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December 9, 2024

Knoxville Knox County Planning
400 Main Street
Suite 403
Knoxville, TN 37902

Re: Agenda Item No. 9
File No. 9-A-24-HPA; 9-G-24-SU
Calvary Chapel of Knoxville
3330 W Governor John Sevier Hwy.

Dear Planning Commission:

I represent Calvary Chapel of Knoxville. At your upcoming Planning Commission meeting you will be considering the applicant's request for a Level II COA for 1.23 areas of disturbance above the "allowed disturbance budget" in City's codified Hillside Protection Ordinance as well as a Special Use approval for a building addition and parking structure for a place of worship. Staff is recommending the Level II COA subject to a single condition and is recommending approval of the special use to expand their Chapel building subject to 5 conditions. While we appreciate staffs' recommendation, we are asking the Level II COA be approved without any conditions and that the condition in the Special Use approval relating to the HPA condition further be removed. Specifically, the condition that "at least 1.23 acres of the subject property within the HP Overlay be reforested and maintained by Calvary Chapel" be removed in its entirety because (1) the property is exempt from the application of the Hillside Protection Plan per Article 8.9.B of the City's Zoning Ordinance and (2) assuming the HPP applies, the additional disturbance requested by the Chapel is less than the areas of the Property that have already been disturbed by easements and Right-of-Way by KUB, East Tennessee Gas, and the City of Knoxville.

The Proposed Disturbance is Exempt from the COA requirements under Section 8.9.B of the City of Knoxville's Zoning Ordinance.

Pursuant to Section 8.9.B of the City's Zoning Ordinance,

The HP Overlay regulations apply to all development on lots in all districts withing the HP Overlay district with the following exceptions:

1. Legally existing structures existing as of the effective date of this Code.
2. Lots of record for single-family dwellings existing as of the effective date of this Code. This exception applies only where the lot of record is one acre or less.
3. Lots that have been **issued a grading permit prior to the effective date of this Code.**
4. Lots that have been **previously legally disturbed or developed** would also be excepted provided that any new/additional disturbance does not exceed the previously-disturbed area or the maximum land disturbance permitted by [Table 8.6](#) below¹, whichever is greater. For the purposes of this section, disturbance shall mean any activity that changes the physical conditions of land form, vegetation and hydrology, creates bare soil, or otherwise may cause erosion or sedimentation.

(**Emphasis** added). Section 8.9.B.3 and 8.9.B.4 contains the operative exemptions at issue in this application.

Per 8.9.B.3., the property is exempt because of the past grading permits which were issued prior to January 1, 2020 (the effective date of the current zoning ordinance for the City of Knoxville). This is uncontroverted and confirmed by Levan Cranston of the Knoxville-Knox County Planning Department in an August 13, 2021, email to Kaity Patterson.

From: Levan King Cranston <levan.kingcranston@knoxplanning.org>
Sent: Friday, August 13, 2021 1:34 PM
To: [Kaity Patterson <kpatterson@bhn-p.com>](mailto:kpatterson@bhn-p.com)
Subject: Re: Certificate of Appropriateness for 3330 W. Governor John Sevier Highway

Hi [Kaity](#),

HP Overlay COA Exempt -- Knoxville-Knox County Planning Approval Letter

This lot is exempt as per article 8.9.B.3. Lots that have been issued a grading permit prior to January 1, 2020. This site received a site development permit from the City of Knoxville on 10/17/2019. See Permit Number: DSD19-0290.

As noted in the slope analysis, development on this property cannot exceed 25.995 of the 43.03 acres. I have attached in this email the slope analysis table and a map for your reference. If you have any questions please let me know.

Sincerely,

Levan King Cranston

On Tue, Aug 10, 2021 at 8:26 AM [Kaity Patterson <kpatterson@bhn-p.com>](#) wrote:

Good morning Levan,

We have been advised by the City of Knoxville that a certificate of appropriateness is needed for a site we are working on (3330 W. Governor John Sevier Highway) due to the HP Overlay Zoning District. You were listed as the point of contact for this. Could you please let me know what the requirements/process consists of to obtain this permit? I appreciate any help you can offer. I have attached the UOR for reference.

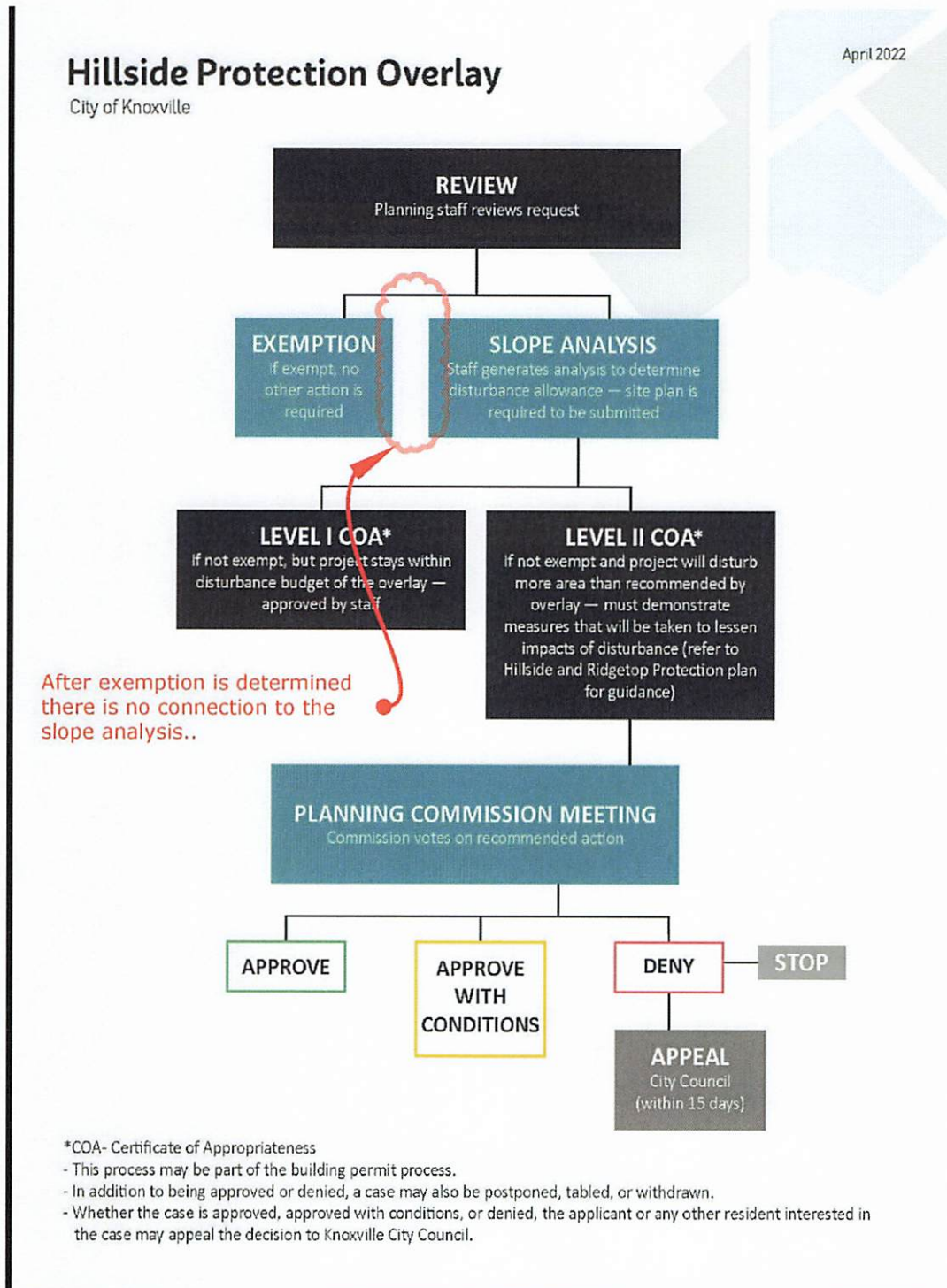
If you have any questions or need more information, please let me know.

Thank you!

[Kaity Patterson](#), E.I.T.
Batson, Himes, Norvell, & Poe
4334 Papermill Drive,
Knoxville, TN 37909
(865) 588-6472

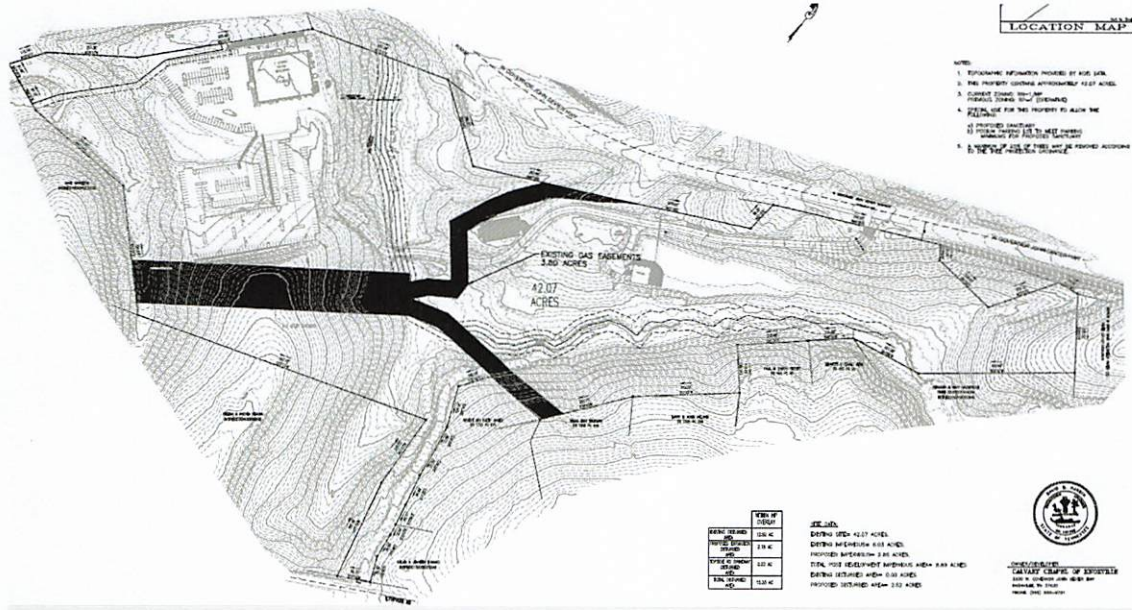
¹ Table 8.6 is the land disturbance calculation tables which form the basis for staff's slope disturbance allowance in any lot within the HP Overlay in the City of Knoxville.

Per these exemptions, no further COAs are required. There is no further inquiry listed in the zoning ordinance. Once exempt, the property remains exempt. This is further demonstrated in the HP flowchart listed on the planning department’s website, which states that “if exempt, no other action is required.”



Additionally, the property is exempt under Section 8.9.B.4 because of the prior disturbance in easements and right-of-way, which predated the codification of the Hillside Protection Ordinance, has improperly been included in staff’s stated disturbance budget of 14.1 acres. “Lots

that have been **previously legally disturbed or developed** would also be excepted provided that any new/additional disturbance does not exceed the previously-disturbed area or the maximum land disturbance permitted by [Table 8.6](#) below², whichever is greater.” Included in the 14.1 acres is 3.80 acres of disturbance based on disturbance from existing gas line easements. Embedded below is an engineered diagram identifying the area of disturbance, completely outside of the applicant’s control, The additional disturbance requested, 1.23 acres, is less than the 3.80 acres of these easements.



Reforestation 1.23 acres is unequitable and infeasible.

Staff’s condition for the approval for 1.23 acres of disturbance is to plant ~806 trees to reforest two cleared “fields of manicured grass.” For the reasons stated above, the is inappropriate. It is also not feasible. As depicted above, one of the areas staff identified as a potential location for reforestation is within KUB’s existing easement. Any reforestation at this location would be subject to KUB’s easement rights and could be cleared by KUB at any time. The second location, “south of the driveway and abutting DeArmond Spring” is the Chapel’s playfield, adjacent to the Chapel’s recently constructed Pavillion, used for its youth and teen ministries. Reforestation this area is asking the Chapel to forgo its investment in its youth ministry and the play area it recently created for that purpose.

Finally, the cost of planting 1.23 acres (estimated 860 tree saplings) is a financial burden. While the applicant has not obtained a specific quote for reforestation 1.23 acres with 860 trees, I am involved in an unrelated matter where the quote to plant and maintain 375 trees over 1.03 acres was estimated to be \$166,932.30. Even if this is not an accurate estimation³, the cost would be burdensome nonetheless.

² Table 8.6 is the land disturbance calculation tables which form the basis for staff’s slope disturbance allowance in any lot within the HP Overlay in the City of Knoxville.

³Indeed, that amount is contested in this unrelated litigation.

As the Property is exempt, as confirmed by the Planning Department, it would be inappropriate to impose as a condition for a Special Use review a requirement that the Property owner waived its right to an exemption simply by moving forward with this application. Such conditions are illegal. As stated by the Tennessee Court of Appeals, “[t]o require the landowner to give up what he is legally permitted to have in order to obtain what he may already be entitled to, is bureaucratic extortion, if not judicial extortion.” *Fiser v. Town of Farragut*, 2001 Tenn. App. LEXIS 118 at *11 (Tenn. Ct. App. February 27, 2001).

This application of the HP Ordinance infringes on the Applicant’s rights under Tenn. Code Ann. § 4-1-407.

This body’s role in approving or denying this request for a special use/COA is further governed by Tennessee’s Preservation of Religious Freedom Act (“PRFA”), Tenn. Code Ann. § 4-1-407. The PRFA “prohibit[s] the imposition of a law or regulation that substantially burdens the exercise of religion, including zoning regulations.” *Ward v. Metro. Gov’t of Nashville & Davidson Cty.*, No. M2018-00633-COA-R3-CV, 2019 Tenn. App. LEXIS 186, at *19 (Tenn. Ct. App. Apr. 17, 2019). The purpose of the request is to expand the Chapel’s worship services. Staff’s request to reforest the Chapel’s play-field infringes on property dedicated to its youth ministry. This implicates the protections of PRFA. The PRFA relevantly provides the following:

(b) Except as provided in subsection (c), no government entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability.

(c) No government entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is:

- (1) Essential to further a compelling governmental interest; and
- (2) The least restrictive means of furthering that compelling governmental interest.

Tenn. Code Ann. § 4-1-407. As defined in the act, “substantially burden” means to inhibit or curtail religiously motivated practice. Tenn. Code Ann. § 4-1-407(a)(7). Although this act was modelled after and is substantially similar to its federal equivalent, the Religious Freedom Restoration Act, 42 U.S.C.S. § 2000, the Tennessee PRFA confers more substantial protection of the right to free exercise of religion in two ways: the government bears a higher standard of proof to justify its action in curtailing religious practice, and the action must be *essential* to the government’s compelling interest. The PRFA is clear that the government bears the burden of demonstrating those factors listed in subsection (c) when an individual challenges a government act restricting religious exercise. The government must demonstrate each element, as such term is defined in the PRFA, by meeting “the burdens of going forward with the evidence and of persuasion under the standard of clear and convincing evidence[.]” Tenn. Code Ann. § 4-1-407(a)(1).

The Tennessee Court of Appeals identified and described these differences in *Johnson v. Levy*, No. M2009-02596-COA-R3-CV, 2010 Tenn. App. LEXIS 14, at *1 (Tenn Ct. App. Jan. 14, 2010):

To satisfy Tennessee's clear and convincing standard the evidence must establish that the truth of the facts asserted is highly probable, *In re Audrey S.*, 182 S.W.3d

838, 861 (Tenn. Ct. App. 2005), and that it eliminates any serious or substantial doubt about the correctness of the conclusions drawn from that evidence. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); *In re J.J.C.*, 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). To constitute clear and convincing evidence, it must produce in the fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. 2001); *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002). Therefore, Tennessee's religious freedom statute places a significantly heightened burden of proof on the governmental entity.

The second difference is that in order to satisfy strict scrutiny under RFRA, the federal government must demonstrate that the proposed action is "in furtherance of a compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(1) (emphasis added). By contrast, in Tennessee the governmental agency must prove that its proposed course of action is "essential to further a compelling governmental interest." Tenn. Code Ann. § 4-1-407(c)(1) (emphasis added). The distinction between "in furtherance" and "essential" is more than semantics; it reveals that the Tennessee General Assembly intended to provide greater protection of religious freedom than that afforded by the federal RFRA. Under Tennessee's religious freedom statute, the governmental agency has to prove by clear and convincing evidence that the action it seeks to take is essential to furthering that compelling governmental interest. See Tenn. Code Ann. § 4-1-407(c)(1).

Id.

If body approves the Special Use subject to the reforestation requirement, this will inhibit or curtail the Chapel's religiously motivated practice to expand its worship areas and maintain its existing youth ministry field. If this body were to impose this condition, and if my clients elected to challenge that denial,⁴ the burden of proof would be on the City to prove beyond any serious or substantial doubt that the decision was essential to promote a compelling government interest, and that the decision was the least restrictive means of doing so. Although the City of Knoxville has an interest in enforcing the stated policies of its Hillside Protection ordinance, the HP application in this case is neither essential to this interest nor the least restrictive means available to further those interests.

Regardless, the burden of demonstrating by a significantly heightened standard of proof that the ordinance condition is the least restrictive means of furthering the City's interest falls on the governmental agency. See *Ward v. Metro. Gov't of Nashville & Davidson Cty.*, No. M2018-00633-COA-R3-CV, 2019 Tenn. App. LEXIS 186, **23-24 (Ct. App. Apr. 17, 2019) (holding that the construction of a micro-home village for the homeless constituted the exercise of religion under Tenn. Code Ann. § 4-1-407, and explaining that although the government had a compelling interest, "in the unique procedural posture of this case, the [government had] the burden of showing

⁴ The PRFA also provides the following: A person whose religious exercise has been burdened by government in violation of this section may assert that violation as a claim or defense in any judicial or administrative proceeding and may obtain such declaratory relief, monetary damages as may properly be awarded by a court of competent jurisdiction, or both declaratory relief and monetary damages. A person who prevails in any proceeding to enforce this section against a government entity may recover the person's reasonable costs and attorney's fees. Tenn. Code Ann. § 4-1-407(e).

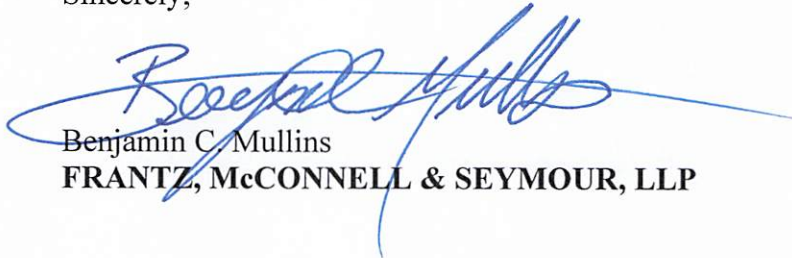
that imposing the RS 10 zoning requirements on this project would be the least restrictive means of furthering that interest.”) In the *Ward* case, the Tennessee Court of Appeals upheld the BZA’s decision to grant accommodation for the exercise of religiously motivated conduct.

Conclusion:

The Chapel has made investments and long-term planning decisions based on the previously communicated exemption. But because the property is exempt from the Hillside Protection Overlay, because the requested disturbance is less than the area disturbed by third-party utility companies, and because the imposition of the recommended conditions would run afoul of Tenn. Code Ann. § 4-1-407, the COA should be approved without conditions, Condition No. 2 for the Special Use approval, should be removed, and the application should pass per staff’s recommendation and the other 4 conditions.

Please contact me if you have any questions.

Sincerely,



Benjamin C. Mullins
FRANTZ, McCONNELL & SEYMOUR, LLP