

COMMONWEALTH OF KENTUCKY  
KENTON CIRCUIT COURT  
DIVISION 4  
CASE NO. 18-CI-00638

*Electronically Filed*

DEFEND VH GROUP, LLC, et al.

PETITIONERS

vs.

RESPONDENTS

KENTON COUNTY PLANNING  
COMMISSION, et al.

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MERIT BRIEF OF PETITIONERS

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. STATEMENT OF FACTS..... 2

    a. Overview..... 2

    b. Application for a Map Amendment and Text Amendment..... 3

    c. The Only Trial-Type Public Hearing was Improperly Noticed..... 4

*Resource Development Corp. v. Campbell County Fiscal Court*, 543 S.W.2d 225  
        (Ky. 1976)..... 5

    d. The Emergence of a Conflict of Interest at the Trial-Type Hearing and an  
        Incomplete Hearing Record..... 6

    e. The Institution of a Limited Argument-type Hearing, Contrary to the Express  
        Wishes of Some Councilmembers..... 9

*City of Louisville v. McDonald*, 420 S.W.2d 173 (Ky. 1971)..... 10

*Resource Development Corp. v. Campbell County Fiscal Court*, 543 S.W.2d 225  
        (Ky. 1976)..... 10

    f. The Argument-Type Hearing before the Council and the Improper Restriction of  
        the Petitioners’ Arguments..... 11

*KRS 100.213* ..... 13

    g. City Attorney Stewart Advised Council on the record at the Special Meeting to  
        Take Legislative Action on the Map Amendment and Text Amendment..... 14

III. ARGUMENT..... 16

*KRS 100.211* ..... 16

*Hilltop Basic Res., Inc. v. County of Boone*, 180 S.W.3d 464 (Ky. 2005) ..... 17

*Louisville v. McDonald*, 470 S.W.2d 173 (Ky. 1978). ..... 17

*Morris v. Cattletsburg*, 437 S.W.2d 753 (Ky. 1969) ..... 18

*Resource Development Corp. v. Campbell County Fiscal Court*, 543 S.W.2d 225  
    (Ky. 1976)..... 17

	<i>Warren County Citizens for Managed Growth, Inc. v. Bd. of Commr's</i> , 207 S.W.3d 7 (Ky. App. 2006).....	17
	<i>KRS 100.347</i> .....	17
	<i>KRS 100.347(3)</i> .....	17
a.	The Council’s Adoption of the Map Amendment and Text Amendment was based on an incomplete record compiled at an improperly noticed hearing.....	18
	<i>Hilltop Basic Resources, Inc. v. County of Boone</i> , 180 S.W.3d 464 (Ky. 2005).....	19
	<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	19
	<i>KRS 100.182</i> .....	19
	<i>KRS 100.211(2)(b)</i> .....	19
	<i>KRS 100.211(3)</i> .....	19
	i. The KCPC did not hold a properly noticed due process hearing.....	19
	<i>KRS 100.207</i> .....	19
	<i>KRS 100.211</i> .....	19
	<i>KRS 100.211(2)(b)(1) and 3</i> .....	19
	<i>KRS 424.130(1)(b)</i> .....	20
	<i>KRS 424.139(b)</i> .....	20
	<i>KRS 424.140(1)</i> .....	20
	ii. The defective notice materially prejudiced the substantive rights of Petitioners, and was not remedied by the KCPC or the Council. ....	21
b.	The Council’s decision was tainted by conflict because the Council was directly advised on the zone change by a City Attorney whose firm also represented the zoning applicant in the same zoning proceedings.....	24
	<i>American Beauty Homes Corp. v. Louisville &amp; Jefferson County Planning &amp; Zoning Com.</i> , 379 S.W.2d 450 (Ky. App. 1964) .....	24
	<i>Hilltop Basic Res., Inc. v. County of Boone</i> , 180 S.W.3d 464 (Ky. 2005) .....	24
	<i>Louisville v. McDonald</i> , 470 S.W.2d 173 (Ky. 1971) .....	25
	<i>Morgan v. U.S.</i> , 304 U.S. 1 (1938) .....	24

	<i>Lagrange City Council v. Hall Bros. Co.</i> , 3 S.W.3d 765 (Ky. App. 1999) ..	25, 26, 27
	<i>Macomb County Prosecutor v. Murphy</i> , 233 Mich. App. 372, N.W.2d 745 (1999)	25
	<i>National-Southwire Aluminum Co. v. Big Rivers Electric Corp.</i> , 785 S.W.2d 503 (Ky. App. 1990) .....	25, 29
c.	At least three of the four votes to adopt the Amendments were based either on legal advice or self-interest, not substantial evidence.....	29
	<i>Hilltop Basic Res., Inc. v. County of Boone</i> , 180 S.W.3d 464 (Ky. 2005) .....	29, 30
	<i>National-Southwire Aluminum Co. v. Big Rivers Electric Corp.</i> , 785 S.W.2d 503 (Ky. App. 1990) .....	30
	Mark W. Cordes, <i>Policing Bias and Conflicts of Interest in Zoning Decision Making</i> , 65 N.D. L. Rev. 161 (1989) .....	30
IV.	CONCLUSION.....	31

## PETITIONERS' MERIT BRIEF

### I. INTRODUCTION.

Petitioners Defend VH Group, LLC (the “Group”), *et al.*,<sup>1</sup> hereby submit their Merit Brief in support of their Petition for Judicial Review (Apr. 3, 2018) of the legislative action by Respondent City of Villa Hills City Council (the “Council”) adopting the recommendation by the Kenton County Planning Commission (the “KCPC”) for a Map Amendment and Text Amendment to the Zoning Ordinance for the City of Villa Hills (“Villa Hills”).

Even at a glance, the circumstances surrounding the final underlying zoning proceedings are sufficient to raise a suspicious eyebrow: a critical hearing on a matter that will completely reshape Villa Hills was pushed through the KCPC on short notice – then adopted by the Council on advice of the City Attorney, whose law firm also represented the applicant seeking the zoning change.

But a close inspection of the record before the Court confirms the worst: not only does the City Attorney’s law firm represent the applicant *generally*, the law firm represented the applicant *in these very zoning proceedings*. And as the record shows, the Councilmembers who voted to adopt the zone changes by the narrowest of margins did so either on the advice of the City Attorney, or in line with their own apparent self-interests (the exploration of which was denied at the hearings on the matter).

Although there were several deficiencies with the administrative proceedings before the KCPC and the Council, the following constitute the most glaring violations of Petitioners’ right to constitutional due process:

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<sup>1</sup> Individual Petitioners include Henry Mitchell, Andrea Mitchell, Bob Stevens, Cathy Stevens, Tom Bogner, Janice Bogner, Gary Menne, Kathy Menne, Arnold Terrell, Jane Terrell, Lauren Overmann, and Justin Overmann.

- (1) Petitioners were denied an opportunity to be heard at a meaningful time and in a meaningful manner by the Council's reliance on a materially limited administrative record compiled at a statutorily defective hearing;
- (2) the Council's decision adopting the Amendments was arbitrary because it was tainted by conflict when the Council was directly advised on the zone change by the City Attorney, whose firm also represented the zoning applicant at the time; and
- (3) three of the four votes to adopt the Amendments were based on either the conflicted legal advice of the City Attorney, or self-interest, and not substantial evidence.

Under Kentucky law, the Council's decision adopting the zone change should be vacated and remanded for proceedings that comport with constitutional due process, that is, proceedings that are free from the taint of conflicts of interest and bias.

## **II. STATEMENT OF FACTS.**

### **a. Overview.**

Respondent Saint Walburg Monastery of Benedictine Sisters of Covington, Kentucky (the "Monastery") owns roughly 85 acres located to the north side of Amsterdam Road in Villa Hills, Kentucky (the "Monastery Property"), which it planned to sell to Respondent Ashley Commercial Group, LLC ("Ashley") for a planned development called the "Sanctuary Project." The Monastery, in combination with Ashley, sought a Map Amendment and Text Amendment to allow for the development of the Monastery Property, which is currently zoned institutional.

As proposed, the Sanctuary Project stands to increase the population of Villa Hills by fifty percent. Despite the magnitude of these proposed amendments, and contrary to fundamental due process requirements, Petitioners were denied a meaningful opportunity to present their opposition to the Council.

Worse, the same law firm that advised the Council on the matter also represented one or more of the third-party applicants, tainting all proceedings with an improper conflict of interest. This conflict appeared to manifest itself both in the decision by Council (members of which expressly based their vote on advice of the conflicted City Attorney), and the treatment of opponents of the development during the zoning proceedings.

Ultimately, the Council made its decision on an incomplete record, compiled from an improperly noticed evidentiary hearing. Consequently, the legislative actions of the Council adopting the proposed zoning Map Amendment and Text Amendment were arbitrary, beyond statutory authority, and not based on substantial evidence.

**b. Application for a Map Amendment and Text Amendment.**

In or around 2015, the Monastery announced its intent to sell the Monastery Property. Villa Hills, 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”).<sup>2</sup>

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.”<sup>3</sup>

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

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<sup>2</sup> See Villa Hills Study Final Report (March 2, 2017), at VH179 - VH180.

<sup>3</sup> See Traffic Impact Study for the Sanctuary Development (Dec. 2017), at VH066.

1 and 2 development plans, zoning map amendments, subdivision plats, and waiver of subdivision regulations related to [Ashley’s] proposed development of the Property.”<sup>4</sup>

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).”<sup>5</sup>

The proposed Map Amendment was necessary to accommodate development plans for the Sanctuary Project, which included several single family homes and a four-story apartment building containing 187 apartments. As proposed, the Sanctuary Project “has the capability to increase Villa Hills’ population by 50% (from 7,500 to 11,000+) based on the maximum number of units that have been authorized in the small area study for the 115 acre site.”<sup>6</sup> In conjunction with the proposed Map Amendment, the City proposed a Text Amendment.<sup>7</sup>

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.

**c. The Only Trial-Type Public Hearing was Improperly Noticed.**

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.<sup>8</sup>

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<sup>4</sup> See Letter from the Monastery to KCPC (Dec. 1, 2017), VH374.

<sup>5</sup> See Letter from P. Darpel to City (Feb. 2, 2018), enclosing KCPC Statement of Action and Recommendation (PC1712-0005), at VH025 - VH026.

<sup>6</sup> See Application for Consensus Capital Project List, at VH120.

<sup>7</sup> See Letter from P. Darpel to the City (Feb. 1, 2018), enclosing KCPC Statement of Action and Recommendation Number (PC1711-0004), at VH001 - VH003.

<sup>8</sup> See Legal Notice to Kentucky Enquirer (Dec. 25, 2017), at VH375.



KCPC published notice of the special meeting *on Christmas day*, December 25, 2017 in the Kentucky Enquirer.<sup>9</sup> 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.<sup>10</sup>

The published notice did *not* indicate that this hearing would serve as a “trial-type”<sup>11</sup> due process evidentiary hearing; that it would be the *only* such trial-type hearing on the matter; or that KCPC planned a vote to recommend the project. The notice only stated: “Please plan to attend if you want to learn more about [the proposed amendments] or to provide input.”<sup>12</sup> A similar notice was mailed to 47 adjoining property owners. However, the trial-type hearing on the Map Amendment and Text Amendment did not go forward on January 9th as noticed because the Commission Chambers at PDS could not accommodate the number of people that sought to participate in the special meeting.

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.<sup>13</sup>

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

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<sup>9</sup> *See id.*

<sup>10</sup> *Id.*

<sup>11</sup> 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, during 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.*

<sup>12</sup> *Id.*

<sup>13</sup> *See* Legal Notice to Adjoining Owners (Jan. 10, 2018), at VH376 (emphasis in original).

new date (“January 16, 2018”), the new location (“Lakeside Christian Church”), and the agenda mentioning the proposed Map Amendment and Text Amendment.<sup>14</sup>

The published notice did *not* indicate that this hearing would serve as a “trial-type” due process evidentiary hearing; that it would be the *only* such trial-type hearing on the matter; or that KCPC planned a vote to recommend the project. The notice only stated: “Please plan to attend if you want to learn more about [the proposed amendments] or to provide input.”<sup>15</sup>

**d. The Emergence of a Conflict of Interest at the Trial-Type Hearing and an Incomplete Hearing Record.**

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.

With regard to the proposed Text Amendment, Villa Hills requested that the discussion on it be tabled, and the KCPC voted to “table the issue until the next regularly scheduled meeting.”<sup>16</sup> Accordingly, the KCPC proceeded only with discussion on the Map Amendment.

The first speaker to address the KCPC on the proposed Map Amendment was attorney Gerry Dusing, a named partner of the law firm Adams, Stepner, Woltermann & Dusing, PLLC (the “Adams Stepner Firm”).<sup>17</sup> Mr. Dusing stated: “Ladies and Gentlemen of the Commission, my name is Gerry 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.*”<sup>18</sup> Mr. Dusing also stated, “I’ve known the Benedictine Sisters a long time...this development will be [Villa Hills’]

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<sup>14</sup> See Legal Notice to Kentucky Enquirer (Jan. 12, 2018), at VH381.

<sup>15</sup> *Id.*

<sup>16</sup> Minutes from KCPC Special Meeting on Jan. 16th, 2018 (Feb. 1, 2018), at VH384.

<sup>17</sup> See The Council’s Answer (Aug. 17, 2018), at ¶48.

<sup>18</sup> See KCPC Video Record Part 1 (Jan. 16, 2018) (VH365), at 58:30 - 58:46 (emphasis added) (KCPC Video Record also available online at <https://tbkn.viebit.com/player.php?hash=CkQeJzhMOS5J>).

crown jewel.”<sup>19</sup> 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.”<sup>20</sup>

The Group, represented by counsel, objected to the special meeting for, *inter alia*, having been improperly noticed.<sup>21</sup> Certain of the Group members and the Individual Petitioners addressed the KCPC at the hearing.<sup>22</sup> Other Individual Petitioners were unable to make the meeting on the short notice provided by the KCPC.<sup>23</sup>

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. Mr. Darpel repeatedly assured Petitioners that the ultimate decision on the Map Amendment was that of the Council.<sup>24</sup>

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 and the breadth of the public’s opposition to the proposed Map Amendment and Sanctuary Project) at the hearing before Council.<sup>25</sup> At one point, Mr. Darpel instructed an

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<sup>19</sup> See KCPC Video Record Part 1 (Jan. 16, 2018) (VH365), at 1:19:30 - 1:20:03.

<sup>20</sup> See KCPC Video Record Part 1 (Jan. 16, 2018) (VH365), at 1:27:22 - 1:27:57.

<sup>21</sup> See KCPC Video Record Part 1 (Jan. 16, 2018) (VH365), at 1:45:00 - 1:46:46.

<sup>22</sup> See, generally, KCPC Video Record Part 1 (Jan. 16, 2018) (VH365), at 1:45:00 - KCPC Video Record Part 2 (Jan. 16, 2018) (VH366), at 1:02:30 (KCPC Video Record Part 2 also available online at <https://tbnk.viebit.com/player.php?hash=8Zab7kX0PJGP>).

<sup>23</sup> See, generally, KCPC Sign-In Sheet (Jan. 16, 2018), at VH260 - VH271.

<sup>24</sup> See, e.g. KCPC Special Meeting Minutes, at VH389; see also KCPC Video Record Part 3 (Jan. 16, 2018) (VH366), at 31:56 - 32:12 (KCPC Video Record Part 3 also available online at <https://tbnk.viebit.com/player.php?hash=EG9xchdTWYe3>).

<sup>25</sup> See Verified Petition (Apr. 3, 2018), at ¶56.

opponent to the Sanctuary Project that he contact Villa Hills City Attorney Mary Ann Stewart (“City Attorney Stewart”) about the options for stopping the development process.<sup>26</sup>

City Attorney 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 of those entities), as well as a duty of loyalty to the City.<sup>27</sup> City Attorney Stewart had 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 as well).<sup>28</sup>

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.”<sup>29</sup> Additionally, the KCPC improperly transcribed the record of the evidence proffered for and against the Map Amendment. At 52:42 of Part 3 of the KCPC Video Record, the video cuts out in the middle of KCPC’s questioning of several proponents and opponents.<sup>30</sup>

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.

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<sup>26</sup> See KCPC Video Record Part 2 (Jan. 16, 2018) (VH366), at 1:09:00 - 1:09:10.

<sup>27</sup> See SCR 3.130.

<sup>28</sup> See KCPC Video Record Part 1 (Jan. 16, 2018) (VH365), 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.”).

<sup>29</sup> See Minutes from KCPC Special Meeting on Jan. 16th, 2018 (Feb. 1, 2018), at VH384.

<sup>30</sup> See also KCPC Video Record Part 3 (Jan. 16, 2018) (VH367), at 52:42 - 59:01 (displaying only a black screen with no audio).

Moreover, the vote itself was not recorded. Consequently, there is *no record* (either in the incomplete video transcript or the KCPC meeting minutes) of a vote by KCPC approving the proposed Text Amendment.<sup>31</sup>

**e. The Institution of a Limited Argument-type Hearing, Contrary to the Express Wishes of Some Councilmembers.**

Despite the improperly noticed KCPC hearing, and the incomplete record of that hearing, the Council proceeded to schedule a limited “argument-type” public hearing on the proposed Amendments for February 21, 2018. Doing so confined the Council to the defective KCPC administrative record, which was compiled at the improperly noticed KCPC hearing.

City Attorney Stewart advised the Council to conduct the limited argument-type hearing, despite the 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 Councilmembers).<sup>32</sup>

Indeed, City Attorney Stewart copied the Council on correspondence sent to Petitioners on Adams Stepler Firm letterhead in which she stated that the Council would only conduct an argument-type hearing.<sup>33</sup> Numerous Councilmembers stated on the record at subsequent public hearings that they felt confined by the administrative record, suggesting they had not been

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<sup>31</sup> Compare Minutes from KCPC Special Meeting on Jan. 16th, 2018 (Feb. 1, 2018), at VH393 with KCPC Statement of Action and Recommendation Number (PC1711-0004), at VH002 (“A public hearing was held on this application on Tuesday, January 16, 2018 at 6:15pm at Lakeside Christian Church[.]”) (emphasis added).

<sup>32</sup> See, e.g., Villa Hills Special Meeting Video Record (March 6, 2018) (VH373), at 8:35 - 9:10 (Councilmember Ringo asks City Attorney Stewart, “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?” City Attorney Stewart replied, “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.”) (Villa hills Special Meeting Video Record is also available online at <https://tbk.viebit.com/player.php?hash=FJRQOUJi4GII>).

<sup>33</sup> See, e.g., Letter from City Attorney Stewart (Feb. 20, 2018), at VH394 - 396.

advised that the Council had the ability to conduct its own trial-type evidentiary hearing and make different findings than those made by the KCPC.<sup>34</sup>

City Attorney 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 the Council regarding the procedural options that were available to the Council, and the impact different types of hearings would have on the Council's ability to receive additional evidence outside of that presented to the KCPC. Any legal advice City Attorney Stewart or other members of the Adams Stepner firm gave to the Council regarding the Sanctuary Project, *while she and her firm simultaneously represented the Sanctuary Project's proponents*, was irreparably tainted by City Attorney Stewart's clear conflict of interest.

The Adams Stepner Firm's conflict of interest deprived the Council, and therefore, by extension, the people of Villa Hills (including but not limited to Petitioners), of a City Attorney who had undivided loyalty to the Council and Villa Hills, and who was capable of exercising independent judgment with respect to the Council's consideration of the KCPC's recommendation regarding the Sanctuary Project.

Neither City Attorney Stewart, nor the Adams Stepner Firm, ever formally recused themselves from the Sanctuary Project proceedings, and no written waiver of the conflict of interest from Villa Hills or any Councilmember was ever mentioned or offered into the record.<sup>35</sup>

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<sup>34</sup> See, e.g., Villa Hills Special Meeting Video Record (March 6, 2018) (VH373), at 8:35 - 9:10 and 14:31 - 14:45; 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).

<sup>35</sup> Attorney Frank Wichmann presided over the argument-type hearing, while City Attorney Stewart attended in an unknown capacity. Mr. Wichmann did not attend the Special Meeting adopting the Amendments, as his role was limited to presiding over the February 21, 2018 public hearing. See Letter from City Attorney Stewart (Feb. 20, 2018), at VH394.

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

The Council held the argument-type public hearing on February 21, 2018, which City Attorney Stewart attended in an undisclosed capacity.<sup>36</sup> Several Councilmembers made comments that indicated they had not reviewed the administrative video record of the hearing before the KCPC. Moreover, no members of Council *could* have reviewed the complete record because of the KCPC's failure to transcribe the entire evidentiary proceedings and the actual vote.

The Group urged the Councilmembers to review the transcript of the KCPC hearing, and requested that the Council table the matter and reconvene to conduct a full evidentiary, trial-type hearing.<sup>37</sup> Individual Petitioners also attended and attempted to present their arguments to the Council.

During the Council hearing, Group member and Individual Petitioner Henry Mitchell attempted to make arguments concerning the integrity of the compiled record. Mr. Mitchell attempted to raise a question regarding the propriety of Councilmember Mary Koenig's participation in voting on the matter due to her own apparent conflict of interest.<sup>38</sup>

Councilmember Koenig's son, Adam Koenig, is the listing agent for the Pathfinder Property, which is currently for sale for \$3,200,000 and is contiguous to the Monastery

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<sup>36</sup> Attorney Frank Wichmann was retained for the purpose of presiding over the argument-type hearing, but City Attorney Stewart continued to advise the Council.

<sup>37</sup> See Special Meeting Minutes (Feb. 21, 2018), at VH337 (“[Counsel for Defend VH Group] acknowledged Council’s decision to hold an argumentative style hearing but urged Council to table the hearing and hold an evidentiary trial style hearing after giving proper notice before the 45-day deadline in the zoning ordinance expires.”).

<sup>38</sup> See Villa Hills Special Meeting Video Record Part 1 (Feb. 21, 2018) (VH369), at 41:19 - 43:25 (Part 1 of the Special Meeting Video Record is also available online at <https://tbkn.viebit.com/player.php?hash=OBFNZeweHyg7>).

Property.<sup>39</sup> 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.

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.<sup>40</sup> 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 Council could not have become part of the KCPC record. Mr. Mitchell was therefore improperly prohibited from presenting argument relating to Councilmember Koenig's conflicts, among other items.

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.<sup>41</sup> 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 permitted to make a record of his objection on the Group's behalf.<sup>42</sup>

At the conclusion of the hearing, Councilmember Greg Kilburn spoke on behalf of the Council and stated:

As we've discussed previously and in consultation with some of the councilmembers, **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

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<sup>39</sup> See Verified Petition for Judicial Review (Apr. 3, 2018) at ¶82; see also Property Listing at <https://www.coldwellbanker.com/property/1100-Amsterdam-Rd-Park-Hills-KY-41011/32104972/detail?src=agent-profile-featured-address> (last viewed Oct. 19, 2018); see also Small Area Study (VH179 - 180).

<sup>40</sup> Villa Hills Special Meeting Video Record Part 1 (Feb. 21, 2018) (VH369), at 43:25 - 44:10; 44:55 - 45:55.

<sup>41</sup> See Villa Hills Special Meeting Video Record Part 2 (Feb. 21, 2018) (VH370), 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) (Villa Hills Special Meeting Video Record Part 2 is also available online at <https://tbnk.viebit.com/player.php?hash=S2qk87BaD02O>).

<sup>42</sup> See *id.* (VH370), at 30:02 - 30:30.



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.

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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...."<sup>43</sup>

Other Councilmembers noted at the hearing that their position was based in part on advice from City Attorney Stewart, and that their ultimate legislative action would be based, at least in part, on the advice of City Attorney Stewart. For example, Councilmember Gary Waugaman stated, "there is a legal issue involved in this." Councilmember Waugaman then proceeded to read from a legal memorandum ostensibly prepared for the Council by the Adams Stepner Firm (or its designee), concluding: "I am convinced that any denial of the proposed map amendment by the City Council will not withstand judicial review."<sup>44</sup>

Councilmember 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 councilmember."<sup>45</sup>

Indeed, Councilmember 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."<sup>46</sup>

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<sup>43</sup> See *id.* (VH370), at 31:18 - 32:43 (emphasis added).

<sup>44</sup> See, e.g., *id.* (VH370), at 42:40 - 45:46.

<sup>45</sup> See *id.* (VH370), at 46:18 - 46:50. Based on Mr. Waugman's comment at the hearing that he did not meet with residents or return emails "based on legal advice," it appears one or more of the "attorneys" Mr. Waugaman referred to was City Attorney Stewart, or another attorney from the Adams Stepner Firm. See Special Meeting Minutes (Jan. 16, 2018), at VH345.

<sup>46</sup> See *id.* (VH370), at 1:01:16 - 1:01:32.

Councilmember Kilburn summarized his remarks by saying: “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.”<sup>47</sup>

Per a prior agreement among the Council, they voted to table action on the Map Amendment and Text Amendment until after an executive session with the City Attorney.<sup>48</sup>

**g. City Attorney Stewart Advised Council on the record at the Special Meeting to Take Legislative Action on the Map Amendment and Text Amendment.**

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. City Attorney Stewart presided over the special meeting and called on Council for a motion to open voting on the proposed Amendments.<sup>49</sup>

Following such a motion, Councilmember 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?”<sup>50</sup> Then – on the record – *City Attorney Stewart openly advised the Council* regarding the adoption of the Map Amendment and Text Amendment.<sup>51</sup>

During the special meeting, City Attorney Stewart continued to field questions from the Council, advised them on what constituted 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 disclosing citations.<sup>52</sup>

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<sup>47</sup> See *id.* (VH370), at 1:05:54 - 1:07:10; see also *id.* (VH370), 1:10:18 - 1:10:24 (concluding his remarks by saying it is an honor to serve with City Attorney Stewart).

<sup>48</sup> See Special Meeting Minutes (Jan. 16, 2018), at VH344.

<sup>49</sup> See Villa Hills Special Meeting Video Record (March 6, 2018) (VH373), at 2:13 - 3:03 (City Attorney Stewart directed: “at this point I would call for a motion onto the floor [to vote on the Map Amendment and Text Amendment].”)

<sup>50</sup> See *id.* (VH373), at 3:48 - 3:55.

<sup>51</sup> See *id.* (VH373), at 3:50 - 5:15.

<sup>52</sup> See, e.g., *id.* (VH373), at 5:53 - 5:58; 6:08 - 8:34.

At one point, Councilmember 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?”<sup>53</sup> City Attorney 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.”<sup>54</sup> City Attorney Stewart did not advise Councilmember Ringo that the Council was entitled to conduct *its own* trial-type evidentiary hearing in addition to that conducted by the KCPC.

Mr. Ringo expressed his frustration with the process explained by City Attorney 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?”<sup>55</sup> City Attorney Stewart responded, “that should have been heard at the evidentiary hearing before ... the planning commission.”<sup>56</sup> To which Mr. Ringo replied: “[The KCPC] voted in favor of it, *now you’ve [City Attorney Stewart] brought it before us, and I feel like the only decision I’m being asked to make, is yes.*”<sup>57</sup>

Councilmember George Bruns then stated, “I don’t feel like that this process is doing the City of Villa Hills justice.”<sup>58</sup> And, Councilmember 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*

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<sup>53</sup> *Id.* (VH373), at 8:35 - 8:47.

<sup>54</sup> *See id.* (VH373), at 8:48 - 9:10.

<sup>55</sup> *Id.* (VH373), at 9:20 - 10:36.

<sup>56</sup> *Id.* (VH373), at 10:39 - 10:47.

<sup>57</sup> *Id.* (VH373), at 10:52 - 11:01 (emphasis added).

<sup>58</sup> *Id.* (VH373), at 14:31 - 14:45.

*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.'"*<sup>59</sup>

Councilmember 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."<sup>60</sup>

Councilmember Waugaman then read from a Villa Hills legal memorandum that opined that rejection of the KCPC's recommendation would not survive judicial review.<sup>61</sup>

Subsequently, Council voted to adopt the Map Amendment four to two.<sup>62</sup> The Council also voted to adopt the Text Amendment four to two.<sup>63</sup>

Three of the Councilmembers who voted in favor of adoption of the KCPC's recommendation were Councilmember Waugaman, Councilmember Kilburn, and Councilmember Koenig. Councilmember Waugaman and Kilburn each expressly relied on the legal advice they apparently received from the Adams Stepner Firm as the basis for their votes, whereas Councilmember Koenig's vote approving the Amendments patently stood to benefit her son as the listing agent for the contiguous Pathfinder Property. Moreover, the Text Amendment was adopted without any public hearing on the matter.

### **III. ARGUMENT.**

Municipal planning and zoning are statutorily regulated by KRS 100.211. In addition to, and in furtherance of, the regulations enumerated by statute, the Kentucky Supreme Court has

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<sup>59</sup> *Id.* (VH373), at 24:50 - 25:30 (emphasis added).

<sup>60</sup> *Id.* (VH373), at 33:37 - 34:07.

<sup>61</sup> *Id.* (VH373), at 34:14 - 36:47. Councilmember 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.

<sup>62</sup> *See, generally, id.* (VH373); *see also* Council Meeting Minutes (March 6, 2018), at VH357 - 359.

<sup>63</sup> *See, generally,* Villa Hills Special Meeting Video Record (March 6, 2018) (VH373); *see also* Council Meeting Minutes (March 6, 2018), at VH357 - 359.

held that interested parties to a zone change are entitled to the protections of constitutional due process.<sup>64</sup> These constitutional protections include “a hearing, the taking and weighing of offered evidence, a finding of fact based upon a consideration of the evidence and conclusions supported by substantial evidence.”<sup>65</sup> Additionally, zoning proceedings and decisions tainted by bias, corruption, or conflicts of interest are strictly prohibited as arbitrary.<sup>66</sup>

With regard to the gathering and weighing of evidence, 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.<sup>67</sup> If a compliant trial-type hearing is conducted by a planning commission, the reviewing legislative body may conduct 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.<sup>68</sup> “In any event, the ultimate decision must be made by the legislative body.”<sup>69</sup>

KRS 100.347(3) allows any person or entity claiming to be injured or aggrieved by any final action of the legislative body concerning a map amendment to appeal to the Circuit Court for review. Claims of bias or conflicts of interest require a determination of whether the proceedings comported with due process, and are within the scope of review of KRS 100.347.<sup>70</sup> On review, “[t]he action of an administrative body will be considered arbitrary if (1) the

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<sup>64</sup> *Louisville v. McDonald*, 470 S.W.2d 173, 177 (Ky. 1978).

<sup>65</sup> *Louisville v. McDonald*, 470 S.W.2d 173, 177 (Ky. 1978).

<sup>66</sup> *Hilltop Basic Res., Inc. v. County of Boone*, 180 S.W.3d 464 (Ky. 2005).

<sup>67</sup> *See Resource Development Corp. v. Campbell County Fiscal Court*, 543 S.W.2d 225, 227-228 (Ky. 1976).

<sup>68</sup> *Id.*

<sup>69</sup> *Louisville v. McDonald*, 470 S.W.2d at 179.

<sup>70</sup> *Warren County Citizens for Managed Growth, Inc. v. Bd. of Commr's*, 207 S.W.3d 7, 17 (Ky. App. 2006).

proceedings before the body did not afford procedural due process or (2) the action of the body was not supported by substantial evidence heard by it.”<sup>71</sup>

The record in this matter demonstrates several material deficiencies in the map and text amendment process, both with regard to the conduct of the KCPC, and the adoption of the Amendments by the Council. Specifically, the proceedings before the KCPC were improperly noticed and improperly limited, and therefore did not afford procedural due process to opponents of the Sanctuary Project. These violations were duplicated and aggravated during the proceedings before the Council, resulting in an arbitrary vote adopting the Amendments. Specifically, the adoption by the Council was arbitrary (a) because the Council’s Adoption of the Map Amendment and Text Amendment were based on a materially limited record compiled at an improperly noticed hearing, (b) because the Council’s decision was tainted by conflict when the Council was directly advised on the zone change by the City Attorney whose firm also represented the zoning applicant in the zoning proceedings; and (c) because three of the four votes to adopt the Amendments were tainted by either conflicted legal advice or self-interest creating a conflict of interest, not substantial evidence.

**a. The Council’s Adoption of the Map Amendment and Text Amendment was based on an incomplete record compiled at an improperly noticed hearing.**

KRS 100.211 requires that the proposed map and text amendments be referred to the planning commission before adoption. With regard to a map amendment, KRS 100.211(2) mandates that the commission shall “**1.** Hold at least one (1) public hearing after notice as required by this chapter; and **2.** Make findings of fact and a recommendation of approval or disapproval of the proposed map amendment to the various legislative bodies or fiscal courts

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<sup>71</sup> *Id.*; see also *Morris v. Cattletsburg*, 437 S.W.2d 753, 755 (Ky. 1969)

involved.”<sup>72</sup> Similarly, text amendments also require one “public hearing after notice 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 state the reasons for its recommendations.”<sup>73</sup>

Although planning commissions are relieved from strict compliance with the notice provisions by statute, the notice provisions nevertheless exist against the backdrop of required constitutional due process. Thus, notice must still be provided in a manner that affords fundamental due process to the interested parties so that “all affected parties be given the opportunity to be heard at a meaningful time and in a meaningful manner.”<sup>74</sup>

The KCPC violated KRS 100.211(2) and basic due process requirements by failing to properly notice a hearing on the Map Amendment and Text Amendment, and by limiting the evidence offered by Petitioners. These violations materially prejudiced Petitioners when they were carried forward by the Council’s action on that defective record without the taking of any additional adjudicative facts at a properly noticed trial-type evidentiary hearing.

**i. The KCPC did not hold a properly noticed due process hearing.**

KRS 100.211 requires that prior to a planning commission’s recommendation of a map amendment or text amendment to the legislative body, the commission must hold at least one public hearing after proper notice “as required by this chapter.”<sup>75</sup> KRS 100.207 dictates that

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<sup>72</sup> KRS 100.211(2)(b).

<sup>73</sup> KRS 100.211(3).

<sup>74</sup> See KRS 100.182 (relieving strict compliance except where deficiencies materially prejudice substantive rights of those adversely affected); see also *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 469 (Ky. 2005) (“The fundamental requirement of procedural due process is simply that all affected parties be given ‘the opportunity to be heard at a meaningful time and in a meaningful manner.’”) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

<sup>75</sup> See KRS 110.211(2)(b)(1) and (3).

“[n]otice of the public hearing shall be given in accordance with the provisions of KRS Chapter 424.”

KRS 424 provides direction on what must be included in the notice, and how it must be published. KRS 424.140(1) requires that “[a]ny advertisement of a hearing, meeting or examination shall state the time, place and purpose of the same.” KRS 424.130(1)(b) requires that “the advertisement shall be published at least once ... provided that (1) publication occurs not less than seven (7) days ... before the occurrence of the act or event.”

In light of these statutes, the January 14, 2018 notice (the “January 14 Notice”) published by the KCPC was defective in two critical respects. First, the January 14 Notice did not adequately state the purpose of the hearing: it did not state that a vote by the KCPC would occur at the hearing, nor did it state that the KCPC would conduct a trial-type evidentiary hearing.<sup>76</sup> Moreover, the notice did not state that the hearing could be the *only* trial-type evidentiary hearing on the matter. Instead, the January 14 Notice stated: “The [KCPC] will conduct a special meeting at Lakeside Christian Church ... on Tuesday evening, January 16, 2018 at 6:15PM. The agenda for this hearing includes the following items. Please plan to attend if you want to learn more about them or to provide input.”<sup>77</sup> Additionally, the January 14 Notice was published just two days before the so-called “special meeting,” not seven days in advance as required by statute.<sup>78</sup>

The multiple defects described have a compounding impact that goes beyond a mere technicality. Accordingly, they operated to deny Petitioners a statutorily and procedurally sufficient time to coordinate and prepare their opposition to the Sanctuary Project. Moreover, individual Petitioners lacked notice of the nature and scope of the hearing, and were left

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<sup>76</sup> See January 14 Notice, at VH381 - VH382.

<sup>77</sup> *Id.* (notably the agenda does not indicate a vote by the KCPC).

<sup>78</sup> See 424.130(b).



uninformed as to how the hearing would affect their ability to protect their interests at further proceedings.

**ii. The defective notice materially prejudiced the substantive rights of Petitioners, and was not remedied by the KCPC or the Council.**

The impact of the foregoing deficiencies was exacerbated by the fact that, unbeknownst to Petitioners, the KCPC would become the only trial-type evidentiary hearing on the Map Amendment. Moreover, no hearing of any kind was held on the Text Amendment.<sup>79</sup> And, as evidenced by the KCPC’s Special Meeting Minutes, no vote was ever taken or recorded.<sup>80</sup>

The video transcript of the proceedings demonstrates that the vague notice left opponents to the zone change confused about the purpose of the hearing and the process going forward. One opponent asked the KCPC, “does any of this make any difference to your vote ... does it make any difference what we say?”<sup>81</sup> And later asked, “[i]f you pass this, do we have any more say through the council?”<sup>82</sup> Another opponent had the following exchange with the KCPC’s chairman, Mr. Darpel:

Opponent Keller: “For clarity, whether or not you vote tonight to recommend this, it still goes to City Council?”

Mr. Darpel: “Absolutely.”

Opponent Keller: “So if you vote yes, that doesn’t mean the plan is going to happen. And if you vote no, that doesn’t mean the plan’s not going to happen. Is this Correct?”

Mr. Darpel: “Correct.”

Opponent Keller: “OK. So this isn’t an end-all-be-all game.”<sup>83</sup>

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<sup>79</sup> See KCPC Special Meeting Minutes, at VH384 (discussion on the Text Amendment was officially tabled by a roll call vote of the KCPC and never reopened).

<sup>80</sup> Compare KCPC Special Meeting Minutes, at VH393 (limiting the motion to approve PC1712-0005 (the Map Amendment) with KCPC Statement of Action and Recommendation, at VH002.

<sup>81</sup> See Testimony of Mike Goetz, KCPC Video Record Part 3 (Jan. 16, 2018) (VH367), at 12:30.

<sup>82</sup> See *id.* (VH367), at 15:55.

<sup>83</sup> See Testimony of Christopher Keller, KCPC Video Record Part 3 (Jan. 16, 2018) (VH367), at 31:56 - 32:20.

However, the improperly noticed hearing before the KCPC became the *de facto* final chance to create an evidentiary record on the proposed Amendments. Petitioners' unmitigated confusion, coupled with Mr. Darpel's repeated assurances, worked to dissuade them from presenting certain opposition evidence to the KCPC.<sup>84</sup>

Notwithstanding those disadvantages, the Group still objected to the meeting on the record before the KCPC on the grounds it was improperly convened.<sup>85</sup> Accordingly, the KCPC had the opportunity to remedy the defectively noticed hearing by tabling the matter and properly noticing a new hearing. Instead, the KCPC approved a recommendation of the Map Amendment. Additionally, despite having tabled the proposed Text Amendment and failing to take a vote on the Text Amendment on the record, the KCPC subsequently issued a recommendation for the Text Amendment, which was adopted by the Council without any due process hearing.

At the argument-type hearing before the Council, Petitioner Defend VH Group reiterated its objection by urging the Council to hold a new trial-type hearing.<sup>86</sup> Like the KCPC, the Council could have remedied the defective notice by holding its own properly noticed trial-type hearing, as Petitioners had suggested. Instead, and apparently on the advice of the City Attorney, the Council chose to hold a limited argument-type hearing.<sup>87</sup> This worked to the material

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<sup>84</sup> See, e.g., Verified Petition for Judicial Review (Apr. 3, 2018), at ¶56.

<sup>85</sup> See Statement of Todd McMurtry, KCPC Video Record Part 1 (Jan. 16, 2018) (VH365), at 1:46:00 - 1:46:24.

<sup>86</sup> See Special Meeting Minutes (Feb. 21, 2018), at VH337 (“[Counsel for Defend VH Group] ... urged Council to table the hearing and hold an evidentiary trial style hearing after giving proper notice before the 45-day deadline in the zoning ordinance expires.”).

<sup>87</sup> See, e.g., Villa Hills Special Meeting Video Record (March 6, 2018) (VH373), at 8:35 - 9:10 (Councilmember Ringo asks City Attorney Stewart, “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?” City Attorney Stewart replied, “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.”).

prejudice of Petitioners when, despite Mr. Darpel's assurances, they were prevented from presenting evidence to the Council.

For example, Petitioner Henry Mitchell attempted to raise arguments before the Council concerning an apparent conflict of interest involving Councilmember Koenig. However, his remarks were cut short on the grounds that this conflict was not part of the administrative record before the KCPC.<sup>88</sup> Indeed, the minutes from the Council's February 21, 2018 Special Meeting are replete with cavalier determinations of what was and was not connected to the KCPC's administrative record. For example, Petitioner Bob Stevens addressed the Council, but his comments were written off in the minutes as involving issues beyond the limited evidence included in the KCPC's record.<sup>89</sup>

Accordingly, the material prejudice to Petitioners caused by the defective notice snowballed from the KCPC hearing into the Council's hearing, denying Petitioners their constitutionally protected opportunity to be heard on the Map Amendment at a meaningful time and in a meaningful manner. Additionally, nobody had an opportunity to be heard in *any* manner with regard to the proposed Text Amendment, which was pushed through by the KCPC and the Council without even a vote by the KCPC, let alone the presentation of any evidence at a properly noticed meeting.

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<sup>88</sup> See Villa Hills Special Meeting Video Record Part 1 (Feb. 21, 2018) (VH370), at 43:25 - 44:10, 44:55 - 45:44; see also Special Meeting Minutes (Feb. 21, 2018), at VH339.

<sup>89</sup> See Special Meeting Minutes (Feb. 21, 2018), at VH342 ("The City Clerk found references to traffic and opposition to the apartment building in the administrative record, but not the other comments made by Mr. Stevens.").

- b. The Council’s decision was tainted by conflict because the Council was directly advised on the zone change by a City Attorney whose firm also represented the zoning applicant in the same zoning proceedings.**

Kentucky courts have long-recognized that interested parties in zoning proceedings are entitled to fair and nonarbitrary treatment.<sup>90</sup> To be sure, a party to an administrative proceeding is not guaranteed the identical procedural protections afforded parties to a strictly judicial or adjudicative proceeding.<sup>91</sup> However, the line is clearly drawn at proceedings and decisions tainted by conflicts or self-interest.<sup>92</sup>

In *Hilltop Basic Res., Inc. v. County of Boone*, the Kentucky Supreme Court addressed the issues of impartiality, bias and conflict in the zoning context.<sup>93</sup> The case involved allegations that a zoning decision regarding a mining operation was arbitrary because two members of the Fiscal Court denying the application were generally outspoken against mining.<sup>94</sup> In its analysis, the Court repeatedly referenced a party’s right to fair and nonarbitrary treatment based on the traditional principles of due process.<sup>95</sup>

Despite the more relaxed approach to impartiality, the Kentucky Supreme Court in *Hilltop* cautioned that “decision makers are not free to be biased or prejudicial when performing

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<sup>90</sup> See, e.g., *American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Com.*, 379 S.W.2d 450, 456 (Ky. App. 1964) (“In the interest of fairness, a party to be affected by an administrative order is entitled to procedural due process ... Administrative proceedings affecting a party's rights which did not afford an opportunity to be heard could likewise be classified as arbitrary.”); see also Ky. Const. § 2 (“Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.”).

<sup>91</sup> *Hilltop Basic Res., Inc. v. County of Boone*, 180 S.W.3d 464, 468 (Ky. 2005). (“In the administrative or legislative context, ... the concept of impartiality is, by necessity and by function, more relaxed and informal.”).

<sup>92</sup> *Id.* at 469 - 470.

<sup>93</sup> See *id.* at 466 - 467.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 469 - 470. This notion of “fairness” echoes the decision by the U.S. Supreme Court in *Morgan v. U.S.*, 304 U.S. 1, 22 (1938) in which the Court recognized the quasi-judicial functions undertaken by administrative bodies require heightened vigilance (“The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance ... it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.”).

nonjudicial functions. To the contrary, any bias or prejudicial conduct which demonstrates ‘malice, fraud, or corruption’ is expressly prohibited as arbitrary.”<sup>96</sup> The Court then separately addressed conflicts, holding “[f]urthermore, *decisions tainted by conflicts of interest or blatant favoritism are also prohibited as arbitrary.*”<sup>97</sup>

Ultimately, the Court found that generic preexisting bias was insufficient to declare the proceedings arbitrary. In so holding, the Court especially noted the absence of “allegations of malice, fraud, corruption, or other *conflicts of interest* on the part of the Fiscal Court members.”<sup>98</sup>

In reversing the Court of Appeals in *Hilltop*, the Kentucky Supreme Court noted its agreement with Judge Knopf, who had issued a dissenting opinion in the underlying appellate case.<sup>99</sup> In *Lagrange City Council v. Hall Bros. Co.*, Judge Knopf delivered an earlier decision of the Kentucky Court of Appeals in another matter involving conflicts of interest in the context of zoning decisions.<sup>100</sup>

In *LaGrange*, a zoning applicant cited a conflict of interest created by a councilmember’s dual positions on both the planning commission and the City Council. The Court of Appeals noted that, in addition to statutorily enumerated conflicts of incompatible offices, there also exists “common-law or functional incompatibility, which is declared by courts without the aid of specific constitutional or statutory prohibition when the two offices are inherently inconsistent or repugnant, *or when the occupancy of two offices is detrimental to the public interest.*”<sup>101</sup> The Court explained that the “policy behind both types of incompatibility of offices recognizes that it

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<sup>96</sup> *Id.* (citing *National-Southwire Aluminum Co. v. Big Rivers Electric Corp.*, 785 S.W.2d 503, 515 (Ky. App. 1990).

<sup>97</sup> *Id.* (citing *Louisville v. McDonald*, 470 S.W.2d 173, 177 (Ky. 1971) (emphasis added)); *see also Warren County Citizens for Managed Growth, Inc. v. Bd. of Commrs.*, 207 S.W.3d 7 (Ky. App. 2006).

<sup>98</sup> *Hilltop*, 180 S.W.3d at 470.

<sup>99</sup> *Id.* at 470.

<sup>100</sup> 3 S.W.3d 765 (Ky. App. 1999).

<sup>101</sup> *Id.* at 769 (emphasis added).

is the duty of a public officer or servant to discharge his or her duties uninfluenced by the duties and obligations of another office.”<sup>102</sup>

Referencing “the basic principles of due process” applicable to rezoning cases, the Court affirmed the circuit court’s invalidation of the council’s vote. It did so on the grounds that one of the councilmembers served in dual incompatible capacities.<sup>103</sup> In so ruling, the Court of Appeals noted that “abstaining from official actions does not remedy a conflict between offices.”<sup>104</sup> Notably, the Court invalidated the vote on the basis of the conflict even though there was “absolutely no evidence in the record to indicate that Hoffman has any personal or financial interest in the outcome of the vote of the proposed zoning map amendment.”<sup>105</sup> The Court also stated that “Hoffman’s decision to abstain from the vote before the Planning Commission demonstrates his desire to avoid any appearance of impropriety.”<sup>106</sup>

The instant case implicates the same principles of law at issue in *Hilltop* and *Lagrange*, but the facts materially differ because of the centrality of the claimed conflict of interest to the ultimate decision made, the personal and financial interests involved, and the lack of any formal abstention. Unlike the facts noted in *Hilltop*, an undeniable conflict of interest is at the heart of Petitioners’ claim of arbitrariness. Attorney Gerry Dusing of the Adams Stepler Firm represented applicants Ashley and the Monastery during the trial-type hearing before the KCPC. Meanwhile, City Attorney Stewart of the same law firm represented and advised the Council on its rights and obligations with respect to the application made by her other clients. She advised

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<sup>102</sup> *Id.* at 770.

<sup>103</sup> *Id.* at 770 - 771.

<sup>104</sup> *Id.* at 771 (citing *Macomb County Prosecutor v. Murphy*, 233 Mich. App. 372, 380, 592 N.W.2d 745, 748 (1999)).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

the Council on the legal consequences of denying the proposed Amendments, and even presided over the vote adopting the Amendments.<sup>107</sup>

And unlike the councilmember in *Lagrange*, City Attorney Stewart never formally recused herself, or ever publicly disclosed any possible conflict to the Council or the Petitioners.<sup>108</sup> More troubling, the City Attorney's conflict of interest was not limited to one decision-maker. Instead, she advised *all* Councilmembers on the Map and Text Amendments right up to the actual vote by the Council on March 6, 2018. And, the product of that vote was the adoption of the Amendments – just as her other client, the Monastery, had requested.

Indeed, it is compelling that the Court need not use its imagination to determine to what extent the Council was influenced by the conflicted City Attorney's legal advice. At the argument-type hearing before the Council, Councilmember Waugman announced “there is a legal issue involved in this[,]” and then read from a legal memorandum prepared on the Amendments before concluding, “I am convinced that any denial of the proposed map amendment by the City Council will not withstand judicial review.”<sup>109</sup> Councilmember Waugman also shared on the record, “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 councilmember.”<sup>110</sup>

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<sup>107</sup> See Villa Hills Special Meeting Video Record (March 6, 2018) (VH373), at 2:13 - 3:03 (City Attorney Stewart even called the matter to a vote: “at this point I would call for a motion onto the floor [to vote on the Map Amendment and Text Amendment].”).

<sup>108</sup> Even if the conflict had been disclosed, it is not one that can be waived. See SCR 3.130 (a conflict cannot be waived if it involves “the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.”). Moreover, the 4 - 2 vote adopting the Amendments, and the repeated fears expressed about the city being “sued” if the change was denied, demonstrates the interests of the zoning applicants, members of the Council, and City itself were directly adverse.

<sup>109</sup> Special Meeting Video Record Part 2 (Feb. 21, 2018) (VH370), at 42:40 - 45:46.

<sup>110</sup> *Id.* (VH370), at 46:18 - 46:50.

Councilmember Kilburn stated on the record at the argument-type hearing that the Council had been “under the constant guidance” of City Attorney Stewart “throughout this process[.]”<sup>111</sup> Indeed, Councilmember Kilburn stated that they were delaying a vote at the argument-type hearing pursuant to a plan by the Council “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.”<sup>112</sup>

Then, at the Council’s March 6, 2018 Special Meeting, City Attorney Stewart openly advised the Council regarding the adoption of the Map Amendment and Text Amendment.<sup>113</sup> And while some of the Council expressly based their vote on the advice of the City Attorney, others made statements showing an absence of advice on voting to *deny* the requested zoning change.

For example, Councilmember Ringo stated, “The [KCPC] voted in favor of [the Amendments], now you’ve [City Attorney Stewart] brought it before us, and I feel like the only decision I’m being asked to make, is yes.”<sup>114</sup> Before the vote, Councilmember Ringo highlighted the importance of legal guidance on 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.’<sup>115</sup>

The record unambiguously demonstrates that the Council’s decision was “tainted” by conflicts of interest. City Attorney Stewart advised the Council “throughout this process”

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<sup>111</sup> *Id.* (VH370), at 1:01:16 - 1:01:32; *see also id.* (VH370), at 1:10:18 - 1:10:24 (Councilmember Kilburn concluded his remarks by saying it was an honor to serve with City Attorney Stewart).

<sup>112</sup> *Id.* (VH370), at 31:18 - 32:43.

<sup>113</sup> *See* Villa Hills Special Meeting Video Record (March 6, 2018) (VH373), at 3:50 - 5:15.

<sup>114</sup> *Id.* (VH373), at 14:31 - 14:45.

<sup>115</sup> *Id.* (VH373), at 24:50 - 25:30.



despite her firm's representation of the Monastery *in the process*. The undeniable influence of the City Attorney on the Council's decision in these proceedings constitutes an impermissible denial of Petitioners' rights to constitutional due process. Thus, the Court should vacate the adoption of the Amendment, and remand the matter for a new trial-type evidentiary hearing free from the taint of any conflict.

**c. At least three of the four votes to adopt the Amendments were based either on legal advice or self-interest, not substantial evidence.**

With regard to administrative proceedings, Kentucky law requires "at a minimum, that all actions are taken on the 'basis of a record and on the basis of substantial evidence.'"<sup>116</sup> Setting aside the defective record and the fact that the advice from City Attorney Stewart was tainted by her conflict of interest, two of the Councilmembers premised their votes on a fear of legal jeopardy as opposed to substantial evidence. Additionally, Councilmember Koenig (whose son Adam Koenig is the listing agent for the Pathfinder Property neighboring the Sanctuary Project) voted to adopt the Amendments without stating any basis for doing so. These circumstances demonstrate adoption of the Amendments was based on self-interest and self-preservation, not substantial evidence.

As noted, *supra*, Councilmember Kilburn stated his fear that voting "no" on the proposed Amendments "would subject the City to legal jeopardy that could well be in the millions of dollars."<sup>117</sup> Similarly, Councilmember Waugaman stated immediately prior to his vote adopting that Amendments that "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."

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<sup>116</sup> *Hilltop*, 180 S.W.3d at 470 (quoting in part *McDonald*, 470 S.W.2d at 178).

<sup>117</sup> Special Meeting Video Record Part 2 (Feb. 21, 2018) (VH370), 1:05:54 - 1:07:10.

As for Councilmember Koenig, she provided no basis for her vote to adopt the Proposed Amendments. In *Hilltop*, the Kentucky Supreme Court held “decision makers are not free to be biased or prejudicial when performing nonjudicial functions. To the contrary, any bias or prejudicial conduct which demonstrates ‘malice, fraud, or corruption’ is expressly prohibited as arbitrary.”<sup>118</sup> The Court also noted “distinctions should be made between bias based on opinion and bias *based on self-interest*.”<sup>119</sup>

At the February 21, 2018 argument-type hearing before the Council, Petitioner Henry Mitchell “raised concern[s] about potential conflicts of interest by elected officials regarding the sale of the [Pathfinder] Radio Station Property which he contended would be enhanced by the approval of the Sanctuary development.”<sup>120</sup> However, his comments were cut short by City Clerk Bohman, and written-off as disconnected from the KCPC’s record. Councilmember Koenig did not address the potential bias, was not asked to abstain by the Council, and in fact did not abstain from the vote on the Amendments.

Under Kentucky law, Councilmembers Waugaman and Kilburn should have grounded their vote in substantial evidence, not a fear of reprisal from a well-heeled applicant. Likewise, Councilmember Koenig, should have at least addressed the potential bias raised by Petitioners, and identified the evidence serving as the basis of her vote, absent abstention altogether. Based on these circumstances, the Court should vacate the adoption of the Amendments and remand the matter for a trial-type hearing and an unbiased vote based on the evidence in the record; not one based on fear of legal jeopardy or self-interest.

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<sup>118</sup> *Hilltop*, 180 S.W.3d at 469 (quoting in part *National-Southwire Aluminum Co. v. Big Rivers Electric Corp.*, 785 S.W.2d 503, 515 (Ky. App. 1990)).

<sup>119</sup> *Id.* (emphasis added) (citing Mark W. Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D. L. Rev. 161 (1989). Mr. Cordes’ Article also concludes “participation in a decision involving a close association will be perceived as tainted and thus lacking the ‘appearance of fairness’ which is essential to a proper decision making process \* \* \* Close family relationships clearly raise the most concern and should usually lead to disqualification.” *Id.* at 205 - 206.

<sup>120</sup> Special Meeting Minutes (Feb. 21, 2018), at VH339.

#### IV. CONCLUSION.

Petitioners are entitled to a process that provides them a meaningful opportunity to be heard, and one that is free from the taint of conflict or bias. The underlying proceedings were statutorily defective and constitutionally impermissible. Accordingly, the Court should vacate the legislative action and remand the matter 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.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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