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Reply to: Reno

February 12, 2021

Via email to julie.thompson@camconevada.com

Board of Directors
Dayton Valley Community Association
c/o CAMCO Homeowners Association Management
Attn: Julie Thompson, CMCA, AMS
704 W. Nye Lane, Ste. 101
Carson City, NV 89703

Re: *Dayton Valley Community Association*
Board Member Conduct

Dear Members of the Board:

As general counsel to the Dayton Valley Community Association ("Association") and in connection with increasing tensions between members of the Board, I have received dozens of emails, participated in an executive session and had phone calls with various members of the Board. The Association's Board of Directors ("Board") has authorized me to communicate regarding these matters. As a result of my review of these matters, it is my recommendation you consider adoption of a Code of Conduct. I enclose one for your review and consideration.

Fiduciary Duty

NRS 116.3103(1) provides in pertinent part that Board members are fiduciaries and shall act on an informed basis, in good faith and in the honest belief that their actions are in the best interest of the association. Board members are required to exercise the ordinary and reasonable care of officers and directors of a nonprofit corporation, subject to the business-judgment rule; and are subject to nonprofit corporation conflict of interest rules. *Id*. Directors have certain fiduciary obligations to the corporation and to its members, including a duty of care and a duty of loyalty. *See Horwitz v. Southwest Forest Industries*, Inc., 604 F.Supp. 1130, 1134 (D.Nev.1985). This requires a director to perform his or her duties with the care, diligence and skill that an ordinarily prudent director, in a similar position and under similar circumstances would reasonably be expected to exercise and to maintain the interests of the members, as a whole, over the director's own or anyone else's interests. *Bedore v. Familian*, 122 Nev. 5, 125 P.3d 1168 (2006); *Shoen v. SAC Holding Corp*., 122 Nev. 621, 137 P.3d 1171 (2006).

Unless required by NRS 116 or the association's governing documents, the board acts on behalf of the association and by majority vote of the directors. *See* NRS 116.3013(1); NRS 116.3109(3). A corporation, like Dayton Valley Community Association, acts through its directors, officers, agents and employees and can be bound by the acts of a director who appears to be acting within the apparent scope of the director's authority, even if that director is acting on his/her own and not based on a majority decision of the Board. *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006); *Frantz v. Johnson*, 116 Nev. 455, 999 P.2d 351 (2000); *Seigworth v. State*, 91 Nev. 536, 539 P.2d 464 (1975); *Young v. Nevada Title Co.*, 103 Nev. 436, 744 P.2d 902 (1987). An association is liable for a director's acts unless it is proven that the director acted with willful or wanton misfeasance or with gross negligence. NRS 116.31037. In summary, a breach of fiduciary duty can have adverse consequences for the Association as well as the individual director.

In considering whether a director has fulfilled his/her fiduciary duties, the Commission on Common Interest Communities and Condominium Hotels ("Commission") may consider whether the board member has, among other things:

- Acted outside the scope of the authority granted in the governing documents.
- Acted for reasons of self-interest, gain, prejudice or revenge.
- Committed an act or omission which amounts to incompetence, negligence or gross negligence.
- Except as otherwise required by law or court order, disclosed confidential information relating to a unit's owner, a member of the executive board or an officer, employee or authorized agent of the association.
- Caused the association to comply with all applicable federal, state and local laws and regulations and the governing documents of the association.

See NAC 116.405.

<u>Prohibitions on Discrimination and Harassment</u>

Discrimination or harassment is a violation of NRS 116.31184 which prohibits a Board member from:

> [W]illfully and without legal authority threaten, harass or otherwise engage in a course of conduct against any other person who is the community manager of his or her common-interest community or an agent or employee of that community manager, a member of the executive board of his or her association, an officer, employee or agent of his or her association, another unit's owner in his or her common-interest community or a guest or tenant of a unit's owner in his or her common-interest community which:
>
> (a) Causes harm or serious emotional distress, or the reasonable apprehension thereof, to that person; or
>
> (b) Creates a hostile environment for that person.

Repercussions for the Association and/or Board Members Individually

Pursuant to NRS 116.31037, if a Board member is named as a respondent or sued for liability for actions undertaken in his or her role as a member of the Board, the Association must indemnify the member for his or her losses or claims, and undertake all costs of defense, unless it is proven that the member acted with willful or wanton misfeasance or with gross negligence. After such proof, the Association is no longer liable for the cost of defense and may recover costs already expended from the Board member. Additionally, if the Commission finds that you knowingly and willfully committed a violation then you may be found personally liable for any fines and costs imposed by the Commission. *See* NRS 116.785(5). If the Commission finds that your act was negligent but not knowing or willful, then the Association is responsible for any fines and costs imposed as a penalty for your actions. *Id*.

Comments Implying Discriminatory Animus:

Remarks that are personally disparaging are inconsistent with the role as a Board member. Such remarks may include broad and sweeping statements or accusing fellow Board members of reckless fiduciary responsibility, claiming to make someone look like a fool, or that a fellow Board member is worthless.

Such comments create a hostile environment and may be actionable under NRS 116.31184 and other laws. Board members must work together. An inability or unwillingness to check personal feelings and concentrate on the business of the community will have an adverse effect on the Board and staff. Therefore, it is necessary to restrict comments to factual inquiries and statements related to a member's position on the Board. Board members should not vent personal feelings to the manager or the Board.

Re-litigating Past Issues Without Majority Board Support and Repeatedly Taking Unilateral Actions:

The Board acts by majority vote. The Board determines how to expend its resources, both monetary and staff, by majority vote. No single director has the authority to bind the corporation.

A Board member's fiduciary duty imposes a duty of loyalty and care. This requires each member to work within the decisions made by a majority of the Board and not seek to undo or undermine those decisions. Board members must act within the scope of their authority. *See* NAC 116.405. Understanding the parameters of Board action, such as the difference between a solicitation and a bid, is important to remember.

Each Board member should review NRS 116.3102 and the Association's Governing Documents to clarify the scope of the Board's authority. Board members should constrain themselves to inquiries and actions within that scope. I enclose a copy of NRS 116.3102 for your review.

Role of a Board Member:

Board members are allowed to rely on experts. *See* NAC 116.405(8)(e). In fact, relying on expert advice is a defense against liability claims under the business judgment rule. In the matters in which an attorney has been consulted, it is not a member's job as a Board member to exhaustively revisit the issue to satisfy your concerns.

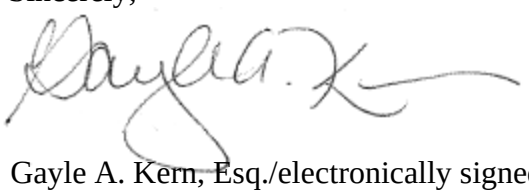
The fiduciary duty to act on an informed basis means that the Board members must inform themselves on the issue before the Board based on the information available at the time the decision must be made. It is the rare situation when a person or a Board are in possession of all the facts. Nonetheless, directors have a fiduciary duty to make decisions in a timely manner.

Inability to Establish a Positive Working Relationship with Board:

A propensity to accuse fellow Board members and staff of inappropriate behavior must be avoided. Communications with fellow directors and staff must be respectful. This is not an environment that is conducive to accomplishing the work of the community and is demonstrably not in the best interests of the Association.

In closing, in order to have a successful relationship as a member of a Board, the conduct of the members of the Board should be in accordance with these guidelines.

Sincerely,



Gayle A. Kern, Esq./electronically signed

Enclosures

Dayton Valley Community Association
Board Resolution for
Board Member Code of Conduct Policy

RECITALS

R.1. NRS 116.3102 provides for the power and limitations of the power of Board members to act on behalf of Dayton Valley Community Association (the "Association").

R.2. NRS 116.3103 provides that Board members and officers are fiduciaries with a high duty of care. Officers and members of the Board: (a) are required to exercise the ordinary and reasonable care of officers and directors of a nonprofit corporation, subject to the business-judgment rule; and (b) are subject to conflict of interest rules governing the officers and directors of a nonprofit corporation organized under the law of Nevada.

R.3. Being a fiduciary requires the Board members act on an informed basis, in good faith and in the honest belief that their actions are in the best interest of the Association.

R.4. In applying NRS 116.3103 and determining whether a Board member has performed his or her duties, the Commission may consider whether the director has, among other things: (a) acted outside the scope of the authority granted in the governing documents; (b) acted for reasons of self-interest, gain, prejudice or revenge; (c) committed an act or omission which amounts to incompetence, negligence or gross negligence; (d) except as otherwise required by law or court order, disclosed confidential information relating to a unit's owner, a member of the executive board or an officer, employee or authorized agent of the association; and (f) uniformly enforced the governing documents.

R.5. NRS 116.31183 and 116.31184 prohibit a Board member from retaliation, threats or harassment directed toward fellow Board members, employees, agents, owners, tenants or guests of an owner or tenant.

R.6. NRS 116.31185-116.31189 prohibit a Board member from directly or indirectly soliciting or accepting any gifts, incentives, gratuities, rewards or other items of value above a certain dollar amount or any compensation, gratuity or reward, or any promise thereof, in exchange for his or her vote, opinion or action in a matter before the Board. Nor shall a director enter into a contract or renew a contract with the Association to provide financing, goods or services to the Association.

R.7. NRS 115.31084 requires directors who stand to gain any personal profit or compensation of any kind or whose family (i.e. persons related by blood, adoption or marriage within the third degree of consanguinity or affinity) or household members may benefit from a transaction before the Board to disclose such conflict and, in the case of financial benefit to themselves, recuse themselves from voting.

R.8. The Board members are required to comply with NRS 116 and NAC 116.

R.9. The Board members must perform their duties as required under NAC 116.405.

R.10. The Association conducts regular meetings of the Board of Directors, member meetings, special meetings, and workshops as necessary.

THEREFORE, pursuant to Nevada law and the Association's Governing Documents (i.e. the most current Declaration, By-laws, and Rules & Regulations), the Board of Directors ("Board") by at least a majority vote, hereby adopts the following Policy to be enforced as Rules and Regulations of the Association:

Board Members' Code of Conduct Policy:

It is hereby resolved that the Association adopts this Policy regarding a Code of Conduct for the Board to better run the affairs of the Association in a civil, prudent and efficient manner. The Association has the right and obligation of conducting business in the State of Nevada according to the standards set forth in NRS, NAC and the Governing Documents of the Association.

1) ***General Procedures: Board Members Shall:***
    a. Follow all laws as set forth in NRS, NAC and the provisions of the Governing Documents.
    b. Strive at all times to serve the best interests of the Association as a whole regardless of personal interests.
    c. Use sound judgement to make the best possible business decisions for the Association, taking into consideration all available information, circumstances and resources.
    d. Act within the boundaries of their authority as defined by law and the Governing Documents of the Association.
    e. Perform their duties without bias for or against any individual or group of owners or non-owner residents.
    f. Disclose personal or professional relationships with any company or individual who has or is seeking to have a business relationship with the Association.
    g. Always speak with one voice, supporting all duly adopted Board decisions even if the Board member was in the minority regarding actions that may not have obtained unanimous consent, subject to the minutes reflecting the votes on any action.
    h. When communicating in email, refrain from engaging in personal attacks on either fellow Board Members, fellow Association Owners, management, professionals engaged by the Association, vendors or others involved in any aspect of the Association.
    i. Make all decisions as a fiduciary of the Association and act on an informed basis, in good faith and in the honest belief that the Board member's actions are in the best interest of the Association.
    j. Return to the Association at the termination of serving as a Board member all property, documents, emails, communications or other item received in the capacity of serving as a Board member.
    k. Obtain authority of the majority of the Board before placing anything in an official publication, such as newsletters.
    l. Include all members of the Board on official communications or discussions about the business of the Association.

2) ***General Procedures: Board Members Shall Not***:
    a. Make personal attacks on colleagues, staff, vendors, contractors, professionals engaged by the Association or residents.
    b. Harass, threaten or attempt through any means to control or instill fear in any Board member, Owner, resident, employee, manager, vendor, professional engaged by the Association, or contractor.
    c. Reveal to any Owner, resident or other third party the discussions, decisions and comments made at any Meeting of the Board held in Executive Session.
    d. Advocate or support any action or activity that violates a law or regulatory requirement.
    e. Use their positions or decision-making authority for personal gain or to seek advantage over another Owner or non-owner resident.
    f. Misrepresent known facts in any issue involving Association business.
    g. Divulge privileged communications from the Association's attorney or personal information about any Association Owner, resident, or employee that was obtained in the performance of Board duties.
    h. Spend unauthorized Association funds for their own personal use or benefit.
    i. Except as allowed by NRS 116.31187(2), accept any gifts – directly or indirectly – from Owners, residents, contractors, vendors, professionals engaged by the Association or suppliers.
    j. Use social media to discuss Association business.

3) ***Meetings, Workshops***: It is essential for the efficient and effective transaction of Association business at all meetings or workshops that all Board members conduct themselves in a businesslike, ethical, and appropriate manner that serves the best interests of the Association as a whole. Meeting and workshop conduct shall include:
    a. Maintain decorum, sit quietly, and refrain from speaking until recognized by the meeting or workshop chair. During officer reports, hold all questions until the reports are finished, then wait to be recognized.
    b. Do not interrupt anyone who validly has the floor, or otherwise disrupt the meeting or workshop.
    c. When speaking, abide by time limits set by the meeting or workshop chair for comment.
    d. Refrain from engaging in personal oral attacks on fellow Board Members, fellow Association Owners, management, professionals engaged by the Association or vendors.
    e. Refrain from using other Board Members' names when speaking and address all remarks to the meeting or workshop chair.
    f. Confine comments to things relevant to the agenda item being discussed.
    g. Refrain from speaking for a second time until everyone who wants to speak has been given a chance to speak once.
    h. Refrain from speaking more than twice on any one issue, subject to the discretion of the meeting or workshop chair.
    i. Follow all orders made by the meeting or workshop chair, including an order to step down.

j. Behave with common courtesy and civility, and refrain from the use of abusive, rude, threatening, or crude language.
k. Prepare fully for the meeting or workshop by reviewing the Board packet and/or any other information or documents necessary to make informed decisions.
l. Hearings are conducted in executive session (except as requested to be in an open meeting by the Owner who is the subject of the hearing) and unless the Board appoints a hearing panel, the Board must participate in the hearings with the same decorum as described in this provision regarding meetings and workshops.
m. Directors shall not promise any outcome to an Owner, resident or contractor unless such outcome has been agreed to by a majority of the Board.
n. Except in an emergency or a scheduled vacation or other scheduled conflicting matter, attend all Association meetings, hearings, or workshops of the Board.

4) ***Harassing Conduct Prohibited***: Any and all activities by any Board member that are improper, whether directly intended or not, serve to hinder or affect the Association's ability to conduct business or the Board's ability to act according to fiduciary standards and in an efficient business-like manner, or which serve to damage the good will of the Association, are hereby prohibited. This includes unauthorized, unfounded, subversive, harassing, threatening, defaming, or otherwise disruptive and onerous contact via any means at any time, including but not limited to meetings, with the Board, management companies, vendors, legal counsel and/or other Owners or tenants/residents.

5) ***Confidential Information***: All Board members shall safeguard any and all information pertaining to the Association or its Owners that may be considered confidential including but not limited to, attorney privileged communications, ownership information, contact information, status of account(s), alleged violations, and/or any other Association matters which involve an Owner.

6) ***Licensed and Insured Contractors Required***: All Board members shall be required to ensure that the Association hires contractors, vendors or companies which hold proper license and insurance as required by Nevada law and/or the State Contractor's Board to conduct projects for the Association.

7) ***Board Member Communications***: Each Board member shall ensure that his or her correspondence and/or communication to any Owner, vendor, managing agent, and/or other third party must be approved by the Board as such correspondence or communication may be seen as an opinion or act of the Board. No individual Board member has the authority to act on behalf of the Board without being authorized to do so in advance by at least a majority of the members of the Board.

8) ***Owner Communications***: All communications from Owners shall be to the Association in care of the community manager, and individual Board members shall not communicate directly, oral or in writing, regarding Association business with Owners unless authorized to do so in advance by a majority of the Board.

9) ***Enforcement of Code of Conduct***: The Association shall have the authority to enforce this Code of Conduct using any means available under the Governing Documents or state law. Enforcement shall include proceeding to a hearing regarding any alleged violation as provided in NRS 116.31031 and determining if sanctions are appropriate. Such sanctions may include, but not be limited to, fines, revocation of privileges, revocation of voting, assessment of any damages or expenses incurred by the Association, including but not limited to attorney's fees and costs. Remedies may include commencement of an action under Chapter 38 of the Nevada Revised Statutes and/or commencement of an action in a court of competent jurisdiction.

10) ***Intent of Policy and Code of Conduct***: It is resolved that this Policy is not meant to be used arbitrarily or as a basis of harassment or abuse but rather as a mechanism to allow the Association to conduct its business unfettered by wasteful, divisive, needless and expensive conflict towards safeguarding both homeowner value and living experience in a positive and transparent environment and according to law and Governing Document. It is also resolved that it is the Board's intention to improve and maintain the very best good will at its board meetings.

11) ***Omnibus Rules and Regulations***: This Policy may be incorporated into the omnibus Rules and Regulations.

DATED THIS _____ DAY OF _____, 2021, as approved by a majority vote of the Board of Directors of the Dayton Valley Community Association at a properly noticed meeting.

_____ _____

President Secretary

The undersigned certifies that a copy of this Policy was delivered to all Owners of record on _____, 2021.

_____

Signature

NRS 116.3102 Powers of unit-owners' association; limitations. [Effective January 1, 2020.]

1. Except as otherwise provided in this chapter, and subject to the provisions of the declaration, the association:

(a) Shall adopt and, except as otherwise provided in the bylaws, may amend bylaws and may adopt and amend rules and regulations.

(b) Shall adopt and may amend budgets in accordance with the requirements set forth in NRS 116.31151, may collect assessments for common expenses from the units' owners and may invest funds of the association in accordance with the requirements set forth in NRS 116.311395.

(c) May hire and discharge managing agents and other employees, agents and independent contractors.

(d) May institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community. The association may not institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or units' owners with respect to an action for a constructional defect pursuant to NRS 40.600 to 40.695, inclusive, unless the action pertains to:

(1) Common elements;

(2) Any portion of the common-interest community that the association owns; or

(3) Any portion of the common-interest community that the association does not own but has an obligation to maintain, repair, insure or replace because the governing documents of the association expressly make such an obligation the responsibility of the association.

(e) May make contracts and incur liabilities. Any contract between the association and a private entity for the furnishing of goods or services must not include a provision granting the private entity the right of first refusal with respect to extension or renewal of the contract.

(f) May regulate the use, maintenance, repair, replacement and modification of common elements.

(g) May cause additional improvements to be made as a part of the common elements.

(h) May acquire, hold, encumber and convey in its own name any right, title or interest to real estate or personal property, but:

(1) Common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to NRS 116.3112; and

(2) Part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to NRS 116.3112.

(i) May grant easements, leases, licenses and concessions through or over the common elements.

(j) May impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.

(k) May impose charges for late payment of assessments pursuant to NRS 116.3115.

(l) May impose construction penalties when authorized pursuant to NRS 116.310305.

(m) May impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.

(n) May impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed

the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

(o) May impose a reasonable fee for opening or closing any file for each unit. Such a fee:

(1) Must be based on the actual cost the association incurs to open or close any file.

(2) Must not exceed $350.

(3) Must not be charged to both the seller and the purchaser of a unit.

(4) Except as otherwise provided in this subparagraph and subject to the limitation set forth in subparagraph (2), may increase, on an annual basis, by a percentage equal to the percentage of increase in the Consumer Price Index (All Items) published by the United States Department of Labor for the preceding calendar year. The fee must not increase by more than 3 percent each year.

(p) May provide for the indemnification of its officers and executive board and maintain directors and officers liability insurance.

(q) May assign its right to future income, including the right to receive assessments for common expenses, but only to the extent the declaration expressly so provides.

(r) May exercise any other powers conferred by the declaration or bylaws.

(s) May exercise all other powers that may be exercised in this State by legal entities of the same type as the association.

(t) May direct the removal of vehicles improperly parked on property owned or leased by the association, as authorized pursuant to NRS 487.038, or improperly parked on any road, street, alley or other thoroughfare within the common-interest community in violation of the governing documents. In addition to complying with the requirements of NRS 487.038 and any requirements in the governing documents, if a vehicle is improperly parked as described in this paragraph, the association must post written notice in a conspicuous place on the vehicle or provide oral or written notice to the owner or operator of the vehicle at least 48 hours before the association may direct the removal of the vehicle, unless the vehicle:

(1) Is blocking a fire hydrant, fire lane or parking space designated for the handicapped; or

(2) Poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community.

(u) May exercise any other powers necessary and proper for the governance and operation of the association.

2. The declaration may not limit the power of the association to deal with the declarant if the limit is more restrictive than the limit imposed on the power of the association to deal with other persons.

3. The executive board may determine whether to take enforcement action by exercising the association's power to impose sanctions or commence an action for a violation of the declaration, bylaws or rules, including whether to compromise any claim for unpaid assessments or other claim made by or against it. The executive board does not have a duty to take enforcement action if it determines that, under the facts and circumstances presented:

(a) The association's legal position does not justify taking any or further enforcement action;

(b) The covenant, restriction or rule being enforced is, or is likely to be construed as, inconsistent with current law;

(c) Although a violation may exist or may have occurred, it is not so material as to be objectionable to a reasonable person or to justify expending the association's resources; or

(d) It is not in the association's best interests to pursue an enforcement action.

4. The executive board's decision under subsection 3 not to pursue enforcement under one set of circumstances does not prevent the executive board from taking enforcement action under another set of circumstances, but the executive board may not be arbitrary or capricious in taking enforcement action.

5. Notwithstanding any provision of this chapter or the governing documents to the contrary, an association may not impose any assessment pursuant to this chapter or the governing documents on the owner of any property in the common-interest community that is exempt from taxation pursuant to NRS 361.125. For the purposes of this subsection, "assessment" does not include any charge for any utility services, including, without limitation, telecommunications, broadband communications, cable television, electricity, natural gas, sewer services, garbage collection, water or for any other service which is delivered to and used or consumed directly by the property in the common-interest community that is exempt from taxation pursuant to NRS 361.125.

(Added to NRS by 1991, 556; A 1999, 3000; 2003, 2227, 2267; 2005, 2590; 2009, 1009, 2796, 2879, 2911; 2011, 2427; 2015, 18; 2019, 2263; 2019, 851, 2263, effective January 1, 2020)