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MEMORANDUM

ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIAL COMMUNICATION

To: Board of Directors, Birkdale Community Association, Inc.
c/o Earl Bishop, President
Via email only: earlbishop8313@gmail.com

From: Jerry M. Wright, Jr., Esq.

Re: Issues Regarding Conveyance of Golf Course Pool and Tennis Courts

Date: March 19, 2025

At the request of the President of the Board of Directors (“Board”) of Birkdale Community Association, Inc. (“Association” or “BCA”) we are writing to provide our responses to the questions below, in the order they were presented to us. As a background, we understand that neighboring Birkdale Golf Club ceased to operate its swimming pool in 2023, and since that time, there have been inquiries related to the Association acquiring the pool area, including two tennis courts (“Pool Property”) or entering into some other arrangement to reopen the pool. The purpose of this Memorandum is to address issues (below) related to the possibility of the Association’s purchase and operation of the Pool Property. We now turn to the questions posed to us:

1. Can BCA consider this proposal and proceed to develop a business model? Does it matter if a lease or purchase is considered? Can this be done by the Board without a two-thirds affirmative vote by the membership under the Bylaws?

Association Acquiring the Pool Property.

As a threshold response to this question (and perhaps other questions below), we note that by email dated August 12, 2024, we analyzed the authority of the Association to acquire the Pool Property and concluded that the Association has authority to acquire the land and, if it

complies with the procedures as set forth in the Declaration, make it part of the Common Area. The Association would need to declare the new property as Common Area and could annex the land in as additional property subject to the Declaration. A copy of our August 12, 2024 email is attached hereto and made a part of this Memorandum. However, it is important to note that the Board's authority to utilize Association's funds to purchase and maintain the Pool Property, and especially to obtain a loan to purchase the Pool Property, in our view, would require an amendment to the Declaration.

Association Leasing the Pool Property.

Please also see our email of August 27, 2024, concluding that the Association's management and operation of the Pool Property pursuant to a lease, and the spending authority to do so, would require an amendment to the Declaration. A copy of our August 27, 2024 email is also attached hereto and made a part hereof. However, please note that we supplement that email opinion, noting that Article V, Section 5.2 of the Master Protections ("Declaration") provides the following:

*Section 5.2. Purpose of Assessments. **The assessments levied by the Association shall be used** for the management, maintenance, improvement, care, operation, renovation, repair and replacement of the Common Areas and improvements thereon and other property owned or acquired by the Association of whatsoever nature, **for the performance of the Association's obligations under the Recreation Area Lease and to provide recreational amenities and opportunities to Owners in the Recreational Area**, for the discharge of all real estate taxes and other levies and assessments against the Common Areas and improvements thereon and other property owned or acquired by the Association, for the procurement of insurance by the Association as more particularly described in the Bylaws, for the establishment of reserves with respect to the Association's obligations, for the discharge of such other obligations as may be imposed upon or assumed by the Association pursuant to its Articles or Bylaws or this Declaration or any Supplemental Declaration, and for such other purposes as may be authorized by or pursuant to the Articles or Bylaws. (Emphasis added).*

We highlight this provision because our cursory review of the land records pertaining to the ownership of the Golf Club reveals that the Pool Property might be deemed Recreation Area subject to a Recreation Area Lease. We note that at the time that the original Developer of Birkdale, Spring Run Associates, conveyed certain common area property to the Association (by Deed recorded on July 17, 1990), it also immediately recorded thereafter a Memorandum of Lease evidencing and describing a lease of the same date for the Pool Property wherein Spring Run Associates (then owner of the Golf Club Property, including the Pool Property) was the Lessor and the Association was the Lessee. We also found a Declaration of Covenants, recorded on December 8, 1993, between a subsequent Owner of the Golf Club property and subsequent Declarant (The Fairways Group, L.P. and Crimson Birkdale Limited Partnership), which describes the Pool and Tennis Courts as follows:

Section 2. Swimming Pool and Tennis Courts. The Property includes a swimming pool and tennis courts and related area (the "Recreational Area"). Declarant agrees to manage and own the Recreational Area as a high-quality, semi-private facility for the benefit of, primarily, the residents of Birkdale and secondarily for the public at large.

It would appear, although we will need further information to confirm, from these documents that the Golf Club pool and tennis courts were intended to be treated as “Recreational Area.” As such, we turn to the language in the Association’s Declaration – in Article I, Section 1.1 (Definitions) -- which characterizes “Recreation Area” and “Recreation Area Lease” as follows:

....
"Recreation Area" shall mean the portion or portions of the Properties which the Declarant has designated or may designate as a recreation area in any amendment to this Declaration, in a Supplemental Declaration or in any other instrument executed by Declarant and recorded in the Clerk's Office, together with the improvements and recreational amenities now or hereafter located thereon. Any such amendment shall not require the consent of any other Owners as provided in Section 9.4.

"Recreation Area Lease" means the lease of the Recreation Area to be entered into between the Association, as lessee, and the Declarant, as lessor, and any amendments thereto and renewals and replacements thereof.

....
We also note that the “Recreation Area” is NOT Common Area under the Association’s Declaration, pursuant to the definition of “Common Area” in Article I, Section 1.1 of the Declaration.

We have attached these documents for the Board’s files and review. Please note that we have not performed a full title search, as one would take a significant number of hours. We do not make any legal conclusions on the legal effect of these documents, or whether the Pool Property is Recreation Area which is subject to the Recreation Area Lease. However, the reason for providing these documents to the Board is because they might come into play with respect to the Association’s authority to utilize assessment funding IF the Pool Property is or can be made the subject of a Recreation Area Lease pursuant to the Declaration. Currently, we have no record of such a Lease, only the recorded Memorandum of Lease from 1990. Thus, we cannot confirm if the Pool Property is the Recreation Area contemplated in the Declaration.

In our view, a full title search and report to gather all documents pertaining to this property should be obtained from a title company who specializes in such matters. As explained in response to Number 3, below, we believe the primary effort to resolve this issue should be from, or in collaboration with, the current Owner of the Golf Club property – Birkdale Golf Acquisition LLC (“Birkdale Golf”) and/or (if possible) the current successor Declarant, Milhaus Corp. Moreover, given that the Memorandum of Lease identified above references an actual Lease between the Declarant and the Association, and given that the Association’s authority to expend funds on its performance obligations under such a Lease, we suggest that you look in the Association’s files for such Lease (and potential subsequent Leases) or work with Birkdale Golf

and/or Milhaus Corp. to seek records from them (not recorded) of any Lease documents for the Pool Property as “Recreation Area.” Existence of such a Lease will have bearing on whether the Association has authority to expend assessment funds on whatever the Association’s performance obligations would be under the Lease.

2. Must we poll the membership before developing the business model to gauge if there is sufficient interest to incur the large liability?

The Board is not obligated to “poll” the membership to gauge interest acquiring or leasing the Pool Property. However, it is always wise to conduct “straw polls” or even have a “town-hall” meeting to allow Owners to weigh in and express their interest, or lack thereof, for any proposed undertaking by the Board (whether it is acquiring property outright or pitching appropriate amendments to the Declaration to put the Board in the position to do so). Of course, if the action ultimately requires member approval, putting the proposed action before the membership ahead of time to gauge interest rarely a bad idea.

3. Should we take steps to determine if the golf club can effectuate such a property transfer? The property is believed to be part of the master plan of the golf club and has not been separated; there are several partners involved; the land is landlocked and would require parking and access easements.

In our opinion, this should be the first step before going further with any steps to put the Association in the position to utilize Association funds and/or obtain a loan to purchase and/or maintain the Pool property. If the Board is considering taking further steps on the Association side, we suggest first investigating whether Birkdale Golf, has authority and the desire to carve out the Pool Property from the Golf Club property, provide for adequate parking for the Pool Property and convey the Pool Property to the Association. One major hurdle and cost will be approval by Chesterfield County to re-plat and possible re-zone the Golf Club property to effectuate re-platting the Pool Property, complying with any County conditions or proffers (or additional conditions or proffers), and creating easements for Birkdale residents to park and use the Pool Property.

Otherwise, as provided in our response to Number 1, above, there may be another potential option to work with Birkdale Golf to find further reference to a Recreation Area Lease or otherwise confirm whether the Pool Property could Leased moving forward. The primary effort to resolve this issue should be from, or in collaboration with, Birkdale Golf or the current successor Declarant, Milhaus Corp. Moreover, given that the Memorandum of Lease identified above references an actual Lease between the Declarant and the Association, and given that the Association’s authority to expend funds on its performance obligations under such a Lease, we suggest that you look in the Association’s files for such Lease (and potential subsequent Leases) or work with Birkdale Golf and/or Milhaus Corp. to seek records from them (not recorded) of any Lease documents for the Pool Property as “Recreation Area.” Existence of such a Lease will have bearing on whether the Association has authority to expend assessment funds on whatever the Association’s performance obligations would be under the Lease.

4. If there is interest in joining the pool from individuals outside Birkdale, could we sell outside memberships? Could we use the property for social functions for a fee? Would this affect our non-profit status?

As a threshold, we cannot speak to the Association's non-profit or tax status in this scenario. We suggest that the Board confer with a CPA or other Tax Professional. However, assuming that the Association acquires the Pool Property as Common Area, we do not see where the Association has authority to "sell" memberships to those outside of the Birkdale community to use and enjoy the Birkdale Common Area. We suggest that putting the Board in such a position would require an amendment to the Declaration. Please also see our response regarding the ADA in Number 6, below.

That said, if there is a scenario where the Association does not own the Pool Property and is ultimately subject to a Recreation Area Lease or the Association is in a position to Lease the property going forward (again, this would require much additional investigation), then it would not be an owner, the Pool Property would not be Common Property, and the response to this question would be governed primarily by the Lease.

5. What funds might be used for a down payment or initial capital improvements? We do have substantial capital reserves.

As cited above, Article V, Section 5.2 of the Declaration authorizes reserves "*for the discharge of such other obligations as may be imposed upon or assumed by the Association pursuant to its Articles or Bylaws or this Declaration or any Supplemental Declaration, and for such other purposes as may be authorized by or pursuant to the Articles or Bylaws.*" We note that the Articles of Incorporation provide that one purpose of the Association is to:

[T]o provide a means whereby the management, Owners, acting together, may provide for the maintenance and care of the Common Areas and for this purpose to:

....

(d) subject to the Declarations and the Bylaws, acquire, own, hold, improve, maintain, convey, sell, lease, transfer, or otherwise dispose of real or personal build upon, operate, dedicate for public use property in connection with the affairs of the Association;...

We also note that Article III, Section 2 of the Bylaws provides that the Board shall on behalf of the Association:

(c) Provide for the operation, care, upkeep, maintenance and servicing of the Common Areas and, to the extent required by the Recreation Area Lease, Recreation Area;

...

(h) Make, or contract for the making of, repairs, additions and improvements to or alterations of the Common Areas in accordance with the Declarations and of the Recreation Area in accordance with the Recreation Area Lease.

Based upon the above documentary provisions, we do not believe that the Board could use reserves for the purchase of the Pool Property. However, again, if there exists an applicable Recreation Area Lease, then repairs, maintenance, servicing, additions, improvements or alterations of the Recreation Area could be made using reserves, but only in accordance with a Recreation Area Lease.

6. Would the pool and surroundings have to be ADA compliant?

If the Pool Property were considered open to the general public, then in our view requirements under the American with Disabilities Act (“ADA”) would apply, and the Pool Property would need to be ADA compliant. This issue will come into play in the event the Pool Property ultimately is owned by the Association as Common Property, and the Association determines to authorize offering Pool memberships to those outside of the Birkdale community. The Association may be subject to the ADA only if it is considered a “place of public accommodation” as defined under the ADA. If the Association is subject to the ADA, then the Association is responsible for ensuring those “places” meet ADA accessibility requirements established by the United States Department of Justice.

If the public generally does not have direct access to the Pool Property, then we believe the ADA would not apply. However, if the public is sometimes invited in for different events, we believe the Association may – at a minimum – be responsible for temporary compliance with the ADA during those events. So, during a large event on the Pool Property (a celebration - for example), the Association may have an ADA obligation to provide temporary accommodation to make the Pool Property more accessible.

But typically, ADA concerns with pools come in to play with respect to any requirement for retrofitting the pool with a zero entry reconstruction or installing a handicap lift. We believe it unlikely that the Association would have a permanent ADA-compliance obligation if the Pool Property is used almost exclusively for members and their guests. However, when the public is invited to obtain memberships to the facility (note, not as guests but as members of the public), the Association may be in a position where ADA compliance would be necessary.

7. Who would be the management of the venture; the BCA board or a new management structure?

This would depend upon whether the Pool Property was acquired by the Association and converted to Common Area. In that case, we would expect that the Association would have the responsibility to manage or contract with a third-party pool management company to manage the Pool Property.

If the Association were under a lease for the Pool Property, the Lease would direct how the Pool Property would be managed. Birkdale Golf would remain the owner of the Pool Property.

8. The current proposal includes the tennis courts as they currently are. Should they be considered?

We see no reason the tennis courts should not be included, particularly given that the documents we have found in land records reference the pool and the tennis courts together.