability of the Appellant to build a shrine within the church's preexisting, non-conforming footprint. Admittedly, the scope of the project to do so would likely be smaller in scope than Appellant would like. But the reality is that Appellant *can* build a shrine. Appellant simply does not desire to do so and wishes to substantially increase its footprint into neighboring residential property, in an area already burdened by traffic concerns, which was the reason for the arterial street requirement in the zoning code to begin with. In the same way, there are likely ways to reconfigure the project so as to keep the construction within the existing footprint of the use, and to make the scope of the project smaller, in a manner that does not run afoul of Kentucky law prohibiting the expansion of a non-conforming use.

We are, at bottom, very sympathetic to the desire to engage in religious exercise. But the reality here is that what Appellant wants to do as a general matter, the construction of a shrine, is not prohibited, so long as it occurs within Appellant's existing legal non-conforming footprint. And it can occur in other areas and zones within the city or even in close proximity.

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[6] http://online.encodeplus.com/regs/parkhills-ky/doc-viewer.aspx?secid=298#secid-297 (last accessed 12/12/2024).

But that is not good enough for Appellant – it wants to expand its use – and the burden of the use – in a residential area of the City of Park Hills that is plainly not designed from an infrastructure standpoint to handle it. Which is why Kentucky law prohibits expansions of non-conforming uses to begin with. We are certain that Appellant might find it inconvenient not to be able to build the large grotto that it wants to, but instead have to build something smaller that fits within its existing footprint, but "a 'mere inconvenience'" is "not be deemed a substantial burden." *Livingston*, 858 F.3d 996, 1009.

There are arterial streets within the City of Park Hills in residential zones that also permit the desired use. Just not this particular property, unless Appellant decides to construct the shrine within their current footprint, which they are allowed to do. And even more properties available within a ten-mile radius. Applying *Livingston*, 858 F.3d 996, Appellant has plainly failed to meet the first factor.

Substantial Delay, Uncertainty, and Expense: That turns us to the second factor, "[w]hether the religious institution will suffer 'substantial 'delay, uncertainty, and expense'' due to the imposition of the regulation ...?" *Livingston*, 858 F.3d 996 at 1004. Appellant suggests that it has expended significant funds towards the building of the shrine – yet it was apparent to anyone who reviewed this matter that the use would not be permitted on a neighboring property – and the shine would need to be constructed within the existing footprint. If Appellant has, in fact, incurred these fees (and there is nothing that alleges or establishes that on *this record*), those are costs and expenses that seem to be borne of Appellant's own fault in pursuing

a project that Appellant itself knew was prohibited by law.

Third, whether a "plaintiff has imposed a burden upon itself ... [such as] when an institutional plaintiff has obtained an interest in land without a reasonable expectation of being able to use that land for religious purposes, the hardship that it suffered when the land-use regulations were enforced against it has been deemed an insubstantial burden." *Livingston*, 858 F.3d 996 at 1004; *see, also, Andon, LLC v. City of Newport News*, 813 F.3d 510, 515 (4th Cir. 2016) (concluding that a burden was not substantial because it was self-imposed when the plaintiff entered into a contingent lease agreement for a property despite knowing that the property failed to meet applicable setback requirements and having been informed that the application for a zoning variance would be denied); *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) (concluding that the plaintiff was not substantially burdened when it had imposed the burden upon itself by purchasing property in an industrial zone for use as a church after having been informed that its special-use application would be denied because the relevant zoning ordinance banned churches in that zone).

The evidence here is that Appellant knew, from the outset, that this expansion of the non-conforming use was not permitted. As the applicant admitted in the application, the Zoning Map and Code defined the property at issue as adjacent to a "collector street rather than arterial street." (R. 117, Vol. I). And Appellant *admitted* in its application that the **"creation of any type of accessory space to the existing church is not permitted by the current local zoning ordinance in Park Hills, Kentucky."** (*Id.*).

In addition to the illegal use variance that was requested, the applicant requested a variance for lot width and building setbacks, as well as frontage. (R. 118, Vol. I). That grotto application involved significant construction. (R. 125-130, Vol. I).

And everyone, including zoning staff, recognized that the zoning code did not permit any conditional use for churches or outbuildings in collector streets – they were only permitted off of arterial streets. (R. 143, 145-146, Vol. I). In fact, zoning staff provided a report, which was unrebutted before the Board of Adjustment, that the road in question next to the church, Amsterdam Road, was a "collector street," and the intersecting street, Alhambra Court, is a "local street." (R. 181, Vol. II). The same staff report made clear that Section 10.4 of the Park Hills Zoning Ordinance did not permit churches and other buildings, unless located adjacent to an arterial street. (R. 183, Vol. II). And the zoning staff made clear that the zoning code would be violated and the use was not permissible. (R. 184-185, Vol. II).

It is disingenuous, to say the least, for Appellant to suggest that it did not know, going in, that the use in question was not permitted. Again, its own zoning application, signed by its architect, indicated that the use was not permitted. (R. 49; 117-130, Vol. I).

That distinguishes this matter from *Catholic Healthcare Int'l, Inc.*, 82 F.4th 442, 449-450, where the religious adherents, in applying the plain language of the zoning code, did not expect the code to apply because that same language was applicable only to enclosed indoor structures and not the stations of the cross that the church installed on an outdoor trail.

Appellant here apparently decided to undertake the no-cost acquisition of the neighboring parcel of residential property, and then (at least as Appellant's argue) undertook construction expenses despite knowledge that it would be illegal to do so, it plainly "obtained an interest in land without a reasonable expectation of being able to use that land for religious purposes," which is "an insubstantial burden" particularly when the acquisition of the residential property was at not cost to Appellant. *Livingston*, 858 F.3d 996 at 1004; *Andon, LLC*, 813 F.3d 510, 515; *Petra Presbyterian Church*, 489 F.3d 846, 851; *Catholic Healthcare Int'l, Inc.*, 82 F.4th 442, 449 ("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").

It is worth noting that Appellant exacerbated its hardship, if any, by declining to resolve this matter with the Frederics in exchange for the construction of additional parking to alleviate parking concerns by the neighbors and a smaller footprint. Appellant *could* have constructed its grotto (perhaps smaller in scope than it wanted), with parking that would have provided a substantial benefit not only to its parishioners, but also alleviated some of the parking concerns that were present in the community. But it declined to do so. Any delay, uncertainty, and expense is Appellant's own doing.

Arbitrary, Capricious, or Discriminatory Treatment: The final factor that the Sixth Circuit looked at in *Livingston*, was "whether there is evidence that the municipality's decisionmaking process was arbitrary, capricious, or discriminatory." 858 F.3d 996 at 1004. That said, the Sixth Circuit in *Livingston* ultimately

declined to adopt that reasoning, concluding that "[e]vidence of improper decisionmaking is more appropriately considered when evaluating whether a governmental action was narrowly tailored to serve a compelling

* * *

EXHIBIT A

(ABOVE LINE FOR RECORDERS USE ONLY)

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS:

THAT

Sheila E. Burke, Trustee of the SHEILA E. BURKE TRUST dated December 22, 2014 and SHEILA E. BURKE, individually, whose mailing address is 917 Alhambra Ct., Park Hills, KY 41011,

for and in consideration of One Dollar and other valuable consideration, to her paid by the grantee herein, the receipt of which is acknowledged, do bargain, sell and convey to:

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC., a Kentucky non-profit corporation,

its successors and assigns forever, the following described Real Estate, in the City of Park Hills, County of Kenton, Commonwealth of Kentucky, to-wit:

GROUP NO: 1687 PIDN: 041-30-00-_____

Grantee Mailing Address and care of address to which the Property tax bill for the year in which the Property is transferring may be sent: 1101 Amsterdam Road, Park Hills, KY 41011

SEE EXHIBIT A, attached hereto and incorporated herein by reference,

Subject to easements of record.

Being the same property conveyed to the Grantor by deed from Sheila E. Burke, dated February 3, 2015 and recorded in OR Book C-5594, Page 15 and by deed conveyed to Sheila E. Burke from Donald S. Ringo, et ux, dated May 24, 1985 and recorded in Deed Book 896, Page 33 of the Kenton County Clerk's records at Covington, Ky.

By the signing herein, Sheila E. Burke, as Grantor, hereby certifies under oath, that (i) the Sheila E. Burke Trust dated December 22, 2014 (Trust) is in full force and effect and has not been amended in any way which affect the powers of the Trustee as set forth in the deed recorded in OR Book 5594. Page 15 and incorporated herein by reference, and she is authorized and empowered to make this conveyance; and (ii) her marital status was unmarried at the time of the conveyance to the Trust by deed dated February 3, 2015 and recorded in OR Book C-5594, Page 15 of said records. The purpose of (ii) is to correct of record the missing marital status of Sheila E. Burke at the time of the transfer of the property to her trust in OR Book C-5594, Page 15 of said records which was unmarried.

The parties agree and state that there is no merger of the Ground Lease Agreement dated August 24, 2016 and recorded in OR Book C-5969, Page 260 of said records (Lease) and the Lease is and shall remain in full force and effect.

Together with all the PRIVILEGES AND APPURTENANCES to the same belonging. TO HAVE AND TO HOLD the same to the said

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC., a Kentucky non-profit corporation,

its successors and assigns, forever, the Grantor, its successors and assigns, HEREBY COVENANTING

with the Grantee, its successors and assigns, that the TITLE so conveyed is CLEAR, FREE AND UNENCUMBERED, and that she will WARRANT AND DEFEND the same against all legal claims whatsoever with the exception of the 2022 and subsequent years real estate taxes and assessments.

IN WITNESS WHEREOF, the said Grantors, Sheila E. Burke, Trustee of the SHEILA E. BURKE TRUST dated December 22, 2014 and SHEILA E. BURKE, individually, hereunto set their hands on the 22 day of June, 2021.

SHEILA E. BURKE TRUST
dated December 22, 2014

By /s/ Sheila E. Burke
Sheila E. Burke, Trustee

/s/ Sheila E. Burke
Sheila E. Burke

COMMONWEALTH OF KENTUCKY
COUNTY OF KENTON

The foregoing instrument was acknowledged, subscribed and sworn to before me this 22nd day of June, 2021 by Sheila E. Burke, Trustee of the SHEILA E. BURKE TRUST dated December 22, 2014, on its behalf and SHEILA E. BURKE, individually.

/s/ Linda H. Schaffer
NOTARY PUBLIC (ID # _____)
Kentucky, State at Large

My Commission Expires: _____

LINDA H. SCHAFFER
Notary Public, Kentucky
State At Large
My Commission Expires
October 9, 2021
Notary ID# 588328

CERTIFICATE OF CONSIDERATION

Grantors and Grantee, both certify, under oath, pursuant to KRS Chapter 382 that the names of the Grantors and Grantee stated herein are their respective full names and that the transfer is a gift and Grantee joins in this warranty deed for the sole purpose of making this certificate about the consideration. (FMV is ~~$500.00~~) $1500.00 SB SPK

GRANTEE:

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.

By /s/ Sean Kopcyznski
Sean Kopczynski, Secretary

GRANTORS:

SHEILA E. BURKE TRUST
dated December 22, 2014

By /s/ Sheila E. Burke
Sheila E. Burke, Trustee

/s/ Sheila E. Burke
Sheila E. Burke

COMMONWEALTH OF KENTUCKY
COUNTY OF KENTON

The foregoing instrument was subscribed, sworn and acknowledged before me this 22 day of June, 2021 by Sheila E Burke, Trustee of the SHEILA E. BURKE TRUST dated December 22, 2014, on its behalf and SHEILA E. BURKE, individually, as Grantors.

/s/ Linda H. Schaffer
NOTARY PUBLIC (ID # _____)
Kentucky, State at Large

My Commission Expires: _____

LINDA H. SCHAFFER
Notary Public, Kentucky
State At Large
My Commission Expires
October 9, 2021
Notary ID# 588328

COMMONWEALTH OF KENTUCKY
COUNTY OF KENTON

The foregoing instrument was subscribed, sworn and acknowledged before me this 22 day of June, 2021 by Sean Kopczynski, Secretary, MISSIONARIES OF SAINT JOHN THE BAPTIST, INC., a Kentucky non-profit corporation, on its behalf; as Grantee.

/s/ Linda H. Schaffer
NOTARY PUBLIC (ID # _____)
Kentucky, State at Large

My Commission Expires: _____

LINDA H. SCHAFFER
Notary Public, Kentucky
State At Large
My Commission Expires
October 9, 2021
Notary ID# 588328

This Instrument Prepared By:

/s/ Richard D. Spoor
Richard D. Spoor
Keating Muething & Kiekamp, PLL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202
10913498.1

COMMONWEALTH OF KENTUCKY
SUPREME COURT

Case No. 2024-SC-0006

Received: 2024-SC-0006 04/08/2025
Filed: 2024-SC-0006 04/08/2025
M. Katherine Bing, Clerk

APPEAL FROM THE COURT OF APPEALS
CASE NO. 2022-CA-0867

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.,
Appellant,

v.

JOEL FREDERIC AND ELIZABETH FREDERIC
Appellees.

REPLY BRIEF OF APPELLANT MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.

Respectfully submitted,

/s/ Sarah E. Benedict
Sarah E. Benedict
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Counsel for Appellant

/s/ Thomas W. Breidenstein
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Counsel for Appellant

Certificate of Service on the following page

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* * *

Campbell Cty., 492 S.W.3d 908, 913 (Ky. App. 2016) ("entirely within the [Board's] statutory authority . . . to interpret and define conditional uses and terms [in] a zoning ordinance . . . [while determining] whether to grant a conditional use in a particular zone"). And even if a board were to lack power to make an individualized assessment, "[a] property owner need not [even] pursue such [permit] applications" to bring a RLUIPA claim. *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 349 (2d Cir. 2005). The Board made an individualized assessment. This case easily falls within RLUIPA's scope.

III. The Frederics fail to rebut Saint John's arguments.

The Frederics effectively concede that there was no compelling government interest to satisfy strict scrutiny, rightly abandoning their "traffic" argument from below. *Compare* Appellees' Brief at 29-30, *with* Frederics' COA Brief at 10. The Frederics also endorse the Sixth Circuit's substantial burden standard without adequately addressing any other circuit test.

Appellees' Brief at 9-10.[2] Yet, their Sixth Circuit analysis is incorrect for the following reasons.

A. The Frederics misapply "religious exercise."

"'[R]eligious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief," and "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5(7). Saint John's religious exercise is to construct the "Our Lady of Lourdes" grotto next to Our Lady of Lourdes Church. It is not a "general" exercise of practicing Catholicism or even venerating the Blessed Virgin Mary. *Id.*; *see Holt v. Hobbs*, 574 U.S. 352, 361-62 (2015) (discussing religious exercise); *Ackerman v. Washington*, 16 F.4th 170, 182-83 (6th Cir. 2021). This is about constructing a religious shrine depicting "Our Lady of Lourdes," in accordance with a church-approved apparition, during which the Blessed Virgin requested Saint Bernadette "to tell the priests to build a chapel" *next to* the grotto. *See* Appellant's Brief at 13-14, 18, 25 n.10, 33.

Saint John's religious "mission" is similar to the religious adherent's mission in *Catholic Healthcare International, Inc. v. Genoa Charter Township*, which was to construct a prayer campus. 82 F.4th 442, 453 (6th Cir. 2023) (Clay, J., concurring). The structure here is not a corporate building or school. The grotto is a shrine—its very nature is religious—and Saint

[2] They correctly abandoned their "effectively impracticable" argument. *See* Frederics' COA Brief at 9. And their "coercion or pressure" section merely incorrectly reargues that there is no prohibition. Appellees' Brief at 26.

John's religious exercise is the act of constructing it next to its already established church. This location and this type of shrine are unique to the church's mission. *See* Appellant's Brief at 13-14, 18, 25 n.10, 33. As explained in *Catholic Healthcare*, that is why no alternative locations are adequate. 82 F.4th at 453 (Clay, J., concurring) (rejecting the township's alternative location argument because the church did not own the other property, and it "lack[ed] the qualities which [made] the property . . . suitable for a prayer campus").

This property is unique to Saint John's religious mission to construct the "Our Lady of Lourdes" grotto, with space for reflection and repose, next to Our Lady of Lourdes Church. No alternative locations can feasibly satisfy because no other property contains Our Lady of Lourdes Church, and "the substantial burden inquiry 'requires a case-by-case, fact-specific inquiry,'" *Lozano v. Collier*, 98 F.4th 614, 626 (5th Cir. 2024) (citation omitted).

The Frederics wrongly conflate Saint John's particular religious exercise with the broad practice of Catholicism or honoring the Blessed Virgin Mary in general. Appellees' Brief at 4, 18, 29 (suggesting incorrectly that Saint Agnes in Fort Wright or two Catholic schools could somehow suffice). Thus, the Frederics fail to correctly engage with the substantial burden analysis at hand.

B. The Frederics incorrectly contend that Saint John's grotto is permissible, but if correct, their case is moot.

The Frederics argued below that the grotto was prohibited at this location due to the arterial street requirement. *See* Frederics' COA Brief at 10; TR 222-23. The Court of Appeals agreed, then ruled that "[c]onstruction of a grotto — large or small — in the rear of the *church property* . . . constitutes an expansion of both the scope and area of the nonconforming use. KRS 100.253(2) *prohibits* the church from doing so." *Frederic*, 2023 Ky. App. LEXIS 100, at *10 (emphasis added).

To bolster its point, the court added: "[T]he fact that acquisition of [the plot behind the church] was *necessary* to construct the grotto *further* illustrates [it] would constitute an enlargement of the church's preexisting nonconforming use in terms of both scope and area[.]" *Id.* (emphasis added). According to the Court of Appeals, the church accessory cannot be built on Saint John's property because Amsterdam Road is not an arterial street.[3]

The Frederics ignore this holding, contending that Saint John can build its grotto "so long as it occurs within [its] existing legal nonconforming footprint." Appellees' Brief at 20. The Frederics say they have no desire to "restrict" Saint John from building within its "footprint," but that Saint John just cannot "increase its footprint into neighboring residential property" because of "traffic." Appellees' Brief at 19. That makes no sense.

[3] This prohibition amounts to a substantial burden.

Assuming the Frederics are correct (despite the Court of Appeals' holding), they are asserting that Saint John can build its grotto in its parking lot—a few feet away from its current proposed location. *See* TR 137-40 (depicting Saint John's property covered with parking spaces and schematics for the grotto in relation to the property). Even if permitted, building the grotto in the parking lot would place the grotto even *closer* to the Frederics' home. And if, as the Frederics suggest, the Board required Saint John to dig up its parking lot or shrink its grotto for a *third* time when Saint John's current proposed construction site is an undeveloped hillside a *few feet* away, that would amount to a substantial burden. *See Westchester v. Mamaroneck*, 417 F. Supp. 2d 477, 548 (S.D.N.Y. 2006) (permit denial was substantial burden when adherent worked for about two years "to address the [board's] concerns" and had already offered to make changes to its project).[4]

Further, if "no one" is preventing the grotto's construction, Appellees' Brief at 19, then the Frederics lack standing. Standing requires injury, causation, and redressability. *Cabinet for Health & Family Services v. Sexton*, 566 S.W.3d 185, 195 (Ky. 2018). An asserted injury must be caused by alleged *illegality*. *Id.* If the grotto is legal in one location and illegal a few feet away—as the Frederics suggest—then any alleged illegality is not the but-for cause of the Frederics' alleged injuries of "traffic," "lighting," and "noise," TR 226-27. *See Patton v. Bickford*, 529 S.W.3d 717, 730 (Ky. 2016) (no causation if event "would have occurred without it"). Their asserted in-

[4] Even any lack of clarity under the Court of Appeals' reasoning would cause Saint John substantial delay, uncertainty, and expense.

juries will also not be "redressed" if, regardless of the outcome of this case, the grotto can be built a mere few feet away and closer to their home.

This Court should rule in Saint John's favor either way. Either the Frederics wrongly interpret the Court of Appeals' holding, and there is a substantial burden due to the complete prohibition of this religious exercise, or the Frederics' interpretation is correct, and the Board's permit denial would have *still* been a substantial burden, but the Frederics' case is moot due to lack of standing. If moot, this Court should vacate the lower court's decision and dismiss this case.

C. The Frederics fail to adequately address the Sixth Circuit test.

Saint John previously addressed the lack of feasible alternative locations factor above. The Frederics also fail to fully or accurately address the remaining Sixth Circuit substantial burden factors.

Regarding delay, uncertainty, and expense, the Frederics do not address Saint John's arguments. One of the considerations in *Catholic Healthcare* was that "after years of administrative proceedings" the church was "still . . . unable to obtain permission to erect the desired religious displays on the property." 82 F.4th at 454 (Clay, J., concurring); *see also id.* at 449. Here, after the 2017 meeting, Saint John reduced the size of its planned grotto, conducted a geotechnical study, applied to PDS with updated measured visual schematics and illustrations, and finally appeared before the Board in 2021.[5] *See* VR

[5] They also acquired the title to land behind Saint John's property to satisfy the Board's condition. TR 78.

04/15/2021, 00:31:50-00:33:56; TR 117-148; PARK HILLS CAUCUS MEETING – Feb. 27, 2017, https://www.parkhillsky.net/documents/minutes/WEB-CAUCUS-2-27.pdf.[6] A denial by the Board would have caused further delay, uncertainty, and expense. And as Saint John stated previously, this factor is uniquely satisfied here because Saint John would be prohibited from this religious exercise if the Board denied its permit on the Court of Appeals' reasoning. *See* Appellant's Brief at 15. The Frederics do not demonstrate otherwise.

The Frederics also fail to show that Saint John placed any burden upon itself and assert inaccurate, inadmissible facts.[7] In *Catholic Healthcare*, the township emailed the church, stating that the zoning ordinance prohibited the proposed construction unless the church first obtained a building permit. 82 F.4th at 444-45. The church "proceeded to create the prayer trail anyway, with the Stations of the Cross, [a] mural, and a stone altar[.]" *Id.* Yet, the Sixth Circuit determined that the church did not place the burden upon itself, despite this emailed "notice." *Id.* 449-50. Instead, the Sixth Circuit considered the "ordinary meaning" of terms in the ordinance. *Id.* at 449.

Here, Saint John's permit application before the Board stated that any street requirement should be waived because the property was grandfathered. TR 118. And Amsterdam Road "becomes a street of choice during peak traffic conditions which results in

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[6] This Court may take judicial notice of this document. KRE 201.

[7] *See, e.g.*, Appellees' Brief at 3-4, 23, 30, (discussing one-sided alleged mediation discussions not in the record and inadmissible under KRE 408).

the same use as an arterial street." *Id.* Thus, Saint John reasonably believed its proposed accessory would be allowed. *See also* Brief for Appellant at 35-37. The Board and the trial court agreed with Saint John's analysis. TR 232 (stating that Amsterdam Road "meets the definition" of an arterial street and the grotto was "grandfathered in" as a permissible accessory). The Frederics cannot reasonably expect pastors to make a preemptive legal determination regarding a then-unsettled area of law better than a sitting judge. RLUIPA does not place such a high burden upon religious adherents. *See Johnson v. Baker*, 23 F.4th 1209, 1214 (9th Cir. 2022) (explaining that courts "must construe [RLUIPA's] text 'in favor of a broad protection of religious exercise"). And Saint John had a "*reasonable* expectation of being able to use that land for [its] religious purpose[]." *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1004 (6th Cir. 2017) (emphasis added). Saint John's permit to build was granted, TR 78, and the trial court agreed, TR 232. Saint John had no notice that its permit would be denied because Saint John's permit was, in fact, granted. *See id.*

IV. The Frederics' unequal terms argument fails.

In the trial court, Saint John asserted RLUIPA, "42 USC Sec. 2000 *et. seq.*," protected against "inequalities," "discrimination in zoning laws," and "prohibit[ed] zoning laws that *discriminate* against churches *and burden* their ability to exercise religious beliefs." TR 203-04 (emphasis added).[8]

The Frederics argued under RLUIPA's substantial burden provision and addressed the "plain language

[8] Saint John's permit application also asserted inequalities. TR 118.

of the zoning ordinance." TR 226; Frederics' COA Brief at 10. Saint John asserted RLUIPA's equal terms and nondiscrimination section (and the substantial burden section) before the Court of Appeals. *See* City COA Brief at 18. Additionally, some courts analyze discrimination and unequal terms under the umbrella of "substantial burden,"

* * *