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**CONFIDENTIAL**  
**ATTORNEY-CLIENT PRIVILEGED**

**VIA E-MAIL: RALPHDS@AOL.COM**

Baycrest Homeowners Association, Inc.  
Board of Directors  
c/o Ralph Searce, President

**Re: Roof Replacement Issues**

Dear Members of the Board:

Please accept this letter in response to the Association's inquiry concerning a variety of issues related to roof replacement. Accordingly, I have attempted to address each of the Association's in question in turn below.

As an initial matter, there are a number of specific provisions of the Amended and Restated Declaration of Baycrest Homeowners Association, Inc. (the "Declaration"), which address these issues.

Article IV, Section 1 provides as follows:

The Association shall at all times maintain the Common Open Space and any grassed area, hedges, woody plants, shrubs, bushes or similar such plants on each Lot. The maintenance of the grassed area and each Lot includes mowing and edging the grass and trimming of hedges, irrigation, fertilization and pest control. To preserve the beauty, quality and value of the Project, the Association is also responsible for painting the exterior surfaces of the individual residences on each Lot and coordinating the periodic cleaning of the roofs. See Article V, Section 3. In addition, the Association shall be responsible for maintenance of the recreational facilities. (Emphasis added.)

Article IV, Section 2 of the Declaration provides as follows:

Access – For the purpose of performing the maintenance authorized by this Article and Article VIII hereof, the Association, through its duly authorized

agents or employees, shall have the right to enter upon any Lot(s) or the exterior of any improvements thereon, at reasonable hours on any day except Sunday. In the case of emergency repairs, access will be permitted at any time with only such notice as, under the circumstances, is practically affordable. (Emphasis added.)

Article VI, Section 9 of the Declaration, concerning the Association's right to enforce the Documents in the event of an Owner default provides as follows:

**Non-Monetary Defaults.** In the event of a violation by any Owner or any tenant of an Owner, or any person residing with them, or their guests or invitees, (other than the non-payment of any Assessment or other monies) of any of the provisions of this Declaration, the Articles, the By-Laws or the Rules and Regulations of the Association, the Association shall notify the Owner and any tenant of the Owner of the violation, by written notice. If such a violation is not cured as soon as practicable and in any event within seven (7) days after such written notice, or if the violation is not capable of being cured within such seven (7) day period, if the Owner or tenant fails to commence and diligently proceed to completely cure such violation as soon as practicable within seven (7) days after written notice by the Association, or if any similar violation is thereafter repeated, the Association may, at its option:

- A. Impose a fine against the Owner or tenant as provided in Section 10 hereof; and/or
- B. Commence an action to enforce the performance on the part of the Owner or tenant, or for such equitable relief as may be necessary under the circumstances, including injunctive relief; and/or
- C. Commence an action to recover damages; and/or
- D. Take any and all actions reasonable necessary to correct such failure, which action may include, where applicable, but is not limited to, removing any addition, alteration, improvement or change which has not been approved by the Association, or performing any maintenance required to be performed by this Declaration.

All expenses incurred by the Association in connection with the correction of any failure, plus a service charge of ten (10%) percent of such expenses, and all expenses incurred by the Association in connection with any legal proceedings to enforce this Declaration, including reasonable attorneys' fees, shall be assessed against the applicable Owner, and shall be due upon written demand by the

Association. The Association shall have a lien for any such Assessment and any interest, costs or expenses associated therewith, including attorneys' fees incurred in connection with such Assessment, and may take such action to collect such Assessment or foreclose said lien as in the case and in the manner of any other Assessment as provided above. Any such lien shall only be effective from and after the recording of a claim of lien in the public records of the County in which the Project is located.

Article VIII of the Declaration discusses the Association's right to have architectural control and establish the Architectural Control Committee. Article VIII, Section 3 provides in relevant part as follows:

The Board shall approve proposals or plans and specifications only if submitted for its approval by the Committee or Owner of a Lot and only if it deems that the construction, alterations, or additions contemplated thereby in the locations indicated will not be detrimental to the appearance of the entire Project, and that the appearance of any structure affected thereby will be in harmony with the surrounding structures. The Board may condition its approval of proposals or plans and specifications on such changes therein as it deems appropriate, and may require submission of additional plans and specifications or other information prior to approving or disapproving material submitted. The Board may also issue rules or guidelines setting forth procedures for the submissions of plans for approval. The Board may require such detail in plans and specifications submitted for its review as it deems proper, including, without limitations, floor plans, site plans, drainage plans, elevation drawings and descriptions or samples of exterior materials and colors. (Emphasis added.)

Article VIII, Sections 4, 5 and 6 of the Declaration provide as follows:

**Section 4. Maintenance and Repair Obligations.** In the event any improvements to the Project, including the exterior of all Homes, fall into disrepair or are not maintained so as to create a dangerous, unsightly or unattractive condition, or to otherwise violate this Declaration, the Board has the duty to take such action as is set forth in Section 6 of this Article VIII and any other remedies prescribed by law. The obligations to maintain shall include but not be limited to exterior paint on any building, roof repair and maintenance, landscaping, paving, trash removal, and repair of exterior building surfaces, including utility enclosures.

**Section 5. Inspection.** The Board and Committee shall have the right to inspect from time to time the Common Open Spaces and Lots of the Project in order to determine whether the maintenance of same meet the minimum standards and any improvements constructed thereon meet the architectural standards.

**Section 6. Remedies in the Event of Non-Compliance.** If the Board or Committee shall find that any Lot is not being maintained in accordance with the minimum maintenance standards, or improvements to any Lot is not in compliance with the architectural standards of the Board, the Board shall issue a report to the Owner of the Lot. Within thirty (30) days of receipt of the report, the Owner shall commence with the repair, maintenance or restoration specified in the report and diligently pursue completion of same in an expeditious manner. The cost of all work shall be the responsibility of the Owner. The failure by any Owner to comply with this provision shall entitle the Association to take any or all actions set forth in Article VI, Section 9, (A)(B)(C), and (D) of this Declaration and to collect all expenses and service charges provided for in said Article VI, Section 9.

Article IX, Section 7 of the Declaration, regarding the Owners' responsibility concerning the roofs provides as follows:

**A. Roof Repair**

Each roof which is built as part of the original construction of a Home also serves an adjacent Home and is *a* common roof. In the event that a portion of a roof requires repair or replacement, then the cost thereof shall be shared prorata by the Owners of the Homes over which the roof to be repaired or replaced is situated; provided, however, that in the event that damage or destruction is confined to the roof area wholly within the dimensions of one (1) Home, cost of repair and replacement thereof shall be paid by the Owner of said Home. If the damage or destruction of adjacent roofs or homes is caused by the negligence or willful Misconduct of any one Owner, such negligent Owner shall bear the entire cost of repair or replacement. In the event the owners cannot agree as to the extent of the damage, the timeliness of repair, or which owner or owners should bear the cost, owner or owners may petition the Association for resolution with documentation and certification of damage. The Association has the right but not the duty to effect the roof repair and resulting damage and assess the owner or owners accordingly.

(1) **Arbitration.** In the event the Association chooses not to resolve a dispute, then each party shall choose an arbitrator and such arbitrators shall choose one additional arbitrator and the decision shall be a majority of all the arbitrators and shall be binding.

**B. Roof Replacement.** In the event of a roof repair that requires replacement tile, the color, style, and type shall be approved by the Board.

Article X, Section 1 of the Declaration, discussing easements provides as follows:

**Easements.** Easements for installation and maintenance of utilities and drainage facilities are reserved as shown or designated on the recorded plat(s). Within these easements, no structure (excluding drives and walks), planting or other material shall be placed or permitted to remain which would damage or interfere with the installation or maintenance of the utilities or which may change the direction of flow or drainage channels in the easements. No obstructions such as gates, fences, etc., which will prevent emergency access shall be constructed in any easement strip for fire fighting access purposes. The Association is hereby granted an easement over each Lot for ingress and egress to any portions of the Lot or the improvements thereon requiring maintenance by the Association.

**Question #1:** According to our Baycrest documents, does the Board of Directors, subject to Design Review Committee approval by Pelican Landing, have the authority to establish specifications -- underlayment, color , roof composition, code compliance -- for roof replacement in this community?

Answer: With regard to the Association's authority to establish specifications for roof replacement, the provisions of Article VIII, Section 3 and Article IX, Section 7(B) of the Declaration, cited above, are relevant. Pursuant to the Association's general authority for architectural review, the Board may adopt rules or guidelines setting forth procedures for submissions of plans for approval. Further, the Board may condition its approval of proposed plans or specifications based on receiving additional information. Accordingly, based on this language, the Board could adopt roof replacement specifications outlining the color, style, materials, etc., that will be approved. Further, any Owner replacing their roof would have to replace the roof consistent with the current code as would be required by the County. However, please note that the language contained in the Declaration concerning the Board's authority to approve alterations, appears to be focused on the aesthetics of such alterations. Arguably outlining specifications concerning roof underlayment and other construction-related matters, that are not otherwise visible, is arguably beyond the scope of the authority granted the Association in the Declaration. However, a Board rule adopting specific specifications for roof replacement would at a minimum be defensible, if not aggressive.

**Question #2:** Does the Baycrest Board have the authority -- in the absence of catastrophic destruction -- to require a homeowner to replace a roof, for Safety of, or danger to, the building occupants? Esthetic considerations? Disrepair?

If so, does the Board have the authority to enter into a home to inspect or determine the condition of the roof?

Answer: Here, the Association is really asking two different questions. One, whether the Association has the authority to require a homeowner to replace the roof, and two, does the Board have the authority to enter into a home to inspect the condition of the roof.

With regard to the authority to require an Owner to replace the roof as provided in Article IV, Section 1 of the Declaration cited above, each Owner is responsible for the maintenance, repair and replacement of the structure of their home. Further, the Association has the right to demand that an Owner maintain their property, including the roof, and replace the roof if necessary. Such demand should be based on objective reasons which may require the engagement of appropriate roofing professionals.

With regard to aesthetic considerations, Article IV, Section 1 of the Declaration, provides that the Association can coordinate roof cleaning. Accordingly, if the roof needed maintenance beyond cleaning, that would be the Owner's responsibility and the Association can demand that the Owner undertake appropriate maintenance action, including replacement. However, the Association should, to create a consistent regime of enforcement, adopt defined specifications regarding roof maintenance and replacement so that every Owner is treated equally. However, if a roof is known to be failing, based on the provisions of the Declaration cited above, the Association would have the authority to make appropriate demand that the Owner take action to repair or replace the roof, as required. Further, the Association would have the authority as outlined in Article IX of the Declaration cited above, to take specific action to enforce their maintenance responsibility, whether that is through a lawsuit or specific action to undertake their maintenance responsibility (repair or replace the roof) and seek to recover the expense of such action from the Owner.

With regard to the second question, concerning the Association's authority to enter a home to inspect the condition of a roof, based on the provisions of the Declaration cited above, the Association would not have such authority. Article IV, Section 2 of the Declaration, provides that the Association or its agents may enter upon a lot or the exterior of any improvement at reasonable hours in order for the Association to perform its maintenance obligations. There appears to be no additional authority for the Association to enter upon a Lot and enter a home in order to inspect a roof. Further, such right is not specifically granted by the Florida Homeowners' Association Act, Chapter 720, and is not a right typically granted associations in the homeowners' association context (but access to units in the condominium context is specifically authorized by the statute). Accordingly, I would not advise the Association to attempt to enter an Owner's home in order to inspect the roof.

**Question #3:** Does the Board have the authority to require replacement of the other half or two-thirds, or one third of the common roof of a building if replacement of the roof over an adjacent home is required?

Answer: While the Declaration, as discussed above, is clear in making the Owner responsible for the roof replacement, Question #3 raises the fundamental problem, that the roofs are common

roofs, and apparently, must be replaced for the entire building. Article IX, Section 7 of the Declaration, cited above, outlines the specific roof repair and replacement process. Owners are required to pay their pro-rata share of the roof covering their home when the roof for the entire building is replaced. Further, the document provided from Adler Roofing, states that a single roof may not be replaced and the roof for the entire building would have to be replaced in the event that replacement was necessary. Accordingly, in my opinion the Association has two ways to proceed. One is to rely on the provisos of Article IX, Section 7 of the Declaration and state that this is an issue to be resolved between the Owners and the Declaration provide a mechanism for the Owners to resolve such disputes (arbitration) and the Association should not become involved.

The alternative analysis would be for the Association to seek to resolve such dispute and make demand on all Owners within a building that the roof be replaced. However as currently drafted, I read the Declaration as making this an Owner issue and the Association is not required to insert itself between Owners who have a dispute as to whether a roof requires replacement. However, to the extent that the entire roof has to be replaced, in the event that any portion requires replacement, this will obviously engender disputes (which is why there is an arbitration provision in the documents).

If the Association would like to discuss amending the documents to create a different regime, one where the Association has greater express authority to resolve these disputes and require roof replacement, we can discuss such an amendment.

**Question #4:** Does the Baycrest Board have authority for dispute resolution -- specifically in cases where one homeowner must replace his portion of the common roof and the adjacent property owner disagrees?

Answer: As discussed above, the documents have an express provision in Article IX, Section 7(A)(1) of the Declaration, for resolving disputes between Owners concerning the replacement of the roof. Essentially, if the Association chooses to not resolve the dispute (which would be my advice), the Unit Owners are entitled to proceed to arbitration and settle the dispute in that manner. However, this would not prevent the Association from attempting to resolve the dispute between the Owners. If it was able to do so, obviously that would be in everyone's best interest. However, as discussed above, such a dispute is essentially a dispute between Owners. Again, if the Association would like to discuss creating a more formal mechanism for resolving such disputes, please let me know.

**Question #5:** In order to amend the Baycrest documents does it require two-thirds of the total unit owners, or does it require two-thirds of those that vote, voting to do so?

Answer: With regard to amendment, Article XI, Section 3 of the Declaration provides as follows:

**Duration and Amendment.** The covenants and restrictions of this Amended and Restated Declaration shall run with and bind the land for a term of twenty (20) years from the date this Amended and Restated Declaration is recorded, after which time they shall be automatically extended for successive periods of ten (10) years. This Declaration may be amended by not less than two-thirds (2/3) of the Voting Interests of the Association and voting at any annual or special meeting, provided that notice of any proposed amendment has been given to the members of the Association, and that the notice contains the text of the proposed amendment. Any Amendment must be recorded in the Public Records of Lee County, Florida, to be effective. (Emphasis added.)

Based on the language of Article XI, Section 3 of the Declaration, the Declaration may be amended by a two-thirds (2/3rds) vote of the members voting at a Members' meeting (two-thirds of the quorum) and not two-thirds (2/3rds) of all voting interests in the Association. Pursuant to Article 4.4 of the Amended and Restated By-Laws of Baycrest Homeowners Association, Inc. ("By-Laws"), the quorum of the Association is thirty percent (30%) of the voting interests in the Association. Accordingly, as long as at least thirty percent (30%) of the voting interests participate in a Member's meeting, two-thirds (2/3rds) of those voting may amend the Declaration.

**Question #6:** Does a unit owner who is not current in their dues and or late fees have the right to vote?

Yes. The Association may suspend the voting rights of an Owner who is more than ninety (90) days delinquent in the payment of any monetary obligation to the Association. Article II, Section 1, Paragraph D of the Declaration provides as follows:

The right of the Association to suspend, for a reasonable period of time, the rights of a Member or a Member's tenants, guests, or invitees, or both, to use Common Areas and facilities, except that such suspension of rights shall not impair the right of an owner or tenant of a parcel to have vehicular and pedestrian ingress to and egress from the parcel, including but not limited to the right to park.

Further, Section 720.305, Florida Statutes (2014), provides in relevant part as follows:

Obligations of members; remedies at law or in equity; levy of fines and suspension of use rights.— ...

(4) An association may suspend the voting rights of a parcel or member for the nonpayment of any monetary obligation due to the association that is more than 90 days delinquent. A voting interest or consent right allocated to a parcel or member which has been suspended by the association may not be counted towards the total number of voting interests for any purpose, including, but not

limited to, the number of voting interests necessary to constitute a quorum, the number of voting interests required to conduct an election, or the number of voting interests required to approve an action under this chapter or pursuant to the governing documents. The notice and hearing requirements under subsection (2) do not apply to a suspension imposed under this subsection. The suspension ends upon full payment of all obligations currently due or overdue to the association.

(5) All suspensions imposed pursuant to subsection (3) or subsection (4) must be approved at a properly noticed board meeting. Upon approval, the association must notify the parcel owner and, if applicable, the parcel's occupant, licensee, or invitee by mail or hand delivery.

Accordingly, any Owner who is more than ninety days delinquent in the payment of any monetary obligation to the Association may have their voting rights suspended. However, pursuant to Section 720.305(5), Florida Statutes, such suspension must be imposed by the Association at a properly noticed Board meeting. Further, after the Board votes to suspend a delinquent Owner's voting rights, they must be sent a written notice of such suspension. Because the suspensions must be imposed at a Board meeting, the agenda for the meeting, and minutes, must address the suspension issue. Regarding the meeting agenda and minutes, care must be taken when preparing the meeting agenda and drafting the applicable meeting minutes. I recommend that the names or the addresses of the respective persons not be specifically listed in the agenda/notice. Instead, the agenda should merely include a reference as follows: **Vote on the suspension of use rights and voting rights for owners/occupants due to delinquent accounts.** At the meeting, I recommend the names of the owners/occupants not be specifically mentioned. Instead, the applicable lot numbers or addresses should be used. The minutes should also only reference the lot number/address.

In conclusion, once the Board of Directors has revised the fordoing, if the Board has any additional questions or wishes to discuss amending the Declaration, please let me know.

Very truly yours,



James Robert Caves, III  
For the Firm

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