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.

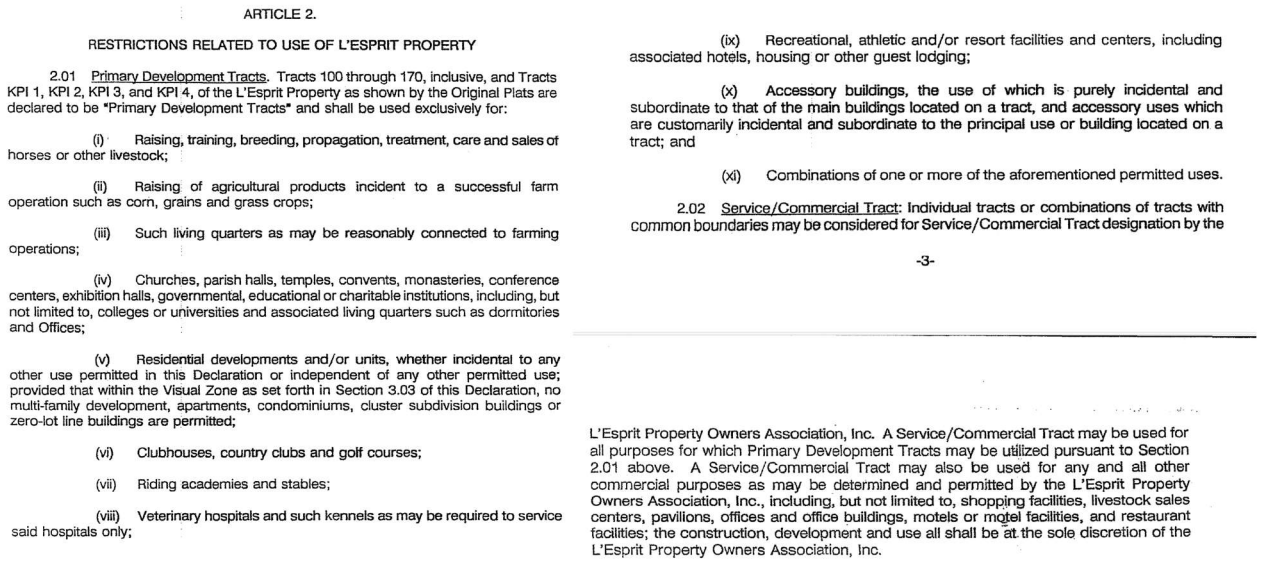
Note, however, that even if KRS § 247.402 does not apply to the property owners, common law does require a property owner to warn users of easements of latent (*i.e.*, not visible or obvious) dangerous conditions. Under general common law principles, a user of an easement is considered a "licensee" of 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

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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.