

Boards have broad discretion on surplus

By Michael Hunter
Association Answers

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Q. Our community adopted the N.C. Planned Community Act several years ago. Our current HOA president and board are of the opinion that they have the authority to spend, without membership approval, any assessment income left over after paying the HOA's operating and other expenses.

The issue surfaced when the HOA found itself with about \$600,000 in excess funds. The board took it upon itself to spend that money on traffic-calming road features and a multitude of playgrounds throughout the community, without getting approval from the membership. Can they do that?

First, allow me to congratulate you on being a member of an HOA that actually has a budget surplus. Many HOAs are suffering with budget shortfalls in these tough times. I wish more of my clients had problems like yours.

Now on to your question: Absent some restrictive language in your HOA's bylaws, the board is vested with broad discretion in handling the affairs of the HOA. This discretion includes all aspects of financial management of the HOA, including the establishment of the assessment rate, expenses, capital improvements and additions, and handling of the budget surplus.

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However, I do find it surprising that your budget surplus was \$600,000. This could be an indicator that either the assessment rate was set too high, maintenance and repairs were set too low, or something otherwise went awry during the budgeting.

Regardless, the board has the discretion to determine how to handle the budget surplus. Unless you believe you can convince a judge that doing so was a breach of the board's fiduciary duty to the HOA members, you and the other members will have to live with that choice.

If you don't approve of the way the current board is running the HOA, remember that those board members were elected by the members - they can be replaced.

You also asked whether your HOA's tax-exempt status is or has been jeopardized by the handling of the surplus, I will defer that question to your tax accountant.

But you are somewhat correct in stating that the members have a say in establishing the HOA budget.

The law says, "Within 30 days after adoption of any proposed budget for the planned community, the executive board shall provide to all the lot owners a summary of the budget and a notice of the meeting to consider ratification of the budget. . . The budget is ratified unless at that meeting a majority of all the lot owners in the association or any larger vote specified in the declaration rejects the budget. In the event the proposed budget is rejected, the periodic budget last ratified by the lot owners shall be continued until such time as the lot owners ratify a subsequent budget proposed by the executive board."

Thus, the budget doesn't actually have to be approved by the members; it is approved automatically unless a majority of all the lot owners (not simply a majority of those present at the meeting) vote to reject the budget.