Daniel E. Hancock ▪ 502.588.2022 ▪ dhancock@fmdlegal.com

February 16, 2024

VIA U.S. MAIL AND EMAIL

L'Esprit Property Owners Association, Inc.
P.O. Box 264
Pendleton, KY 40055
rollofox51@gmail.com

Re: John and Reta Underwood | Response to Feb. 6 letter

Mr. Fox:

This firm represents John and Reta Underwood regarding the subject of your letter of February 6, 2024 (the "Fine Letter," attached as Exhibit 1), as well as statements made on behalf of the L'Esprit Property Owners Association, Inc. ("LPOA") Board of Directors (the "Board") regarding the Board's alleged right to dictate how the Underwoods use and enjoy their own private property. Please send any further communications on these subjects, whether on your personal behalf or that of the Board, directly to me at the address below.

The Board has absolutely no right or authority to levy fines against the Underwoods for their own use of their private property where that use in no way violates the Declaration,[1] the Bylaws,[2] Kentucky law, or any other published rules binding the owners of property in L'Esprit.

You begin your letter with a claim that the Underwoods "have placed considerable debris on the bridle path where horses have been riding for decades," and then purport to levy fines upon the Underwoods for doing so. Perhaps you truly do not understand the specious nature of your claim. But that claim touches on many of the same legal issues I have separately addressed in a memorandum I prepared for the Underwoods prior to their receipt of the Fine Letter. At their request, I am attaching a copy of that memorandum to this response as Exhibit 2.

[1] The "Declaration" means the Third Amendment and Restatement of the L'Esprit Master Declaration of Easements, Covenants and Restrictions, available at https://irp.cdn-website.com/d932630b/files/uploaded/070695-L-Esprit-Third%20Amendment%20and%20Restatement%20of%20Master%20Declaration%20of%20Easements-%20Covenants-%20and%20Restrictions.pdf.
[2] The "Bylaws" means the By-Laws of L'Esprit Property Owners Association, Inc., as amended 11/16/2023, and available at https://irp.cdn-website.com/d932630b/files/uploaded/111623-LPOA%20Bylaws%20(November%202023%20Revision).pdf.

First, the term "bridle path" means something specific. Section 2.03 of the Declaration is the sole source of LPOA's authority to dictate what L'Esprit property owners may do with the portions of their property that have been designated a "bridle path." The Declaration is clear: "Those portions of the L'Esprit property ***so designated on the recorded plats of the*** Property shall be subject to all restrictions, notes, and stipulations thereon." Furthermore, Section 2.03(ii) specifically provides that LPOA may place restrictions on a Bridle Path, but only "within or across any area designated as a Bridle Path ***by the recorded plats***." In other words, the only "Bridle Path" over which LPOA has ***any*** jurisdiction is that designated on the recorded plat.

The Underwoods are aware of the existence of the Bridle Path easement that is recorded on their property. I've attached the relevant portion of the L'Esprit plat as Exhibit 3. In fact, they recently had the area surveyed. As I know you are aware, because you actually walked the section at issue with Mr. Underwood and saw the survey stakes, the Underwoods have not placed debris on the recorded bridle path easement. But a picture is worth 1,000 words:

This image, taken Feb. 10, 2024, shows the section at issue on the Bridle Path easement, as designated on the recorded plat, along the boundary of the Underwoods' property, as indicated by the flagged survey stakes. The recorded Bridle Path runs to the left of the three aligned stakes. The version on the right highlights the recorded Bridle Path.

There is no debris in the recorded bridle path.

Dispensing with this mistake of fact on the LPOA's part should be sufficient to cause the Board to withdraw the Fine Letter. But it is plain from your conduct and prior statements made by you, other members of the Board, and the LPOA's counsel, Hal Thomas, that the current Board has decided it is not restricted by what is permitted in the Declaration, and have decided that it can unilaterally expand or declare new bridle paths by fiat. This is demonstrated not only by the current spurious fine attempt, but also by the communications regarding the denial of the Underwoods' 2023 fence application. To wit:

- In an email dated April 7, 2022 (attached as Exhibit 4), Ms. Rapaport wrote to the Underwoods, "[b]eing as familiar as I am with that area and easements. [sic] I believe that the closure is a violation of Ky Real Estate Law regarding Prescriptive Easements."

- In a letter dated April 25, 2023 (attached as Exhibit 5), Mr. Thomas wrote to Mr. and Mrs. Underwood that "the bridal [sic] path easements are not only shown on recorded plats, but their use by property owners in L'Esprit Subdivision has long since created prescriptive easements which cannot be blocked or otherwise interfered with."

- In an email dated December 23, 2023 (attached as Exhibit 6), Trish Henrion, speaking on behalf of the ACC, wrote that the ACC "has denied your fence application because the erection of a fence in the proposed location transects and significantly encroaches on a path where Members of L'Esprit have been riding for decades. Should you have any questions regarding this denial please contact Rollo Fox, President of LPOA.[3]"

- In a letter dated December 23, 2023 (attached as Exhibit 7), Mr. Thomas wrote to the Underwoods that "L'Esprit has denied your request to build a fence which would partially block a well established bridle path used by the residents of L'Esprit for thirty (30) plus years."

[3] Notably, pursuant to the Declaration and the ACC's own Rules, Regulations, and Procedures, the President of the LPOA board has no authority regarding the determinations to be made by the ACC. Ms. Henrion's specific reference to you as the person the Underwoods should contact regarding this denial, as well as your response, indicate that you are far exceeding your authority as LPOA President.

- You followed up in an email to Mr. Underwood on January 18 (attached as Exhibit 8), in which you summarily stated, "I have consulting with the Chair of the ACC, the Board representative to the ACC and our legal counsel. The ACC denial of your fence proposal stands."

- In the Fine Letter, you now refer to the Underwoods having "placed considerable debris on the bridle path where horses have been riding for decades."

Let me be absolutely clear on this: to the extent you may think LPOA has authority to simply declare new easements across the Underwoods' property, or even to expand the existing easement: you are dead wrong. Your lawyer, Mr. Thomas, is dead wrong. Ms. Rapaport is dead wrong. Even a cursory review of Kentucky law shows as much. A recreational use of private property owned by another does not, and cannot, create a prescriptive easement or any claim of right to access that private property.

First, setting aside the sporadic, recreational nature of a use involving "where horses have been riding for decades," a prescriptive easement requires the exercise of adverse possession, which is not supported by the facts here. The Kentucky Court of Appeals put it thus:

> The law of prescriptive easements is derived from the principles underlying adverse possession of property interests generally. As a general matter, in order to obtain a right to a prescriptive easement, a claimant's adverse use must be "actual, open, notorious, forcible, exclusive, and hostile, and must continue in full force ... for at least fifteen years." A prescriptive easement is a property right in one landowner (dominant tenement) representing a privilege to use the land of another (servient tenement) and is based on a presumed grant that arises from the adverse, uninterrupted, and continued use for a 15–year statutory period.[4]

In other words, for a path to become a prescriptive easement, it must be used openly without the property owner's permission for a period of at least 15 years. Any evidence that the owner permitted use of a path across the owner's property within the applicable 15-year period defeats a claim for a prescriptive easement. The *Cole* court further provided that:

[4] *Cole v. Gilvin*, 59 S.W.3d 468, 475 (Ky. App. 2001).

> … it is well-established that if the right to use a passway at its inception is permissive, the existence of a prescriptive easement or even a presumption of a claim of right does not arise unless there has been some distinct and positive act of assertion of right made clearly known to the owner of the servient tenement. The right to use a passway as a prescriptive easement ***cannot be acquired no matter how long the use continues*** if it originated from permission by the owner of the servient tenement.[5]

Prior to submitting their fence application, the Underwoods had not objected to the occasional use of their property by riders, nor had they attempted to block or prohibit that use by means of barriers, "no trespassing" signs, or other means. Accordingly, to the extent any prescriptive easement could possibly be created against the Underwoods' property, the earliest the 15-year period of adverse use required for the creation of a prescriptive easement would start is in 2023, when they submitted their fence application implying that they no longer approved of such use.

But even if a prescriptive easement might have been created under these common-law principles, which it absolutely was not, ***Kentucky has expressly prohibited the creation of a prescriptive easement based on recreational use of private property***. KRS § 411.190(8) provides straightforwardly that "[n]o action for the recovery of real property, including establishment of prescriptive easement, right-of-way, or adverse possession, may be brought by any person whose claim is based on use solely for recreational purposes."

It may be that you are relying on the advice of counsel in a mistaken belief that KRS § 411.190(8) does not apply if the recreational activity occurred before 2002, when that section was enacted. Indeed, Mr. Thomas emailed Mr. Underwood on January 18, 2024, as follows:

> Mr. Underwood: As I have previously advised, I represent the L'Esprit HOA and as such I, by law work through the Board of Directors. I do not and can not take questions from individual members. However, you might want to review the effective date of KRS 411.190(8).[6]

To the extent that Thomas is implying to Mr. Underwood that a prescriptive easement might have been created across the Underwood's property prior to the enactment of KRS

[5] *Id*. at 476 (emphasis added).
[6] A copy of this email is attached as Exhibit 9.

§ 411.190(8) in 2002,[7] or to the extent the Board may be relying on a similar representation to it from Mr. Thomas, know that he is, again, simply wrong. The Supreme Court of Kentucky, ***fourteen years ago***, clearly dispensed with this argument. The Court held in *Moore v. Stills*, 307 S.W.3d 71 (Ky. 2010), that KRS § 411.190(8) applies ***retroactively*** to claims brought on the basis of recreational use:

> Kentucky law has long rejected adverse possession claims based on the sporadic or insubstantial use of another's property. With KRS 411.190(8), the General Assembly has codified a portion of that law by expressly providing that adverse possession is not established by recreational use alone. Because that statute clarifies existing law but does not alter it, its application to this case was not barred by the rule against retroactive legislation, and under the statute Petitioners' claim fails as a matter of law.

Horseback riding is one of the "recreational purposes" specifically set forth under KRS § 411.190(1)(c). Thus, regardless of when riders began crossing the Underwoods' property outside of the recorded Bridle Path, KRS § 411.190(8) ***prohibits*** the creation of a prescriptive easement outside the recorded Bridle Path.

Kentucky law on this issue is crystal clear. ***No prescriptive easement exists across the Underwoods' property, and the LPOA has no right under the Declaration, Bylaws, or Kentucky law to unilaterally declare that one exists, nor does it have any right to expand the recorded Bridle Paths through a "prescriptive easement" or otherwise.***

Accordingly, the fine levied against the Underwoods, in addition to being meritless, is also in plain violation of the Board's own very-recently published fine policy, which provides that its purpose is to "allow the POA/HOA board to ***enforce the governing documents*** without obstacles" in instances of "[b]locking or altering Bridle Path in any manner." LPOA is plainly acting outside the scope of the governing documents, and the Underwoods have not blocked or altered the Bridle Path (which again, per the Declaration, means "any areas designated as a Bridle Path by the recorded plats).

Finally, Mr. Fox, it is unclear from the Fine Letter whether it represents an action approved by the Board, or whether you acted unilaterally in deciding to fine the Underwoods. I have read the letter circulated by LPOA's Board in 2001 (attached as Exhibit 10) in which the

[7] *See* REAL PROPERTY—LAND USE—PRIVATE LANDING STRIPS, 2002 Kentucky Laws Ch. 306 (H.B. 387).

Board alleged that you took actions in direct contravention of LPOA's governing documents. I am also familiar with the plethora of current lawsuits between LPOA and its members. Among other allegations, many of those lawsuits allege that individuals on various iterations of LPOA's board took unilateral action prohibited by law and L'Esprit's governing documents. I also refer back to my statements earlier in this letter regarding your apparent disregard for the independent authority of the ACC. All of this leads me to the opinion that I should not assume, merely because it appears on LPOA letterhead, that the Fine Letter represents a considered, approved, or valid action of the LPOA Board. Accordingly, please provide documentation reflecting any vote, recorded minutes, or other discussion among the LPOA Board regarding this attempt to fine the Underwoods. In the absence of any such evidence, I must assume going forward that the Fine Letter represents a unilateral action taken by you, not by the Board.

My best guess, based on my review of the current and past lawsuits between the LPOA and its members, is that you (or the Board, if applicable) feel that you need to fine the Underwoods to maintain consistency with the position the LPOA board has taken in its lawsuit with Mr. Weingarten.[8] But that position is just wrong – the LPOA simply has no power to enforce a "path that horses have routinely used for years."

The Underwoods are prepared to seek a declaratory judgment against the Board regarding its improper and unlawful attempts to create a new *de facto* easement or otherwise dictate what the Underwoods can and cannot do with their private property, as well as an award of their attorney's fees and other costs incurred in doing so. To the extent that the vendetta against them is the result of actions of a few individuals who may be acting outside of normal Board channels or without full Board authority, they will seek to hold those individuals personally liable in a way that eliminates their ability to force the LPOA to pay for their legal costs and resulting damages. As with many of the disputes currently plaguing L'Esprit, the actions against the Underwoods appear to be the result of an ill-considered crusade undertaken by a few individuals, and the LPOA members at large should not have to bear the burden of supporting such misguided efforts.

However, the Underwoods would prefer to resolve this without resorting to such steps. If the Board and the individuals serving on the Board wish to avoid yet another costly lawsuit, please provide, no later than February 26, 2024, the following:

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[8] *See, e.g.,* Answer to Plaintiffs' Complaint, *Weingarten* et al. *v. L'Esprit Property Owners Association, Inc.*, et al. (Henry Co. Ky. Circuit Court Case No. 23-CI-00182 (Jan. 2, 2024)) at ¶ 23: "More specifically, the Defendants have never contended that Plaintiff Weingarten blocked the recorded bridle path easement. Rather, Plaintiff Weingarten has blocked the path that horses have routinely used for years."

1) written confirmation that the Board has rescinded its improper action levying fines against the Underwoods;

2) written confirmation that the Board will take no further action against the Underwoods for the matters addressed in the Fine Letter; and

3) all documentation reflecting the vote or other discussions giving rise to the Fine Letter.

In the meantime, you and all members of the Board have an obligation to preserve and retain all hard copies and electronically stored information ("ESI") relevant to the Board's activities regarding the Underwoods specifically, the Board's or any member's claims in any instance that it has a right to enforce horseback riding privileges outside of the recorded Bridle Paths, and its attempts to restrict any L'Esprit owner's use of their own non-easement property generally. This includes all internal communications among the Board and LPOA's committees, whether by email, chat, text message, or other electronic media, as well as all external communications. It also includes relevant communications from Board counsel. This also includes taking any necessary steps to prevent the destruction, loss, override, or modification of relevant data, either intentionally or inadvertently, such as through modification of the Board's document retention policy and systems, to the extent such policies or systems may exist. I trust that you and the other members of the Board will preserve for the duration of this matter all relevant hard copy documents and ESI. In the event of a dispute arising out of your failure to preserve such documents or communications, I will rely on this letter in court as evidence of my request and notice of your preservation obligations.

Sincerely,

Daniel E. Hancock

Encls.

cc: Robert T. Watson and Katy Harvey, McBrayer PLLC (via email to rwatson@mcbrayerfirm.com and kharvey@mcbrayerfirm.com); Rollo Fox (via email to puifox@aol.com); Barrett Shirrell (via email to barrettcbar@icloud.com); Elizabeth Rapaport (via email to brapaport@gmail.com); Tom Henrion (via email to tomhenrion@bellsouth.net); Michael Ash (via email to michael@ashgroup.us.com)

February 16, 2024 letter to L'Esprit Property Owners Association, Inc.

Exhibit 1

L'Esprit Property Owners Association

February 6, 2024

John and Reta Underwood
1030 Bluegrass Parkway
LaGrange, KY 40031

Dear Mr. & Mrs. Underwood –

You have placed considerable debris on the bridle path where horses have been riding for decades. The purpose of this letter is to notify you that unless within 10 days from the date of this letter you have removed the debris you will automatically be fined the sum of $25 per day until such time as the debris is removed. Once the fines have begun the daily rate will be reviewed for an increase every thirty (30) days by the L'Esprit Board of Directors.

Additionally, any fine that is not paid within thirty (30) days from the date of the assessment will result in a Lien Statement being filed against your property in the Oldham County Clerk's Office.

Please note that you have the right under Kentucky law to appeal the fine by making a written request for a hearing before the full Board of Directors within 10 days.

Sincerely,

Rollo Fox

Rollo Fox, President

L'Esprit Property Owners Association

February 16, 2024 letter to L'Esprit Property Owners Association, Inc.

Exhibit 2

Memorandum

To: Ms. Reta Ann and Mr. John Underwood
L'Esprit Tract 152-1
1030 Bluegrass Parkway
La Grange, Kentucky 40031

From: Daniel E. Hancock and Molly P. O'Dea

Date: February 9, 2024

Re: L'Esprit Property Owners Association, Inc.

Mr. and Mrs. Underwood,

Our responses to your questions below regarding the recent actions of the Board of Directors of L'Esprit Property Owners Association, Inc. ("LPOA") and its attorney Hal Thomas ("Thomas") are set forth below. Our responses are based on the information and communications with LPOA and Thomas that you provided to us, certain publicly available L'Esprit governing documents, the documents filed in the Henry County Circuit Court action captioned *Weingarten* et al. *v. L'Esprit Property Owners Association, Inc.* et al., No. 23-CI-00182 (the "Weingarten Action"), and relevant Kentucky law. We have reservations as to whether LPOA is properly and consistently adhering to these governing requirements and applicable statutes, as opposed to intentionally misconstruing or disregarding what otherwise appears to be straightforward language. LPOA's apparent refusal to substantively engage with property owners regarding what it believes are the sources of authority justifying its actions only exacerbates those reservations. Our goal in providing these responses is to provide an assessment of and clarity on these seemingly persistent and worsening issues.

<u>Question 1</u>: The LPOA denied a L'Esprit tract owner's request for compliant fencing on non-easement private property. Do the grounds LPOA stated - because the path has been used to ride horses, with or without the owner's permission - survive legal scrutiny?

On November 18, 2023, you submitted an application to LPOA's Architectural Control Committee ("ACC") to erect a four-board wood fence on non-easement private property. The application appears to have complied with all relevant provisions of the Third Amendment And Restatement Of The L'Esprit Master Declaration Of Easements, Covenants And Restrictions ("Declaration"). It also included an excerpt from LPOA's 2021 commissioned land survey of the bridle path easement on your tract 152-1, as well as detailed photos and

descriptions that clearly established that the requested fencing would not obstruct this easement, including additional survey stakes you procured. You further provided the ACC with access to a video of the same, and then met with ACC representatives onsite to observe firsthand that the requested fence would not obstruct the easement.

The Declaration provides the following relevant prohibitions, which appear to be the only published documentation applicable to your application:

- Section 2.03(ii): No fences, structures, or obstructions of any type shall be permitted within or across any area designated as a Bridle Path by the recorded plats.

- Section 3.04(v)(ii): The only fence that will be allowed within the Visual Zone and on the perimeter boundary of the L'Esprit Property is a four (4) board wood fence that is painted black. Fences outside the Visual Zone other than a four board wood fence that is painted black shall be only of such design, materials and colors as may be approved by the Architectural Control Committee. The recommended height for all fences is 54 inches; provided, however, no fence shall be erected with a height of less than 48 inches or greater than 60 inches.

The ACC's published Rules, Regulations and Procedures,[1] effective Jan. 2023 do not provide any additional relevant prohibitions, and are silent on what standards the ACC is required to use in evaluating otherwise compliant applications. Nonetheless, a governing body making decisions about the use of private property may not act arbitrarily or capriciously in making such determinations. *See, e.g., Hatch v. Fiscal Court of Fayette Cnty.*, 242 S.W.2d 1018, 1021 (Ky. 1951) (in the context of a land-use dispute, "it is undisputed that courts have the inherent power to prevent an administrative body from proceeding illegally, arbitrarily and capriciously to the injury of another.").

On December 23, 2023, the ACC denied your application because the requested fence "…transects and significantly encroaches on a path where Members of L'Esprit have been riding…" Then, on January 8, 2024, LPOA's president emailed the following, again without any supporting documentation, "I have consulted with the Chair of the ACC, the Board representative to the ACC and our legal counsel. The ACC denial of your fence proposal stands."

The ACC's denial of your application appears to be entirely arbitrary, as it is without any apparent basis in the LPOA's governing documents. The ACC provided no legal basis for its denial, and its careful reference to a "path" cannot be interpreted to mean any of the 20 +/-

[1] Available at https://www.lesprit.org/construction-permits.

miles of recorded bridle path easements that are officially referred to as Bridle Paths in the Declaration.

LPOA's statements in its Answer filed in the Weingarten Action provide further evidence of LPOA's lack of authority on this issue. In that action, Mr. Weingarten asserted that "[t]he L'Esprit Property Owners Association now claims Plaintiff Weingarten blocked a portion of the recorded bridle path easement by replacing the missing fence line on his private property," and that "the portion of the recorded bridle path easement does not cross Plaintiff Weingarten's tract of the L'Esprit Property, where he replaced the missing fence line." LPOA denied those allegations, asserting in response that "the Defendants have never contended that Plaintiff Weingarten blocked the recorded bridle path easement. Rather, Plaintiff Weingarten has blocked the path that horses have routinely used for years."

As we discuss further below, a recreational use of private property does not create an easement or any claim of right to access that private property. Accordingly, there does not appear to be any legal justification for the ACC's denial of your application, which appears to be arbitrary rather than based on any adopted guideline or statute.

<u>Question 2</u>: What is the legal justification for LPOA's attorney, Hal Thomas, to issue this statement in his December 23, 2023, letter to the Underwoods that the owner requested to, "…build a fence which would partially block a well-established bridle path used by the residents of L'Esprit…"?

In his April 25, 2023, letter to you, Thomas stated, "…the bridal [sic] path easements are not only shown on the recorded plats…" Then, in his December 23, 2023, letter, he used the Declaration's legal terms of "Bridle Paths" and "bridle path," and subsequently, on December 29, 2023, the Underwoods provided him with all ACC application submittals to verify the requested fence would not partially block a recorded bridle path easement. Nonetheless, it seems Thomas is implying that in addition to the *recorded* Bridle Path easements, created under Section 2.03 of the Declaration and recorded on the relevant plat documents, there are additional easements that have been created through a "well-established" use of a path for recreational purposes.

It appears that Thomas is, perhaps intentionally, using the term "bridle path" in a manner that is inconsistent with the Declaration and Kentucky law. The Declaration refers only to "Bridle Paths" in the context of such "area[s] designated as a Bridle Path by the recorded plats." Further, the Declaration provides a specific procedure at section 2.03 by which any Bridle Path may be relocated by the owner of a tract on which a Bridle Path is located which requires, among other things, the property owner to deliver to LPOA a "recordable perpetual

easement." There is no authority whatsoever in the Declaration providing that any other path constitutes a "Bridle Path."

To the extent Thomas can be understood to have stated that a new Bridle Path could be declared as a result of "well-established" use, that statement is contradicted by Kentucky law, as discussed in further detail below.

<u>Question 3</u>: What is the legal justification for LPOA's attorney, Hal Thomas, to make this statement in his April 25, 2023, letter to the Underwoods, "As you are probably aware, the bridal [sic] path easements are not only shown on recorded plats, but their use by property owners of the L'Esprit Subdivision has long since created prescriptive easements which cannot be blocked or otherwise interfered with."?

Here, Thomas is simply incorrect. You also informed us that Elizabeth Rapaport, who was and is currently a LPOA board member, stated in an email on April 7, 2022, regarding an open fence section on your private property that you closed, "Being as familiar as I am with that area and easements. I believe that the closure is a violation of Ky Real Estate Law regarding Prescriptive Easements." Ms. Rapaport is incorrect as well. The concept of a "prescriptive easement" does not apply under these circumstances.

First, a prescriptive easement requires the exercise of adverse possession, which is not supported by the facts. The Kentucky Court of Appeals put it thus:

> The law of prescriptive easements is derived from the principles underlying adverse possession of property interests generally. As a general matter, in order to obtain a right to a prescriptive easement, a claimant's adverse use must be "actual, open, notorious, forcible, exclusive, and hostile, and must continue in full force ... for at least fifteen years." A prescriptive easement is a property right in one landowner (dominant tenement) representing a privilege to use the land of another (servient tenement) and is based on a presumed grant that arises from the adverse, uninterrupted, and continued use for a 15–year statutory period.

Cole v. Gilvin, 59 S.W.3d 468, 475 (Ky. App. 2001).

In other words, for a path to become a prescriptive easement, it must be used openly ***without the property owner's permission*** for a period of at least 15 years. Any evidence that the owner permitted use of a path across the owner's property within the applicable 15-year period defeats a claim for a prescriptive easement. The *Cole* court further provides that:

> it is well-established that if the right to use a passway at its inception is permissive, the existence of a prescriptive easement or even a presumption of a claim of right does not arise unless there

> has been some distinct and positive act of assertion of right made clearly known to the owner of the servient tenement. The right to use a passway as a prescriptive easement cannot be acquired no matter how long the use continues if it originated from permission by the owner of the servient tenement.[2]

You asserted to us that you had, prior to submitting your fence application, not objected to the occasional use of your property by riders, and not attempted to block or prohibit that use by means of barriers, "no trespassing" signs, or other means. Accordingly, to the extent any prescriptive easement could possibly be created, the 15-year period of adverse use required would ***start*** in 2023, and could be interrupted at any time by your agreeing to further use.

But even if a prescriptive easement might have applied under these common-law principles, Kentucky has expressly prohibited the creation of a prescriptive easement based on recreational use of private property. KRS § 411.190(8) provides straightforwardly that "[n]o action for the recovery of real property, including establishment of prescriptive easement, right-of-way, or adverse possession, may be brought by any person whose claim is based on use solely for recreational purposes."

Accordingly, simply put, assertions that a "well-established" use of your property for horse riding creates a prescriptive easement is a premise entirely without legal support.

Question 4: KRS 411.190 sets forth standards and protections for owners who make land available to the public at no charge for specific recreational purposes, including horseback riding. Are there any limitations to these statutory protections for a compliant L'Esprit tract owner who has provided, or currently provides, non-easement land for the recreational purpose of horseback riding?

There are no such limitations that apply in these circumstances.

In a January 18, 2024, email, Thomas stated to you, "Mr. Underwood: As I have previously advised, I represent the L'Esprit HOA and as such I, by law work through the Board of Directors. I do not and can not take questions from individual members. However, you might want to review the effective date of KRS 411.190(8)."

To the extent that Thomas is implying that a prescriptive easement might have been created across your property prior to the enactment of KRS § 411.190(8) in 2002,[3] he is simply wrong. The Supreme Court of Kentucky has addressed this exact issue. The Court held in *Moore v. Stills*, 307 S.W.3d 71 (Ky. 2010), that KRS § 411.190(8) applies ***retroactively*** to claims brought

[2] *Id.* at 475-476.
[3] *See* REAL PROPERTY—LAND USE—PRIVATE LANDING STRIPS, 2002 Kentucky Laws Ch. 306 (H.B. 387).

on the basis of recreational use. Horseback riding is considered a recreational purpose under KRS § 411.190(1)(c). Thus, regardless of when riders began crossing your property outside of the recorded Bridle Path, the statue applies to prohibit the creation of a prescriptive easement.

Question 5: Is it your legal opinion that LPOA is required to promulgate bylaws language and corresponding rules and regulations that address the referenced provisions of subsection Article 5.04(iv) as they relate to bridle path easements, as well as to clarify the required scope of owner maintenance, upkeep and care of said bridle path easements, pursuant to Article 5.04(i)?

Yes. A tract owner's property includes any bridle path easement, and Article 5.04(iv) of the Declaration requires that owners, "shall be responsible for the maintenance, upkeep and care of the property owned by them." However, Section 5.04(i) states, "The Bylaws of the Association and the Rules and Regulations adopted by it will contain provisions for the operation, maintenance, upkeep, painting, repair, re-surfacing, landscaping, mowing, alteration, replacement, improvement, and/or use of the following . . .", and the list that follows, which includes "…bridle paths as established by easements for same upon the recorded plats," otherwise includes only common areas or other areas subject to common use. It is LPOA's responsibility, pursuant to the Declaration, to promulgate such rules which would designate and clarify who, either property owners or LPOA, is responsible for maintenance of bridle path easements.

We understand from you that the degradation of many of the recorded bridle path easements is the underlying cause of some of the current disputes between LPOA and property owners. But LPOA's failure to promulgate rules and regulations clarifying the obligations for the upkeep of those recorded bridle paths does not in any way justify LPOA's attempts to unilaterally declare new access paths across private property.

Question 6: Article 2.03 of the Declaration sets forth specific provisions whereby a bridle path easement can be relocated on that same tract. Does the Declaration address or specifically permit the creation of new bridle path easements without 75% voting acreage approval?

The Declaration does not address the creation of new bridle path easements. Per Section 1.02 of the Declaration, L'Esprit property is "held, transferred, sold, conveyed, and occupied subject to all easements and restrictions as shown by the plats of the property of record." Because the Declaration provides that the bridle path easements are dictated by what is recorded on the plats and is otherwise silent upon the creation of new bridle path easements, LPOA volunteers simply have no ability to create new bridle path easements. The addition of language to the Declaration permitting LPOA to create new bridle path easements would

require 75% acreage approval of an instrument to amend the Declaration, pursuant to Article 8.01.

Question 7: Pursuant to KRS 247.402(2)(c), is it LPOA's or a tract owner's primary responsibility to conspicuously post a warning sign(s) where there is a "dangerous latent condition" on a bridle path easement, as well as to post directional signs where riders should enter and exit each accessible section of a bridle path easement?

You told us that in 2022, LPOA commissioned High Country Conservation, LLC to review select "riding trails" in L'Esprit. High Country's report states, in part, there are, "…some significant areas of disrepair." It continues, again in part, "[i]n our judgment, this is mainly because it's highly likely the trails weren't designed in any real way but more likely just added on as property boundaries with easements. Due to that, they climb in and out of drainages along straight property boundaries. Each trail as it drops in and climbs out of each drainage will get worse as the trail gets steeper."

You further told us that for three years, the LPOA board of directors has rebuffed a recommendation to secure an independent and affordable safety review of all bridle path easements, as it would apply to all levels of horseback riders. A former board member who had primary volunteer responsibilities concerning the bridle path easements responded that he would rather have "plausible deniability." You also told us that LPOA hasn't provided detailed signage throughout the 20+/- miles of bridle path easements to indicate where horseback riders are restricted, and that as a result, riders typically are not aware when they trespass on non-easement private property, or otherwise encounter a bridle path easement section with a dangerous latent condition.

Whether KRS § 247.402 applies at all is not entirely clear from the facts available to us; however, based on our understanding from you that the intended use of the recorded bridle paths in L'Esprit is for owners of horses to ride those horses on those paths, it appears likely that it would not apply to property owners. Definitions for statutes governing "farm animal activities" are set forth in KRS § 247.4015, and provide as follows:

- "Farm animal activity" means:

  […]

  (d) Rides, trips, shows, clinics, demonstrations, sales, hunts, parades, games, exhibitions, or other activities of any type, however informal or impromptu, that are sponsored by a farm animal activity sponsor or other person;

(e) Testing, riding, inspecting, or evaluating a farm animal belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the farm animal or is permitting a prospective purchaser of the farm animal to ride, inspect, or evaluate the farm animal[.]

- "Farm animal activity sponsor" means an individual, group, club, partnership, corporation, or other legally constituted entity, whether the sponsor is operating for profit or nonprofit, which sponsors, organizes, allows, or provides the facilities for a farm animal activity, including, but not limited to: pony clubs, 4-H clubs, hunt clubs, riding clubs, polo clubs, school and college sponsored classes, programs, activities, and therapeutic riding programs, and operators, instructors, and promoters of farm animal facilities, including, but not limited to, stables, clubhouses, ponyride strings, fairs, exhibitions, farmstays, and arenas at which the activity is held[.]

- "Farm animal professional" means a person engaged for compensation in any of the following: (a) Instructing a participant or renting to a participant a farm animal for the purpose of riding, driving, or being a passenger upon the farm animal; (b) Providing daily care of farm animals boarded at a farm animal facility; (c) Renting equipment or tack to a participant in a farm animal activity; (d) Training a farm animal; (e) Examining or administering medical treatment to a farm animal as a veterinarian; (f) Providing farrier services to a farm animal; or (g) Providing shearing services to a farm animal[.]

- "Person" means any individual, corporation, association, or other legally constituted entity that owns or controls one or more farm animals[.]

KRS § 247.402 provides that "farm animal activity sponsors, farm animal professionals, or other persons" have "the duty to reasonably warn participants in farm animal activities of the inherent risks of the farm animal activities but not the duty to reduce or eliminate the inherent risks of farm animal activities." Accordingly, that duty to warn falls only upon persons or entities that are encompassed by those statutory definitions.

In this instance, it appears that LPOA may be considered a farm activity sponsor, as the Declaration "allows" or "provides" for riding activities in L'Esprit. If LPOA is deemed a farm activity sponsor, then it is responsible for posting warning signs pursuant to KRS § 247.402.

It does not appear, however, that individual property owners would be considered farm activity sponsors (unless they are operating a farm activity business on their tract), nor would they have any duty ***under KRS § 247.402*** to post warnings. The point of an easement, generally,

is that it permits a use of private property that would otherwise be considered a trespass. Thus, it is not up to the L'Esprit property owners to "allow" farm activity participants to ride on those easements – they have no say in the matter. Likewise, L'Esprit property owners (at least those who are not engaged in business benefitting from the use of those bridle paths) are not "farm animal professionals" as they are not "engaged for compensation" with regard to such activities.

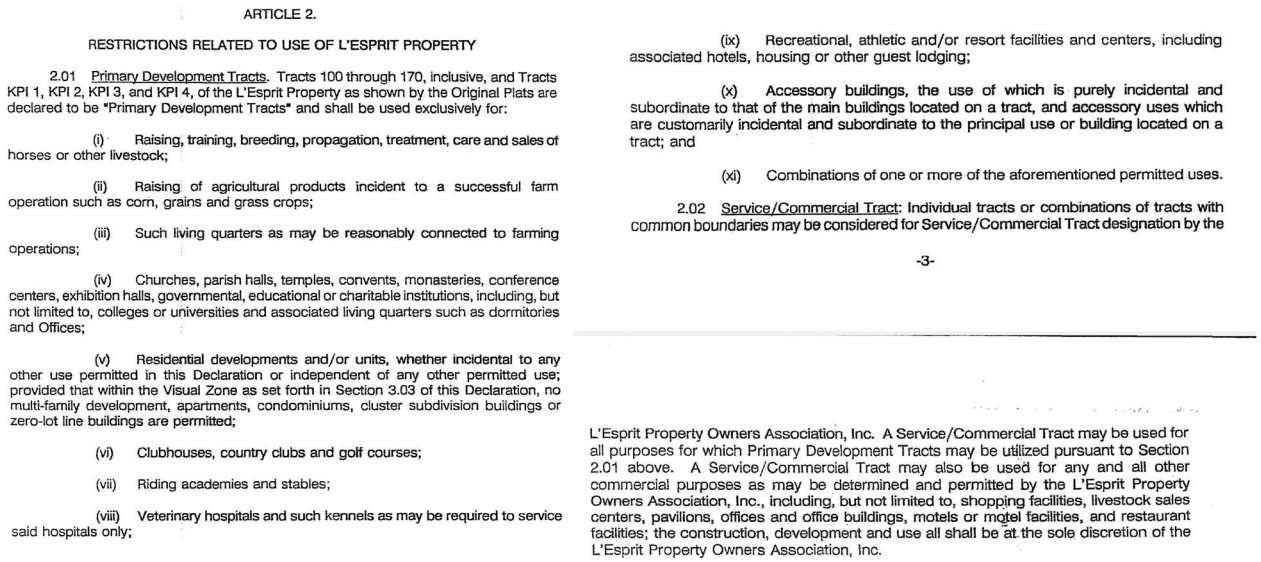
Note, however, that even if KRS § 247.402 does not apply to the property owners, common law does require a property owner to warn users of easements of latent (*i.e.*, not visible or obvious) dangerous conditions. Under general common law principles, a user of an easement is considered a "licensee" of the property, as opposed to an "invitee" or a "trespasser," as the person is using the property under a claim of right, but not at the invitation of the owner. *See, e.g., Hutchinson v. Murawa*, 2021-CA-0294-MR, 2021 WL 5141918, at *3 (Ky. App. Nov. 5, 2021). A possessor of land owes a general duty of care to a licensee to "not knowingly let[ ] her come upon a hidden peril or willfully or wantonly caus[e] her harm." *Smith v. Smith*, 563 S.W.3d 14, 17 (Ky. 2018). Thus, if a property owner is aware of a latent dangerous condition on the owner's property that is subject to an easement, the owner has an obligation to warn others of that latent condition.

It is important to also note that both KRS § 247.402 and the common law principle set forth above apply only to latent conditions – a property owner has no obligation to warn a licensee of a condition that is (or should be) obvious to a person exercising ordinary care. In practical terms in this context, this is the difference between, for example, a dangerously steep or visually degraded path (which is open and obvious) versus an open well that is overgrown with vegetation (which would be a "hidden peril" or latent harm).

Finally, the issue of who, between LPOA and the property owner, is responsible for posting signs regarding entry/exit from an easement is one that, in this case, should have been addressed by LPOA pursuant to its obligation to promulgate rules regarding the use and upkeep of those easements. Thus, a property owner has the right to indicate to the public the demarcation line between the owner's private property and the owner's property subject to easement, but does not have the obligation to do so.

<u>Question 8</u>: Based on the following provisions of Articles 2.01 and 2.02 of the Declaration, and excerpts of definitions in KRS 381.785, is L'Esprit governed by the statutory

provisions for a "planned community", pursuant to KRS 381.785-.801?



ARTICLE 2.

RESTRICTIONS RELATED TO USE OF L'ESPRIT PROPERTY

2.01 Primary Development Tracts. Tracts 100 through 170, inclusive, and Tracts KPI 1, KPI 2, KPI 3, and KPI 4, of the L'Esprit Property as shown by the Original Plats are declared to be "Primary Development Tracts" and shall be used exclusively for:

(i) Raising, training, breeding, propagation, treatment, care and sales of horses or other livestock;

(ii) Raising of agricultural products incident to a successful farm operation such as corn, grains and grass crops;

(iii) Such living quarters as may be reasonably connected to farming operations;

(iv) Churches, parish halls, temples, convents, monasteries, conference centers, exhibition halls, governmental, educational or charitable institutions, including, but not limited to, colleges or universities and associated living quarters such as dormitories and Offices;

(v) Residential developments and/or units, whether incidental to any other use permitted in this Declaration or independent of any other permitted use; provided that within the Visual Zone as set forth in Section 3.03 of this Declaration, no multi-family development, apartments, condominiums, cluster subdivision buildings or zero-lot line buildings are permitted;

(vi) Clubhouses, country clubs and golf courses;

(vii) Riding academies and stables;

(viii) Veterinary hospitals and such kennels as may be required to service said hospitals only;

(ix) Recreational, athletic and/or resort facilities and centers, including associated hotels, housing or other guest lodging;

(x) Accessory buildings, the use of which is purely incidental and subordinate to that of the main buildings located on a tract, and accessory uses which are customarily incidental and subordinate to the principal use or building located on a tract; and

(xi) Combinations of one or more of the aforementioned permitted uses.

2.02 Service/Commercial Tract: Individual tracts or combinations of tracts with common boundaries may be considered for Service/Commercial Tract designation by the

-3-

L'Esprit Property Owners Association, Inc. A Service/Commercial Tract may be used for all purposes for which Primary Development Tracts may be utilized pursuant to Section 2.01 above. A Service/Commercial Tract may also be used for any and all other commercial purposes as may be determined and permitted by the L'Esprit Property Owners Association, Inc., including, but not limited to, shopping facilities, livestock sales centers, pavilions, offices and office buildings, motels or motel facilities, and restaurant facilities; the construction, development and use all shall be at the sole discretion of the L'Esprit Property Owners Association, Inc.

On behalf of LPOA, Thomas recently cited KRS § 381.785-.801, the Planned Communities Act (the "PCA"), in his December 23, 2023 letter to you as the statute granting it authority to impose fines on L'Esprit property owners. You informed us LPOA has never levied fines against members until about six months ago, and that it did so without structured input from the entire membership. Thomas's statement asserts that L'Esprit classifies as a "planned community."

According to KRS § 381.785, "(13) (a) "***[p]lanned community***" means a ***group of residential dwellings***…" and "(16) "***[r]esidential dwelling***" means a building or portion of a building that ***is designed and intended for use and occupancy by a single household and not for business purposes***…" (emphasis added).

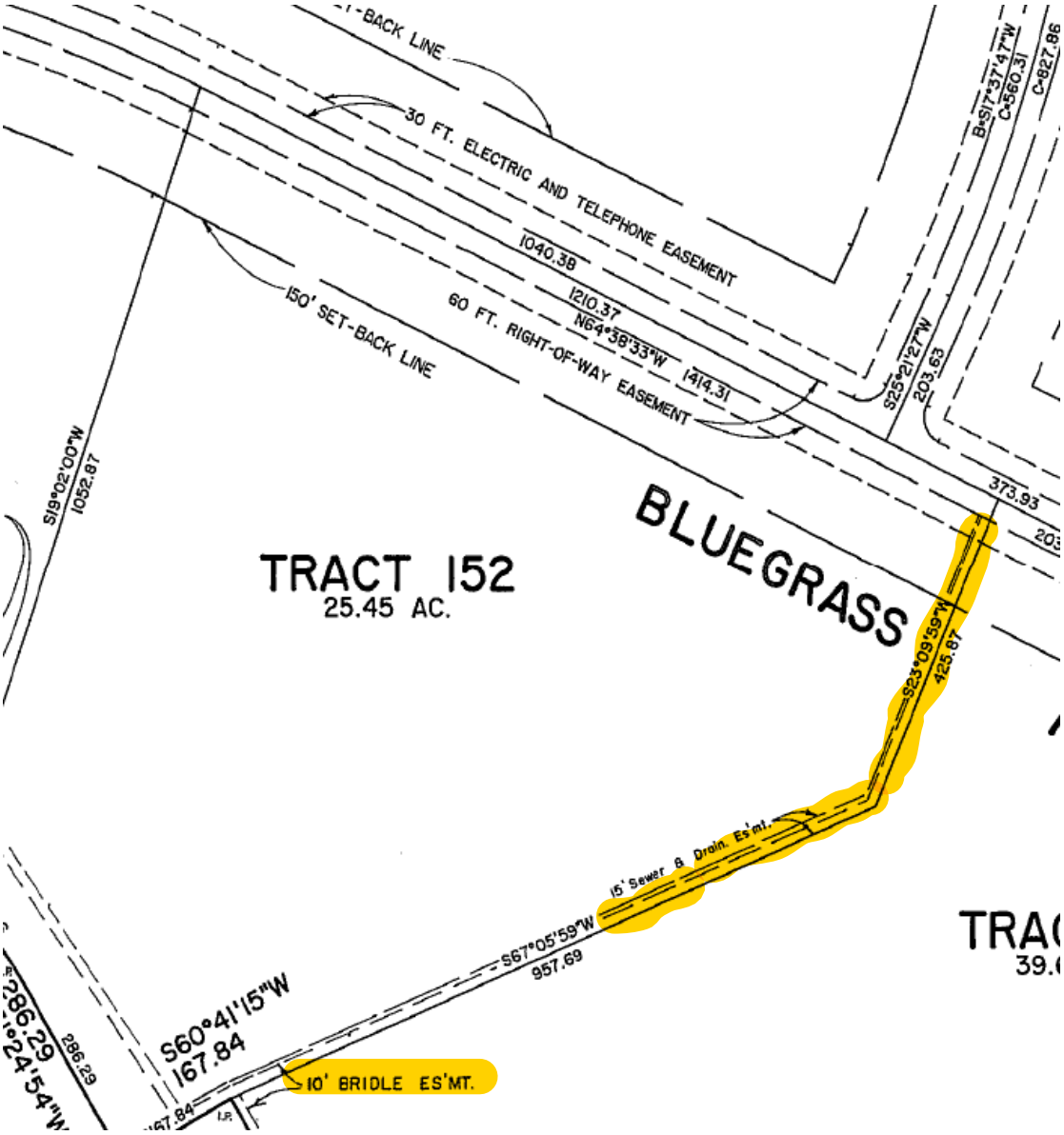
It does not appear that the PCA applies the way LPOA claims. L'Esprit is not a group of buildings designed and intended for use as single households and not for business purposes, but rather is a mixed-use development that, pursuant to the Declaration, expressly allows for multiple business, agricultural, and other non-residential uses. You have informed us that there are indeed tracts in L'Esprit (whose owners are, pursuant to the Declaration, members of the LPOA) that do not contain a single "residential dwelling" and are used strictly for business purposes. Accordingly, L'Esprit does not appear to be a "planned community" within the meaning of KRS §§ 381.785-.801.

* * *

Our responses to your questions above are based on our understanding of the facts at issue, which is in turn based on your representation of those facts to us.

February 16, 2024 letter to L'Esprit Property Owners Association, Inc.

Exhibit 3


BACK LINE
30 FT. ELECTRIC AND TELEPHONE EASEMENT
1040.38
1210.37
N64°38'33"W 1414.31
150' SET-BACK LINE
60 FT. RIGHT-OF-WAY EASEMENT
S25°21'27"W
203.63
373.93
S19°02'00"W
1052.87
TRACT 152
25.45 AC.
BLUEGRASS
S23°09'59"W
425.87
15' Sewer & Drain. Es'mt.
S67°05'59"W
957.69
S60°41'15"W
167.84
10' BRIDLE ES'MT.
286.29
S24°54"W

February 16, 2024 letter to L'Esprit Property Owners Association, Inc.

Exhibit 4

From: Elizabeth Rapaport <berapaport@gmail.com>
Sent: Thursday, April 7, 2022 9:36 AM
To: John Underwood - CLTC
Subject: Potential SPAM easement

Dear John,

The Board is aware of the timeline on the work done at that location, however there have delays beyond our control with the county.
Therefore, I do not recommend you remove the stakes of the survey because that could result in a cost to you to have the surverior return to resstake. These are challenging times for industries of all types and it took Mark Gardner several months to get someone scheduled to come out. As frustrating as it is, that is one again, beyond our control.

Being as familiar as I am with that area and easements. I believe that the closure is a violation of Ky Real Estate Law regarding Prescriptive Easements. Plus it is my understanding that according to the survey, your existing fence line is also an easement issue.

This is a complex matter that is getting the Boards full attention. It is just taking some time to put all of the pieces of this puzzle together and have the HC trail accessible to all riders by late Spring.

Thanks for your patience in this matter.

Elizabeth Rapaport

February 16, 2024 letter to L'Esprit Property Owners Association, Inc.

Exhibit 5

LAW OFFICES
THOMAS, DODSON & WOLFORD, PLLC
AT HURSTBOURNE PARK
9200 SHELBYVILLE ROAD, SUITE 611
LOUISVILLE, KENTUCKY 40222-8502
TELEPHONE (502) 426-1700
FACSIMILE (502) 426-0457

HAROLD W. THOMAS
hal@tdwattorneys.com

April 25, 2023

Mr. & Ms. John and Reata Underwood
1030 Bluegrass Parkway
LaGrange, KY 40031

RE: L'Esprit Community Bridal Paths

Dear Mr. & Ms. Underwood:

I have been requested to contact you on behalf of the L'Esprit Property Owners Association, Inc. regarding your actions in improperly blocking the bridal path easement that runs across a portion of your property. As you are probably aware, the bridal path easements are not only shown on recorded plats, but their use by property owners in L'Esprit Subdivision has long since created prescriptive easements which cannot be blocked or otherwise interfered with.

Hopefully the forwarding of this letter will be sufficient to remedy the situation without there being need for any further action.

Very Truly Yours
THOMAS, DODSON & WOLFORD, PLLC

Harold W. Thomas

HWT:sb
Cc: L'Esprit Property Association, Inc.

February 16, 2024 letter to L'Esprit Property Owners Association, Inc.

Exhibit 6

Your fence application

TH

Trish Henrion <paqequine@ao

To John Underwood - CLTC

Cc Barrett Shirrell; laura Lee Dunn Fischer; john Palmer; Ron retailpm.net; Rollo Fox IPad; Hal Thomas

12/23/2023

You forwarded this message on 12/23/2023 2:13 PM.

John,

I am writing to notify you that after a review of your fence application and on site visits by committee members the LPOA Architectural Control Committee has denied your fence application because the erection of a fence in the proposed location transects and significantly encroaches on a path where Members of L'Esprit have been riding for decades.

Should you have any questions regarding this denial please contact Rollo Fox, President of LPOA.

Regards,

Trish Henrion
LPOA Architectural Control Committee Chair

February 16, 2024 letter to L'Esprit Property Owners Association, Inc.

Exhibit 7

LAW OFFICES
THOMAS, DODSON & WOLFORD, PLLC
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LOUISVILLE, KENTUCKY 40222-8502
TELEPHONE (502) 426-1700
FACSIMILE (502) 426-0457

HAROLD W. THOMAS
hal@tdwattorneys.com

December 23, 2023

Mr. & Ms. John and Reta Underwood
1030 Bluegrass Parkway
LaGrange, KY 40031

RE: L'Esprit Community Bridle Paths

Dear Mr. & Ms. Underwood:

This is in response to your numerous communications to Trish Henrion and the members of the Architectural Control Committee of L'Esprit Property Owners Association, Inc.

First, contrary to your assertions, which are apparently based upon incorrect information received by you, the L'Esprit Property Owners Association, Inc., has the authority to assess fines against property owners who violate the restrictive covenants for L'Esprit Subdivision. A copy of the Kentucky statute which created such authority is attached.

Second, it is my understanding that the Architectural Control Committee for L'Esprit has denied your request to build a fence which would partially block a well established bridle path used by the residents of L'Esprit for thirty (30) plus years. If you should proceed to build the fence in question, the LPOA will pursuant to the Article 7.01 of the Third Amendment and Restatement of the L'Esprit Master Declaration of Easements, Covenants, and Restrictions, "remove at expense of the owners thereof" the fence in question. Law enforcement officials will be present when the fence is removed and you as the property owners will be required to reimburse the LPOA for the cost of removal and in addition you will be fined the sum of $1,000.00.

Under state law you have the right to appeal any fine assessed against you by requesting in writing a hearing before the full Board of Directors.

Very Truly Yours
THOMAS, DODSON & WOLFORD, PLLC

Harold W. Thomas

HWT:sb
Cc: L'Esprit Property Association, Inc.

381.797 Elements of assessments for each lot -- Notice of charges -- Special assessments -- Claimed breach of fiduciary duty -- Annual budget.

(1) In addition to the provisions of the declaration, bylaws, rules, or regulations of the association the assessment for each lot shall consist of:

(a) The allocated common expense liability;

(b) Fines for violations levied by the board;

(c) Individual assessments for utility services that are imposed or levied in accordance with the declaration;

(d) Costs of maintenance, repair, or replacement incurred due to the willful or negligent act of an owner or occupant of a lot or the family, tenants, guests, or invitees of an owner or occupant of a lot; and

(e) Costs or charges associated with the enforcement of the declarations, bylaws, rules and regulations of the association, and any provision of this section, including but not limited to reasonable attorney fees, costs, and other expense.

(2) Prior to imposing a charge for fines, damages, or an individual assessment pursuant to this section, the board shall give the owner a written notice and the opportunity to be heard.

(3) In addition to all other assessments which are authorized in the declaration, the board of an association shall have the power to levy a special assessment against lot owners:

(a) If the board finds that the purpose of the assessment is in the best interests of the association; and

(b) The proceeds of the assessment are used primarily for the maintenance and upkeep of the common areas and other such areas of association responsibility expressly provided for in the declaration, including capital expenditures.

(4) After termination of the declarant control period, an affirmative vote of a majority of the full board shall be required to approve a special assessment subject to the following provisions:

(a) Within thirty (30) days after board passage of a special assessment, a meeting of the association shall be held to allow owners an opportunity to rescind or reduce the special assessment; and

(b) A majority of the total number of lots of the planned community cast in person or by proxy shall be required to rescind or reduce the special assessment.

(5) No director or officer of the association shall be liable for failure to perform his or her fiduciary duty if a special assessment for the funds necessary for the director or officer to perform his or her fiduciary duty is rescinded or reduced by the owners pursuant to this section. The association shall indemnify such director or officer against any damage resulting from a claimed breach of fiduciary duty arising therefrom.

(6) The failure of an owner to pay an assessment or special assessment allowed under this section shall provide the association with the right to deny the owner access to any or all of the common areas, except that access to any road within the planned

February 16, 2024 letter to L'Esprit Property Owners Association, Inc.

Exhibit 8

Re: Please Seeking Clarification & Providing Information

RF

ROLLO FOX <puifox@aol.com>

To John Underwood - Ogimaa

Cc PATRICIA QUIRION; Hal Thomas; Tom Henrion; Elizabeth Rapaport; Michael Ash

1/8/2024

You forwarded this message on 1/8/2024 12:48 PM.

Your fence application.pdf
154 KB

HT Letter 12-23-23.pdf
809 KB

Enclosure #2 - Drawing.pdf

Mr Underwood
I have consulted with the Chair of the ACC, the Board representative to the ACC and our legal counsel . The ACC denial of your fence proposal stands.
Rollo Fox
President
LPOA Board of Directors
Sent from my iPhone

February 16, 2024 letter to L'Esprit Property Owners Association, Inc.

Exhibit 9

RE: Hal - Seeking Written Clarification

HT

Hal Thomas <hal@tdwattorney

To John Underwood - Ogimaa

Cc puifox@aol.com

1/18/2024

You replied to this message on 1/18/2024 11:01 AM.

Mr. Underwood: As I have previously advised, I represent the L'Esprit HOA and as such I, by law work through the Board of Directors. I do not and can not take questions from individual members. However, you might want to review the effective date of KRS 411.190(8).

February 16, 2024 letter to L'Esprit Property Owners Association, Inc.

Exhibit 10

L'ESPRIT

Property Owners Association
704 W. Jefferson, Suite 204
LaGrange, KY 40031
Phone: 502-225-9880
Fax: 502-225-9881
Email: lesprit1@core.com

Wednesday, September 12, 2001

To: L'Esprit Property Owners
Re: Litigation concerning Tract 106

Dear Fellow Property Owners,

The current L'Esprit Board of Directors (the Board) has now been in office almost eight months. We have confronted various situations; many are the same as previous Boards, others that are certainly new and different. The purpose of this letter is to address the current status of one specific effort, which is the litigation between the L'Esprit Property Owners Association and the owners of tract 106, Rollo and Peabody Fox. This has been ongoing for over a year and has been the subject of much discussion. Due to the amount of time that has elapsed, as well as, the direct mailings the Foxes have sent you, the Board felt it prudent to provide a status of the situation.

Contrary to the direct mailings you have received from the Foxes, the Board is not denying the rights of property owners in regard to the covenants and restrictions nor are we attempting to declare this a "residential community" versus an "equestrian community". Also, we certainly want to emphasize that we are not spending the property owner's funds in an irresponsible manner. In fact, quite the opposite is true. We are keenly aware that we are spending Association money. Our efforts are to realize results, which will no doubt impact our community for years to come. Through this effort, we trust that the fundamentals of the L'Esprit Rules and Covenants will not be swept away.

The reason we are in this litigation is due to the fact that plans were submitted to and approval obtained from the L'Esprit Architectural Committee for a barn on tract 106 with a viewing area. A separate residence was sited on the tract with the barn. Oldham County Planning and Zoning also approved the plans for the barn and a building permit was issued for the barn. Rather than building the barn pursuant to the plans submitted and approved, the Foxes built an apartment in the barn where they are now living and have not begun to construct and refuse to commit to the building of a conforming primary residence. In fact, recent plans submitted to the Architectural Committee for other out buildings which were built without L'Esprit approval and without building permits no longer show the house as sited on the original plans. The Foxes now say that they did not submit these plans to L'Esprit or to Planning and Zoning and that the signature on those documents is not that of Rollo Fox.

The Foxes have sought and obtained, after the fact, building permits for the barn apartment, which is now described as a single family dwelling (2600 square feet) with a

barn (19,000 square feet) attached. Planning and Zoning has approved the barn apartment even though such structures are in direct violation of the Oldham County Planning Code which, like L'Esprit's regulations, does not permit such structures. To make matters worse Planning and Zoning cannot even issue a certificate of occupancy for the apartment without an inspection, which is now impossible, since the apartment was originally constructed without the proper inspections or permits. Planning and Zoning continues to permit the Foxes to live there without a certificate of occupancy.

Succinctly, the apartment in the barn was built without the approval of L'Esprit or Planning and Zoning and is not permitted by either Oldham County Planning Code or L'Esprit Regulations, which is the reason for the litigation. Your Board intends to ensure that metal barns are not approved for use as a residence in L'Esprit.

The intent of this letter is not to litigate these issues in the public domain. The complete effort required to enforce the covenants and restrictions is more appropriately handled through the venue of the judicial system in these circumstances where the administration of our rules and covenants are challenged. The Board feels it is important to let the Property Owners know that factual grounds exist which differ markedly from the allegations and self interest statements made by the Foxes in their direct mailings to all property owners.

The board does not gain anything by engaging a fellow property owner in a lawsuit; however, we were elected to uphold the standards set forth in our covenants and restrictions.

There is another important action we need to advise our property owners about. On May 9, 2001 the Foxes began litigation to have the ballots from the November 2000 election turned over to them for a recount. The Board of Directors felt the privacy of the property owners was of the utmost importance and allowed the courts to process the recount. Judge Rosenblum determined that all ballots that were counted were properly counted and that the ballots that were rejected were properly rejected, therefore verifying the Election of the Board of Directors. Enclosed with this letter are copies of the court documents.

Litigation is frequently long and frustrating. However, the benefits of this process will be the sustainment of the standards set out in our covenants and restrictions: the standards that make L'Esprit such a beautiful place to live. The Board is committed to uphold the Rules and Covenants and their intent for L'Esprit.

Sincerely,

Mary Dee Bryant, President
Ben C. Schafer, Treasurer
Margaret Rataj, Secretary
Richard White, Board Rep., Architectural Control Committee
Jim Stone, Board Member