BOARD MEMBER DUE DILIGENCE AND DUTIES

DUE DILIGENCE (also known as due care) is the effort made by an ordinarily prudent or reasonable party to avoid harm to another party or himself. Failure to make this effort is considered negligence.

Generally, due diligence refers to the care a reasonable person should take before entering into an agreement or a transaction with another party. Due diligence is essentially a way of preventing unnecessary harm to either party involved in a transaction.

For example, due diligence would be the necessary research and analysis of a Board undertaken in preparation for a business decision.

BLACK’S LAW DICTIONARY, which is used as an authority for legal research states that Due Diligence is:

“Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.”

In many instances, there has been more liability placed upon Board members, which in turn means that Board members need to be more responsible, and need to seek out more information in their decision-making process.

BOARD FIDUCIARY DUTIES

Board members also must maintain certain fiduciary responsibilities, which include:

DUTY OF CARE

The Duty of Care is a legal obligation imposed on an individual requiring that they exercise a reasonable standard of care while performing any acts that could foreseeably harm others.

DUTY OF LOYALTY

The Duty of Loyalty is a term used in corporate law to describe a fiduciary's loyalty to a corporation.........in this case, the Board Members loyalty to the Association and its Owners.

DUTY OF CONFIDENTIALITY

The Duty of Confidentiality is the restriction on the accessibility and dissemination of information by the Board Members in the scope of their duties.
DUE DILIGENCE IN PRACTICE FOR BOARDS:

Have written policies and procedures in place.
Use Due Diligence checklists for certain issues.
Take time to always fully discuss the issues.
Obtain the cooperative effort of both the Board Members and Management.
Exercise Patience and thoroughness.
Obtain expert assistance, such as attorneys, accountants, appraisers, investigators, and insurance agents, when the circumstances dictate it.
Use due diligence before there is a problem, not as a reaction to something gone wrong!

WHAT BOARD MEMBERS NEED TO EXCERSIZE DUE DILEGENCE:

Information, Information, Information………
Accessibility to management.
Cooperation (it is not Board vs. Management)
Time, Time, Time……… to discuss issues.
Enough time to get educated on the issues.
Enough time to consider the possible ramifications.
Management must consider the Board’s point of view.
Management should include the Board on its ideas early on concerning any major decisions and plans………with no surprises to the Board.

TYPICAL SITUATIONS WHERE BOARD DUE DILIGENCE IS UTILIZED:
Important Contracts
Refurbishments
Long-Range Planning
Finance and Accounting
Large Vendors
Sales Programs

BOARD DUE DILIGENCE:

Does not mean “rocking the boat”.
Does not mean that Management is not being trusted.
Does not mean that Management’s decisions are being questioned.
Does not mean that the Board wants to manage.

IT DOES mean that the Board is interested in doing what is best for the owners that it represents, together with management.
Board members usually volunteer because they really care about the property, have a history of helping and being on boards, and enjoy working with others.
The Board is not in place to micro-manage, and does not have the time to consider that.