

**COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
DIVISION _____
CASE NO. 18-CI-_____**

**DEFEND VH GROUP, LLC
1105 Carpenters Trace
Villa Hills, KY 41017,**

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Judge _____

**HENRY MITCHELL, Individually
1105 Carpenters Trace
Villa Hills, KY 41017,**

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**ANDREA MITCHELL, Individually
1105 Carpenters Trace
Villa Hills, KY 41017,**

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**BOB STEVENS, Individually
1101 Carpenters Trace
Villa Hills, KY 41017**

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**CATHY STEVENS, Individually
1101 Carpenters Trace
Villa Hills, KY 41017**

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**TOM BOGNER, Individually
1089 Carpenters Trace
Villa Hills, KY 41017**

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**JANICE BOGNER, Individually
1089 Carpenters Trace
Villa Hills, KY 41017**

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**GARY MENNE, Individually
1073 Carpenters Trace
Villa Hills, KY 41017**

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**KATHY MENNE, Individually
1073 Carpenters Trace
Villa Hills, KY 41017**

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**ARNOLD TERRELL, Individually
953 Collins Rd
Villa Hills, KY 41017**

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**VERIFIED PETITION
FOR JUDICIAL REVIEW
OF LEGISLATIVE
ACTION ADOPTING THE
KENTON COUNTY
PLANNING COMMISSION'S
RECOMMENDATION FOR A
MAP AMENDMENT AND
TEXT AMENDMENT TO THE
CITY ZONING ORDINANCE**

JANE TERRELL, Individually
953 Collins Rd
Villa Hills, KY 41017

LAUREN OVERMANN, Individually
1097 Carpenters Trace
Villa Hills, KY 41017

JUSTIN OVERMANN, Individually
1097 Carpenters Trace
Villa Hills, KY 41017

Petitioners,

vs.

**KENTON COUNTY PLANNING
COMMISSION,**

Serve:
Paul J. Darpel
2332 ROYAL DRIVE
FORT MITCHELL, KY 41017-2008

CITY OF VILLA HILLS,

Serve:
Mayor Irvin T. "Butch" Callery
720 ROGERS ROAD
VILLA HILLS, KY 41017

**CITY OF VILLA HILLS CITY
COUNCIL,**

Serve:
Mayor Irvin T. "Butch" Callery
720 ROGERS ROAD
VILLA HILLS, KY 41017

SAINT WALBURG MONASTERY OF :
BENEDICTINE SISTERS OF :
COVINGTON, KENTUCKY, :
: :
Serve: :
Registered Agent :
Sr. M. Catherine Wenstrup, OSB :
2500 AMSTERDAM RD. :
COVINGTON, KY 41017 :
: :
AND :
: :
ASHLEY COMMERCIAL GROUP, LLC :
: :
Serve: :
Registered Agent :
FBT LLC :
400 WEST MARKET STREET :
32ND FLOOR :
LOUISVILLE, KY 40202 :
: :
Respondents. :
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: :

Now come Petitioners, by and through counsel, and for their Petition for Judicial Review, state as follows:

I. INTRODUCTION.

1. The named Applicants sought a zoning map amendment and a text amendment to allow development plans to move forward that stand to significantly increase the population of the City of Villa Hills.

2. Despite the magnitude of these proposals, and contrary to fundamental due process requirements, the named Petitioners were denied a meaningful opportunity to present their opposition to the ultimate decision makers, whose legislative action to adopt the zoning amendments was arbitrary, beyond their statutory authority, and not based on substantial evidence.

3. What's worse, the same law firm that advised Villa Hills City Council on the matter also represented one or more of the third-party applicants, tainting all proceedings with an improper conflict of interest.

4. This conflict appeared to manifest itself both in the decision by Council (members of which expressly based their vote on advice of the conflicted counsel), and the treatment of opponents of the development during the zoning proceedings.

5. Ultimately, an ill-advised Council decision was made on an incomplete record compiled from an improperly noticed evidentiary hearing.

6. Accordingly, the legislative actions of the Council adopting the proposed zoning map amendment and text amendment were arbitrary and capricious and must be reversed and remanded so that Petitioners, and the people of Villa Hills generally, can receive the due process guaranteed to each of them by the laws of the Commonwealth of Kentucky on a matter that stands to fundamentally, and permanently, reshape Villa Hills.

II. PARTIES.

7. Petitioner Defend VH Group, LLC (also known as the "Defend Villa Hills Group," hereafter the "Group"), is a Kentucky nonprofit limited liability company whose members include Villa Hills residents Henry Mitchell (1105 Carpenters Trace, Villa Hills, Kentucky 41017), Bob Stevens (1101 Carpenters Trace, Villa Hills, Kentucky 41017), Cathy Stover (2538 Woodcliff Drive, Villa Hills, KY 41017), Tom Wenning (1076 Carpenters Trace, Villa Hills, Kentucky 41017), Gary Menne (1073 Carpenters Trace, Villa Hills, Kentucky 41017), Tom Bogner (1089 Carpenters Trace, Villa Hills, Kentucky 41017), and Jason Stover (1029 Lauren Drive, Villa Hills, Kentucky 41017). The Group assembled to oppose the applications for a Zoning Map Amendment (the "Map Amendment") and Zoning Text

Amendment (the “Text Amendment”) for the construction of the “Sanctuary Project,” and was organized as a Kentucky nonprofit limited liability company to further its members’ ongoing opposition to same. The Group was officially recognized as an “opponent” to the Sanctuary Project, and the Group and its assembled members are injured and aggrieved by the Council’s approval of the Sanctuary Project and the attendant Map Amendment and Text Amendment because the approval, *inter alia*, fundamentally changes the historical character of Villa Hills, causes increased infrastructure expenditure obligations to be funded in part by its taxpayer members, causes additional traffic and safety concerns to be borne by its resident members, decreases property values of its resident members, and significantly increases the population density contrary to the Group’s wishes regarding the density of population and intensity of land use in Villa Hills.

8. In addition to the Group, the following individually petition this Court for judicial review (collectively the “Individual Petitioners”):

a. Group member Henry Mitchell, and his wife Andrea Mitchell are individual petitioners who reside at 1105 Carpenters Trace, Villa Hills, Kentucky 41017 and were identified as interested property owners by the City of Villa Hills. Each opposes the Sanctuary Project and is directly and indirectly injured and aggrieved by the Council’s approval of the Sanctuary Project and its attendant Map Amendment and Text Amendment.

b. Group member Bob Stevens, and his wife Cathy Stevens are individual petitioners who reside at 1101 Carpenters Trace, Villa Hills, Kentucky 41017 and were identified as interested property owners by the City of Villa Hills. Each opposes the Sanctuary Project

and is directly and indirectly injured and aggrieved by the Council's approval of the Sanctuary Project and its attendant Map Amendment and Text Amendment.

c. Group member Tom Bogner, and his wife Janice Bogner, are individual petitioners who reside at 1089 Carpenters Trace, Villa Hills, Kentucky 41017 and were identified as interested property owners by the City of Villa Hills. Each opposes the Sanctuary Project and is directly and indirectly injured and aggrieved by the Council's approval of the Sanctuary Project and its attendant Map Amendment and Text Amendment.

d. Group member Gary Menne, and his wife Kathy Menne, are also individual petitioners who reside at 1073 Carpenters Trace, Villa Hills, Kentucky 41017. Each opposes the Sanctuary Project and is directly and indirectly injured and aggrieved by the Council's approval of the Sanctuary Project and its attendant Map Amendment and Text Amendment.

e. Arnold and Jane Terrell are individual petitioners who reside at 953 Collins Rd, Villa Hills, Kentucky 41017. Each opposes the Sanctuary Project and is directly and indirectly injured and aggrieved by the Council's approval of the Sanctuary Project and its attendant Map Amendment and Text Amendment.

f. Lauren and Justin Overmann are individual petitioners who reside at 1097 Carpenters Trace, Villa Hills, Kentucky 41017 and were identified as interested property owners by the City of Villa Hills. Each opposes the Sanctuary Project and is directly and indirectly injured and aggrieved by the Council's approval of the Sanctuary Project and its attendant Map Amendment and Text Amendment.

9. As noted *supra*, each Individual Petitioner is directly and indirectly injured and aggrieved because each opposes the Sanctuary Project, and because the action by Council approving the Sanctuary Project and its attendant Map Amendment and Text Amendment, *inter alia*, fundamentally changes the historical character of Villa Hills, causes increased infrastructure expenditure obligations to be funded in part by each as taxpayers, causes additional traffic and safety concerns to be borne by each, decreases his or her property values (whether his or her property is appurtenant to the proposed development, or simply nearby, due to the scale of the proposed development), and significantly increases the population density contrary to his or her wishes regarding the density of population and intensity of land use in Villa Hills.

10. The Group and the Individual Petitioners are collectively referred to as “Petitioners.”

11. The Group exhausted its administrative remedies by attending and objecting to the proposed Map Amendment and Text Amendment at the January 16, 2018 KCPC hearing and the February 21, 2018 City Council hearing.

12. Moreover, based on the allegations contained herein and the administrative record, exhaustion by the Group would have been futile because the proceedings were improperly noticed, improperly transcribed, and tainted by conflicts of interest.

13. Likewise, Individual Petitioners Bob and Cathy Stevens, Henry Mitchell, Jane Terrell, Gary Menne, Kathy Menne, Janice Bogner and Tom Bogner attended the January 16, 2018 KCPC hearing and objected to the Map Amendment and Text Amendment.

14. Individual Petitioners Bob and Cathy Stevens, Henry Mitchell, Jane Terrell, Janice Bogner, and Tom Bogner attended the February 21, 2018 City Council hearing for the Map Amendment and Text Amendment.

15. And, to the extent any Respondent would contend that any Individual Petitioner failed to exhaust his or her administrative remedies, exhaustion would have been futile because the proceedings were improperly noticed, improperly transcribed, and tainted by conflicts of interest.

16. Moreover, due to the overwhelming opposition to the Map Amendment and Text Amendment, both the KCPC and Council restricted testimony and argument at the respective hearings, and each instructed opponents that if an opponent shared someone else's prior stated opposition, there was no need to appear and repeat it on the record.

17. Respondent Saint Walburg Monastery of Benedictine Sisters of Covington, Kentucky (the "Monastery") is a nonprofit corporation organized under the laws of the Commonwealth of Kentucky. The Monastery owns roughly 85 acres located to the north side of Amsterdam Road in Villa Hills, Kentucky, which was zoned Institutional prior to the Map Amendment and Text Amendment that is the subject of this Petition. The Monastery is the applicant for the Map Amendment as part of a planned development of what has been called the Sanctuary Project.

18. Respondent Ashley Commercial Group, LLC ("Ashley") is a Kentucky limited liability company with its principal office located at 3005 Dixie Highway, Edgewood, Kentucky. Ashley submitted the application for the Map Amendment on behalf of the Monastery and intends to be the developer of the Sanctuary Project.

19. Respondent City of Villa Hills (the "City") is a municipality and body politic of the Commonwealth of Kentucky and the applicant for the Text Amendment.

20. Respondent Kenton County Planning Commission ("KCPC") recommended approval of the Map Amendment on January 16, 2018.

21. Respondent City of Villa Hills City Council (the “Council”) adopted the recommendation by the KCPC and voted to approve the Map Amendment and Text Change pursuant to KRS § 100.211.

III. JURISDICTION AND VENUE

22. This Court has personal and subject matter jurisdiction over this Petition pursuant to KRS § 100.347(3), as it is the Circuit Court of the county in which the property that is the subject of the proposed Amendments lies.

23. The Group is an entity claiming to be injured or aggrieved by the final action of the Council relating to the Map Amendment and Text Amendment.

24. Individual Petitioners are all persons claiming to be injured or aggrieved by the final action of the Council relating to the Map Amendment and Text Amendment.

IV. BACKGROUND.

A. Application for a Map Amendment and Text Amendment.

25. The Monastery owns roughly 85 acres north of Amsterdam Road in Villa Hills, Kentucky (the “Monastery Property”).

26. In or around 2015, the Monastery announced its intent to sell the Monastery Property.

27. The City, in conjunction with the Monastery and KCPC, commissioned a Small Area Study which investigated the development of the Property and an additional 30 neighboring acres owned by Pathfinder Communications (the “Pathfinder Property”). *See Exhibit 1* Administrative Document Record, at its Exhibit F, Villa Hills Study (March 2, 2017), at p. 1.

28. The Monastery eventually partnered with Respondent Ashley to propose “a mixed use development located along the north side of Amsterdam Road (KY 371), west of Collins

Road (KY 371), in the City of Villa Hills, Kenton County, Kentucky[,]” referred to as the “Sanctuary Project.” *See id.*, at its Exhibit B “Traffic Impact Study for the Sanctuary Development” (Dec. 2017), at p. 1.

29. In furtherance of the development plans for the Sanctuary Project, the Monastery authorized Ashley “to submit on Owner’s behalf one or more applications for approval of Stage 1 and 2 development plans, zoning map amendments, subdivision plats, and waiver of subdivision regulations related to [Ashley’s] proposed development of the Property.” *See Exhibit 2*, Letter from the Monastery to KCPC (Dec. 1, 2017).

30. Ashley, on behalf of the Monastery, submitted an application for “[a] proposed map amendment to the Villa Hills Zoning Ordinance changing the described area from INST (institutional) to R-1EE (PUD) (a single-family residential zone with a planned unit development overlay).” *See* Letter from P. Darpel to City (Feb. 2, 2018), enclosing KCPC Statement of Action and Recommendation (PC1712-0005), at p. 2, attached hereto as Exhibit 3.

31. The proposed Map Amendment was necessary to accommodate the Sanctuary Project development plans, which included several single family homes and a four-story apartment building containing 187 apartments.

32. As proposed, the Sanctuary Project “has the capability to increase Villa Hills’ population 50% (from 7,500 to 11,000+) based on the maximum number of units that has been authorized in the small area study for the 115 acre site.” *See Exhibit 1*, at p. 3 of its Exhibit C, Application for Consensus Capital Project List.

33. In conjunction with the proposed Map Amendment, the City proposed a Text Amendment. *See* Letter from P. Darpel to the City (Feb. 1, 2018), enclosing KCPC Statement of Action and Recommendation Number (PC1711-0004), at p. 1, attached hereto as Exhibit 4.

34. Despite the institution of the small area study in early 2016, the details of Ashley's design plans for the Sanctuary Project – including the erection of a four story 187 unit apartment building – were not publicly disclosed until December 11, 2017.

B. The Only Trial-Type Public Hearing was Improperly Noticed.

35. Shortly after the first disclosure of Ashley's development plans, KCPC noticed a special meeting to take place on January 9, 2018 at 6:15pm in the Commission Chambers of the PDS building at 332 Royal Drive, Ft. Mitchell, Kentucky.

36. In an apparent effort to comply with KRS § 100.211(3) and KRS § 424.130, KCPC published notice of the special meeting *on Christmas day*, December 25, 2017 in the Kentucky Enquirer. *See* Legal Notice to Kentucky Enquirer (Dec. 25, 2017), attached hereto as Exhibit 5.

37. The published notice included the date of the special meeting (“January 9, 2018”), the location (“the Commission Chambers of the PDS Building (2332 Royal Drive in Fort Mitchell)”), and the agenda mentioning the proposed Map Amendment and Text Amendment. *Id.*

38. The published notice did *not* indicate that this hearing would serve as a “trial-type”¹ due process evidentiary hearing, or that it would be the *only* such trial-type hearing on the matter. The notice only stated, “[p]lease plan to attend if you want to learn more about [the proposed amendments] or to provide input.” *Id.*

39. A similar notice was mailed to 47 adjoining property owners.

¹ Kentucky courts refer to two types of zoning hearings: (1) a “trial-type” hearing, and (2) an “argument-type” hearing. A “trial-type” hearing is a “due process” evidentiary hearing, which must record facts sufficient for judicial review by a legislative body or fiscal court. *See Resource Development Corp. v. Campbell County Fiscal Court*, 543 S.W.2d 225, 227-228 (Ky. 1976). If a compliant trial-type hearing is conducted by a planning commission, the reviewing legislative body may conduct only an argument-type hearing in which the body limits itself to the record of the trial-type hearing, or it may conduct its own trial-type hearing to gather additional evidence. *See id.*

40. However, the trial-type hearing on the Map Amendment and Text Amendment did not go forward on January 9th as noticed.

41. The Commission Chambers at PDS could not accommodate the number of people that sought to participate in the special meeting.

42. On January 10, 2018, KCPC mailed a new notice of a special meeting to the adjoining property owners noting that “[t]he public hearing on this proposed rezoning was *not* heard on January 9th as announced previously.” The notice stated that the special meeting would occur just six days later on January 16, 2018 at Lakeside Christian Church. *See* Legal Notice to Adjoining Owners (Jan. 10, 2018), attached hereto as Exhibit 6 (emphasis in original).

43. Then, on January 12, 2018 – only four days before the special meeting was rescheduled to occur – the KCPC published notice of the special meeting in the Kentucky Enquirer listing the new date (“January 16, 2018”), the new location (“Lakeside Christian Church”), and the agenda mentioning the proposed Map Amendment and Text Amendment. *See* Legal Notice to Kentucky Enquirer (Jan. 12, 2018), attached as Exhibit 7.

44. The published notice did *not* indicate that this hearing would serve as a “trial-type” due process evidentiary hearing, or that it would be the *only* such trial-type hearing on the matter. The notice only stated, “[p]lease plan to attend if you want to learn more about [the proposed amendments] or to provide input.” *Id.*

C. The Emergence of a Conflict of interest at the Trial-type Public Hearing and an Incomplete Hearing Record.

45. Despite the absence of statutorily required advance notice, on January 16, 2018, KCPC conducted what would be the only purported trial-type evidentiary hearing on the proposed Map Amendment.

46. With regard to the proposed Text Amendment, the City requested that the discussion on it be tabled, and the KCPC voted to “table the issue until the next regularly scheduled meeting.” Minutes from KCPC Special Meeting on Jan. 16th, 2018 (Feb. 1, 2018), attached hereto as Exhibit 8.

47. Accordingly, the KCPC proceeded only with discussion on the Map Amendment.

48. The first speaker to address the KCPC on the proposed Map Amendment was attorney Jerry Dusing, a named partner of the law firm Adams, Stepner, Woltermann & Dusing, PLLC (the “Adams Stepner Firm”).

49. Mr. Dusing stated: “**Ladies and Gentlemen of the Commission, my name is Jerry Dusing. I’m an attorney and I’m very proud to represent the Benedictine Sisters of Saint Walburg Monastery and the Ashley Group here this evening.**” See KCPC Video Record Part 1 (Jan. 16, 2018), at 58:30 - 58:46 (emphasis added), attached as Exhibit 9.

50. Mr. Dusing also stated, “I’ve known the Benedictine Sisters a long time...this development will be [Villa Hills’] crown jewel.” See Exhibit 9, Part 1, at 1:19:30 - 1:20:03.

51. Mr. Dusing concluded the proponent’s remarks to the KCPC by stating: “[The] Developer was vetted ... very deeply to reflect their charitable and civic responsibility in Northern Kentucky. So, in summary, this plan is the comprehensive plan, and that’s the criteria for approval. And, I appreciate you taking the politics out of this in front of the planning commission.” See Exhibit 9, Part 1, at 1:27:22 - 1:27:57.

52. The Group, represented by counsel, objected to the special meeting for, *inter alia*, having been improperly noticed. See Exhibit 9, Part 1 at 1:45:00 - 1:46:46.

53. Certain of the Group members and the Individual Petitioners addressed the KCPC at the hearing. See, generally, Exhibit 9, Part 1, at 1:45:00 - Part 2, 1:02:30.

54. Several times, Paul Darpel, the KCPC Chair, restricted Petitioners' attempts to offer evidence, contending that the KCPC had a limited role of measuring the application against the comprehensive plan.

55. Mr. Darpel repeatedly assured Petitioners that the ultimate decision on the Map Amendment was that of the Council. *See, e.g. Exhibit 8*, KCPC Special Meeting Minutes, at p. 7; *see also Exhibit 9*, Part 3 at 31:56 - 32:12.

56. Petitioners relied on Mr. Darpel's express assurances that Petitioners would be able to raise concerns beyond the proposed design of the Sanctuary Project (such as certain conflicts involving Council, potentially illegal executive sessions, and the breadth of the public's opposition to the proposed Map Amendment and Sanctuary Project) at the hearing before Council.

57. At one point, Mr. Darpel instructed an opponent to the Sanctuary Project that he contact Villa Hills City Attorney, Mary Ann Stewart, about the options for stopping the development process. *See Exhibit 9*, Part 2, at 1:09:00 - 1:09:10.

58. **Ms. Stewart is also a partner in the Adams Stepner Firm, and thus, had a duty of loyalty to the Monastery and Ashley (by virtue of her firm's representation), as well as a duty of loyalty to the City.** *See SCR 3.130.*

59. Upon information and belief, Ms. Stewart has been advising the Council and the City throughout 2016, 2017, and 2018 in her capacity as the City Attorney while her law firm, the Adams Stepner Firm, simultaneously represented the interests of the Monastery (and, at least during the KCPC hearing, the developer Ashley). *See Exhibit 9*, Part 1, at 58:30 - 58:46 (Mr. Dusing asserts "I'm very proud to represent the Benedictine Sisters of Saint Walburg Monastery and the Ashley Group here this evening.").

60. Despite discussion of the proposed Map Amendment before the KCPC, no evidence was offered by proponents or opponents of the Text Amendment at the KCPC hearing, because it had been tabled by the KCPC “until the next regularly scheduled [KCPC] meeting.” See Exhibit 8, KCPC Special Meeting Minutes, at p. 2.

61. Additionally, the KCPC improperly transcribed the record of the evidence proffered for and against the Map Amendment.

62. At 52:42 of Part 3 of the Administrative Video Record, the video cuts out in the middle of KCPC’s questioning of several proponents and opponents. See also Exhibit 9, at 52:42 - 59:01 (displaying only a black screen with no audio).

63. These critical exchanges between the KCPC, the proponents, and the opponents, which lasted for nearly 30 minutes after the transcription cut out, were unavailable for review by the Council prior to their taking legislative action on the proposed Amendments.

64. Moreover, the vote itself was not recorded. Consequently, there is *no record* (neither in the incomplete video transcript nor the KCPC meeting minutes) of a vote by KCPC approving the proposed Text Amendment. Compare Exhibit 8, KCPC Special Meeting Minutes from Jan. 16th (Feb. 1, 2018), at p. 11 with Exhibit 4, KCPC Statement of Action and Recommendation PC1711-0004 (Feb. 1, 2018), at p. 2 (“A public hearing was held on this application on Tuesday, January 16, 2018 at 6:15pm at Lakeside Christian Church[.]”) (emphasis added).

D. The Institution of a Limited Argument-type Hearing, Contrary to the Express Wishes of some Council Members.

65. Despite the improperly noticed KCPC hearing, and its incomplete record, the City proceeded to schedule a limited “argument-type” public hearing on the proposed Amendments for February 21, 2018, thereby confining the Council to the defective administrative record.

66. Upon information and belief, Ms. Stewart advised the Council to conduct the limited argument-type hearing, despite Council's procedural right to conduct a trial-type evidentiary hearing to accept and consider evidence that could not be presented at the KCPC hearing (such as the breadth of public opposition and apparent conflicts among certain Council members).

67. Indeed, Ms. Stewart copied Council on correspondence sent to Petitioners on Adams Stepner Firm letterhead in which she stated that Council would only conduct an argument-type hearing. *See, e.g.*, Letter from M. Stewart to D. Knecht, attached hereto as Exhibit 10, ("Please be advised that *this office* serves as general counsel to the City of Villa Hills.") (emphasis added)).

68. Numerous Council members stated on the record at subsequent public hearings that they felt confined by the administrative record, suggesting they had not been advised that Council had the ability to conduct its own trial-type evidentiary hearing and make different findings than those made by the KCPC. *See infra* at ¶¶ 99 - 107; *see also City of Louisville v. McDonald*, 420 S.W.2d 173, 179 (Ky. 1971) and *Resource Development Corp.*, 543 S.W.2d at 227-228 (Ky. 1976).

69. Ms. Stewart and other lawyers of the Adams Stepner Firm had an ethical and legal duty to exercise independent judgment in their provision of legal advice to Council regarding the procedural options that were available to Council, and the impact different types of hearings would have on Council's ability to receive additional evidence outside of that presented to the KCPC.

70. Any legal advice Ms. Stewart or other members of the Adams Stepner firm gave to Council regarding the Sanctuary Project, *while she and her firm simultaneously represented the Sanctuary Project's proponents*, was tainted by Ms. Stewart's clear conflict of interest.

71. The Adams Stepner Firm's conflict of interest deprived the Council, and therefore, by extension, the people of Villa Hills, of a City Attorney who had undivided loyalty to the City, and who was capable of exercising independent judgment with respect to Council's consideration of the KCPC's recommendation regarding the Sanctuary Project.

72. Neither Ms. Stewart, nor the Adams Stepner Firm, ever recused themselves from the Sanctuary Project proceedings, and upon information and belief, never obtained a written waiver of the conflict of interest from the City or any Council member.²

73. Attorney Frank Wichmann was retained for the purpose of presiding over the argument-type hearing.

74. Upon information and belief, the City retained Attorney Wichmann at the direction of Ms. Stewart, who continued to provide advice to the City and Council regarding the Sanctuary Project.

E. The Argument-Type Hearing before the Council and the Improper Restriction of the Petitioners' Arguments.

75. The Council held the argument-type public hearing on February 21, 2018, which Ms. Stewart attended in an unknown capacity.

76. Several Council members made comments that indicated they had not reviewed the administrative video record of the hearing before the KCPC.

² Additionally, given the nature of the proceedings, the conflict is not one that can be waived.

77. Moreover, no members of Council *could* have reviewed the complete record because of the KCPC's failure to video the entire evidentiary proceedings. *See supra* at ¶¶60 - 63.

78. The Group urged the Council members to review the complete transcript of the KCPC, and requested that the Council table the matter and reconvene to conduct a full evidentiary, trial-type hearing.

79. Individual Petitioners also attended and attempted to present their arguments to the Council.

80. During the Council hearing, Group member and Individual Petitioner Henry Mitchell attempted to make arguments concerning the integrity of the compiled record.

81. Mr. Mitchell attempted to raise a question regarding the propriety of Council Member Mary Koenig's participation in voting on the matter due to an apparent conflict of interest. *See Villa Hills Special Meeting Video Record Part 1 (Feb. 21, 2018), at 41:19 - 43:25* attached hereto as Exhibit 11.

82. Council Member Koenig's son, Adam Koenig, is the listing agent for the Pathfinder Property, which is currently for sale and is contiguous to the Monastery Property. The Pathfinder Property was included as a part of the Villa Hills Small Area Study and incorporated into the Kenton County Comprehensive Plan Action 2030. The Pathfinder Property is currently in "sale pending" status.

83. However, Attorney Wichmann cut Mr. Mitchell off mid-argument, and prohibited him from continuing on the grounds that the conflict was not part of the administrative record. *See id.*, Part 1 at 43:25 - 44:10; 44:55 - 45:55.

84. Ms. Koenig is not, of course, a member of the KCPC, and as such, her apparent conflict of interest in voting as a member of the Villa Hills City Council could not have become part of the KCPC record. Mr. Mitchell was therefore improperly prohibited from presenting argument relating to Council Member Koenig's conflicts, and the potentially illegal executive sessions that Council held outside the view of the public it represents. (Indeed, upon information and belief, Ms. Stewart had instructed Council Members to avoid speaking with opponents of the proposed Sanctuary Project outside of the public hearings, despite having allowed Council to privately meet with Ashley and the Monastery representatives).

85. Conversely, following the opponents' restricted argument, Mr. Wichmann allowed proponents of the Sanctuary Project to present information and argument to the Council on matters outside of the administrative record without interruption. *See, e.g., id.*, Part 2 at 24:54 - 26:06 (referencing several "discussions" Ashley alleged to have with the TransMontaigne representatives regarding the TransMontaigne jet fuel pipeline, none of which were a part of the KCPC Administrative Record).

86. When counsel for the Group attempted to assert an objection to the preferential treatment received by the proponents, he was shouted down by Mayor Callery and was not even permitted to make a record of his objection. *See id.* Part 2, at 30:02 - 30:30.

87. At the conclusion of the hearing, Council Member Greg Kilburn spoke on behalf of the Council and stated:

As we've discussed previously and in consultation with some of the council members, **we want to make sure that we have the opportunity to review all of the comments that have [been] presented here tonight with our legal counsel before we make a final decision on this matter.** I discussed that with your honor earlier, and we want to make sure that we are afforded that opportunity to discuss this matter with legal counsel in an

executive session because several of us have a great deal of questions that we want answers to.

With that your honor do you have any objections of doing what we've outlined having a special meeting with an executive session so we can get the types of questions to our counsel, our legal counsel, at which Mr. Wichmann is invited to come...."

See id. Part 2 (Feb. 21, 2018), at 31:18 - 32:43.

88. Other Council Members noted at the hearing that their position was based in part on advice from Ms. Stewart, and that their ultimate legislative action would be based, at least in part, on the advice of the City Attorney, Ms. Stewart.

89. For example, Council Member Gary Waugaman stated, "there is a legal issue involved in this." Council Member Waugaman then proceeded to read from a legal memorandum, concluding: "I am convinced that any denial of the proposed map amendment by the City Council will not withstand judicial review." *See, e.g., id.* Part 2, at 42:40 - 45:46.

90. Council Member Waugaman continued, "what I've been told by a couple of attorneys that I talked to about this, is if the Sisters, the developer, or the Sisters and the developer, wind up that they decide if this gets turned down to sue, we're probably going to lose, and that's just an opinion out there but I have to look at that as a council member." *See id.* Part 2, at 46:18 - 46:50.

91. Upon information or belief, one of the "attorneys" Mr. Waugaman referred to was Ms. Stewart, or another attorney from the Adams Stepner Firm.

92. Indeed, Council Member Greg Kilburn addressed the attendees at the hearing stating: "Throughout this process, under the constant guidance of Mayor Callery, counsel Wichmann, [and] **counsel Stewart** we have tried as best we could to follow KRS 100.213." *See id.* Part 2, at 1:01:16 - 1:01:32.

93. Council Member Kilburn summarized his remarks by saying: “My greatest fear, and I gravely fear this, is that if we vote ‘no’ on this in the face of an administrative record ... my fear is this, let’s say we vote this down, I believe we would stand a very great chance that we would subject the City to legal jeopardy that could well be in the millions of dollars.” *See id.* Part 2, at 1:05:54 - 1:07:10; *see also id.* Part 2, 1:10:18 - 1:10:24 (concluding by saying it is an honor to serve with Ms. Stewart).

94. Per a prior agreement among Council, they voted to table action on the Map Amendment and Text Amendment until after an executive session with the City Attorney.

F. Ms. Stewart advises Council on the record at the special meeting to take legislative action on the Map Amendment and Text Amendment.

95. The Council held a special meeting on March 6, 2018 to vote on whether to adopt the Map Amendment and Text Amendment as recommended by the KCPC.

96. Ms. Stewart presided over the special meeting and called on Council for a motion to open voting on the proposed Amendments. *See Villa Hills Special Meeting Video Record* (March 6, 2018), at 2:13 - 3:03 (Ms. Stewart directed: “at this point I would call for a motion onto the floor [to vote on the Map Amendment and Text Amendment].”), attached hereto as Exhibit 12.

97. Following such a motion, Council Member Scott Ringo asked: “Can our attorney, can the attorney please review for all of Council together exactly the parameters of which we are to be voting on this tonight?” *See id.*, at 3:48 - 3:55.

98. Then - on the record - **Ms. Stewart openly advised the Council regarding the adoption of the Map Amendment and Text Amendment.** *See id.*, at 3:50 - 5:15.

99. During the special meeting, Ms. Stewart continued to field questions from Council members, advised them what constitutes substantial evidence, opined on how a court

would handle findings in a judicial review of the vote, and discussed case law “precedent” on these matters without sharing the case names or citations. *See, e.g., id.* at 5:53 - 5:58; 6:08 - 8:34.

100. At one point, Council Member Ringo asked: “So at what point during this entire process, outside of the [KCPC] meeting, was City Council ever get to hear what the public felt about the plan as proposed?” *Id.*, at 8:35 - 8:47.

101. Ms. Stewart advised “that’s the point of the [KCPC] hearing... under the statute the planning commission...is the agent for the city which holds the evidentiary hearing under the statutes.” *See id.*, at 8:48 - 9:10.

102. Ms. Stewart did not advise Council Member Ringo that the Council was entitled to conduct *its own* trial-type evidentiary hearing in addition to that conducted by the KCPC.

103. Mr. Ringo expressed his frustration with the process explained by Ms. Stewart, stating: “I guess the frustration I have, is that we’re here tonight to vote, we’ve clearly heard we’ve seen in two meetings in the last 3 weeks, we have 2,000 signatures [opposing the Sanctuary Project], what do we have in this city 4,000 votes?...when were we going to be able to hear that as part of the record?” *Id.* at 9:20 - 10:36.

104. Ms. Stewart responded, “that should have been heard at the evidentiary hearing before ... the planning commission.” *Id.* at 10:39 - 10:47.

105. Mr. Ringo replied: “[The KCPC] voted in favor of it, **now you’ve [Ms. Stewart] brought it before us, and I feel like the only decision I’m being asked to make, is yes.**” *Id.* at 10:52 - 11:01 (emphasis added).

106. Council Member Greg Bruns then stated, “I don’t feel like that this process is doing the City of Villa Hills justice.” *Id.* at 14:31 - 14:45.

107. Council Member Ringo later spoke directly to his inability to obtain advice on how to vote down the proposed Amendments: “I’ve never experienced more legal controversy about a topic as I have on this development issue ... I have nothing but respect for our city attorneys, but in this very moment **I still don’t feel that I know exactly what I legally can and can’t do to try to influence a change in this development. I feel like I’m being shoved into a voting booth with only one lever marked ‘Yes.’**” *Id.* at 24:50 - 25:30 (emphasis added).

108. Council Member Waugaman stated: “Like I said in the last meeting, there is a legal issue here ... there are legal ramifications of a no vote if this fails ... I have spent a lot of time seeking legal guidance on this issue, but the answer seems to always be coming up to the same for me, so I am once more going to review the same legal statement I read to you last meeting.” *Id.*, at 33:37 - 34:07.

109. Mr. Waugaman then read from a legal memorandum that opines rejection of the KCPC’s recommendation would not survive judicial review. *Id.*, at 34:14 - 36:47.³

110. Subsequently, Council voted to adopt the Map Amendment four to two. *See, generally, id.*; *see also* Council Meeting Minutes (March 6, 2018), attached hereto as Exhibit 13.

111. The Council also voted to adopt the Text Amendment four to two. *See, generally, Exhibit 12; see also Exhibit 13.*

112. Two of the Council Members who voted in favor of adoption of the KCPC’s recommendation were Council Member Waugaman (who expressly relied on the legal advice he apparently received from the Adams Stepner Firm as the basis for his vote) and Council Member Koenig (whose son stood to benefit from the approval as the listing agent for the contiguous Pathfinder Property).

³ Council Member Waugaman did not identify the author of the legal memorandum, but it stands to reason that it was prepared by an attorney at the Adams Stepner Firm.

113. Moreover, the Text Amendment was adopted without a public hearing on the matter.

V. GROUNDS FOR REVERSAL AND REMAND ON JUDICIAL REVIEW.

COUNT ONE

THE IMPROPERLY NOTICED HEARING CONSTITUTED
A VIOLATION OF PETITIONERS' RIGHTS TO DUE PROCESS

114. Petitioners incorporate all of the foregoing allegations as if fully restated herein.

115. KRS 100.211(2)(b)(1), 100.211(3), and KRS 100.207, require that notice of the public hearing be provided in accordance with KRS 424.

116. KRS 424.140(1) requires that: "Any advertisement of a hearing, meeting or examination shall state the time, place and purpose of the same."

117. KRS 424.130(1)(b) requires that "the advertisement shall be published at least once ... provided that one (1) publication occurs *not less than seven (7) days ... before the occurrence of the act or event.*" (emphasis added).

118. The KCPC failed to publish notice of the January 16, 2018 hearing at Lakeside Christian Church seven or more days in advance of its occurrence.

119. The KCPC did not publish a notice until Friday, January 12, 2018 – only four days before the event.

120. Even then, the published notice failed to state the "purpose" of the hearing as required by KRS 424.140(1): the only purported trial-type evidentiary hearing on the proposed Amendments.

121. Mailed notice on January 10th to the adjoining property owners was also defective. *See* KRS 100.212(2).

122. This statutorily defective notice constituted a *per se* violation of Petitioner's due process rights.

123. Furthermore, the improper notice (coupled with the confusion caused by an earlier notice for a hearing on January 9th that never took place) robbed opponents (including Petitioners) of the proposed Amendments of their opportunity to be heard and of their ability to establish a fuller evidentiary record in opposition to the Sanctuary Project.

124. Thus, Petitioners were not given the opportunity to be heard at a meaningful time and in a meaningful manner.

125. The Council's decision to hold an argument-type hearing, which limited Council to the record compiled from a defectively noticed evidentiary hearing, further violated Petitioners' rights to due process and made the Council's decision on that record arbitrary and capricious. *See, e.g.*, Ky. Const. § 2.

126. Based on the foregoing, Petitioners were not afforded statutorily required due process.

127. Accordingly the Court should vacate the Council's legislative action and remand the matter for proceedings consistent with the relief requested in this Petition.

COUNT TWO

THE IMPROPERLY COMPILED ADMINISTRATIVE RECORD CAUSED THE COUNCIL'S LEGISLATIVE ACTION TO BE ARBITRARY AND CAPRICIOUS

128. Petitioners incorporate all of the foregoing allegations as if fully restated herein.

129. The Council is the ultimate authority on zoning changes.

130. The Council's decision to adopt the Map Amendment and Text Amendment must not be made arbitrarily.

131. A decision is arbitrary where it is not supported by substantial evidence.

132. The KCPC failed to make a record of all of the evidence, including the critical exchanges between the KCPC, the proponents, and the opponents near the end of the January 16, 2018 hearing.

133. Accordingly, the Council could not review the complete record evidence, making any decision on the Map Amendment and Text Amendment an arbitrary one. *See, e.g., Ky. Const. § 2.*

134. Moreover, the KCPC limited opponents of the Map Amendment to testimony concerning its relation to the Comprehensive Plan and gave express assurances that opponents could present additional information to the Council, who was the ultimate decision maker.

135. When opponents tried to present such additional information to the Council regarding conflicts of interest, inappropriate executive sessions, overwhelming public opposition, and the like, they were told it was not a part of the administrative record and that such evidence should have been presented at the hearing before the KCPC.

136. Thus, the record was both improperly transcribed and improperly restricted, depriving opponents of a meaningful opportunity to be heard in violation of their rights to due process.

137. The Court should vacate the Council's legislative action adopting the Map Amendment and Text Amendment and remand the matter to proceed consistent with the relief requested in this Petition.

COUNT THREE

THE REPRESENTATION OF THE APPLICANT AND THE CITY BY
THE ADAMS STEPNER FIRM CONSTITUTED A CONFLICT
OF INTEREST AND RESULTED IN ARBITRARY FAVORITISM
IN VIOLATION OF PETITIONERS' RIGHTS TO DUE PROCESS

138. Petitioners incorporate all of the foregoing allegations as if fully restated herein.

139. Under Kentucky law, “[a]ny bias involving a conflict of interest ... is expressly prohibited as arbitrary.” *See Warren County Citizens for Managed Growth v. Bd. of Comm’rs*, 207 S.W.3d 7, 17 (Ky. App. 2006); *see also* Ky. Const. § 2.

140. A lawyer owes a client loyalty and independent judgment, and “shall not represent a client if the representation involves a concurrent conflict of interest.” SCR 3.130(1.7)(cmt. 1).

141. Due to the Adams Stepner Firm’s concurrent representation of the City, and the applicants for the Amendments, Ms. Stewart could not provide objective advice to Council regarding its legal options with respect to approving or denying the Amendments.

142. The Adams Stepner Firm’s representation of the Monastery and Ashley as applicants, while also simultaneously advising the Council on the adoption of the Amendments for which the applicants applied, is inherently repugnant and contrary to fundamental fairness.

143. A zone amendment proceeding in which the legislative body is being advised on how to vote by a lawyer who simultaneously represents the third-party applicants inherently favors the applicants, and is therefore fundamentally arbitrary and unfair in violation of basic tenets of due process. *See, e.g.*, Ky. Const. § 2.

144. With regard to the Map Amendment, several Council Members verbally announced that they had based their vote on the advice provided by the City Attorney, Ms. Stewart of the Adams Stepner Firm.

145. Ms. Stewart even directly advised Council Members on the record before and during the actual vote on the proposed Map Amendment on March 6, 2018.

146. Given that this advice was tainted by the Adams Stepner Firm's representation of the third-party applicants, the resulting Council vote was arbitrary, and thus, a violation of Kentucky law. *See, e.g.*, Ky. Const. § 2.

147. Moreover, the conflicted representation demonstrates a disregard for, and constitutes a clear violation of, the opponent-Petitioners' rights to procedural due process throughout the entire zoning amendment process.

148. On its face, the Adams Stepner Firm's concurrent representation of the City, the Monastery, and the developer created an unfair advantage to the proponent-Respondents throughout the entire zoning application process.

149. Such advantage manifested itself in the preferential treatment proponent-Respondents received at the February 21, 2018 argument-type hearing, and in the apparent private access certain proponents had to Council outside of public hearings.

150. Accordingly, the Court should vacate the Council's adoption of the Map Amendment and remand the matter to proceed consistent with the relief sought in this Petition.

COUNT FOUR

COUNCIL MEMBER KOENIG'S FAILURE TO RECUSE HERSELF DESPITE A CONFLICT OF INTEREST WAS A VIOLATION OF PETITIONERS' RIGHTS TO DUE PROCESS

151. Petitioners incorporate all of the foregoing allegations as if fully restated herein.

152. Under Kentucky law, "[a]ny bias involving a conflict of interest ... is expressly prohibited as arbitrary." *See Warren County Citizens for Managed Growth v. Bd. of Comm'rs*, 207 S.W.3d 7, 17 (Ky. App. 2006); *see also* Ky. Const. § 2.

153. Council Member Koenig's son, Adam Koenig, is the listing agent for the Pathfinder Property adjoining the Monastery Property.

154. The Pathfinder Property was studied as part of the small area study and is being considered for inclusion in the development by Ashley.

155. Rezoning the Monastery Property to R-1EE stands to positively impact the market value of the Pathfinder Property that is being listed by Adam Koenig.

156. Council Member Koenig not only participated in voting to adopt the Map Amendment, she also participated in the deliberative process with other Council Members throughout the zone change proceedings.

157. Calls for her recusal during the argument-type hearing were forbidden by Mayor Callery and Attorney Wichmann.

158. Accordingly, Council Member Koenig's vote should be held illegal and void as arbitrary, and her participation in the deliberative process prior to the vote should be remedied by vacating the legislative action of the entire Council on the Map Amendment and Text Amendment.

159. The Court should vacate the Council's adoption of the Map Amendment and Text Amendment and remand the matter to proceed without participation from Council Member Koenig.

COUNT FIVE

THE COUNCIL'S LEGISLATIVE ACTION ADOPTING THE KCPC'S RECOMMENDATION ON THE PROPOSED AMENDMENTS WAS NOT BASED ON SUBSTANTIAL EVIDENCE

160. Petitioners incorporate all of the foregoing allegations as if fully restated herein.

161. Legislative action on proposed zoning map amendments and text amendments must be supported by substantial evidence.

162. The KCPC improperly restricted the evidence that could be presented at the January 16, 2018 trial-type hearing, while providing assurances, which ultimately proved false, that opponent-Petitioners could have their say before Council.

163. Additionally, the evidence presented at the only purported trial-type hearing was not properly transcribed, and no evidence was taken on the Text Amendment.

164. Accordingly, adoption of the Map Amendment and Text Amendment were not supported by the requisite substantial evidence.

165. Moreover, repeated statements from several Council Members demonstrated that their votes were based on the advice of legal counsel, who had a conflict of interest throughout the process.

166. The requirement that the legislative action be based upon substantial evidence in the record cannot be supplanted by legal advice, especially legal advice from conflicted counsel.

167. Thus, the legislative action should be vacated and remanded for proceedings consistent with the relief sought in this Petition.

COUNT SIX

THE COUNCIL'S LEGISLATIVE ACTION ADOPTING THE KCPC'S RECOMMENDATION ON THE PROPOSED TEXT AMENDMENT WAS BEYOND ITS STATUTORY AUTHORITY

168. Petitioners incorporate all of the foregoing allegations as if fully restated herein.

169. KRS 100.211(3) requires that: "The planning commission shall hold at least one (1) public hearing after notice as required by KRS Chapter 424 and make a recommendation as

to the text of the amendment and whether the amendment shall be approved or disapproved and shall state the reasons for its recommendation.”

170. Notwithstanding the improper notice for the January 16, 2018 public hearing, at such hearing the City requested that comment on the Text Amendment be tabled.

171. The KCPC formally tabled the hearing on the Text Amendment “until the next regularly scheduled [KCPC] meeting.” *See* Minutes from KCPC Special Meeting (Feb. 1, 2018).

172. Despite formally tabling discussion, the KCPC subsequently issued a Statement of Action and Recommendation approving the Text Amendment and forwarding the Text Amendment to the Council for final action.

173. The Council adopted this recommendation on March 6, 2018, despite the fact that there had never been a public hearing on the Text Amendment. Council’s adoption of the recommendation was *ultra vires*, as the act exceeded the Council’s statutory authority under Kentucky law. *See* KRS 100.211(3).

174. Accordingly, the legislative action should be vacated and remanded for proceedings consistent with the relief sought in this Petition.

WHEREFORE, Defend VH Group, LLC and the Individual Petitioners, respectfully pray for judgment and an order:

- A. Setting a briefing schedule on the issues relating to this Petition;
- B. Vacating the legislative action by the Villa Hills City Council that adopted the Map Amendment and Text Amendment;
- C. Remanding the matter for a properly noticed, conducted, and transcribed evidentiary trial-type hearing on the Map Amendment and Text Amendment;

D. Ordering Council to exclude any member with a conflict of interest, including Council Member Koenig, from participating in deliberations or a vote on the proposed Amendments;

E. Ordering the City and Council to exclude the Adams Stepler Firm, including any counsel retained at its direction, from representing the City and Council in this matter, and further exclude such counsel from providing any advice on the proposed Map Amendment and Text Amendment to the City, or Council; and

F. Granting Petitioners any additional relief to which they may be entitled.

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Respectfully submitted,

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