

# **Governing Document and Statutory Provisions Concerning Fiduciary Duty<sup>1</sup>**

## **I. The duties of the Treasurer (or Chief Financial Officer)**

The Treasurer shall be responsible for the oversight of financial management by the management company, including receipts and deposits in appropriate accounts of all monies of the association and disbursements of such funds as directed by resolution of the board of directors; may sign all checks and promissory notes of the association; shall keep or cause to be kept proper books of account; shall cause an annual review (or, if required pursuant to provisions of the governing documents relating to the rights of first mortgagees, an audit) of the association's books and financial statements to be made by a public accountant at the completion of any fiscal year for which such review is required by law or as determined by the board; shall assist the board in preparation of an annual budget and a statement of income and expenditures to be presented to the members of the association as provided by law; and shall have such other powers and perform such other duties as may be prescribed by the board of directors.

## **II. CACM Standards of Practice**

### **Standard 3-04: Accurate Financial Records**

A member shall at all times cause to be kept and maintained current and accurate records of all financial transactions and cause to be prepared financial statements in sufficient detail to allow the determination of the status of the association's accounts and financial operations.

### **Standard 3-07: Budgetary & Finance**

A member shall act as a fiduciary on behalf of the client in handling the client's financial affairs and shall put the client's interests above the member's own in handling the client's financial affairs.

The member shall recommend that the association comply with the fiscal requirements of the Davis-Stirling Common Interest Development Act and the client's governing documents.

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<sup>1</sup> For discussion purposes, excerpts from the statutes and CACM Standards cited above have been edited. Wording underlined has been added for emphasis.

## Standard 3-08 Reserve Investment

The member shall recommend that the client invest its funds in accordance with the association's legal documents and recommend that the primary objectives in investing should be safety first, liquidity second and then yield and then other considerations. Recommended investments should be limited to deposit accounts insured by the FDIC, or U.S. Treasury Securities or other Full Faith and Credit Obligations of the Federal Government or money funds which invest exclusively in these instruments and which are FDIC or SIPC insured.

The member shall refrain from giving investment advice unless qualified. When advice is requested, the member shall recommend qualified investment professionals.

### III. The power to indemnify Directors, Officers, Managing Agents and Others

To the extent provided in *Corporations Code* section 7237, the board on behalf of the association shall have the power to indemnify and hold harmless, to the maximum extent permitted by California law, each person who is or at any time was a director, officer, employee, or agent of the association, or member of any committee appointed by the board from and against any and all claims, liabilities, expenses, judgments, fines, settlements, and other amounts, as those terms are defined by California law, actually and reasonably incurred by any such person, and to which any such person shall become subject by reason of his or her being a director, officer, employee, or agent of the association, or member of any committee appointed by the board.

### IV. Corporations Code statutory requirements for indemnification (edited)

**7237.** (a) "Agent" means any person who is or was a director, officer, employee or other agent of the corporation; "proceeding" means any threatened, pending or completed action or proceeding; and "expenses" includes attorneys' fees and expenses. (b) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any proceeding by reason of the fact that such person is or was an agent of the corporation, against expenses, judgments and settlements if such person acted in good faith and in a manner such person reasonably believed to be in the best interests of the corporation. The termination of any proceeding by judgment, order or settlement shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in the best interests of the corporation or that the person had reasonable cause to believe that the person's conduct was unlawful. (c) No indemnification shall be made in respect of any claim, as to which such person shall have

been adjudged to be liable to the corporation unless and only to the extent that the court shall determine that, in view of all the circumstances such person is fairly and reasonably entitled to indemnity. (d) To the extent that an agent of a corporation has been successful on the merits in defense of any proceeding the agent shall be indemnified against expenses actually and reasonably incurred. (e) Except as provided in subdivision (d), any indemnification under this section shall be made by the corporation only if authorized in the specific case, upon a determination that indemnification of the agent is proper in the circumstances because the agent has met the applicable standard of conduct set forth in subdivision (b) or (c), by a majority vote of a quorum consisting of directors who are not parties to such proceeding or approval of the members or the court. (f) Expenses incurred in defending any proceeding may be advanced by the corporation prior to the final disposition of such proceeding upon receipt of an undertaking by or on behalf of the agent to repay such amount unless it shall be determined ultimately that the agent is entitled to be indemnified as authorized in this section. (g) No provision made by a corporation to indemnify shall be valid unless consistent with this section. Nothing contained in this section shall affect any right to indemnification to which persons other than such directors and officers may be entitled by contract or otherwise.

V. Corporations Code defining fiduciary duty standard (edited)

**7231.** (a) A director shall perform the duties of a director in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances; (b) In performing the duties of a director, a director shall be entitled to rely on reports, including financial statements and other financial data prepared by: (1) One or more officers or employees whom the director believes to be reliable and competent; (2) Counsel, independent accountants or other persons as to matters which the director believes to be within such person's professional or expert competence; or (3) A committee which the director believes to merit confidence, (c) A person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director.

VI. Civil Code provision providing conditional immunity (edited)

**1365.7.** (a) A volunteer officer or volunteer director of an association shall not be personally liable in excess of the coverage of insurance specified below to any person who suffers bodily injury, emotional distress, wrongful death, or property damage or loss as a result of the tortious act or omission of the volunteer officer or volunteer director if: (1) The act or

omission was performed within the scope of the officer's or director's association duties; (2) was performed in good faith; (3) was not willful, wanton, or grossly negligent; and (4) The association maintained policies of insurance which shall include coverage for (A) general liability of the association and (B) individual liability of officers and directors of the association for negligent acts or omissions in that capacity; provided, that both types of coverage are in (prescribed) minimum amounts.

VII. Association not obligated to enforce every violation

Every act or omission constituting or resulting in a violation of any of the provisions of the Governing Documents shall be deemed to constitute a nuisance and, in addition to any other remedies which may be available, such nuisance may be abated or enjoined by the association or its officers or board of directors or by any Owner; provided, however, that the board shall not be obligated to take action to abate or enjoin a particular violation if, in the exercise of its discretion, the board determines that acting to abate or enjoin such violation is not likely to foster or protect the interests of the association and its members as a whole. Notwithstanding the preceding sentence and without limiting the generality of the proviso therein, nothing in the Governing Documents shall be deemed to impose upon the association, the board, or the officers, employees, or agents of the association a duty to intervene in any physical dispute or altercation or any criminal or alleged criminal activity other than to notify law enforcement officials.

VIII. Imposition of sanctions

Upon an explicit finding and for reasons specified by the board following a hearing conducted in accordance with the Article \_\_\_ of the Declaration ("Enforcement; Notice; Hearings"), the board shall have the power to impose sanctions on a Member who is in default in the payment of any Assessment or other charge levied by the board or is found to be in violation of any provision of the Governing Documents. Sanctions may include loss of good standing, suspension of other rights, and/or monetary penalties (fines), as described in Section \_\_\_ of the Declaration ("Imposing Sanctions")(underline for emphasis).