Request to the Department of Codes and Regulations for Formal Determinations in Writing on HRG's Development Plan

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By:

Daniel & Elizabeth Fauxpoint
1505 Rosewood Ave, Unit #7
Louisville, Kentucky 40204

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1 - Expired Applications, Plans and Permits

Throughout April of 2005 to the present, HRG's plan submissions for the Rosewood II have occurred at five distinct time intervals. The plan currently under review is based on an array of previous applications, plans, and permits, all of which have expired.

Per LDC (2006) Section 1.1.9, a Category Review Development Plan has a two-year time limit. An applicant must obtain a building permit and/or a clearing and grading permit within two years of the final approval date.

If a building permit is not issued within two years of obtaining the permit, the applicant must show good cause to obtain an extension of the approved plan prior to its expiration. If the applicant has failed to meet the above requirements, a new development plan must be approved.

Per Kentucky Building Code [KBC] Section 105.3.2, a permit application is deemed abandoned 180 days after the date of filing. Per KBC Section 105.5, every permit issued becomes invalid if work does not commence within 180 days after its issuance.

1. April of 2005 [see Appendix 1, Table 2]

It is unclear if the site plan submitted to BOZA is technically an approved development plan.[1] If so, it expired on June 8, 2007. If not, it required additional review and final approval prior to the issuance of a building permit.

2. January of 2013 [see Appendix 1, Table 4]

In January of 2013, HRG resubmitted the 2005 site plan.[2] This plan was not certified or Code-compliant, and it contained many inaccurate data points.[3] The submission did not meet the majority of criteria under KBC Sections 105 and 106 to obtain a building permit.

On April 16, 2013, HRG submitted three separate applications for a Single Family Building and Accessory Permit.[4] Although the site plan was either expired or had not yet received final approval, and the January submission did not include an EPSC Plan, MSD apparently issued an EPSC Permit that same day.

Shortly thereafter, Building Permit #359225 was issued for "full build construction."[5] The permit has no issue date and expired on October 16, 2013. The permit indicates approvals from MSD and Public Works, but these approvals are not reflected on the site plan, as required by KBC Section 106.3.1. The only documented approval is a landscape review (waived on 1/25/13).

The timing of these applications and approvals is significant. The Rosewood Master Deed Clause (P) required the declarant to relinquish control of the condominium project to the Rosewood Council by July 21, 2013.[6]

As such, it was imperative that HRG obtain plan approval and permits while it still retained control of the project and the corresponding right to submit applications on behalf of the landowners. After July 21, 2013, development rights may be exercised through the declarant's power of attorney to amend the Rosewood Master Deed and to supplement the floor plans.

In October of 2013, we addressed the issuance of Building Permit #359225 with Construction Review staff. The supervisor explained that the issuance of this permit was a computer glitch. If that is the case, then this building permit is null and void. It does not effectively preserve HRG's development rights, as was likely its intent.

[1] Document #1-1 [2005 site plan with BOZA's handwritten corrections]. Also see Request for Determination 6e on page 21.
[2] Document #1-2 [January 2013 revisions to 2005 site plan].
[3] see Section 4 on total number of dwelling units, and Section 6 on outstanding Code violations.
[4] Document #1-3 [April 2013 building permit applications for January 2013 site plan].
[5] Document #1-4 [Building Permit #359225 with no issue date].
[6] see Section 8(b) on the provisions of the Rosewood Master Deed.

3. September of 2013 [see Appendix 1, Table 5]
HRG then supplemented the April 2005/January 2013 plan with detailed construction documents on September 11, 2013. The plan was reviewed and approved by MSD and Public Works that same day.[7]

4. January / February 2014 [see Appendix 1, Table 5]
On January 10, 2014, three separate building permits [#359225, #359231, and #359232] were issued.[8] Note, however, that the three corresponding applications for single-family building permits (dated April 16, 2013) had expired long before the issuance of these permits.

Note also that the same permit ID number 359225 was re-used, and that each of the permits incorporate the exact language of the original permit. In other words, these permits were effectively a reinstatement of the null and void permit (#359225, issued the year prior), itself based upon a null and void application.[9]

Codes & Regulations then suspended these three permits on February 6, 2014 on the basis of unapproved plan deviations and multiple compliance issues (which are well documented in the Rosewood case file).

In any event, all three building permits expired on August 6, 2014. Each related approval and permit (EPSC; Site Disturbance; MSD General Permit) expired as well. There would be no logical reason to reinstate permits that expired eight months ago and issued for an entirely different plan than what HRG proposes today.

5. June of 2014 [see Appendix 1, Table 6]
The non-compliant site plan currently under review is an ongoing modification of previous non-compliant plans.[10] Per KRS 198B.062, a building *shall* be constructed according to the approved construction documents. No such documents have been approved. HRG therefore *must* submitted an application accompanied by Code-compliant plans in order to obtain a building permit.

Request for Determination #1:

1a - Reinstatement of Expired Permits
PDS staff have indicated that Codes & Regulations will reinstate HRG's suspended and expired permits. We are unable to locate any provision in the LDC or KBC that would support such a decision, most especially one that insulates HRG from its failure to obtain the necessary permits within the time limit set by the developer himself.

We ask that Codes & Regulations enforce the regulations set forth in KBC Section 105, which mandates HRG to follow the proper procedure to obtain a building permit. If the Department determines that it will reinstate invalid and expired building permits, please refer us to any applicable regulations that would indicate its statutory authority to do so.

1b - Expired Development Plan
When the Department suspended HRG's building permits in February of 2014, HRG was instructed to go back to the drawing board and devise a new development plan that complies fully with Code. HRG instead devised a plan that *did not* but theoretically *could* meet Code.[11] PDS forwarded the non-compliant site plan to the Planning Commission, which approved two parking waivers in August of 2014.

Per LDC 1.1.9, a category review development plan has a two year time limit. HRG submitted its revised plan in January of 2013, which has since expired in January of this year. All subsequent approvals and permits were based directly on that now expired plan.

We therefore ask the Department to simplify what has become a rather convoluted process via formal acknowledgement of HRG's expired development plan. This would allow for a comprehensive plan review, taking into account that the proposed building is actually an expansion of the existing Rosewood condo regime.

[7] Document #1-5 [Hanson Report on September 2013 Construction Plans]
[8] Document #1-6 [set of building permits issued on January 10, 2014].
[9] see Section 8(d) for discussion on the submitted plan application.
[10] Document #1-7 [Rosewood II Current Site Plan submitted on December 17, 2014].
[11] Document #1-8 [PDS email related to Code compliance of the July 2014 site plan].

2 - Appropriate Category Review for a Multi-Phased Condominium Project

a. Master Plan for Development

A condominium project requires a *comprehensive* review because each phase is the continuation of a master plan for development.[1] Condominiums are a complex form of property ownership and require meticulous planning. As such, experienced condo developers devise a master plan from the outset. Plans often change and may involve development in phases. But each phase is inextricably linked to that master plan, as approved by city officials and set forth in the recorded deed, plats, and plans.

Strictly speaking, the Rosewood property is *one* condominium, currently comprised of 9 individually-owned units and the rest owned in common. HRG's plan for the "Rosewood II" is not an independent project. It is a proposed expansion of the existing condominium regime.

Unfortunately, HRG did not devise a coherent master plan that unified each development phase. HRG's piecemeal implementation of ad hoc plans effectively bypassed the thresholds that should trigger a Category 3 Review.

In fact, despite extensive research in the Jefferson County land records, we could not find a condo project spanning over a decade but lacking a master plan, advanced in phases as haphazard as this HRG project:

Phase 1 - 2004: Secured a building permit (#45216) for a purported "interior renovation," but entailed the reconstruction of a nonconforming, antebellum building in a strictly regulated TNFD. Constructed far outside the permitted work scope. Increased density by 25%, impervious surfaces by over 50%, and floor area by 1,000 sqft.

Phase 2 - 2005: Submitted a site plan depicting a proposed new building, with faulty data on key development guidelines: density, FAR, PYA, and use of existing structures. Argued that without approval for an underground garage, the development would be "completely [and] adversely rendered to a marginal value." Obtained BOZA's approval for a variance that reduced the PYA by 2,835sqft.; a waiver allowing the west-side garage to be built 0 ft. from the property line; and another waiver for a curb cut access to the 5-car underground garage.

Phase 3 - 2006: Established an expandable condominium regime per the recorded Master Deed, plats and plans, but did not record any plan depicting the proposed building or boundaries of development site (despite obtaining plan approval the prior year). Advertised the large green space in marketing materials and to prospective buyers.

Phase 4 - 2007: Reconstructed a non-conforming carriage house (without a building permit or determination of use rights). Incorporated an unapproved 9th unit into the condo regime. Conveyed Unit #9 to HRG's partners, via a deed reciting a non-existent "Tunny Master Deed" rather than the Rosewood Condominium Master Deed.[2]

Phase 5 - 2013: Modified the 2005 plan without approval (resulting in the suspension of building permits issued in January of 2014) *after* declarant had relinquished all rights, powers, and control of the condo project.

Phase 6 - 2014: Secured the Planning Commission's approval for two parking waivers (despite safety concerns and intense neighborhood opposition), a step made necessary by the elimination of the underground garage.

Phase 7 - 2015: Continues the attempted expansion of the Rosewood Condominium via a non-compliant building that may exceed the permitted FAR, to be constructed on the significantly reduced PYA (in conflict with BOZA's imposed restrictions, as well as the Rosewood's recorded deed, plat, and plans).

It is unlikely that officials would have approved this plan had it been presented as such from the start. What is particularly surprising, though, is that HRG did not even submit a development plan in 2004. In July of last year, we asked PDS staff for a copy of HRG's original development plan. The planner explained that HRG was not required to submit development plan because the "interior renovation project" did not increase the floor area.

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[1] see *Condominium and Homeowner Association Practice: Community Association Law, Third Edition*, Wayne Hyatt, ALI-ABA Publications, 2000; *Methods of Practice, Third Edition*, Robert Keats, West Publishing Co., 1989; *Kentucky Real Estate Law and Practice, Fourth Edition*, University of Kentucky, 2013; *The Kentucky Condominium Act (Part II)*, Scott Brinkman, Kentucky Law Journal Online, Volume 99, 2010-2011 (pages 13-22).

[2] see Section 8(d) on plan applications submitted by declarant falsely assert property ownership.

It is unclear why site inspections throughout 2005-2007 did not note the approximate 1,000 sqft. of expanded floor area or construction activities far beyond the scope of Building Permit #45216. Moreover, the PDS determination in 2004 that a proper development plan was not required seems to conflict with KBC Section 105 and with Code. LDC (2004) 2.7.C.5 required at least a site plan review, whereas LDC (2004) 11.6.3b expressly required an approved development plan prior to issuing a building permit.

Regardless, by April of 2005, HRG clearly intended to develop a condominium project with over 10 units. This *should* have triggered an appropriate review *before* HRG advanced its development plan via the critical zoning exemptions granted by BOZA that May.

b. Compounding Effects

There are two important points about the Rosewood property that should not be overlooked.

First, the Rosewood site was spot zoned. On June 16, 1971, the historic site was rezoned from R5 to R7 by the Board of Aldermen under highly irregular circumstances.[3] The Planning Commission in 1967 and 1969 twice recommended to deny the R7 zone change. The Commission described the request as "spot zoning," the proposed density increase as an "invasion of incompatible land use," and the previous owner/developer's use of a non-conforming structure as an "unfair advantage" over the surrounding "good quality" single-family homes.[4]

There is an obvious disparity between a typical R7 site and the Rosewood site.[5] The property's high-density R7 zoning is inappropriate for a relatively small half-acre lot, located in the middle of a residential street, surrounded by low-density, single-family lots that require a sizeable Private Yard Area.

Second, each pivotal stage of HRG's development plan occurred precisely when our city's zoning system was in a state of experiment and flux. Throughout 2003 - 2006, the LDC underwent significant revisions as the city transitioned from conventional zoning to a hybrid variation of Form Based Code.[6] The dimensional standards that once strictly regulated the density and intensity of an R7 zoning district shifted to the form district instead.

In theory, the distinct traits and patterns of a neighborhood are now protected by form district standards (and also the Comprehensive Plan). TNFD standards require a *minimum* PYA of 6,427 sqft. for the Rosewood site. Its current PYA is only 4,684 sqft. TNFD regulations would therefore restrict development on a site with insufficient land area to support it.

However, this restriction was nullified when BOZA granted a variance that reduced the PYA by nearly half. The variance permitted a drastic increase in both density and intensity. KRS 100.247 disallows a variance of this nature:

> "The board shall not possess the power to grant a variance to permit a use of any land, building or structure which is not permitted by the zoning regulation in the zone in question, *or to alter density requirements in the zone in question*."

The Rosewood site exemplifies how deviation from the Comprehensive Plan requires deviation from Code. Development of this site was only *theoretically* possible because of an improper zone change from 44 years ago. However, it required a "humungous loss of green space" (as noted by BOZA[7]) in the form of a PYA reduction of nearly 3,000 sqft. to make it *physically* possible. Even so, HRG has consistently failed to meet the minimum yard requirements in all proposed site plans. That HRG's plan is irreconcilable with Cornerstone 2020 is an important matter that should be addressed separately.

[3] The Zoning District Map was "corrected" on a Sunday on 6/6/71, two days **prior** to the Aldermen's 6/8/71 vote. Ordinance No. 63 was approved on 6/16/71, a peculiar time in the city's history. No zoning ordinances were in effect because the Aldermen missed a statutory deadline to re-adopted the city's zoning regulations. The Aldermen also never considered the Commission's **R6** recommendation and never conducted a fact-finding hearing before effectuating the R7 zone change.
[4] Document #2-1 [Planning Commission findings in 1967 and 1969].
[5] Document #2-2 [Comparison of a typical R7 District and the Rosewood site].
[6] see Preamble to Cornerstone 2020 and Document #2-3 [*Form-Based Zoning*, APA Zoning Practice, May 2004], page 6.
[7] Document #2-4 [BOZA 2005 hearing transcript, page 18, at 45:31].

c. Category 3 Review

When examined in its entirety, HRG's development plan meets the criteria for a Category 3 Review. Per the TNFD Threshold Table 5.2.3 (LDC 2004), the construction of 10 or more multi-family residential dwelling units required a Category 3 Review. HRG has constructed a total of 9 units and proposes to construct 3 more.

Alternatively, each unit is a "parcel" by legal definition. The LDC makes no distinction between a "parcel" and a "lot." HRG has therefore created 9 residential parcels/lots and proposes to create 3 more.

A Category 3 Review is a fair and reasonable solution for these reasons:

First, HRG's "interior renovation project" was merely a foothold for a high-density, Class 2 Intensity, expandable condominium regime. A Category 3 Review was applicable in 2004 and remains so today. Anything less would allow HRG to capitalize on its successful evasion of a comprehensive review.

Second, the expiration of HRG's development plan in January presents something of a clean slate. This is an opportune time to reevaluate the current plan, which requires a far more holistic review than it has received so far.

Third, the neighborhood has very legitimate concerns about this development plan. A Category 3 Review would allow for some much-need community input and also afford Rosewood residents their due process right to an administrative hearing. This right has been denied on several occasions.[8]

Fourth, an architectural review would assess the "Rosewood II" for compatibility with surroundings homes and the existing antebellum structure. Please note that the Master Deed was prepared by Gene Crawford (managing partner of HRG) and contains zero standards to ensure a high-quality design. Crawford also explicitly stated he will construct a cheaper, less desirable building that will not complement current property values.[9] We urge the Department to take him at his word.

Fifth, the imposition of binding elements would prevent further adverse plan deviations. For example, HRG argued in 2005 that the underground garage was a mitigating element to: offset the PYA reduction; protect surrounding property values; and avoid the safety hazards posed by additional parking on a dangerous hill. BOZA's approvals were based on these precise justifications. Then in 2014, HRG eliminated the garage and obtained parking waivers with relative ease. A Category 3 Review would presumably look at the big picture and negotiate more favorable terms for our community.

Sixth, the Rosewood case is a departure from established norms. The complexities surrounding HRG's 10-year struggle to devise a Code-compliant plan calls for the technical guidance of the Planning Commission. Several members are developers and perhaps familiar with key concepts of condo law and development. The Commission is also advised by legal counsel. In light of the long-standing controversies of the Rosewood case, it would be prudent to draw upon the expertise of a legitimate administrative body.

Finally, approval of this development plan absent a rigorous Category 3 Review would set a dangerous precedent for our neighborhood. As the Kentucky Supreme Court warned Louisville Metro officials in 2001: Erosion of the Comprehensive Plan occurs on a *case-by-case basis*.[10]

Request for Determination #2:

We ask the Department to apply the regulations set forth in LDC (2006) 11.6.4 related to the Category 3 Review Procedure to HRG's comprehensive development plan.

[8] The primary example is the Aldermen's failure to meet its statutory duty to conduct a fact-finding hearing on the 1971 zone change. Other examples include: the defective 2005 PDS Notice of the BOZA hearing that excluded any reference to the curb cut request, which would have effectively put the neighborhood on notice that HRG intended to build; also, PDS's refusal to process the Rosewood Council's zone change proposal, which was essentially an attempt to secure an administrative hearing on HRG's development plan. No appeal process is otherwise available to the current landowners.

[9] Document #2-5 [Email from Gene Crawford to Council president Michael Kuharich dated February 16, 2014].

[10] Document #2-6 [Louisville Planning Commission v. Schmidt, 2001].

3 - Origination of Certified Land Use Restriction recorded in the Jefferson County Land Records

a. Non-Disclosure

There is a misperception among administrative officials that Rosewood unit owners clearly understood HRG's intent to construct an additional building because this intent was contemplated in the Master Deed. In fact, the Planning Commission's rationale to grant parking waivers to HRG in August of 2014 was based in part on this misperception:

> "I do believe that from day one when they bought their condos, it was very clear that there was an intent to build another 3-unit building. That was never hidden from anyone. So they knew that from the beginning that that was going to happen most likely some day."[1]

Unfortunately, this is not the case. HRG has consistently opted not to disclose the existence of an approved development plan to the Rosewood unit owners.

A comparative analysis of various condominium projects throughout 2002-2009 indicates that developers provided extensive details on the scope of a project. The Rosewood documents reveal an aberration from standard practices.

For example, the Rosewood plat/plans fail to designate the limits of common elements; whereas other developers not only identified common element boundaries, but also provided the square footage and dimensions (of particular import for common element yard areas).[2]

While the Rosewood plat/plans give no indication of a phased expansion, other developers not only detailed contemplated phases in the master deed, but also delineated how the percent of common interest would be modified in accordance with subsequent deed amendments.[3]

Most importantly, other developers adhered to provisions of KRS 381.835(2), which requires a declarant to **clearly and accurately depict the location, dimensions, area, and units for both existing and *proposed* buildings on the plans recorded simultaneously with the Master Deed**.[4] The Rosewood plat/plans, however, provide only the basic dimensions of existing structures. In fact, the Rosewood plat/plans did not (and still do not) actually depict the proposed building.[5]

Under KRS 381.835(2), a declarant may also record a plan approved by the city/county with the authority to issue building permits. However, HRG's 2005 approved plan depicting the proposed building was never recorded in the land records either.

Compare HRG's striking omission of an approved plan with that of the Creekwood Condominiums plat/plan recorded in 2002.[6] The Rosewood plat/plans of 2006 make no reference to the three variance/waiver approvals of 2005, whereas the Creekwood plat/plans included the docket number for a special requirement approved by the Planning Commission.

Another key difference is the Creekwood's documentation of critical plan elements, such as: MSD and Public Works approvals; a certificate of ownership; and a statement certifying that the plan complies with zoning regulations and issued building permits. Compare such precision to the Rosewood plat/plans, which were never amended to reflect the multiple plan approvals and permits obtained by HRG in 2013.

[1] see video of the Planning Commission hearing on Case #14PARK1002 at 3:17:55.
[2] see Document #3-2a [Brookley Place 2006] or Document #3-2d [Spring Castle 2009].
[3] see Document #3-2e [Spring Villa 2006].
[4] Under Kentucky Horizontal Property Law, KRS 381.810(3) a "condominium project" includes both existing and proposed buildings; KRS 381.835(2) requires the particulars of those buildings be depicted in the recorded plans. This requirement is reiterated (with far greater specificity) in the Kentucky Condominium Act under KRS 381.9141.
[5] compare Document #3-1 [Rosewood Condominium recorded plat and plans, July of 2006] with Document #3-2c [Lofts of Baxter Walk 2003] or Document #3-2a [Brookley Place 2006].
[6] see Document #3-2b [Creekwood 2002].

When the "interior renovation" of the Rosewood condos was completed in June of 2006, HRG partnered with two Semonin realtors to market and sell the units. The realtors purchased Unit #9 (the carriage house), and therefore were presumably involved in its reconstruction and interior renovation.[7] They even participated in condo meetings as representatives for Unit #9 *and* Unit #3.[8]

Not only did HRG and its Semonin business partners promote the "large green space" in marketing materials, one agent explicitly stated in a June of 2006 email to a potential buyer (and eventual owner of Unit #7) that:

> "The property next door is going to green space for the condos. We have convinced the developer that this would encourage those people who are presently interested in the building."[9]

It is important to note that HRG obtained plan approval a year *prior* to these representations. As such, officials should not base future decisions on a presumption of HRG's good faith disclosure of its intent to build.

b. Certificate of Land Use Restriction [LUR]

KRS 100.3681 requires that land restrictions, including variances and development plans**,** are certified on the designated form and recorded in the land records. The public (i.e. lenders, title search services) and potential buyers are then made aware of restrictions that would directly impact a real estate investment.

A certified LUR could even be the basis for a condo management company to certify in August of 2013 that the Rosewood condo project is not subject to additional phasing or add-ons.[10]

Despite PDS's incorrect determination in 2004 that HRG did not need to submit a development plan, by April of 2005, the "interior renovation project" had clearly evolved into an expandable condominium regime. This critical change in the project's scope should have been duly reflected in the county land records.

PDS staff instead recorded an improper Certificate of Land Use Restriction on August 26, 2005.[11]

- The LUR referenced only the Goddard subdivision instead of the "Rosewood II" project (or even the Rosewood condominium project) as identified on the 2005 plan.

- The LUR was not completed on the designated form utilized by other PDS staff at that time. The correct form documents the restriction of variances specific to a development plan.

- The LUR cross-referenced only Docket #B-74-05, which pertains to HRG's variance request to build a rear garage at 0 ft. from the west-side property line, rather than Docket #B-74-05**W**, which pertains to HRG's critical variance/ waiver requests for a curb cut and PYA reduction.[12]

[7] Document #3-3 [Unit #9 Deed - HRG to Brewer and Jones, dated 8/17/07]. Note that the deed makes no reference to the Rosewood Master Deed recorded in DB8871x375 and instead points to DB8488x271, in which Tunny, LLC. sold the Rosewood property to HRG in September of 2004.

[8] Document #3-4 [Rosewood condo meeting attendance sheet on October 24, 2006.

[9] Document #3-5 [Email from Jones to Lawson re: green space in June of 2006] and Document #3-6 [MLS listings for Units #2 and #7].

[10] Document #3-7 [Wells Fargo Lender Questionnaire dated August 7, 2013].

[11] Document #3-8 [Certificate of Land Use Restriction recorded by PDS on 8/26/05].

[12] It is still unclear why the PDS Notice of Docket #B-74-05**W** mailed to 1st Tier residents made no reference to the curb cut request. This error was the root cause of residents' mistaken belief that the BOZA hearing in May of 2005 pertained to a yard reduction in order to build the rear garage.

A prospective buyer who relies on current land records to determine the scope of the Rosewood condominium project (and ultimately their percentage of ownership) will find as of today:

1. A certified LUR recorded in 2005 that does not point to the existence of HRG's development plan;
2. A Master Deed recorded in 2006 that only "contemplates" the expansion of a condo project in which the declarant has since relinquished all rights, power, and control to the Rosewood Council on July 21, 2013;
3. A condo plat that depicts an unencumbered private yard instead of an additional 3-story, 3-unit building.

We stress that if HRG's development plan had been assigned the appropriate Category 3 Review from the start, interested parties could have easily avoided the predicament we find ourselves in today. The proper LUR would have *necessarily* been recorded because the designated form is attached to the Category 3 plan review application.[13]

It would therefore have been abundantly clear to all prospective buyers that their significant real estate investment (for some, their life savings) in the Rosewood condo project was subject not to a "*contemplated*" building but to an already approved plan that had secured **3** (not just 1) crucial exemptions from zoning regulations.

Understand that quite aside from the aesthetic value of the open green space, its abundance of natural sunlight, and the substantial tree canopy area along the west LBA, these features are intrinsic to the economic value of the Rosewood condos, which initially sold at an average price of over $400,000. Full disclosure of the 2005 approved plan was not in HRG's best financial interests.

Request for Determination #3:

KRS 100.991(3) imposes penalties upon any person who intentionally violates the statutory provisions for a certified Land Use Restriction. KRS 100.3681(4) allows for an improper filing to be cured by a subsequent proper filing.

However, the origination of this certified LUR is unclear. We request the Department to determine whether its contents were prepared by HRG or PDS staff, and impose the appropriate penalty for violation of this statute. We also request the Department to ensure that the improper filing is cured prior the issuance of a building permit.

[13] See other examples of LURs recorded by PDS in 2002 and 2005 per Document #3-9 [LUR for Jawbreaker Properties].

4 - Total Number of Dwelling Units Permitted on the Rosewood Site

A series of unresolved administrative errors were key factors in the advancement of HRG's development plan.

On April 25, 2005 (as construction was well under way) HRG submitted to PDS a site plan in support of a ***waiver*** application to reduce the Private Yard Area by 3% or 650 sqft.[1] The request actually called for a ***variance*** and a 44% or 2,835 sqft. reduction. Neither HRG nor PDS demonstrated that the Rosewood site even met the minimum requirement of 30% or 6,427 sqft. (for the record, the current PYA is 4,684 sqft.).

Rather than reject the application, PDS staff corrected the math, synthesized HRG's "waiver" justifications with "variance" criteria language, and recommended in the staff report that BOZA approve the PYA variance.[2]

As to the density, the variance application proposed a total of 11 units, whereas the site plan proposed 12. The plan failed to identify an existing dwelling unit in the carriage house, described only as an "Existing Garage."

On May 16, 2005, HRG testified under oath to BOZA no less than 5 times that there would be a maximum density of **11 units**.[3] BOZA's chairperson then made a hand-written correction to the site plan indicating approval for 11 units.[4] However, PDS stamped approval on a *clean copy* of the site plan (indicating 12 units) instead of BOZA's *corrected copy* (approving 11 units).[5] HRG later incorporated the Unit #9 carriage house into the condo regime.

A maximum density of 11 units would be consistent with HRG's original proposal and sworn testimony, as well as BOZA's written approval. Also, HRG considered 11 units as a viable option just a few months ago.[6] More importantly, a density of 11 units would be more consistent with both Code and the Comprehensive Plan.

Goal C1 in particular requires compatibility with the distinct patterns of a traditional neighborhood. The last home on Rosewood Ave. was constructed nearly 60 years ago. The proposed Rosewood II would be the first and only infill development to date and remarkably incongruent with the surrounding land use.[7] For example:

- 85% of residences on the Rosewood blockface were built prior to 1930.
- 88% of those residences consist of single-family homes.
- 90% of homes have off-street parking, whereas the high-density Rosewood site would be short by 5 spaces.
- Property values average at $310,515. Prior to HRG's elimination of the elevator, landscaped brick courtyard, underground garage, and ultimately the tree canopy, the target selling price was only $275,000 per unit.*
- The average finished floor area of homes along the Rosewood blockface is 2,659 sqft. The average floor area of the Rosewood condos is 1,868 sqft. The maximum FAR allowed for the Rosewood II is either 2 units at 1,420 sqft. or 3 units at 946 sqft. (see Section 6a). HRG has chosen the smaller and less compatible option.
- 97% of homes along the blockface are under 3 stories. The Rosewood is the only existing 3-story structure.

Limiting the permitted density to 11 units would help meet some basic Code requirements: to provide adequate light, air, and privacy; to avoid undue concentration of population by regulating and limiting the height and bulk of buildings; and to limit congestion in the public streets by providing off-street parking of motor vehicles.

Request for Determination #4:

We ask for the Department to clarify the maximum number of units allowed per the approved plan.

[1] Document #4-1 [Waiver application to reduce PYA submitted on April 25, 2005].
[2] Document #4-2 [PDS Staff Report for BOZA hearing]
[3] Document #4-3: see highlighted sections of BOZA transcript: page 11 at 33:09; page 15 at 38:50; page 15 at 40:20; page 16
[4] Document #4-4 [2005 Site Plan with BOZA's handwritten corrections].
[5] Document #4-5 [clean copy of 2005 site plan with PDS approval stamp dated June 8, 2005].
[6] In January of 2015, our Council president was contacted by a loan officer on behalf of Gene Crawford via email and phone. The loan officer explained that Crawford had yet to decide between 2 or 3 units in the proposed building.
[7] Document #4-6 [Compatibility Standards for the Rosewood Avenue Blockface (page 1) and *Crawford's email on 9/17/13 to Rosewood Council regarding buyout of HRG's development rights for $300,000.

5 - Corrective Action for Construction Activities without a Building Permit

a. Background

HRG seeks to expand a multi-phase condominium project that began in November of 2004. This is the same developer, same site, and same condo project. The proposed building cannot be isolated from the established Rosewood regime. Whatever violations have occurred during the construction, reconstruction, and expansion of the project that HRG now intends to finish are acutely relevant today and subject to penalties and fines.

On February 4, 2015, we submitted Open Records Request #1392 to obtain copies of applications and permits related to 11 distinct structures and additions constructed by HRG between 2004 - 2007.[1] Develop Louisville produced 84 pages of documents. None of them pertained to the construction activities detailed below. Unless the relevant documents were somehow lost or withheld, one may reasonably conclude that these activities were performed without the required permits and inspections.

Please reference the following documents: Building Permit #45216 (Document #5-2); Document #5-3 for a breakdown of the work covered under that permit; and also Document #5-4, which provides PVA photographs of those activities.

b. Unpermitted Construction Activities

1. Roof Deck

Construction Review requires a permit for deck projects.[2] The Kentucky Residential Code contains regulations specific to roof decks. These regulations ensure that the roof can support the load, that proper construction materials are used, and that the deck is safe and structurally sound for occupancy.

HRG's Building Permit #45216 does not cover work for a roof deck. The ORR #1392 documents do not include an application, permit, or inspections notes for a roof deck.

PVA Photo #1 depicts construction of the 4th floor access to the roof deck (which should be included in the FAR calculations). Photo #2 depicts the roof deck and 4th floor stairwell access as it exists today.

The Council's financial records indicate that the deck was constructed over a leaking roof.[3] Sections of the deck were dismantled in an unsuccessful attempt to reach the source of the leak. A second contractor reported that the rolled roofing underneath was improperly installed and with improper materials (such as finishing nails instead of 8d common nails as required by KRC). He recommended that HRG dismantle the entire deck. HRG did not heed this advice and the roof continues to leak.

The deck cannot be safely occupied. The hand rail along the 4th story roof line is dangerously unstable, despite HRG's representation to the Council that all handrails were inspected by the city and met Code.[4] The Council presently lacks the funds to dismantle and replace the roof deck. We face a $30,000 special assessment to repair a faulty elevator system and extensive wood rot from chronic roof leaks along the building's entire perimeter.

2. Unit #9 Deck

Neither Building Permit #45216 nor the ORR #1392 documents include an application, permit, or inspection notes for the Unit #9 Deck. HRG had to relocate the deck to make way for the construction of Garage 2. This deck is a critical structure because it is the only means of access for the second floor unit.

[1] Document #5-1 [Open Records Request #1392]. Please note that as of today, we have received no response to the follow-up ORR submitted over a month ago on February 23, 2015 (see pages 4-5).
[2] Document #5-5 [Homeowners Toolbox for Decks].
[3] Document #5-6 [2007 invoices for deck and roof repairs, turned over by HRG to Rosewood Council].
[4] Document #5-7 [July 2010 email from Gene Crawford indicating that all handrails passed inspections].

3. 7-Space Parking Lot

Building Permit #45216 (issued 11/19/04) covered the construction of a "new parking lot with seven spaces." HRG instead constructed a 2-space concrete loading area to the service elevator. This unapproved deviation conflicts with the 2005 plan submitted to BOZA, which identified the space as a "New Landscaped Area," despite having already reserved it for accessory use.

However, the PYA reduction by 2,835 sqft. was insufficient. So the revised June of 2014 site plan in support of parking waivers identified this concrete loading area as "private yard."[5] This plan deviation also conflicts with testimony given to the Planning Commission on HRG's behalf. HRG's engineer and attorney both asserted that the area was always intended as green space, but HRG converted into a service area *at the request of unit owners.*[6]

The testimony (presumably based upon information from Crawford) is flawed, considering that HRG reserved this "green space" for parking in 2004 and poured concreted well before the first unit was sold in August of 2006.

4. Garage 1

Building Permit #45216 specifically excluded work on the carriage house garage. Building Permit #57878 (issued on 3/18/05) covered the construction of two garages identified by size (644 sqft. and a 744 sqft).[7] HRG was permitted to build two garages but instead built three. The third garage is presumably Garage 1, located at the east-side property line. Photo #3 depicts the location of Garage 1 during an apparent soil collapse. Photo #4 depicts Garage 1 as it exists today.

5. Unit #9 Carriage House

Building Permit #45216 specifically excludes any work on the carriage house. The ORR #1392 documents do reference some electrical inspections, but nothing that would reflect an approved reconstruction project.

Per IRC [2003] Section AJ201, reconstruction means: "the reconfiguration of a space that affects an exit... and/or there are extensive alterations." Section R105.1 requires a permit for the alteration, repair, or occupancy change for a building or structure, or the removal of any appurtenance connected to or attached to such buildings.

Per LDC (2004) 1.1.6, no building, structure, or part therefore shall be reconstructed, moved, or structurally altered except in conformity with all applicable provisions of Code.

The above regulations would apply to work involving the exterior and structural alterations, extensive interior alterations, and relocation of the Unit #9 deck.

PVA Photo #5 depicts the carriage house prior to reconstruction. Note the stairs leading to the 2nd floor entrance are located on the right side. PVA Photo #6 depicts the entrance after the stairway was removed. Photo #8 depicts the same facade with the door replaced by a window. Photo #9 depicts the reconstructed access point and the stairs leading up to the 2nd floor deck.

The reconstruction project was not performed in a workmanlike manner. The Council's records indicate that HRG utilized improper insulation between the garage and the condo. A previous owner was advised that exhaust fumes could seep into the condo if a vehicle ran for a prolonged period of time.[8] The Council incurred repair costs to remedy this safety hazard.

[5] Document #5-8 [June 2014 revised site plan claiming concrete loading area as private yard].
[6] see video of Planning Commission hearing on August 21, 2014, at 2:50:00 - 2:50:31 [Mark Madison] and 2:52:50 - 2:53:43 [Bill Bardenwerper].
[7] Document #5-9 [Building Permit #57878 for construction of two garages issued on March 18, 2005].
[8] Document #5-10 [Rosewood Council excerpt of 2009 meeting minutes re: carriage house insulation].

6. The Rosewood Principal Structure

Building Permit #45216 covered the "interior renovation" of 6 apartment units into 8 condos units. The ORR #1392 documents do not include an application, approval, inspection, or amended plan for the below additions and structural alterations.

a. Unit #2 Addition

PVA Photo #10 depicts the Rosewood prior to reconstruction without a right-sided addition. PVA Photo #11 depicts the addition under construction. PVA Photo #12 depicts the completed 130 sqft. addition.

b. Unit #3 Addition

Photos #13 and #14 depict the completed 432 sqft. finished bedroom located in the basement.

c. Rear Sunrooms

Photos #15 and #16 depict the sunrooms at the start of construction. Three left-sided windows are visible. PVA Photos #17 and #18 depict structural alterations to the sunrooms. PVA Photos #19 and #20 depict the sunrooms as they exist today. Note that only two windows are now visible on the left side. Each sunroom is enclosed and must be included in FAR calculations.

Unit #1 sunroom: 123 sqft.	Unit #7 sunroom: 99 sqft.
Unit #4 sunroom: 107 sqft.	Unit #8 sunroom: 115 sqft.
Unit #6 sunroom: 106 sqft.	

c. Incomplete Inspections

Other work covered under Building Permit #45216 includes: the elevator system; east-side exterior stairs; and fire suppression.

It appears that work covered under Permit #45216 received a final inspection and Certificate of Completion on February 28, 2007. However, units #2, #4, #5, and #7 were already sold and occupied by that date.[9]

HRG then obtained a Certificate of Occupancy for the eight condo units on October 23, 2007.[10] By that point, units #1, #8, and #9 were also sold and occupied. The only remaining unit was #3, which was owned by the developer.

In light of the inspection gaps, discrepancies in the inspection notes, and repair costs later incurred by the Council, it is unclear if the remainder of work received a thorough or final inspection.

For example, the handrails on the east-side exterior stairs received only a partial pass under Inspection #666481. The inspection notes reflect an unresolved problem with the handrails and steps. The Council later discovered the handrails were non-compliant, and so it made the necessary repairs to meet Code.[11]

A second example involves the sprinkler system. Final Inspection #651704 received a Pass on 2/29/07, but the report includes this notation: "sprinkler permit?" The meaning of the question mark is unclear. Fire Suppression Permit #170754 wasn't issued until 8/21/07, which was several months after the final inspection date and one year after the units had been sold and occupied.[12]

Please note that a few months after the sprinkler system received a final pass, the Council discovered that the alarm bell to the fire suppression system was inoperable. The repair invoice noted that the "system was missing wire for N.O. Circuit and was not wired correctly to begin with."[13]

[9] Document #5-11 [Certificate of Acceptance/Completion]. Also see Document #1-0 [Appendix 1, Table 3] for unit sales.
[10] Document #5-12 [Certificate of Occupancy].
[11] Document #5-13 [2010 email exchanges between HRG and Council regarding handrail inspections].
[12] Document #5-14 [Fire Suppression Permit #17054 issued on 8/21/07].
[13] Document #5-15 [Council 2007 records on defective fire suppression system].

It is very troubling that HRG obtained a Certificate of Acceptance prior to substantial completion of a functioning sprinkler system. More so because three units were already occupied prior to the final inspection of a life-saving, fire-suppression system, and because the inspection itself did not uncover the defective alarm bell.

A third example involves the elevator system. The Council's records reflect several thousand dollars in repair costs soon after the elevator was installed.[14] Incidentally, HRG improperly designated the elevator as a limited common element on the recorded condo plat and funded repairs directly from monthly condo fees. When HRG transferred financial control to the Council, the operating account was at negative $5,900 and the reserve funds were at $0.[15]

Request for Determination #5:

5a - Roof Deck

HRG's construction of the roof deck violates six KRC regulations: §R105.3 (obtain a permit); §R106.1 (submit construction documents); §R109.1 (work must be subject to inspections); §R109.1.7 (request final inspection); §R115.1 (provide proof of worker's comp insurance) and §R502.2.2.1 (utilize proper materials).

Per KRS 198B.990(1), each violation is subject to a minimum daily fine of $10. The Council's records indicate the roof deck was constructed in mid-2006. HRG would therefore face a conservative estimate of $190,000 in fines [3,167 days x 6 violations x $10 per day].

These violations may also be cured. We ask the Department to require HRG to hire a licensed contractor (approved by the Council) to dismantle the roof deck and construct a high-quality, fire-resistant, and Code-compliant deck prior to issuing a building permit for the proposed building.

5b - Unit #9 Deck

HRG's construction of the Unit #9 deck violates five KRC regulations: §R105.3 (obtain a permit); §R106.1 (submit construction documents); §R109.1 (work must be subject to inspections); §R109.1.7 (request final inspection); and §R115.1 (provide proof of worker's comp insurance).

Per KRS 198B.990(1), each violation is subject to a minimum daily fine of $10. The start date is unknown, but the deck was built at least prior to incorporating Unit #9 into the condo project on 6/21/07. HRG would therefore face a conservative estimate of $140,600 in fines [2,812 days x 5 violations x $10 per day].

5c -Seven Space Parking Lot

This unapproved deviation from the permitted work scope violates KBC 106.4 (work must adhere to approved documents) and also directly impacts the still pressing matters of the Rosewood property's inadequate off-street parking and inadequate yard area.

HRG has misled public servants in violation of KRS 523.010 in order to secure exemptions from zoning regulations. We therefore request the Department to issue a formal citation so that interested parties may present their arguments and evidence to the Code Enforcement Board.

5d - Garage 1

The construction of Garage 1 without a building permit and three required inspections violates KBC 109.1 and KBC 110.1. In addition, the garage was not constructed in a workmanlike manner as required by KBC Section 122.4. In particular, the structure floods during heavy downpours.

We ask the Department to impose upon HRG the appropriate penalties and daily fines (based on a construction start date in mid-2005).

[14] Document #5-16 [Rosewood Council invoices for repairs to elevator system].
[15] Document #5-19 [Rosewood Council emails re property damage], page 6.

5e - Carriage House

The carriage house was reconstructed without a permit or inspections. The start date is unknown, but Electrical Permit #82735 suggests that activities began in September of 2005.[16] We ask the Department to impose the appropriate penalties and daily fines.

5f - Principal Structure

The work that expanded the floor area by 1,000 sqft. was not performed in a workmanlike manner. The Council's records demonstrate that this work has caused significant property damage.[17] That HRG incorporated roof repairs into the monthly condo fees as early as June of 2005 suggests that the marketed "top to bottom renovation" very likely excluded the purported "new roof."[18]

The Unit #2 addition in particular has been plagued with ongoing water damage. Faulty construction of the five sunrooms has resulted in chronic leaking, significant wood rot, and HVAC defects subsequent to HRG's "interior renovation project."

These structural alterations and expanded floor area were performed without an approved plan, permits, or inspections. We ask the Department to impose on HRG the appropriate penalties and daily fines.

5g - Incomplete Inspections

The attached invoices are by no means exhaustive, but simply a representative sample of costs incurred by the Council throughout the years. We offer this evidence of inadequate inspections and HRG's substandard workmanship in hopes that the Department will recognize our legitimate concerns over additional construction.

The Council has no adequate protection against further financial loss. We therefore ask that the Department require HRG to provide:

i. proof of commercial general liability insurance covering bodily injury, including death, and property damage, with a combined single limit of no less than $1,500,000 per occurrence and $5,000,000 in the aggregate (umbrella coverage is acceptable for the aggregate coverage);

ii. a performance bond in the amount of no less than $750,000 naming the Council as obligee and insuring that HRG will complete the additional building if construction is commenced;

iii. a payment bond in the amount of no less than $750,000 naming the Council as obligee and insuring any and all contractors and suppliers utilized in the construction of the building.

We must emphasize that past and present Rosewood Council members had no knowledge of these building and Code violations (see Section 6) until we began our own investigation into the many defects of HRG's development plan.

Whatever adverse action that may result from this request for formal determinations must be imposed on the responsible party. The Rosewood Council has absolutely no liability for HRG's infractions. We have already carried the financial burden of having to remedy HRG's substandard and unapproved construction activities. If the Rosewood II is constructed, the Council will suffer the consequences long after HRG has made its profit and moved on to the next development project.

[16] Document #5-17 [Electrical Permit #82735 to rewire carriage house issued September 9, 2005].
[17] Document #5-18 [Rosewood Council repair invoices] and Document #5-19 [Council emails related to property damage].
[18] Document #5-20 [HRG June of 2005 budget for roof repairs incorporated into monthly condo fees].

6 - Corrective Action for Unresolved, Uncured, and Outstanding Code Violations

a. Floor Area Ratio

HRG has not provided a reliable value for the existing floor area, which makes it difficult to assess the proposed intensity for this site. The floor area must include the total area within a building. Per Cornerstone 2020, the FAR calculation includes all buildings on a lot. Aside from attics, garages, *unfinished* basements, and *unenclosed* porches, a building that contains a dwelling unit must be included in the FAR.

1. Previously Approved Site Plans

HRG has secured plan approvals by under-reporting the existing FAR. The 2005 plan submitted to BOZA to obtain the PYA variance reported a square footage of 15,863 for the principal structure. The proposed building (at 5,560 sqft.) only *appeared* to meet the permitted FAR of 1.

The January of 2013 and September of 2013 plans report the same faulty data.[1] HRG received building permits for both (although the latter was suspended for unapproved plan modifications[2] and Code violations). It was only *subsequent* to the suspensions that HRG reported the existing Rosewood's (unconfirmed) floor area of 17,829 sqft.

2. Current Site Plan

The current site plan excludes Unit #9's 755 sqft. floor area from the FAR calculation. Assuming the Rosewood's floor area is truly the reported 17,829 sqft., and that neither the "covered porch" nor the balconies will be enclosed, the proposed building still cannot exceed this value without exceeding the maximum FAR of 1:

Total Land Area: 21,423 sqft.
Existing Floor Area: -18,584 sqft.
Proposed Building: 2,839 sqft.

The building must be reduced by 710 sqft. This would allow for either 3 units at 946 sqft. or 2 units at 1,420sqft. However, there is simply no market for a 946 sqft. condo located in the Highlands that would sell at HRG's (former) target selling price of $275,000.[3] To permit the construction of 3 units at 946 sqft. would wreak havoc on the already unstable property values of the existing condos (which average 1,868 sqft. per unit).

3. Violations

The misleading FAR calculations involves a number of serious violations. First, under KRS 100.253 and per LDC 1.3.1.C , any increase in the floor area devoted to a nonconforming use is strictly forbidden. That the Rosewood is a nonconforming structure and use was well-articulated by the Planning Commission.[4]

Second, HRG's undocumented expansion of the floor area violates KBC 106.2 (plans must reflect accurate data for existing structures) and KBC 106.4 (work must adhere to approved plans and permits).

Third, HRG has successfully advanced a development plan via bait and switch tactics.[5] For example, in 2005 HRG argued that in order to make full use of the maximum FAR, it was necessary for BOZA to reduce the PYA requirement and to approve curb cut access to the underground garage. After securing the PYA variance, HRG deviated from its restrictions. After securing the curb cut approval, HRG eliminated the garage and obtained parking waivers instead.

As such, HRG has repeatedly violated KRS 523.010 by providing false material statements that have affected the outcome of administrative proceedings, and by misleading public servants in order to secure multiple zoning exemptions, approvals, and permits.

[1] compare reported floor area of 15,863 sqft. in Documents #6-1(a-c) and later 17,829 sqft. in Document #6-2(a-b).
[2] see comparative overlays in Document #6-3 [unauthorized modifications to approved plan].
[3] Document #6-4 [MLS listings for Highlands condos at maximum price of $275,000]. Note that the average floor area of comparable units is 1,610, with 2 bedrooms, 2 baths, and off-street parking. A target price around 250k-275k is unrealistic.
[4] Document #6-5 [Planning Commission findings] pages 1 and 6.
[5] see Document #6-6 [Waiver Application for PYA Variance], Answer D2.

b. Unit #9 Carriage House

The spot zoning of the Rosewood property to R7 might have solved one problem for the prior developer, but created another. LDC 2.2.10 specifies that a carriage house is land use permitted only in an R-5B District. This restriction is reiterated in the Zoning District Land Use Table Appendix 2A.[6] The carriage house could continue as a *legally* nonconforming, provided its use was not altered in such a way that would expand its nonconformance.

But that is precisely what occurred. The Polk City Directory shows that from 2002 to 2007, the structure was utilized as a lawn care business.[7] Between 1998 and 2003, the city received at least three complaints related to the illegal operation.[8] The Code makes no allowances for *illegally* nonconforming uses.

It is worth mentioning that the PDS case file on the Rosewood includes a 2008 Courier Journal article on a local controversy involving a carriage house just a few doors down from the Rosewood site.[9] In this instance, building and zoning regulations were strictly enforced. The building permit reflects 9 inspections for this 520 sqft. structure (as compared to HRG's building permit with 4 inspections for an approximate 20,000 sqft. structure).[10] The owners were also required to obtain a Conditional Use Permit and were assessed penalties and fines.

HRG, on the other hand, purchased property with an illegally nonconforming use, in a district that prohibits its use altogether. HRG failed to secure nonconforming use rights, failed to obtain a building permit for its reconstruction, failed to schedule the required inspections, and presumably failed to obtain a Certificate of Occupancy.

HRG further failed to indentify the existing residence on site plans, in violation of KBC Section 106.2. The carriage house is misrepresented as an "Existing Garage" on both the 2005 site plan and the January of 2013 site plan, despite the fact that Unit #9 had been sold and resold three times.

PDS has avoided the matter altogether by deeming the Unit #9 carriage house as a "dwelling unit." This term has no definitive value. All dwelling units are physically bound in some manner. The form of that boundary is what differentiates a single-family dwelling from a townhouse or a mobile home from a multi-family building.

We note that such flexibility was not extended to the owners at 1526 Rosewood or 1646 Cowling Avenue, who may be surprised to learn that a "carriage house" is simply a "dwelling unit" on the Rosewood site. Such flexibility has not been extended to many similar cases docketed on the Louisville Metro agenda and meeting portal.

1. Violations

LDC (2004) 2.1.3 specified that "in no case shall there be more than one main building on one lot except for multi-family residential buildings." The key point is that the Unit #9 carriage house is not a multi-family building.

This real estate is one condominium, which consists of an illegally nonconforming structure. The combined effect of HRG's violations should call into question whether HRG should be permitted to further expand a condominium comprised of land area devoted to an illegally nonconforming use.

Under LDC (2006) 1.3.1.B: "a nonconforming use shall not be enlarged, expanded, or changed except as expressly permitted by KRS 100.253." However, that statute would restrict expansion of the Rosewood condominium for a period of 10 years:

> "Any use which has existed illegally and does not conform to the provisions of the zoning regulations, and has been in continuous existence for a period of ten (10) years, and which has not been the subject of any adverse order or other adverse action by the administrative official during said period, shall be deemed a nonconforming use."

[6] Document #6-7 [LDC 2004 Appendix 2A excerpt].
[7] Document #6-8 [Polk City Directory listings: LPW Lawn (pages 1-6); Hug Factory (page 8-12)
[8] Document #6-9 [service requests on illegal lawn care operation out of carriage house].
[9] Document #6-10 [Courier Journal article on carriage house at 1526 Rosewood Ave.].
[10] Document #6-11 [Zoning Land Use Application for 1526 Rosewood Ave].

Unit #9 was sold on August 17, 2007. The above statute would deem the Unit #9 carriage house as *legally* nonconforming effective on August 17, 2017.

We are unsure if the question of use rights falls within the jurisdiction of Codes & Regulations. We are in the process of preparing an application for a formal determination of nonconforming use rights. Unless the above details are sufficient to deem the Rosewood condominium as nonconforming and thus restricted from further development, we are not asking the Department to make a formal determination at this time.

However, it does appear that zoning regulations related carriage houses are not being consistently applied. For example, the owners at 1526 Rosewood Ave. were required to obtain a Conditional Use Permit, whereas the owners at 1646 Cowling Ave. were required to submit a minor plat application (and also a CUP) to actually subdivide the land.[11] Whereas the owners at 1054 Cherokee Road were required to apply for a determination of nonconforming rights.

We would therefore ask the Department to clarify the official policy on the use of a carriage house located in an R7 District.

c. Private Yard Area

As discussed in Section 4, HRG failed to justify the PYA variance by submitting a waiver application addressing the wrong criteria. Waiver and variance requests are not interchangeable. There are clear distinctions in the statutory criteria to evaluate, justify, and approve such requests. BOZA therefore exceeded its authority to grant a variance for a waiver request that had no logical connection to the required criteria. The variance is invalid and arguably void under the legal doctrine of *void ab initio*.

Regardless, HRG has deviated from (or altogether abandoned) each justification in support of the PYA variance.[12] Moreover, the 2005 site plan upon which the approval was based is irredeemably flawed. For example:

- Adjacent single-family home is depicted as 40 ft. from the west property line, but the distance is 10 ft.
- The dwelling unit that would become #9 is identified only as an "Existing Garage."
- Concrete loading area to the service elevator is identified as a "New Landscaped Area."
- PYA calculations fail to depict the actual square footage of the nonconforming yard area.
- Site plan fails to depict a number of existing and/or intended improvements within the private yard.

Also note that LDC 5.4.1.D.2 requires the Private Yard Area to be located between the principal structure area and the accessory structure area. As such, the approximate 860 sqft. area between the existing Rosewood and proposed Rosewood II is technically a side yard that should not even qualify as PYA in the first place.

As the Department weighs the appropriate corrective action for outstanding violations, please keep in mind BOZA's own description of the reduced yard area as a "humungous loss of green space," and the circumstances under which HRG secured this variance. Also note that an appropriate Category 3 Review would have effectively prevented the vast majority of these violations.

1. Common Elements

HRG's development plan is subject to *discretionary* review, denial, or approval. However, the Rosewood condominium is bound to statutory regulations and the legal instruments recorded in the county land records.

Under KRS 381.9111, all local ordinances, regulations, building codes, and real estate use law are applicable to the Rosewood site. Each Code violation is a breach of the Rosewood Master Deed[13] and in conflict with Kentucky's condo law.

[11] Document #6-12 [Zoning Applications for 1646 Cowling Ave.].
[12] Document #6-13 [Analysis of PYA waiver/variance justifications].
[13] see Rosewood Master Deed, Article II(F) related to adherence of zoning regulations (pages 8-9).

The Rosewood's Private Yard Area is a common element owned by the Council. Certain structures within the PYA are Limited Common Elements (i.e. designated for the exclusive use of particular unit owners).

A most basic condominium requirement is for the developer to clearly identify and assign the common elements. Because once a condominium is established, the common interest is "permanent in character" and "shall not be altered without the acquiescence of co-owners."[14]

One key problem with HRG's continuous plan revisions is that HRG misappropriates the common elements, and by doing so, interferes with the unit owners' property rights. In an attempt to meet the PYA requirement, HRG has improperly extended its claim to areas that are disqualified by Code and already occupied by Limited Common Element (LCE) structures.

Condominium real estate cannot be both a general and limited common element simultaneously. As shown in Document #6-14 [PYA Dimensions and LCE Areas] and Document #6-15 [Photos of PYA and Accessory Use Areas], the areas identified below are not subject to HRG's attempts to reassign as private yard.

a. Limited Common Element 1 [a/c units]

The 2005 plan depicts an expansive landscaped brick courtyard, presented to BOZA as a mitigating design element to offset the drastic loss of green space. What the plan fails to depicts, however, is the existing (or intended) location of the six a/c units adjacent to the (now eliminated) courtyard.[15]

LDC 5.4.1.D.1 restricts HRG from claiming as private yard an area occupied by other improvements. Per Article I(H) of the Master Deed, these a/c units are designated as LCE. Per KRS 381.9139(1), an allocated LCE shall not be altered without the consent of the unit owner.

b. Limited Common Element 2 [Unit #9 appurtenances]

Although the 2004 BTM survey (for Tunny, LLC) and the Rosewood's recorded condo plat depict a concrete storage structure appurtenant to the carriage house, the 2005 plan does not. The plan also fails to identify the intended relocation of the Unit #9 deck.

LDC 5.4.1.D.1 restricts HRG from claiming this area as private yard. A deck only qualifies as PYA if it is constructed at the same elevation as the first floor residence. The Code also restricts HRG from claiming as PYA an area occupied by other improvements. The area immediately the left of LCE 2 is also disqualified because LDC 5.4.1.D.2 requires a minimum dimension of 20 ft. of contiguous open area.

HRG is further restricted by the Unit #9 deed, which specifically designates this area as an LCE structure exclusive to the unit owner.

c. Limited Common Area 3 [Accessory Use Area D]

The 2005 plan depicts Area D as green space and contiguous to the private yard. However, this is an Accessory Structure/Use Area, as defined by Code (located between the PYA and the alley), and has always been physically separated from the private yard.[16]

After securing the PYA variance, HRG constructed a 3 ft. concrete retaining wall and two concrete stairs that create an unequivocal line of demarcation between the PYA and Area D. This area also serves as an access point to Garages 2 and 3, and is the primary route between Unit #9 and the street (or in this case, the rear alley).

[14] see KRS 381.830(b) [Kentucky Horizontal Property Law] and also KRS 381.9137 [Kentucky Condominium Act].
[15] see Document #6-15, Photos #1 and #2, and also Document #6-16 [Rosewood Condo Plat recorded in July 2006].
[16] see the BTM survey conducted on behalf of Tunny, LLC prior to HRG's purchase of the Rosewood property. The survey identifies an existing brick wall between the PYA and Area D. Also see Document #6-15, Photos #4 and #5 depicting the existing demarcation line between, and also Photo #6 depicting the brick wall remnant that previously separated the areas.

HRG is restricted from claiming Area D as private yard. Per LDC 5.4.1.D.1, the area occupied by other improvements and accessory buildings shall not be considered PYA. Per the Rosewood Master Deed, Area D is appurtenant to the LCE garages. Per KRS 381.9139(1), the allocation of an LCE shall not be altered without the unit owners' consent.

2. Current PYA Calculations

It is unclear how HRG arrived at the reported PYA value of 4,028 sqft. If we compare the verifiable calculations (provided in Document #6-14[17]) and HRG's current site plan, the numbers don't add up. So that we compare apples to apples: the *gross* private yard area combined with Area D is 5,322 sqft. If we subtract the proposed building's 1,101 sqft. footprint and the 430 sqft. LBA,[18] the remaining PYA is 3,791 sqft.

It appears that HRG has inflated the PYA value. Unfortunately, the current site plan provides no dimensions whatsoever in order to verify HRG's calculations. After we exclude the disallowed areas of LCE 1-3 (a modest 638 sqft), the remaining PYA is only 3,153 sqft., which is below the minimum requirement of 3,592 sqft.

3. Violations

Under LDC 11.5.B.2(a), an applicant must submit a development plan with sufficient detail to demonstrate to BOZA the character and objectives of the proposed development and the potential impacts of the development on the community and its environs. HRG failed to do so.

Under LDC 11.5.B.3.D, BOZA's findings must be based on the justifications provided by the applicant, the statutory regulations under KRS 100 *et seq*., the PDS staff report, and the applicant's testimony. Under KRS 100.243, BOZA is restricted from granting a variance request to an applicant who has willfully violated zoning ordinances. Each basis for BOZA's findings has been discredited.

HRG is mandated under KRS 198.062 to adhere to the approved plans. Deviation from the approved plan is punishable by the revocation of permits and subject to forfeiture under KRS 83A.065.

d. Other Zoning Violations

The Rosewood property featured nonconforming elements prior to the establishment of the condo project. The most significant example is that PYA did not constitute 30% of the land area, and so the PYA variance expanded this nonconformance with zoning regulations.

BOZA's approval of zoning exemptions led to additional zoning violations, which conflicts with the mandate under KRS 100.247 that a variance cannot contradict zoning regulations:

> "The board shall not possess the power to grant a variance to permit a use of any land, building, or structure which is not permitted by the zoning regulation in the zone in question."

1. Landscape Buffer Area [LBA] along the west property line

LDC (2004) 10.2.4.A required a property perimeter LBA along all property boundaries (including VUAs) for sites with a more intense use than the adjacent property. BOZA's approval for HRG to construct Garage 4 at 0 ft. from the west property line contradicts this zoning regulation. However, since HRG's plan depicted the area adjacent to the carriage house as open green space, BOZA was clearly unaware of HRG's intent to place additional structures within the LBA.

The Unit #9 deck and the a/c unit below now encroach on the required LBA. We addressed these violations with PDS staff in June of 2014, when HRG submitted a waiver application to reduce the minimum width of the LBA from 10 ft. to 5 ft. HRG simply withdrew the application and attempted to claim the loading area as PYA instead.

[17] The dimensions in Document #6-14 are a short-hand version of the Council's 2014 certified land survey, Document #6-17.
[18] Not all of the proposed building's 1,183 sqft. footprint is located within the PYA. The LBA value of 430 sqft. and the building's value of 1,101 sqft. excludes those portions located outside of the gross PYA.

2. **Accessory Structures**
   LDC (2004) 5.4.1.D.5 prohibited accessory structures to exceed a footprint of 1,200 sqft. The combined footprint of the Rosewood's accessory structures/VUA is 3,565 sqft. This regulation has since been revised. Impervious surface coverage is now regulated under LDC Chapter 10.

   HRG's current Landscape Plan is non-compliant. Its approval should be revoked. Further development will leave scant green space and fewer trees, at a time when Mayor Fischer just announced a major citywide initiative to preserve and replace trees.

   As to the Rear Yard, LDC 5.4.1.E.2 requires a minimum distance of 5 ft. between accessory structures and the rear property line. The Rosewood site has no Rear Yard. The three garages and VUA constructed by HRG all encroach in what should be a minimum area of 730 sqft.

3. **LBA along the east property line**
   The 2005 plan failed to identify the intended improvements along the east-side property line, as required by LDC (2004) 11.5B.2 and KBC 105.1. Multiple nonconforming structures now encroach on the required LBA:

   - Garage 1 (for which HRG did not obtain a permit or inspections)
   - the exterior deck (that did not pass final inspection)
   - and the expanded floor area of Unit #2 (for which HRG did not obtain approval)

e. Site plan currently under review

Considering the totality of outstanding violations, we feel it is unnecessary at this point to detail the non-compliant elements of the plan currently under review. We already provided PDS staff with documents that outline each violation. Whatever compliance issues not directly addressed here are explained in Document #6-18.

Request for Determination #6:

6a - Floor Area

We ask the Department to utilize its authority under KRS 198B.990 and KRS 100.991 to impose the appropriate penalties for HRG's misrepresentations of the existing floor area and proposed FAR. We specifically ask the Department to mandate that HRG include the 755 sqft. of Unit #9 in its FAR calculations, as defined by LDC 1.2.-20 and required under LDC 2.2.12.E.1.

6b - Building Drawings

The current site plan lacks sufficient details to determine which portions of the proposed building may or may not be included in the total FAR. For example, the excessive 282 sqft. footprint of the poorly defined "covered porch" suggests that HRG may enclose it after securing plan approval. The site plan does not clarify if the proposed balconies have been eliminated; and if not, whether the balconies will be enclosed.

We have many concerns with the overall design quality. For example, PDS indicated that the building may feature front-facing, external stairs. This is an unacceptable design that would destroy the continuity of Rosewood Avenue.

Gene Crawford recently indicated that he has not filed building drawings so as to avoid potential challenges to its design. We certainly hope that HRG's plans are not receiving unofficial reviews. We ask the Department to provide us with copies of the building drawings that are currently unavailable in the Rosewood case file.

6c - Private Yard Area

In light of the proposed density and intensity, coupled with the already excessive impervious surface coverage, our request that HRG exclude 638 sqft. from its PYA calculation is most reasonable. We ask the Department to instruct HRG to exclude the combined 638 sqft. of the disallowed areas from its PYA calculations.

6d - Other Zoning Violations

HRG has created a condominium in gross non-compliance with zoning regulations. This affects Council members' ability to refinance mortgages and has even prevented prospective buyers from obtaining financing. We ask the Department to impose the maximum amount of penalties and fines for violations that cannot be cured.

6e - Ambiguity Surrounding Development Plan Approval and Effect on Validity of PYA Variance

As previously detailed, PDS incorrectly determined in 2004 that HRG was not required to submit a development plan because the "interior renovation project" did not expand the floor area.

A development plan by LDC definition includes the following elements: location and bulk of buildings and other structures; intensity of use; density of development; streets, ways, parking facilities; drainage of surface water; access points; a plan for screening or buffering; utilities; existing man-made and natural conditions; and all other conditions agreed to by the applicant.

The validity of the PYA variance is questionable because it is unclear if the plan submitted to BOZA was, in fact, an approved development plan.

Setting aside the fact that the 2005 plan misrepresented critical data and excluded much of the above required elements, it seems that what HRG submitted was a generic site plan to support its variance/waiver requests rather than a qualifying development plan.

Note also that the PDS case manager made this point at the August of 2014 Planning Commission hearing:

> "BOZA doesn't necessarily approve a site plan or development plan, just like I explained for this case earlier. They approved two variances and a waiver... As long as they maintain the square footage of private yard on the property as approved by BOZA and in the areas approved by BOZA, then they could get building permits.[19]"

Therefore, all evidence suggests that HRG did not submit a qualified or approved development plan, which should raise questions as to the legitimacy of the 2005 PYA variance, since per LDC (2004) 11.5B.1:

> "A variance shall be approved only on the basis of the development plan approved by the Board and shall be valid only for the location and area shown on the approved development plan... All construction and operations must be conducted in accordance with the approved development plan conditions attached to the variance."

In any case, HRG clearly did not perform construction in accordance with *any* approved development plan. It is impossible for HRG to "maintain the square footage of the property as approved by BOZA or in the areas approved by BOZA" because HRG has already deviated from the imposed restrictions. As such, HRG's ability to secure building permits is questionable as well.

HRG's request to reduce the private yard by nearly half was not a straightforward *dimensional* variance. BOZA's approval was an implicit and improper green light to develop the Rosewood site. It bypassed the zoning principles of Cornerstone 2020 and circumvented the Code's authority to regulate density, intensity, and land use.

Under KRS 83.065(1), administrative officials are empowered to establish fines, penalties, and also forfeitures. We request that whatever corrective action the Department takes is proportionate to the damage this variance has caused.

We also ask the Department make a formal determination as to whether HRG has actually submitted a qualified development plan. If affirmative, we ask the Department to determine if the qualified development plan has received final approval. If such approval was granted, we request a full copy of the approved and official development plan.

[19] see video of Planning Commission hearing on August 21, 2014, at 3:10:04.

7 - Evidence of a Sinkhole Warrants a Geotechnical Survey

a. High Karst Potential and Confirmed Land Fill Activity

On Friday morning of May 11, 2007, the city received at least three calls describing karst-related events.[1] One report described a "very large (15'x20') hole in this yard that is collecting water." Two reports described an ephemeral lake.

The site was inspected the following Monday on May 14th, but the inspector did not observe evidence of a cover-collapse sinkhole. However, in a February 2015 meeting, attended by HRG's attorneys and a Rosewood Council representative, Gene Crawford acknowledged that he did fill a large hole within the development site (presumably on the weekend of May 12-13 and prior to the May 14 site inspection). In addition, evidence of an underground drainage system, of unclear origin, is present at the site.[2]

To our knowledge, HRG has not disclosed any specific environmental constraints to the Rosewood unit owners. This vital information was extrapolated directly from the property maintenance cases. The reports do not indicate any follow-up inspections, but the case was not officially closed until many years later on July 21, 2011.

We tried to obtain further details via open records requests in March and July of 2014, but received only verbal answers from PDS staff stating that the inspector involved in this case had recently retired, and that no additional information was available.

We urge the Department to examine the historical facts as detailed above, in light of the LOJIC Land Development Report and LDC Core Graphic #14 indicating that the Rosewood property is located on karst terrain.[3] The Kentucky Geological Survey [KGS] identifies this particular site as high karst potential. Its primary Lithology is Beechwood Limestone (Sellersburg Member) and the most susceptible to solution.[4]

According to KGS, when the overlying soil is repeatedly wetted and dried, small amounts of soil are dislodged and carried away by the cave conduit draining the sinkhole.[5] Historic weather reports from April and May of 2007 reflect a cycle of above-average precipitation followed by dry heat and then sustained precipitation.[6] Also per KGS, sinkhole flooding occurs when there is more precipitation than the conduits can handle. The throat of a sinkhole can be clogged by eroded soil or disturbances from recent construction activities. KGS advises that:

> "once a structure has been built in a sinkhole prone to flooding, little can be done to prevent future flood damage, except move the structure."

All documented evidence is strongly consistent with an episode of flooding and a cover-collapse sinkhole that occurred in 2007 within the proposed development site.

We stress that this information should have been disclosed in HRG's plats and plans. LDC (2006) 4.6.2.B requires that a development site with karst features be designated as a "Site with Environmental Constraints" and the site disturbance limits to be precisely depicted on plans.

In fact, the Code mandates that approved site disturbance limits *shall* be shown on the final plans and record plats. Since the Rosewood's record plats and plans do not show the proposed building or the designated development site, they fail to identify disturbance limits in relation to the site's environmentally constrained features as well.

[1] Document #7-1 [Case #266909 and #2677091].
[2] see Document #7-2 [Photos of Development Site], Photos #1-#7.
[3] Document #7-4 [2013 Land Development Report] and Document #7-5 [LDC Core Graphic 14 - Karst Areas].
[4] Document #7-6 [KGS Karst Potential Map and ID Features].
[5] see Document #7-7, *Kentucky is Karst Country: What You Should Know About Sinkholes and Springs*, James Currents, Kentucky Geological Survey, 2002 (page 16).
[6] Document #7-8 [Historic Weather Reports for April and May 2007].

b. Grading, Drainage & EPSC Plan

HRG has also failed to follow the procedural guidelines set forth in EPSC Ordinance No. 186, Series 2007.[7] The above LDC regulations and the EPSC Ordinance were in effect for many years when HRG submitted an EPSC Plan on September 11, 2013, which received an MSD stormwater and EPSC construction approval that same day.[8]

The plan is outdated. Land disturbing activities must conform with approved plans. A revised EPSC Plan should reflect at the very least the eliminated underground garage. Also note that a land survey conducted on behalf of the Council indicates that HRG under-reported both the existing and proposed impervious surface coverage, which would affect the calculations on the outdated EPSC Plan.[9]

More importantly, the EPSC Plan does not address the potential sinkhole within the development site. This oversight should invalidate both the EPSC permit referenced in the voided Building Permit #359225 and the expired MSD General Permit issued in December of 2013 in conjunction with HRG's outdated construction documents.

Also, per EPSC Ordinance §159.01(D)(2), the "Permittee" is the person responsible for the land disturbing activity. That person either: holds legal title to the land; possesses or controls the land; directly allows the land disturbing activity; or benefits from that activity.

To obtain an MSD General Permit, a EPSC-certified contractor must take responsibility for land disturbing activities that might negatively impact the property. Such activities could increase the risk of flooding, degrade water quality, increase sedimentation, reduce groundwater recharge, and adversely affect wildlife, other resources, and threats to public health.[10]

Per §159.02(B)(1), the Permittee's identification must be verified and the Personal Responsible must provide written acknowledgment. However, the MSD General Permit obtained by HRG is invalid. It omits the company name, the contractor's signature, and an EPSC certification number.[11] To our knowledge, Gene Crawford is not a licensed contractor or EPSC-certified.

In fact, neither HRG nor Gene Crawford actually possess, control, or hold legal title to the property. Only HRG stands to benefit from the intended activities. The Council rejects all responsibility for any adverse impacts that may result from developing this site. Whomever does take responsibility must be properly identified and fully apprised of the environmental constraints on this site.

c. Development on Sites with Environmental Constraints

It is unfortunate that HRG did not disclose its prior land fill activities to the unit owners who made significant investments in the Rosewood property. KGS advises that "the most effective way to avoid a cover-collapse sinkhole damage is to avoid buying or building a structure on a sinkhole that has been filled."

We need not detail the complexities of construction within a sinkhole area, or the potential for safety hazards and catastrophic property damage. At this juncture, there is sufficient evidence of a sinkhole to place a moratorium on HRG's development plan.

- The LOJIC and USG karst maps identifying the Rosewood site as high potential karst terrain.
- History of drainage problems [for example: the approximate 10,000 gallons of raw sewage backup in the basement, as documented in Case #2677091].
- Evidence of a previous soil collapse elsewhere on the property [see Photos #8 - #11].

[7] Document #7-9 [EPSC Ordinance No. 186, Series 2007].
[8] Document #7-10 [EPSC Plan for September of 2013].
[9] Document #7-11 [Rosewood Council's Land Survey conducted by Jason Graves in August of 2014].
[10] see Document #7-9, page 3.
[11] Document #7-12 [MSD General Permit issued December 27, 2013].

- The ephemeral lake and soil collapse in May of 2007, as documented in the Rosewood case file.
- Presence of an underground drainage system in the yard area [see Photos #1 - #7].
- Prominent underground pipe that may indicate ongoing soil erosion [compare Photos #3 - #5].
- Invoices related to possible remediation efforts by HRG (reflected in the Council's financial records).
- A large bowl-shaped depression and visible soil erosion in the middle of development site.
- Gene Crawford's own recent acknowledgment of prior land fill activities.

Request for Determination #7:

7a - Karst Survey

We ask the Department to enforce the regulations set forth in LDC 4.9.3, which require an extensive karst survey conducted by a geologist or licensed engineer qualified to analyze karst geological features. If the survey confirms an existing sinkhole or karst spring, we ask the Department to enforce LDC 4.9.5, which requires a geotechnical engineer to conduct a full scale assessment report. Whether or not the Rosewood site may be developed should be decided only after a rigorous investigation is completed.

7b - Statutory Duty and Full Disclosure

The Rosewood Council has a statutory duty under KRS 381.770(4) to intervene in a potentially dangerous construction project on its land:

> "It shall be unlawful in any city... for the owner of a property... to permit any structure upon the property to become unfit and unsafe... or to permit conditions to exist in the structure which are dangerous or injurious to the health or safety of the occupants of the structure."

We are well within our rights to insist that HRG incur the costs of an independent investigation, and to provide full and immediate disclosure of its findings. We also ask the Department to mandate that HRG disclose any soil or geological reports that may have been previously conducted on behalf of HRG and/or Tunny, LLC.

7c - Fiscal Surety

In order to protect the landowners from liability, economic loss, and property damage caused by karst-related hazards, we ask the Department to enforce §159.04(B),which requires the Permittee to post a fiscal surety, consisting of a performance bond, prior to the issuance of any and all permits.

7d - Tree Canopy and Landscape Plan

Under LDC 4.6.3(a), land disturbing activities on a site with environmental constraints or within a buffer area must comply with all applicable regulations. HRG's recently approved plan does not comply with many (let alone all) applicable regulations.

1. Per LDC 10.1.2(B), the combined increase of impervious surfaces by over 50% requires full compliance with TCA and landscape regulations. HRG instead plans to remove several trees within the LBA, utilize the remaining vegetation to meet the LBA requirement, and seeks credit for a non-existent street tree.

2. HRG did not obtain a waiver for the required property perimeter LBA. Garage 4 and the Unit #9 deck encroach on an area that should have been fully preserved as LBA. LDC 10.2.2 prohibits changes to non-conforming sites and requires that all existing LBA and plant material be retained.

3. Under LDC 10.2.3, the LBA is a mitigating element that cannot be disturbed. It serves as a critical buffer between the adjacent single-family home and the proposed Intensity 2 building on a high-density site [see attached photos in Document #7-13]. The approved landscape plan also disregards LDC Table 10.2.4, which requires a planting density multiplier.

4. HRG once testified to BOZA that a proposed landscaped brick courtyard would help mitigate the drastic loss of green space. HRG has since eliminated what is arguably a binding element and now proposes a concrete walkway instead.[12]

   In order to obtain the Planning Commission's approval for parking waivers, Gene Crawford testified that the underground garage was eliminated to protect the existing natural resources.[13] The waivers are now secured, so the revised plan calls for removing those natural resources.

We therefore ask the Department to revoke the recent approval for HRG's non-compliant Tree Canopy and Landscape Plan.[14]

7e - Expired EPSC Plan

The EPSC Plan requires significant revisions. Its plan approval and the Site Disturbance Permit have also expired. We therefore ask the Department to enforce §159.02(G)(4)(b), which mandates that plan approvals and permits automatically lapse and become null and void if the Permittee does not commence construction within one year.

We also ask the Department to enforce all applicable guidelines set forth in §159.02 [in particular §159.02(B)(1-2) and §159.02(C)(1-7)] and §159.03 to ensure that a detailed EPSC Plan is thoroughly examined and adheres to the EPSC Checklist prior to final approvals and permits.[15]

7f - Expired MSD General Permit

The MSD General Permit is both expired and invalid. It is impossible to identify the Person Responsible from this permit. We therefore ask the Department to enforce §159.02(C)(8b-d) of the EPSC Ordinance, which requires the revocation of final approval and permit if procured by false representation or issued by mistake. We also request that if a General Permit is issued at a later date, all standards set forth in §159.02(H)(4)(b)(3) are strictly enforced.

[12] see Document #7-14 [BOZA Meeting Minutes of May 16, 2005], Finding #5 (page 18).
[13] see video of Planning Commission hearing on August 21, 2014 at 2:29:53 - 2:31:04.
[14] Document #7-15 [HRG Landscape Plan approved in March of 2015].
[15] Document #7-16 [MSD EPSC Detailed Construction Plan Checklist].

8 - Issuance of building permits to an applicant who is not the legal property owner

a. Kentucky Condominium Law

Administrative officials have long recognized that plan reviews for condo projects require a basic understanding of the legal framework for condominium law. For example, in 1987, Planning Commission Director Paul Bergmann explained that plan reviews must factor in legal considerations so that approvals are consistent with the condominium form of property ownership.[1]

Likewise, Goal A1 of Cornerstone 2020 was written with such an objective in mind:

> "Ensure that comprehensive plan(s), zoning ordinance(s), and land use regulations are consistent with constitutional guarantees and evolving case law, in order to ensure private property rights and preserve the public interest."

For these reasons, permit applications require the landowner's signature, proof of ownership via the current deed, and a landowner's consent for an applicant to act as his/her representative.

Both Gene Crawford and his attorney acknowledge that the Rosewood Council owns the land that is subject to development. Although Crawford continues to assert HRG's ownership on recently submitted applications and site plans, the Council's proof of ownership is clearly set forth in the recorded Master Deed.

b. Rosewood Master Deed

The Master Deed, Article I(E) [pg. 2] specifies that the Common Elements "shall consist of *all* of the property as set forth on the set of floor plans of the buildings, excepting the individual units, including but not to be limited to the land (including the Land under the Units)." Per Article II(d) [pg. 4], "each unit owner shall obtain fee simple ownership of the unit acquired, the appurtenant *undivided interest in the general common elements* of the Condominium Project."

Note that the Master Deed itself is a legal instrument prepared by the declarant, Gene Crawford [see pg. 19]. He is not a licensed attorney, which may explain certain discrepancies related to his asserted development rights.[2]

Per Clause (J), all rights and powers initially vested in the declarant became vested in the Council when the last unit was sold in July of 2012. Per Clause (P), the declarant relinquished control of the *condominium project* and the property on July 21, 2013. From that point on, deed amendments require the Council's approval.

The Master Deed contains no explicit language allowing the declarant to act unilaterally as the landowners' agent or submit applications on behalf of the Council after he relinquished control of the condo project. His 10-year development rights per Clause (T) are based solely upon a power of attorney to amend the Master Deed.

c. Declarant's Development Rights

Under Kentucky's Horizontal Property Law [HPL], a condominium project means: "a real estate condominium project; a plan or project whereby two or more apartments... or other units in existing or *proposed buildings* or structures are offered or *proposed* to be offered for sale."

The scope of that project must be clearly delineated via the recorded Master Deed, plats, and plans. More precisely, KRS 381.835 requires that the recorded plans depict all buildings' layout, location, units, and dimensions.

The crux of the problem is that the declarant did not and still has not depicted the proposed new building in any recorded plat or plan. This omission calls into question whether the Rosewood condominium was properly established, or how the declarant can now effectively exercise those development rights.

[1] see Document #8-1 [*Concepts of Planned Unit Developments*, Paul Bergmann, 1987].
[2] see Document #8-2 [Rosewood Master Deed], Clause (J) Bylaws (page 14); Clause (P) Amendments (page 15-16); and Clause (T) Expandable Regime (page 16).

1. Under Article I(C) of the Master Deed [page 2], the declarant submitted both existing and proposed buildings to HPL. Article II(A) [page 3], "Description of Buildings," indicates that the "location of the building**s** on the Land... are as set forth on the plans."

   Note that in lieu of disclosing, referencing, or recording the 2005 plan approved by the city, HRG could have simply depicted the "contemplated" building on the 2006 plats and plans. However, there is no such depiction of the Rosewood II, or its layout, location, units, and dimensions. The plat shows an unencumbered yard area as it exists today.

2. The declarant relinquished control of the plan for the proposed building when he relinquished control of the *condominium project*, as it is legally defined under HPL. The declarant's development rights cannot supersede the landowners' property rights. The provisions in Clauses (J) and (P) would otherwise have no meaning if HRG could simply extend unilateral control of the condo project for another three years via the power of attorney to amend the Master Deed.

3. In January of 2011, Kentucky's condo law was significantly revised under the Kentucky Condominium Act [KCA]. HRG still retained control of the condo project at that time. KCA allows the declarant to revise the recorded documents to depict contemplated expansions with precision and detail. HRG therefore had ample time and opportunity to correct any defects or omissions in the recorded documents.

   KCA also clarifies the procedure for a declarant to exercise development rights. "Special declarant rights" under KRS 381.9105(23a) includes the right to "complete improvements indicated on the plats and plans filed with the declaration." HRG never corrected the recorded documents, and so the plats and plans *still* do not identify the proposed building, indicate contemplated improvements, or designate real estate reserved for either separate or common ownership.

   Also note that under KRS 381.9107: "a declarant may not act under a power of attorney, or use any other device, to evade the limitation or prohibitions of [KCA] or the declaration."

4. Whether a condominium is established under HPL or KCA, per KRS 381.9103(5), any amendments to the Master Deed, plats and plans must conform with the procedures and requirements of KCA:

   > "... An amendment shall not create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit, or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners."

In summary, HRG's expedient omission of the proposed building from the recorded plats and plans may have backfired. Although the declarant drafted a legal instrument that expressly reserved his development rights, he did not incorporate the necessary mechanisms to properly exercise those rights after relinquishing control of the condo project to the legal landowners. HRG's failure to obtain final plan approval and required permits only compounds the problem.

d. Plan applications submitted by declarant falsely assert property ownership

Our combined open records requests have sought out every available document on the Rosewood property (both physical and electronic). We can therefore state with confidence that HRG has not actually demonstrated proof of ownership.

Each site plan since January of 2013 attempts to disconnect the Rosewood II from the established condominium by referencing only DB 8848x271, which conveyed the property from Tunny to HRG in 2004. Even after HRG established the regime in 2006, the submitted plans fail to reference the Rosewood Master Deed recorded in DB 8871x375 (as required under KRS 381.835), and fail to accurately depict the proposed building as a phased expansion of the existing condo project.

For example, the January of 2013 site plan (submitted under Crawford and his wife's name rather than HRG) makes no reference to the "Rosewood Condominiums at the Highlands."[3] The project is simply named "The Rosewood II." The principal structure is identified as a "3-Story Brick Apartment Building;" Unit #9 as an "Existing 2-Story Garage," and the Rosewood II as a "3-Plex Condo Above Proposed Building" with a new garage.

Another example pertains to Unit #9. The deed prepared for Gene Crawford conveying the condo to HRG's Semonin partners omits *any* reference to the Rosewood Master Deed (8871x375) itself. In fact, the recitation falsely describes Unit #9 as part of the "Rosewood Condominiums as recorded on *Master Deed* in Deed Book *8488*, Page 271," i.e., the Tunny deed.[4]

The same pattern is exhibited in HRG's site plan for the approved parking waivers and in the site plan currently under review.[5] As such, HRG has willfully misled public servants about legal ownership in order to obtain the necessary approvals.

1. April of 2013 - application for building permits

HRG's applications for building permits expired long before they were issued in January of 2014 (then suspended in February).[6] The applications and permits are void for this reason alone.

In addition, KBC 105.3 requires the applicant to complete **all** information on the designated form. HRG submitted a standard application (now obsolete) utilized for variances and waivers rather than a plan application specific to developments. HRG omitted the majority of data required under KBC 105.3, including the parcel IDs, related cases (i.e. the three zoning exemptions under Docket #B-74-05W), the floor area and land area, number of residential units, zoning information, and significantly, any reference to the current deed proving legal ownership of the property.

Far more critical, however, is the declarant's false assertions of property ownership. Bear in mind that Crawford sold the final condo unit in July of 2012. He therefore had zero ownership in the Rosewood condos and was not a Council member when he listed his own name under "Primary Owner" on page 2 of the application.

Also note that Crawford submitted a Single Family Building for each individual unit (#10, #11, and #12) rather than one permit for a multi-family building. Although Crawford will initially own each unit once construction is completed, he cannot own units that do not exist. As to the structure itself, it will become a common element and the Council's legal property. HRG therefore has no standing to assert ownership of the Rosewood II or the Rosewood property.

Nevertheless, Crawford certified (on page 3) that HRG was the property owner of record:

> "I, Gene Crawford, in my capacity as "Member" hereby certify that Highlands Restoration Group is the owner of the property... and that I, Gene Crawford/Member, am authorized to sign this application on behalf of the owner."

While this statement would have been true in 2005 (when HRG did have sole ownership), it was demonstrably false as of April 2013.

2. June of 2014 - application for LBA Reduction and Parking Waivers

Crawford again signed as owner (on page 2), but left the Certification Statement blank (on page 3), with the exception of the date and his signature, which deliberately leaves open to interpretation exactly what his signature attests.[7] As such, this application and related approvals should be declared null and void.

[3] see Document #8-3 [January 2013 revisions to 2005 site plan] and Document #8-4 [Site Plan Application #18719].
[4] Document #8-5 [Unit #9 deed - HRG to Semonin Realtors 2007].
[5] Document #8-6 [Site Plan exhibit for LBA and parking waivers June 2014] and Document #8-7 [Site Plan December 2014].
[6] see Document #8-8 [Application for building permits April 2013]; Document #8-9 [Building Permit #359225]; and Document #8-10 [Building Permits issued in January of 2014].
[7] Document #8-11 [Application for parking waivers and LBA reduction_06.02.14].

3. February of 2015 - application for Landscape Plan

Aside from the fact that HRG's recent Landscape Plan is non-compliant, Crawford again falsely asserts that he is the parcel owner.[8] He did complete the Certification Statement this time (although dated a month later on March 24th), and falsely asserts that HRG is the property owner. As such, this application and related approval should be declared null and void.

Request for Determination #8:

8a - Plan Review Guidelines for a Multi-Phased Condominium Project

It seems that administrative guidelines for plan reviews specific to condo projects would likely be available to staff at PDS, Construction Review, Develop Louisville, etc. If there is a written policy, checklist, or any such document that delineates review standards for multi-phased condo projects, we would ask the Department to provide us with copies.

8b - Correct Application

According to Construction Review staff, HRG submitted three separate applications for a single-family building permit (in April of 2013) in order to construct each unit in phases. This rationale is unacceptable. If HRG encounters financial difficulties and cannot complete construction, the Rosewood Council would be left with a half-finished building and the responsibility to demolish the structure.

We therefore ask that the Department require HRG to submit the correct application, which is the Plan Review for a Multi-Family Condo Building. However, this form presents two complications that must be resolved.[9]

First, it requires the applicant to certify that he is an authorized agent of the property owner, which we have sufficiently demonstrated to be false. Second, it specifies that the Department may not issue a building permit to an applicant who has unresolved, uncured, and outstanding Code violations. However, as detailed in Sections 5 and 6, HRG has a multitude of such violations.

8c - Reinstatement of Suspended Building Permits

Each application contains a Certification Statement with an exceedingly clear caveat: knowingly providing false information may cause the application to be "declared null and void." It is a violation of KRS 523.010, and punishable as a Class B misdemeanor. This language does not lend itself to discretion.

HRG had over eight years (April of 2005 to July of 2013) to submit construction plans and applications to obtain the necessary approvals and secure the necessary building permits. To reinstate the suspended permits would allow HRG to circumvent the body of laws and regulations that may ultimately prevent HRG from further expanding the Rosewood condominium.

We therefore request the Department to clarify whether it will reinstate the suspended permits to an applicant who is not the property owner and has relinquished control of the condo project to its owners. If affirmative, we ask the Department to cite the specific laws and regulations it would rely on to support this decision.

8d - Issuance of New Building Permit

If the Department intends to issue a new building permit to an applicant who is not the property owner and has relinquished control of the condo project to its owners, we ask the Department to cite the specific laws and regulations it would rely on to support this decision.

[8] Document #8-12 [Landscape Application_02.25.15]
[9] Document #8-13 [Plan Review Application for Multi-Family Condo Building].

Concluding Remarks

We regret the need to invest a considerable amount of our time to present such a lengthy and complex analysis, but it was unavoidable given the scope of HRG's project and the numerous deficiencies that have marred the administrative management of this case.

The Department's written findings will represent a workload that accumulated over 10 years and should have been performed by administrative staff and various planning subcommittees. We believe our analysis should make a thorough review of this case by your staff substantially easier, as it provides sufficient information for the Department to make each of the requested determinations.

We have copied the Division of Building Codes Enforcement in Frankfort because we would appreciate the additional oversight. Under KRS 198B.050, the Board of Housing, Buildings and Construction "shall monitor the effectiveness of agencies designated by local governments to enforce the provisions of the [UBSC]," and take corrective action if the Board finds that deficiencies exist in local government enforcement.

We hope these determinations are based strictly on the corpus of documentation. It leads to an unavoidable conclusion that city officials might help HRG to understand: further expansion of the Rosewood condominium project is impossible from a technical, administrative, and legal standpoint.

The sum total of HRG's violations may create a liability for penalties and fines that could very well exceed any potential profit. We do not wish any personal ill to this developer. We would therefore be willing to forgo aggressive enforcement if all parties simply came to an agreement that further expansion of this condo project is no longer a viable option.

As we noted in the cover letter, the Department has a statutory duty to enforce the regulations that protect a well-established neighborhood, and the property values of the Rosewood condos and surrounding homes. The Department is further bound by law to prohibit a development that does not conform to the literal terms of zoning regulations.

An underlying principle of those zoning regulations is that a development should offer something of beauty, or value, or necessity to the community, or otherwise cause no adverse impacts. For that reason, no one is allowed to build whatever they desire on their own land, let alone on land that belongs to others. HRG's development plan fails to meet any one of the above objectives. Its sole purpose is financial gain.

The Rosewood case has been a long-standing controversy for 60 years. It remains under sustained public scrutiny that will only intensify if HRG is ultimately allowed to build, as our entire neighborhood is deeply invested in the final outcome.

Summary of Request for Formal Determinations in Writing

ID	Issue	Request
1a	Reinstatement of Expired Building Permits	Enforce KBC § 105 regulations related to the proper procedure for obtaining a building permit or provide the applicable regulations that would demonstrate the Department's authority to reinstate suspended and expired permits.
1b	Expiration of HRG's Development Plan	Formal acknowledgement by the Department that the development plan of January 2013 expired in January of this year.
2	Category 3 Review	Designate a Category 3 Review to HRG's comprehensive development plan.
3	Origination of the Certified Land Use Restriction	Identify the person or entity responsible for preparing the contents of the recorded LUR. Impose the appropriate penalties and instruct HRG to cure the improper filing.
4	Number of Permitted Dwelling Units	Clarify the maximum number of dwelling units allowed for the Rosewood site.
5a	Construction of Roof Deck without a Permit	Impose the appropriate penalties and daily fines. Require HRG to incur the costs to dismantle and rebuild a Code-compliant roof deck.
5b	Construction of Unit #9 Deck without a Permit	Impose the appropriate penalties and daily fines.
5c	Construction of a 2-Space Loading Area instead of a 7-Space Parking Lot	Impose the appropriate penalties and fines for an unapproved deviation from permitted work scope. Issue a formal citation to HRG for misleading public officials in order to secure exemptions from zoning regulations.
5d	Construction of Garage 1 without a Permit	Impose the appropriate penalties and daily fines.
5e	Reconstruction of the Unit #9 Carriage House without a Permit	Impose the appropriate penalties and daily fines.
5f	Expansion of the Principal Structure's Floor Area without a Permit	Impose the appropriate penalties and daily fines for unapproved additions to Units #2 and #3, and unapproved structural alterations to the rear sunrooms of Units #1, #4, #6, #7, #8 without a building permit.
5g	Incomplete Inspections	Require HRG to provide proof of insurance, performance bond, and payment bond.
6a	Misrepresentations Related to Existing and Proposed FAR	Instruct HRG to include the 755 sqft. of Unit #9's floor area in the FAR calculations. Impose appropriate penalties for reporting false FAR data in order to secure plan approvals and zoning exemptions.
6b	Building Drawings	Provide a full copy of any building drawings currently under review.
6c	Disallowed Areas included in the PYA Calculations	Instruct HRG to exclude the combined 638 sqft. of disallowed areas from its PYA calculations.
6d	Other Zoning Violations	Impose the maximum amount of penalties and daily fines for outstanding zoning violations that cannot be cured.
6e	Ambiguity of Approved Development Plan and Validity of PYA Variance	Take corrective action that is proportionate to the adverse impacts of the approved PYA variance. Verify if HRG has submitted a qualified and approved development plan; if so, provide a full copy of that development plan.
7a	Karst Survey	Instruct HRG to conduct a karst survey to confirm whether or not there is an existing sinkhole within the development site.
7b	Full Disclosure of Geological Reports	Instruct HRG to provide full and immediate disclosure of any previous and anticipated geological reports.
7c	Fiscal Surety	Require HRG to post a fiscal surety that would protect the Council from economic losses and liability related to development on karst terrain.
7d	Landscape Plan	Revoke the recent approval for the non-compliant Tree Canopy Preservation and Landscape Plan.

7e	Expired EPSC Plan	Instruct HRG to revise its expired plan and submit a detailed plan in adherence to the EPSC Ordinance.
7f	Expired MSD General Permit	Revoke approval for the expired General Permit that failed to meet the requirements of EPSC Ordinance.
8a	Administrative Guidelines for Plan Reviews of Condominium Projects	Provide a copy of any available written policy, administrative guidelines, or checklist that would delineate review standards for multi-phase condominium projects.
8b	Appropriate Plan Review Application to obtain a Building Permit	Instruct HRG to submit the correct Plan Review Application for a Multi-Family Condo Building rather than separate applications for a Single-Family building permit.
8c	Reinstatement of Suspended Permits	Clarify the Department's position on whether it will reinstate the suspended building permits for an applicant who is not the property owner or authorized agent. Provide whatever laws and regulations the Department would rely on to support this decision.
8d	Issuance of a New Building Permit	Clarify the Department's position on whether it will issue a new building permit to an applicant who is not the property owner or authorized agent. Provide whatever laws and regulations the Department would rely on to support this decision.