

Mandatory versus Voluntary - Are You Ruled by a HOA?

By: Barbara Stage

Many times I receive questions from people asking if they have a mandatory homeowners association. What makes an association mandatory? There are several factors to consider and a complete review of the governing documents of the association are required to provide a definitive answer. There is no one size fits all answer to this question.

First, in order to create a mandatory association there has to be 100% participation in the association. That is to say the deed restrictions creating an association must have been recorded before any property was sold to a buyer or any property which was sold would have to sign a consent and joinder agreeing to be a member of the association. A mandatory association cannot have less than 100% participation because that would mean not everyone is a mandatory member.

In addition to having recorded deed restrictions, those deed restrictions must include language of the intent to create a mandatory association and preferably contains language assigning the rights to enforce those restrictions and impose assessments from the developer to the association after turnover (i.e., the developer turns over control of the association to the membership).

Many older deed restrictions do not contain this language and a recorded assignment is required to authorize the association to impose assessments and enforce restrictions. Many of these older deed restrictions are nothing more than land use restrictions (no livestock, no chain link fencing, etc.) and do not have language authorizing the creation of an association. Many associations with these older documents claim to be mandatory and get away with it because homeowners are unaware of the requirements for creating an association. After 1995 Florida law required associations to record the Declarations (deed restrictions), bylaws and articles of incorporation in the county where the association is located. Subsequent case law provided unrecorded documents are not binding and enforceable against homeowners because they lack notice of the documents.

A mandatory association can be created after the fact (after the sale of lots) if 100% of the lot owners agree to be bound to the association.

Buying property in a development requires a careful reading of the documents. Often developers create and record the documents for a mandatory membership, but never actually start the association until it is time to turn it over to the members or sell to a subsequent developer. Homeowners will be caught unaware when all of a sudden the association comes into existence. The developer can take up to five years to set up the association as long as the language is in the documents manifesting the intent. The courts have upheld the validity of associations under these circumstances.

Homeowners should also be careful when there is a missing assignment. The courts have allowed out-of-business developers to assign their rights to an association long after the developer ceased doing business. There is one case on record in which the developer was allowed to assign the rights eight years after he went out of business.

If you think your association might not actually be a mandatory association, hire a condo/HOA lawyer to review the governing documents (Declarations, Bylaws and Articles of Incorporation), as well as performing a research of the county records to look for missing documents. If you are thinking of purchasing in a development, pay the extra money to have a review.