



DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION

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ADVISORY OPINION 16-01

Replaces: 12-02-116

October 22, 2015

QUESTIONS:

- 1. Is a homeowner vote required to approve a capital improvement expense?**
- 2. Can surplus funds be used to pay for capital improvements?**
- 3. Does the ratification of a budget which contains a capital improvement expense equate to homeowner approval of the expense?**

SHORT ANSWER:

- 1. Is a homeowner vote required to approve a capital improvement expense?**

The board may initiate capital improvements only if authorized by the governing documents. In such case, homeowner approval is only required if NRS 116.345(3) applies (disclosure to unit-owners and written consent of a majority of those owning or residing within 500 feet).

If capital improvements are not authorized by the governing documents, homeowners would need to approve an amendment to the governing documents to expand the authority of the association, in order for the board to possess that authority.

2. Can surplus funds be used to pay for capital improvements?

Yes. Although surplus funds must be distributed as set forth in NRS 116.3114, to the extent the governing documents authorize a capital improvement, and the association has satisfied the provisions of NRS 116.345(3), if applicable and NRS 116.3115(9), they can use surplus funds to pay for an authorized capital improvement.

NOTE: To the extent the capital improvement requires an amendment to the governing documents, surplus funds may not be used for the expense absent homeowner approval for an amendment to the governing documents.

3. Does the ratification of a budget which contains a capital improvement expense equate to homeowner approval of the expense?

The board may not put a capital improvement expense in the budget unless the board is authorized by the governing documents to take action regarding the improvement. If a particular capital improvement is authorized by the governing documents, NRS 116.3115(9) requires notice of a meeting at which assessments for a capital improvement will be considered or action taken be noticed at least 21 calendar days before the meeting date; and NRS 116.345(3) requires disclosure to unit-owners and majority written consent of unit-owners who own property or reside within 500 feet of the proposed location.

Ratification of a budget which includes a capital improvement expense does not satisfy the requirement for owners to approve a capital improvement through amending the governing documents; and it does not constitute compliance with NRS 116.345(3).

ANALYSIS OF THE ISSUE:

The authority of an association's board is limited by NRS 116 and its governing documents. As previously discussed in the Division's Advisory Opinion 12-02-116, "capital improvement" is not a defined term in NRS 116. The Division considers a capital improvement for an association an expense for the acquisition or construction of new common element components. These new components then become part of the common elements and must be included in the association's reserve study.

NRS 116.3115(9) requires 21 days' notice of a meeting at which an assessment for a capital improvement is to be considered or action is to be taken on such assessment. In addition, NRS 116.345(3) provides:

An association may not expand, construct or situate a building or structure that is not part of any plat of the planned community if the expansion, construction or situation of the building or structure was not previously disclosed to the units' owners of the planned community unless the association obtains the written consent of a majority of the units' owners and residents of the planned community who own property or reside within 500 feet of the proposed location of the building or structure.

Governing documents define the authority of the association and its board. If the governing documents grant the board authority to take action regarding a capital improvement, the board must comply with NRS 116.3115(9), as well as, NRS 116.345(3), if applicable.

For example, let's say an association's common elements include a vacant landscaped area. The board wants to expand the use of the landscaped area by installing a playground, picnic areas and bar-b-que grills. As these improvements were not part of the original plans for the association, the association would have to comply with NRS 116.345(3) by getting a majority of the owners and residents within 500 feet of the new park components to approve the changes if it is located in a planned community. The expense to construct the park components would be an assessment for a capital improvement requiring 21 days' notice of the board's meeting to consider or to take action on the item. The analysis does not end there.

What if the governing documents do not specify that the board has the authority to change the use of the common elements or add new components to the common elements? In that case, the governing documents would need to be amended to allow the board the authority to add the park components. The governing documents amendment procedures would need to be followed.

The next issue is where the funds come from. Funds for capital improvements come from an assessment for the capital improvement. If the board has surplus funds, the association's governing documents or NRS 116.3114 determines the distribution of those funds. Once the board determines that it has surplus funds, NRS 116.3114 must be followed. Assuming the board has authority to incur the expense for the capital improvement, surplus funds could be used after the assessment for the capital improvement is approved by the board. The board must comply with the requirements of NRS 116.3115(9) by giving 21 days' notice of the assessment for a capital improvement even if surplus funds will be used.

The budget for the association as adopted by the board must only include expenses the board is authorized to incur according to NRS 116 and the governing documents. Adding a capital improvement expense to a budget – when the governing documents do not allow the board to incur the expense – would exceed the board's authority. The owners' ratification of a budget that includes expenses the board is not authorized to incur does not change the board's authority. A budget adopted by the board is deemed ratified unless a majority of the owners vote to reject the budget. The owners need not vote in favor of ratification for the budget to be ratified. (NRS 116.3115(3)).

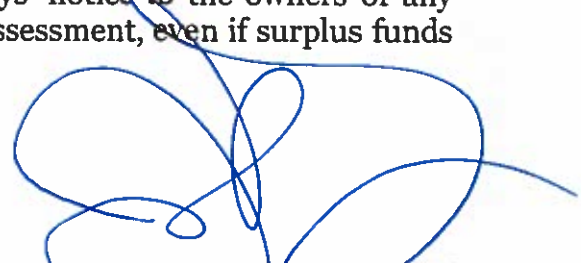
As previously discussed, the board's authority is governed by the governing documents. It is only an amendment to the governing documents that would change the board's authority. Additionally, ratification of a budget would not satisfy the requirements of NRS 116.345(3).

ADVISORY CONCLUSION:

The board's authority is dependent upon its express authority in the governing documents. If the governing documents do not give the board authority to incur the expense for or take action regarding a particular capital improvement, the owners must approve an amendment to the governing documents to expand the board's authority.

Surplus funds could be used to fund a capital improvement if the board has authority to impose the capital improvement assessment, either through authority granted in the governing documents originally or after an amendment by a vote of the owners. Application of surplus funds to such a capital improvement assessment would be consistent with NRS 116.3114.

The board may not put a capital improvement expense in the budget unless the board is authorized to take action regarding the improvement. Even then, the requirements of NRS 116.3115(9) must be met prior to including the expense item in the budget for ratification. According to NRS 116.3115(9), the board must provide 21 days' notice to the owners of any meeting to consider or take action on a capital improvement assessment, even if surplus funds will be used, and comply with NRS 116.345(3), if applicable.



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