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IN THE SUPREME COURT OF THE STATE OF FLORIDA.

CASE NO. 80,233

4th District Court of Appeal - Case No. 90-0728

BANK ONE, DAYTON, N.A.,

Petitioner,

vs.

SUNSHINE MEADOWS CONDOMINIUM ASSOCIATION, INC., et al.,

Respondent.

_____/

ANSWER BRIEF OF RESPONDENT

THE 5000 CORPORATION

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PREFACE

The 5000 Corporation is a respondent in this court, was an appellant in the District Court of Appeal, and was a defendant in the trial court. Sunshine Meadows Condominium Association, Inc. is a respondent in this court, was an appellant in the District Court, and a defendant in the trial court. Sunshine Meadows Condominium Association, Inc. will be referred to as the "Condominium Association." Bank One, Dayton, NA is the petitioner in this court, was an appellee in the District Court and the plaintiff in the trial court; it will be referred to as "Bank One."

References to the joint appendix which was filed in the District Court and which Bank One has submitted to the Florida Supreme Court will be shown as (A.). References to the Bank One appendix will be shown as (B.A.). The Declaration of Condominium for Sunshine Meadows may be referred to as "Declaration."

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts provided by Bank One in its brief is generally acceptable, except for those portions which constitute argument. For example, on page 4 of its brief, Bank One contends that it was "required" to consent to the amendment to Declaration submitting phases II, III, IV, IV-A and IV-B to the condominium. There is no evidence in the record that Bank One was under any legal compulsion to execute the consent. It is simply Bank One's argument that it was required to do so.

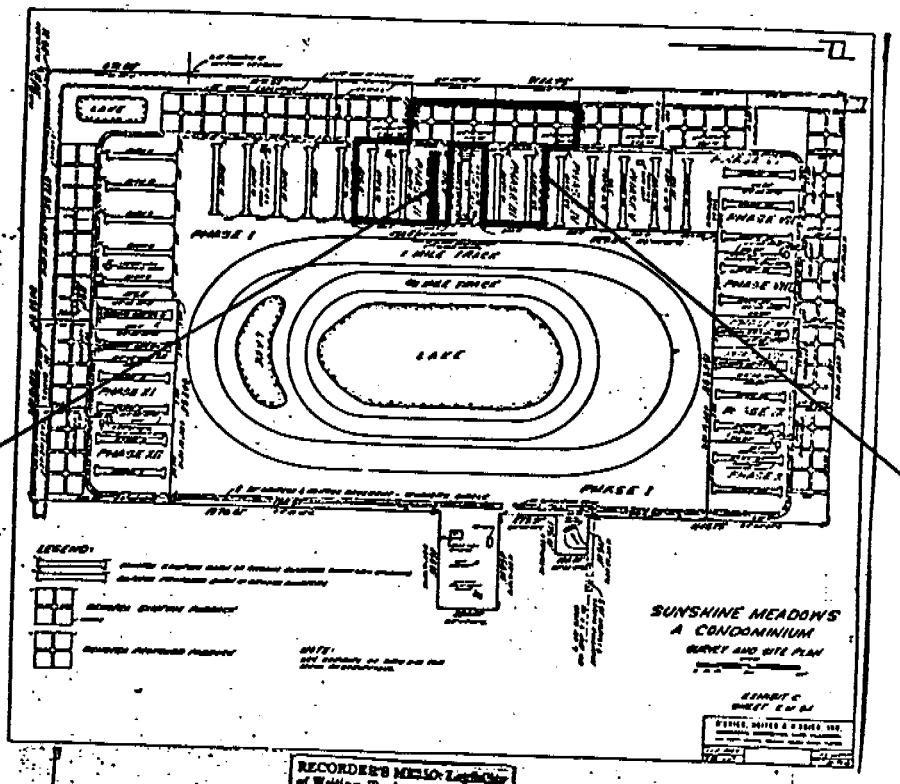
The 5000 Corporation would supplement the statement of the case and facts by providing: first, a time line which may help this court review the case; second, a diagram to give this court an idea of the physical layout of the condominium; and, third, a brief discussion of deposition testimony and documentary evidence which was part of the record on appeal and bears on the issues in this appeal.

1. A TIME LINE OF EVENTS:

Date	Type of Document	Description
6/21/83	Declaration of Condominium of Sunshine Meadows, a Condominium, recorded 6/24/83 (A. 109-225)	Created a condominium known as Sunshine Meadows, a phased condominium, including Articles of Incorporation, bylaws and survey. All Phase I improvements complete at time of Declaration
6/2/83	Special Warranty Deed, recorded 6/24/83 (A. 48)	Deed from Sunshine Meadows, Inc. to Sunshine Meadows Development Corp. conveying its interest in the property subject to the declaration of condominium
6/12/84	Mortgage Note (A. 234)	In favor of Bank One from Sunshine Meadows Development Corp. and John B. Shaw, individually, in the amount of $400,000

Date	Type of Document	Description
6/12/84	Mortgage and Security Agreement, recorded 6/13/84 (A. 235-239)	Mortgage from Sunshine Meadows Development Corp. to Bank One to secure mortgage note for property described by metes and bounds description specified to contain 1.43 acres more or less
6/12/84	Construction Loan Agreement (A. 226-233)	Agreement between Bank One and Sunshine Meadows Development Corp. (the developer under the Declaration) to fund a maximum $400,000 loan to construct a building with thirty-six grooms' quarters on the 1.43 acres
8/21/85	Modification Agreement, recording date N/A (A. 240-241)	Between Sunshine Meadows Development Corp., John B. Shaw and Bank One extending maturity date of the note to September 12, 1986, otherwise ratifying and affirming the prior mortgage
2/28/87	Amendment to Declaration of Condominium, recorded 4/23/87 (A. 242-254)	Submitted Phase II and Phase III to the Declaration of Condominium
2/28/87 4/22/87	Amendments to Declaration of Condominium, recorded 4/23/87 (A. 265-271) (A. 256-258)	Amendments also adding Phase IV to the Condominium as Phase IV-A and Phase IV-B
3/26/87	Consent of Mortgagee, recorded 4/23/87 (A. 255)	Consent by Bank One to the foregoing amendment of the Declaration with respect to its mortgage on the 1.43 acres
4/22/87	Corrective Special Warranty Deed, recorded 4/23/87 (A. 57)	Conveyance from Sunshine Meadows Development Corp. to K.T.I. Corp. of all the property within Phases II, III and IV under the Declaration
4/22/87	Special Warranty Deed, recorded 4/23/87 (A. 73)	Conveyance from K.T.I. Corp. to The 5000 Corp. of condominium parcels 17A, 17B, 17C and 17D, 18A, 18B, 18C and 18D, 21A, 21B, 21C and 21D, and 22B, 23A, 23B, 23C and 23D and Phase IV-B
12/14/87	Notice of Lis Pendens, filed 12/17/87 (A. 82-84)	Filed by Bank One, covering only the 1.43 acre parcel described in its mortgage
9/22/89	Amended Notice of Lis Pendens, filed 9/28/89 (A. 85-88)	Filed by Bank One and covers condominium property other than the 1.43 acres, and presumably the 1.43 acres as well

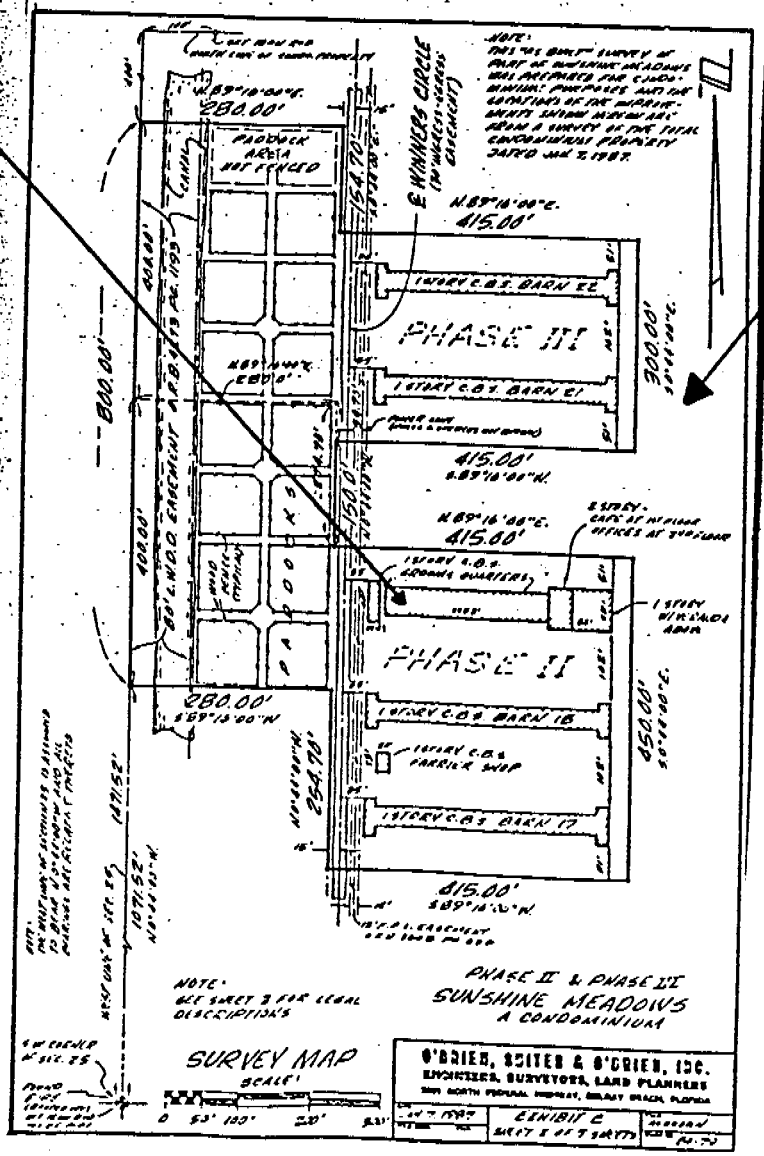
2. **DIAGRAM OF THE CONDOMINIUM:**



Groom's Quarters Under Bank One's Mortgage, Phase II

Area shown in in detail below

RECORDER'S MEMO: Legibility of Writing, Typing or Printing unsatisfactory in this document when received.



3. **EVIDENCE IN THE RECORD ON APPEAL CONCERNING ACTIONS BY BANK ONE:**

John Kavanaugh, an officer of Bank One, testified that the purpose of the Bank One loan was to develop construction on the 1.43 acres grooms' quarters, consisting of thirty-six grooms as well as a kitchen area and office on the 1.43 acres described in the mortgage. (A. 432, 439, 440) The bank had in its file the declaration of condominium (A. 440) and was aware that the 1.43-acre parcel containing the grooms' quarters could become part of the condominium subsequent to recordation of the mortgage (A. 441) The Bank's title insurance policy on its mortgage stated the policy was subject to the terms of the Declaration (A. 454; depo exhibit 3). The intended collateral for the mortgage note was the 1.43 acre parcel described in the construction loan agreement (A. 444); there was no other property pledged as security for this debt. (A. 445) There are no documents in the Bank's file which indicate that the bank intended to spread its lien to all the condominium parcels when it executed the consent of mortgagee to the amendment to declaration of condominium. (A. 447) The bank also had a personal guaranty from John Shaw to secure the debt. (A. 450, 452) A May 30, 1985 loan review observed that the collateral is grooms' quarters, and as a common element was probably not marketable. (A. 467) The sources of repayment for the original $400,000 loan were intended to come from the developer from sales of surrounding condominium units and from the personal resources of John Shaw, or perhaps take out financing from another lender. (A. 526) The construction loan agreement states that any single grooms' unit of the thirty-six grooms' quarters units to be

constructed can be released by payment to the bank of the sum of $15,000. There is only one appraisal in the bank's file and it is on the 1.43 acres, not on the entire condominium property. (A. 528-529) Bank One has agreed with John Shaw that it will not sue John Shaw under its guaranty depending upon the outcome of this instant lawsuit. (A. 488)

When K.T.I. sold condominium property in June of '87 to The 5000 Corp., Bank One did not receive any of the proceeds of the sale under its purported lien over all units in the condominium. (A. 523) The conveyance was after the maturity date of the mortgage note. The bank did not contact either K.T.I. or The 5000 Corp. to make a claim for the proceeds from the closing under its purported lien. (A. 524)

POINT ON APPEAL

WHETHER A LENDER WHO CONSENTS TO THE ADDITION OF PROPERTY COVERED BY ITS MORTGAGE AS A CONDOMINIUM COMMON ELEMENT IN A PHASE CONDOMINIUM MAY FORECLOSE ITS MORTGAGE AS TO ALL INDIVIDUAL UNIT OWNERS OF ALL PHASES OF THE CONDOMINIUM, INCLUDING PRIOR PHASES, BECAUSE THE COMMON ELEMENTS BECOME APPURTENANCES TO EACH UNIT UPON THE DEVELOPER'S SUBMISSION OF THE PROPERTY TO THE PHASE CONDOMINIUM

SUMMARY OF ARGUMENT

Bank One consented to the Amendment to Declaration which subjected the mortgaged 1.43 acres to the provisions of the Declaration and the Florida Condominium Act. The 1.43 acres constituted common elements of the condominium. Both the Declaration and the Act prohibit sale of common elements apart from an entire condominium parcel (unit plus pro rata interest in common elements). Bank One contends that because of the anti-severance provisions of the Declaration and the Act, its lien necessarily spreads to all the condominium parcels, even though its mortgage actually encumbers only a very small part of the entire condominium.

The District Court of Appeal correctly determined that there is no basis under the Declaration or the Act for spreading the lien to the fee simple interest of the unit owners. Bank One consented to the 1.43 acres becoming part of the condominium as common elements. Under § 718.104(3), the consent subordinated Bank One's interest to the declaration. Thus, the lien is not enhanced by being spread to all the condominium parcels as a result of the consent, but rather is subordinated and subjected to the anti-severance provisions. The protection for Bank One, as mortgagee, is the right to withhold its consent and avoid the subordination. Spreading the lien to all the condominium parcels violates § 718.121(1), because the mortgage was not a lien that arose or was created against a condominium parcel, and a lien cannot exist as to the entire condominium without the unanimous consent of the unit

owners. The legislature could have provided for Bank One's spreading theory in the Condominium Act, but chose not to do so.

The public records would not give constructive or actual notice that Bank One intended to assert a lien on all the condominium parcels. Any purchaser reviewing the public records would see not only the declaration, but also the Bank One consent, which constitutes a subordination of Bank One's interest to the declaration and the anti-severance provisions. Any purchaser reviewing title prior to the time that the additional phases were submitted to the declaration would know that under the Condominium Act, Bank One would be required to subordinate its interest if it consented to adding that property under the Declaration of Condominium.

Bank One never intended to have a lien on any property other than the 1.43 acre parcel. The bank's loan file, together with testimony of a bank officer, shows that the bank never viewed its lien as spreading to the condominium parcels. That claim was not asserted until after a second amended complaint was filed, probably in response to the realization that the anti-severance provisions would preclude a foreclosure sale on the 1.43 acre parcel. Further, there is no equitable basis for allowing this foreclosure. Bank One could have pursued a claim under the promissory note signed by the developer and guarantors. This court should not create a rule of law which allows a developer to unilaterally mortgage future phases to any amount that the developer deems desirable, and then escape liability while the bank forecloses on unit owners who never consented to the mortgage and never received

any funds from the bank. The unit owners are not receiving the 1.43 acres for free; they paid a purchase price to the developer, which price included consideration for that property as part of the condominium.

ARGUMENT

A LENDER WHO CONSENTS TO THE ADDITION OF PROPERTY COVERED BY ITS MORTGAGE AS A CONDOMINIUM COMMON ELEMENT IN A PHASE CONDOMINIUM MAY NOT FORECLOSE ITS MORTGAGE AS TO ALL INDIVIDUAL UNIT OWNERS OF ALL PHASES OF THE CONDOMINIUM, INCLUDING PRIOR PHASES, BECAUSE THE COMMON ELEMENTS BECOME APPURTENANCES TO EACH UNIT UPON THE DEVELOPER'S SUBMISSION OF THE PROPERTY TO THE PHASE CONDOMINIUM

A. BANK ONE'S CONSENT TO THE DECLARATION AND THE ANTI-SEVERANCE PROVISIONS OF THE DECLARATION AND CONDOMINIUM ACT.

The trial court order reversed by the District Court would have allowed Bank One to foreclose on all condominium parcels (units and common elements) in a 138-acre condominium development, even though the Bank One mortgage describes only a 1.43-acre piece constituting a grooms' quarters, kitchen and office -- a very small part of the entire project. The 1.43 acres described in the Bank One mortgage by a metes and bounds description covers property which are common elements under the Declaration. Bank One cannot foreclose on the 1.43-acre parcel because of provisions in the Declaration and Condominium Act (hereinafter "anti-severance" provisions) which state as follows:

> Declaration Article XI(B):... Any attempts to separate the fee simple title to a Unit from the undivided interest in the Common Elements and/or Condominium Property appurtenant to such Unit shall be null and void. (A. 121)
>
> Section 718.107, Fla. Stat. (1991):
>
> (1) The undivided share in the common elements which is appurtenant to a unit shall not be separated from its and shall pass with the title to the unit, whether or not separately described.

> (2) The share in the common elements appurtenant to a unit cannot be conveyed or encumbered except together with the unit.
>
> (3) The shares in the common elements appurtenant to the units are undivided, no action for partition of the common elements shall lie.

Bank One does not dispute that these anti-severance provisions preclude it from foreclosing and separately selling the 1.43-acre parcel under its lien. The bone of contention is the effect of this prohibition.

The District Court determined that when Bank One consented to submitting the 1.43 acres to the Declaration, its mortgage lien became subject to the anti-severance provisions. As noted by the District Court, this conclusion rests on clear legal principles, is in conformity with mortgage law in general, and is simple in application. In contrast, Bank One attempts to construct an awkward and unworkable "rule" which is not set forth in any statute or court opinion:

> At the time encumbered property [the 1.43 acres] is phased-in, the form of the property ownership changes from fee simple to condominium, and the mortgage lien [of Bank One] thereby becomes a lien by operation of law against all condominium parcels, pro-rata, according to each unit owner's percentage of liability for common elements and ownership interest in the common elements, as set forth in the Declaration of Condominium. (no citations given)

(Bank One Initial Brief at p.8). In other words, Bank One contends that its lien spreads from the 1.43-acre parcel to the entire condominium, and Bank One may foreclose against all of the condominium parcels. The District Court, in its carefully reasoned

opinion, rejected this "rule" (hereinafter referred to as the "spreader theory").

The 1.43-acre parcel was not subject to the Declaration of Condominium at the time the mortgage was recorded, but was a portion of a larger parcel which was added to the condominium by the developer through an Amendment to Declaration of Condominium. The recorded Bank One consent of mortgagee expressly states that Bank One consented to the Amendment in accordance with Section 718.104 of the Florida Statutes. Section 718.104(3) states as follows:

> All persons who have any record interest in any mortgage encumbering the interest in the land being submitted to condominium ownership must either join in the execution of the declaration or execute, with the requirements for deed, and record, a consent to the declaration or an agreement **subordinating their mortgage interest** to the declaration. (emphasis added)

If the legislature intended for the spreader theory to apply, why would it consider a consent by the holder of a mortgage on property which will become common elements to be a subordination of the mortgage interest to the Declaration? It is a subordination because the mortgage lien is impaired by the anti-severance provisions of the Declaration and the Condominium Act. The fact that common elements cannot be severed from the ownership of a unit is at the very heart of the condominium concept. If the spreader theory is correct, then the Bank's lien is enhanced, not impaired, when the mortgaged property is made subject to a Declaration of Condominium. Under the spreader theory, it is the interest of unit owners which is subordinated, not the interest of the mortgagee.

B. THE SPREADER THEORY IS CONTRARY TO SECTION 718.121(1).

As noted by the District Court, the spreader theory is also at odds with the provisions of Section 718.121(1) which states:

> (1) Subsequent to recording the Declaration and while the property remains subject to the Declaration, no liens of any nature are valid against the condominium property as a whole except with the unanimous consent of the unit owners. During this period liens may arise or be created only against individual condominium parcels.

Under the spreader theory, Bank One seeks to have its mortgage lien spread to the condominium as a whole; however, such a lien cannot exist without the unanimous consent of the unit owners once the underlying property is made subject to a declaration of condominium. Moreover, under Section 718.121(1) a lien may <u>arise</u> or <u>be created</u> only against individual condominium parcels. The Bank One mortgage lien, which predated the declaration, was not created and did not arise against a condominium parcel because the property was not condominium property when the mortgage was recorded.

C. THE SPREADER THEORY IS INCONSISTENT WITH THE LEGISLATIVE INTENT AND SCHEME UNDER THE CONDOMINIUM ACT.

An idea related to the spreader theory is present in Section 718.121, which states:

> Labor performed on or materials furnished to a unit shall not be the basis for the filing of a lien pursuant to part I of chapter 713, the Construction Lien Law, against the unit or condominium parcel of any unit owner not expressly consenting to or requesting the labor or materials. Labor performed on or materials furnished to the common elements are not the basis for a lien on the common elements, but if authorized by the association, the labor or materials are deemed to be performed or furnished with the express

> consent of each unit owner and may be the basis for filing of a lien against all condominium parcels in the proportions for which the owners are liable for common expenses.

In a very clearly defined situation - a construction lien for work done on common elements - a lien may be asserted against all the condominium parcels. However, the legislature carefully limited this provision to liens under the Construction Lien Law and arising on property which is condominium property under a recorded declaration. If the property is not condominium, then it would be impossible for the work on the common elements to have been authorized by an association, which cannot exist in the absence of a declaration. Section 718.121 would have been the perfect opportunity for the legislature to make the spreader theory available to mortgagees such as Bank One, but the legislature declined to do so. The protection for the mortgagee in Bank One's position is its power to give or deny consent to the declaration.

D. BANK ONE COULD HAVE WITHHELD CONSENT AND PROTECTED ITS POSITION.

Bank One falsely states that it was required to give its consent to the Amendment to the Declaration which added the 1.43 acres to the Condominium. To the contrary, Bank One could have withheld its consent, and not subordinated its mortgage lien to the non-severance provisions of the Declaration. For example, Bank One could have insisted, as a condition of consent, that (1) its mortgage be paid off or refinanced; (2) the mortgage be modified such that the lien encumbers some or all of the condominium parcels in the newly created phases; or (3) the developer offer some other collateral to secure the loan.

By way of illustration, assume the added phases are made up of the following condominium parcels: 100-A, 100-B, 100-C, 100-D, 200-A, 200-B, 200-C and 200-D. (A. 213). Upon the amendment to declaration being recorded, the developer now owns these condominium parcels consisting of units together with undivided shares of common elements as set forth in the declaration and amendment adding the phases. Thus, as a condition of consent, the mortgage could be modified so that the mortgaged property is described as condominium parcel 100-A, 100-B, 100-C and 200-A, 200-B and 200-C. This type of mortgage can be foreclosed because the foreclosure is against condominium parcels, not common elements alone. Such a foreclosure would only affect the owners of those condominium parcels as actually described in the mortgages. Moreover, the mortgage is now in the chain of title for these parcels. A purchaser reviewing the clerk's records would see the amendment to declaration adding condominium parcel 100-A and a mortgage on that parcel.

If the mortgage had been so modified, each of the six condominium parcels would likely have had a partial release price for the mortgage. A person buying unit 100-A could determine under a partial release schedule how much he had to pay to remove the Bank One lien. Under the spreader theory proposed by Bank One, no unit owner ever has any idea of how much he must pay to redeem the mortgage; the amount of redemption changes as phases are added or the developer increases the debt. If Bank One had truly intended to have a lien on all the condominium parcels, it would have

provided partial release prices to facilitate releasing of its lien on each of the condominium parcels.

E. THE PUBLIC RECORDS DID NOT GIVE CONSTRUCTIVE NOTICE OF BANK ONE'S PURPORTED MORTGAGE INTEREST ON THE ENTIRE CONDOMINIUM.

Both Bank One and Judge Farmer in his dissent focus on the notice issue, namely, that any purchaser in Sunshine Meadows should have known that the Bank One lien on the 1.43 acres constituted a lien on his or her condominium parcel.[1] Under this view, because the Declaration described potential future phases, including the phase where the 1.43 acres are located, a purchaser should have known that this 1.43 acres might become a common element such that the Bank One lien spreads to the purchaser's condominium parcel.

The problem with this notice argument is that it only considers the declaration and not the Bank One consent, which is also recorded. Thus, it is not a question of simply having notice of the Declaration and the potential future phase, but also having a notice of the Bank's consent subordinating its lien to the anti-severance provisions of the Declaration and the Condominium Act. Taken together, the logical conclusion from the public records is that Bank One has elected to subordinate its mortgage on the 1.43 acres, and its right to foreclose, via its consent.

The result is the same as to a potential purchaser looking at the Declaration prior to the Bank One consent being recorded and the 1.43 acres being added to the condominium. Such a purchaser knows that the only way the 1.43 acres could be brought into the

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[1] As noted infra, this argument assumes the purchaser was aware of Bank One's recently invented spreader theory.

condominium is if (1) Bank One released its mortgage so it was no longer a mortgagee whose consent was required; or (2) Bank One consented to the submission of the 1.43 acres and subordinated to the Declaration of Condominium. Based on applicable law, that purchaser would also realize that the consent would have the effect of subordinating Bank One's interest to the Declaration and the anti-severance provisions. Thus, rather than being on notice that Bank One's lien may spread to all the condominium parcels, the purchaser was on notice that if the 1.43 acres came into the condominium, Bank One could not foreclose on the property as common elements. Contrary to the arguments by Bank One and Judge Farmer, there is nothing in the majority opinion by the District Court which in any way impairs or upsets the concept of notice from recorded instruments. There is no special aspect of phase condominiums which affects this analysis. The phase condominium statute does not alter the other provisions of the Condominium Act which apply to this case.

The unit owners purchased property legally described as a condominium parcel consisting of a unit and a pro-rata share in common elements. If Bank One had intended to take future condominium parcels as collateral, it could have so stated in its mortgage. Bank One claims that Article II(A) of the Declaration, which states that the condominium will have twelve phases, somehow gave purchasers notice of "the possibility of encumbrances in future phases" (Bank One brief at p. 29). However, as argued above, any purchaser would know that the mortgage financing would

be subordinated, not spread, when the future phases became part of the condominium property.

The only way a purchaser of a condominium parcel could have had notice of Bank One's expansive lien under its spreader theory is if that purchaser knew that the spreader theory constituted a rule of law that applied to the condominium. However, it is not reasonable to impute knowledge of such a legal "rule" to condominium purchasers from 1983 through 1987 when Bank One had no idea such a rule existed until it filed its second amended complaint in September, 1989. (See p. 19 infra).

F. BANK ONE NEVER INTENDED TO HAVE A LIEN ON ANY PROPERTY OTHER THAN THE 1.43 ACRES.

There is no reason to feel sorry for Bank One based on the result reached by the District Court. Both the Construction Loan Agreement between Bank One and the developer and the testimony of the bank's officer, John Kavanaugh, show that Bank One never intended to have a lien on any realty other than the 1.43 acres. The construction loan agreement states that the loan is for the purpose of constructing a thirty-six grooms' quarters building, a kitchen area and an office. (A. 226) Neither this agreement nor the mortgage reference any other real property. According to the survey attached to the Declaration, these facilities were to exist in a single building. (See diagram, Stmt. of Facts, supra) The bank officer, Kavanaugh, testified that the bank intended the loan to be repaid by the developer from sales of condominium units, or from the personal resources of John Shaw, a co-maker of the note together with the corporate developer. (A. 452-454) An internal Bank One memorandum dated May 30, 1985, prior to the date of the

amendment to declaration adding the 1.43 acres to the condominium, states that the 1.43 acres would be common element and unmarketable. (A. 560) The memo did not refer to the spreader theory.

The initial complaint by the bank sought foreclosure only on the 1.43 acres, and did not seek any relief against other condominium property; the initial lis pendens described only the 1.43 acre parcel. There is no evidence that the bank intended to assert a lien on any property other than the 1.43 acres until filing of the second amended complaint. When condominium units were sold in June, 1987, Bank One did not make any claim to the proceeds. (A. 523-524) If Bank One intended to have a lien on property other than the 1.43 acres, surely it would have made some effort to enforce its lien at that time. The facts in the record show that neither Bank One nor the mortgagors intended to assert a lien on the entire condominium property at the time the mortgage at issue was executed; this expansive lien is a creation of counsel in an effort to avoid the effect of Bank One's consent to the amendment to declaration and the resulting subordination.

For a mortgage to constitute a lien, the mortgage must describe the property subject to the lien. See Caples v. Taliaferro, 197 So.861 (Fla. 1940). This principle is particularly applicable where the parties did not intend at the time of the mortgage to affect any property other than that expressly described in the mortgage. Florida courts have resisted efforts to spread mortgage liens to properties not specifically described in the mortgage. For example, in Caples, Caples purchased certain

waterfront property and later took a deed from the Trustees of the Internal Improvement Fund to the submerged lands bordering the uplands previously purchased. Subsequently, Caples gave a mortgage to Taliaferro on the upland property. Taliaferro foreclosed and obtained a certificate of title to this property. Thereafter, Taliaferro sued Caples in order to have Taliaferro decreed to be the riparian owner with title to the submerged lands bordering the uplands. Taliaferro prevailed in the trial court, but the appellate court reversed and determined that Taliaferro improperly attempted to extend his mortgage over property that was not described in the mortgage or covered by the lien. Caples, 197 So. at 862.

The supreme court observed that Caples had purchased the submerged property from the Trustees after purchasing the property mortgaged to Taliaferro. It was not necessary for Caples to reserve the submerged property from the mortgage; a riparian owner may separate uplands from submerged lands in title. Because Taliaferro knew that the uplands and the submerged property had been purchased separately, Taliaferro was estopped to claim a right to the submerged property as a riparian owner. Taliaferro could not extend his mortgage to security which was not specifically described in the mortgage. Caples, 197 So. at 862. Similarly, in the instant case, Bank One knew when it accepted the mortgage that the property was subject to a declaration which described the 1.43 acres as common element, and thereafter consented to the amendment to Declaration, which made all the anti-severance provisions applicable to the property. Bank One is estopped to expand its

lien to property not described in the mortgage or to disavow the effect of the Declaration to which it consented.

G. BANK ONE CANNOT ASSERT A RIGHT TO FORECLOSE ON THE BASIS OF "EQUITY."

There is no evidence in the record that Bank One may not otherwise be able to recover in full under its note, other than by foreclosure on the condominium property. John Kavanaugh, the bank officer, testified that the claim against John Shaw, the individual maker of the note, is outstanding. The bank's loan file shows that the bank intended to look to Mr. Shaw's personal assets to the same extent that it would look to the 1.43 acre parcel. Bank One, a sophisticated lender, could have taken such steps as were necessary to maintain a lien in the fashion that it deemed desirable. Moreover, it is not the case that the lien has been extinguished. More correctly, the lien is subject to the Declaration, and upon termination of the condominium, the anti-severance provisions of the Declaration and of the Condominium Act may no longer apply, and Bank One could arguably assert its lien on the 1.43 acres, subject to any available defenses.

As shown in the initial complaint, the bank had a claim against other persons under the note. John Kavanaugh testified that these claims were surrendered in exchange for $7,500. (A. 490) Simply because the bank elected to settle the claim against these parties for that amount should not work to the detriment of the unit owners. Bank One claims that any unit owner harmed under its spreader theory can sue the developer. Bank One has a promissory note from the developer, so if it is truly proposing

this "remedy" with a straight face, then it should be the one to sue the developer, not the unit owners.

The spreader theory urged by Bank One would leave a unit owner without any protection as to the developer's use of his condominium parcel as collateral. Hypothetically, assume a unit owner purchased a unit in phase I. Thereafter, the developer mortgages a portion of potentially future phase II property (which is not yet condominium) to Bank Two, in exchange for a loan to him of $500,000.00. Under the spreader theory, the phase I unit owner's condominium parcel (unit plus pro-rata interest in common elements) immediately becomes potentially subject to that $500,000.00 mortgage. The unit owner has no control over how much of the $500,000.00 is used to improve phase II and how much goes to the developer's ski chalet. The fact that the Declaration of Condominium references a potential phase II is enough to spread Bank Two's lien to the unit owner's phase I unit if phase II is, in fact, submitted by the developer to condominium ownership. It is important to note that under the phase condominium statute, the developer has a unilateral right, without unit owner consent, to submit that phase II property to condominium ownership. See § 718.403(f) Fla. Stat. (1991).

Under this hypothetical, the developer can then make a deal with Bank Two that the bank foreclose on the unit owners in all the phases, asserting a lien on the entire condominium property rather than just on the property specifically described in the mortgage. If the bank wins, there is no deficiency and the developer walks away. This deal is the one John Shaw has made with Bank One; the

unit owners suffer while the one who actually signed the note and collected the purchase price from the unit owners does not spend a dime.

Bank One seems to argue that a unit owner necessarily benefits when additional phases are added to the condominium. However, no such benefit necessarily accrues. There is no requirement that a phase add additional common elements which constitute amenities. For example, an initial phase might include popular recreation amenities, such as a swimming pool, tennis courts and clubhouse. These amenities are constructed when sales of condominium units commence. In the case at bar, phase I did include substantially more amenities than were added in any additional phase. Going back to the residential condominium example, which is easier to visualize than the equestrian condominium, assume that a future phase is added which includes only an additional residential building and no further amenities. The unit owners in phase I have not benefitted in the sense urged by Bank One. The addition of phase II simply means that more people will be using the existing amenities, whereas no additional amenities are added for the phase I unit owners. There is no colorable argument to be made that somehow the addition of phases necessarily benefits all of the other owners in the other phases.

Bank One also implies that the unit owners at Sunshine Meadows somehow receive a windfall if Bank One is not permitted to foreclose its mortgage. There is no windfall. It is important to remember that the unit owners paid the developer for their units. The price paid presumably reflected the amenities being sold, such

as the groom's quarters. These unit owners will not be receiving the 1.43 acres for free if Bank One is not allowed to foreclose. As set forth in the record on appeal, it was the bank that failed to take any steps to try and collect a portion of the purchase price from the developer reflecting the value of its mortgage.

Bank One also sounds the trumpet that the District Court's opinion will ruin the lending industry. As noted supra, a careful lender could have easily taken a proper mortgage on condominium parcels as part of the process of adding the groom's quarters property to the condominium. Bank One itself recognized the problem with having a mortgage only on the 1.43 acres at the time the mortgage was originated. The District Court's opinion was published in the Florida Law Weekly on May 1, 1992, and has been in circulation for over four months. Yet, no bank or other interested party has sought leave to file any amicus brief in this proceeding. There is certainly no shortage of attorneys associated with the banking industry, so if the District Court's opinion was indeed a genuine cause for concern, we can be sure that that concern would have been expressed to this court. As noted by Judge Farmer in his dissent, it is extremely unlikely that this situation will repeat itself in a future lawsuit.

H. PRIME BANK'S VARIATION ON THE SPREADER THEORY - ONLY PHASE II - IS ALSO INCORRECT.

Prime Bank claims that the Bank One mortgage attaches only to those units created within the phase in which the 1.43 acres are located and would attach only to the condominium parcels physically located in that phase. Thus, Prime Bank, as a mortgagee of phase

I units, does not have to bear any burden. There is no legal or equitable basis for this result. Under the argument advanced supra in this brief, there is no reason to apply the spreader theory to phase II alone.

If this court were inclined to spread the mortgage lien as urged by Bank One, it would be inequitable to limit that spread to phase II only. Because the groom's quarters are common elements, they are by definition available for the use and benefit of all unit owners, not just the phase II unit owners. Under the Condominium Act and the Declaration, the phase II owners would not have any right to bar other unit owners from using these common elements or to charge a separate fee.

The Declaration indicates that, for the four phases which were created, there are only two buildings for groom's quarters. (A. 113-114) By comparison, there are over 64 units (A. 213). Thus, the intended proportion was not that each phase would have its own groom's quarters because there are not groom's quarters existing in each phase. Unless this court wants to make a rule that unit owners in one phase can require compensation from unit owners in other phases for utilizing common elements in their phase, placing the burden on phase II alone would be completely inequitable. Of course, this whole notion of common elements belonging more to one unit owner than another is completely absurd and antithetical to the condominium concept; Prime Bank's position should be rejected.

The analysis by Prime Bank concerning whether units are located on or off the mortgaged property makes no sense. The scenarios ignore the fact that the whole idea of common elements is

that there is an undivided, joint ownership of the whole. There is no "boundary line" between common elements which are appurtenant to one unit versus another unit. The interest in common elements is undivided and appurtenant to every unit. Every common element is part of every condominium parcel. It does not matter where a unit is located relative to common elements in terms of the degree or quality of ownership which the owner of the unit can assert with regard to the common elements.

The simple solution provided by the Condominium Act is that if a mortgagee wants to have a lien on condominium property, that lien can only exist if it is (1) given by the owner of a condominium parcel and (2) encumbers a condominium parcel. If the mortgage lien only encumbers a unit or only encumbers common elements, it cannot be foreclosed because to do so would result in a unit or common element being severed from the condominium. There is no provision in the Condominium Act which provides that a mortgage lien which covers only a unit or only common elements (and not a whole condominium parcel) can be spread to include the other. Such a lien is simply not enforceable so long as the property is subject to a Declaration of Condominium.

CONCLUSION

For the foregoing reasons, this court should affirm the opinion of the District Court, which reversed the trial court order granting summary judgment in favor of Bank One.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U. S. Mail to all parties on the attached service list, this 30th day of September, 1992.

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