IN THE SUPREME COURT OF THE STATE OF FLORIDA.

CASE NO. 80,233

BANK ONE, DAYTON, N.A.,

Petitioner,

vs.

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

Respondent.

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

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AN APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

This case comes to the Supreme Court of Florida as a case of first impression pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure. The Petitioner, BANK ONE, DAYTON, N. A., requests that this Court accept jurisdiction to answer the following question, certified as a question of great public importance by the Fourth District Court of Appeal in Sunshine Meadows Condominium Association, Inc., and Prime Bank v. Bank One, Dayton, N. A., et al., _____ So.2d _____, 17 F.L.W. D1045 (Fla. 4th DCA 1992):

> MAY A LENDER WHO CONSENTS TO THE ADDITION OF PROPERTY COVERED BY ITS MORTGAGE AS A CONDOMINIUM COMMON ELEMENT IN A PHASED CONDOMINIUM 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 PHASED CONDOMINIUM?

Petitioner, Bank One, Dayton, N.A., will be referred to as "Bank One". Bank One was the Plaintiff in the trial court and the Appellee in Case No. 90-0728 in the Fourth District Court of Appeal. The Respondents are Sunshine Meadows Condominium Association, Inc., Prime Bank and the 5000 Corporation. All Respondents were Defendants in the trial court and Appellants in the Fourth District Court of Appeal. Respondent, Sunshine Meadows Condominium Association, will be referred to as "Association". The other Respondents will be referred to by their proper names.

The Joint Appendix filed in the District Court by the Association, the 5000 Corporation and Prime Bank, has been filed

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with this Court and will be cited as "(A.____)". The Appendix to Bank One's Answer Brief, which was filed in the District Court has also been filed with this Court, and will be cited as "(B.A.____)". The Declaration of Condominium for Sunshine Meadows Condominium will be referred to as "the Declaration".

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STATEMENT OF THE CASE AND FACTS

Sunshine Meadows is an equestrian center which has been declared condominium. It has stalls, paddocks and other facilities for horses. A "condominium unit" consists of ten (10) stalls, an office, restroom and storage room. To assist the Court in understanding what occurred, color-coded illustrations have been provided at (B. A. 1-5).

On June 24, 1983 the Declaration of Condominium of Sunshine Meadows Condominium was filed in the Official Records of Palm Beach County, Florida. (A-109). The Declaration provided for a "phase condominium" with the first phase, consisting of 116.50 acres and forty condominium units, being submitted to the condominium form of ownership by the filing of the Declaration. Article XXVI of the Declaration provided for the completion of subsequent phases according to a schedule published within the Declaration.

Sunshine Meadows Condominium Association, Inc., is the condominium association established to operate the entire phase condominium. The developer conveyed units within the condominium to various purchasers, some of whom gave mortgages to the Respondents, Prime Bank and the 5000 Corporation. (A-17-20). In conjunction with the developer's recording of the Declaration of Condominium of Sunshine Meadows, a Warranty Deed was recorded conveying the entirety of Sunshine Meadows from the developer, Sunshine Meadows, Inc., to Sunshine Meadows Development Corp., subject to the newly filed Declaration. (A.48,109-225).

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With only Phase One completely in place, Sunshine Meadows Development Corp. and John B. Shaw, individually, gave a note for $400,000.00 to Bank One for a mortgage secured by property described by a metes and bounds legal description. The property securing the $400,000.00 mortgage consisted of 1.43 acres of non-condominium, fee simple property. Bank One and Sunshine Meadows Development Corp. then entered into a construction loan agreement whereby Bank One would fund (and did fully fund) $400,000.00 for the construction of a building with 36 grooms quarters on the 1.43 acres of non-condominium property. (A.226-233). On August 21, 1985, Bank One, Sunshine Meadows Development Corp. and John B. Shaw entered into a recorded Modification Agreement whereby the maturity date of the note for $400,000.00 was extended, but the mortgage was otherwise ratified and affirmed. (A. 240-241).

On April 23, 1987, the developer recorded its amendment to the Declaration of Condominium, submitting Phases II, III, IV, IV-A and IV-B to the Condominium. (A. 242-255). Because the 1.43 acres securing the mortgage given to Bank One was included in the newly phased-in property, Bank One was required, pursuant to Section 718.104(3), Florida Statutes, to consent to the amendment, which it did, for the property to be submitted to condominium as part of the phase plan of development (A.255). The 1.43 acres and the building constructed thereon were submitted to the condominium as part of the common elements appurtenant to all of the condominium units.

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On April 22, 1987 Sunshine Meadows Development Corp. conveyed all of the property within Phases II, III and IV under the Declaration to K.T.I. Corp. by warranty deed. (A. 57). On that same date K.T.I. Corp. conveyed parcels 17A, 17B, 17C and 17D, 18A, 18B, 18C and 18D, 21A, 21B, 21C and 21D and 22B, 23A, 23B, 23C and 23D in Phase IV-B to the 5000 Corp. by warranty deed. (A. 73). Both the warranty deed from Sunshine Meadows Development Corp. to K. T. I. Corp, and the warranty deed from K. T. I. Corp. to the 5000 Corp. were recorded on April 23, 1987.

On December 17, 1987, Bank One filed a Complaint to foreclose its mortgage on the 1.43 acres which had been phased into the condominium as additional common elements. A lis pendens was also filed by Bank One covering only the 1.43 acre parcel described in its mortgage. (A. 1, 82-84). Bank One later filed a Second Amended Complaint containing two counts. (A. 13). The second count was an alternative count for foreclosure of the property described in the mortgage. However, in Count I of the Second Amended Complaint Bank One sought foreclosure of its mortgage as to each "condominium parcel" (which is the unit plus each unit's appurtenant, undivided pro-rata share ownership of the common elements) according to their pro-rata share ownership of the common elements of the condominium. Bank One sued the Association as the appropriate class representative pursuant to Fla. R. Civ. P. 1.221 for all of the unit owners who are, by statute and by the Declaration, the owners of all common elements of the condominium. On September 22, 1989, Bank One filed an

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Amended Notice of Lis Pendens for all the condominium parcels, including the 1.43 acres described in its mortgage. (A. 85-88).

On December 6, 1989, Bank One filed its Motion for Partial Summary Judgment. (A. 272-282). Bank One sought judgment under Counts I and II of its Second Amended Complaint. Initially, the Court reserved ruling on Bank One's Motion, requesting the parties to file memoranda as to certain questions which the Court set out in its Order. The Association and Prime Bank filed memoranda, and Bank One filed replies. (A. 394-395, 411-427).

On February 15, 1990, the Court entered its Order Granting Bank One's Motion for Partial Summary Judgment, except as to Defendants, Hyder Management and Cypress Savings, neither of which are parties to the present appeal. (A. 573-574). Bank One had sought only to foreclose junior interests, recorded after the date of the amendment to the Declaration which submitted subsequent phases to the Condominium, including the phase containing the 1.43 acre parcel and the building constructed thereon. (A. 336,418,423)

The Order Granting Bank One's Motion for Partial Summary Judgment, which is the Order determining liability that was appealed by the Association, Prime Bank and the 5000 Corp., reserved jurisdiction for the entry of a Final Judgment of Foreclosure, which would order a clerk's sale to be held for each condominium parcel. Thus, the judgment would satisfy each condominium parcel's pro-rata share of the debt which was due to Bank One under its mortgage. (A. 212, 426).

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On March 14, 1990, the Association filed its Notice of Appeal to the Fourth District Court of Appeal. Prime Bank filed its Notice of Joinder on March 23, 1990. The District Court filed its opinion on April 22, 1992; Judge Warner writing for the majority and Judge Farmer dissenting strenuously.[1] After the District Court denied Bank One's Motion for Rehearing, review was sought from this Court by jurisdiction based upon the certified question of the District Court. Bank One requests that this Court answer the certified question in the affirmative and quash the opinion of the District Court.

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[1]/ A copy of the opinion, as it appears at 17 F.L.W. D1045 (4th DCA 1991) is attached to this Brief.

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SUMMARY OF ARGUMENT

The trial court's Order Granting Bank One's Motion for Partial Summary Judgment was an eminently correct ruling, which resulted from the proper interpretation of the phase condominium method of development under the Florida Condominium Act. A phase condominium is different from any other form of condominium development. It is designated a "special type of condominium" in the Condominium Act. In a "phase condominium", the unit owners agree, by purchasing subject to the Declaration and Condominium Act, that the developer may add to the condominium real estate under a plan of development which allows it to submit additional property to the condominium which may be encumbered by a mortgage. The newly phased-in property, as additional common elements to every condominium parcel, gives the unit owners greater use rights. Under the Condominium Act the additional common elements, once phased-in, cannot be separated from the condominium parcels to which they have attached. As a matter of law, each unit owner's undivided, pro-rata share of the common elements cannot be separated from the condominium unit.

When property to be phased-in is encumbered by a mortgage, the Condominium Act only requires that the mortgagee consent to the provisions of the Declaration. At the time encumbered property is phased-in, the form of the property ownership changes from fee simple to condominium, and the mortgage lien thereby becomes a lien by operation of law against all condominium parcels, pro-rata, according to each unit owner's percentage of

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liability for common expenses and ownership interest in the common elements, as set forth in the Declaration of Condominium. If the underlying debt secured by the mortgage is not paid, each unit owner's condominium parcel can be foreclosed to satisfy their respective portions of the lien. The trial court correctly determined that this is the proper method to foreclose such a mortgage pursuant to the provisions of the Florida Condominium Act and the Declaration of Condominium. This is so irrespective of who the holder of the mortgage being foreclosed is, Bank One or any mortgagee superior to Bank One.

The District Court misperceived the facts and erroneously applied the law in its opinion of April 22, 1992. The District Court failed to recognize that, in this case, prospective purchasers of phased-in condominium parcels were on notice of the fact that future phases may be mortgaged and that the Declaration states that the very purpose of subdividing the land into twelve phases was to finance the construction of additional improvements. The Declaration itself alerted purchasers to the possibility of encumbrances on future phases. There is no provision in the Declaration that any future phases would be submitted free and clear. The District Court also failed to realize and give effect to the record notice resulting form the recording of Bank One's mortgage prior to the submission of the property to condominium. Further, the District Court misconstrued Section 718.121, Florida Statutes, thereby erroneously interpreting Bank One's lien as an impermissible lien

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against the condominium "as a whole". The District Court also misconstrued Section 718.104(3), Florida Statutes, by erroneously concluding that a lender's consent to the submission of encumbered real property to the condominium form of ownership constitutes a waiver of its right to foreclose the mortgage. Obviously, no rational lender would ever give its consent if this is the law, and the phase condominium concept could not exist as a practical matter.

The District Court has failed to recognize the important public policy considerations resulting from its opinion which will stifle future development of phase condominiums in Florida. If condominium units are inextricably intertwined with their common elements, which they are under the Condominium Act, then a mortgage secured by common elements must attach to the units both as a matter of law and of logic and common sense. This is especially so when the unit owners are on notice of the existence of a mortgage encumbering property which is phased into the condominium and thereby becomes additional common elements to all existing units in the condominium.

The opinion of the District Court is erroneous. It should be quashed and this Court should substitute its own opinion upholding the trial court's Order Granting Partial Summary Judgment to Bank One.

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POINT ONE

THE QUESTION CERTIFIED BY THE FOURTH DISTRICT COURT OF APPEAL AS A QUESTION OF GREAT PUBLIC IMPORTANCE SHOULD BE ANSWERED IN THE AFFIRMATIVE

In its opinion filed on April 22, 1992, reported at ___ So.2d _____, 17 F. L. W. D1045 (Fla. 4th DCA 1992), the District Court determined that the following certified question is of great public importance because the condominium development industry is a vital part of the Florida economy and is affected by the ability of lending institutions to loan money for such developments:

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

THE PHASE CONDOMINIUM CONCEPT

Understanding the phase condominium concept is crucial to understanding why this question should be answered in the affirmative. Phase condominium development is one of the "special types of condominiums" authorized by Part IV of the Florida Condominium Act (Section 718.401, Fla. Statutes-718.403, Fla. Statutes). Phase condominium development provides a unique degree of flexibility for the developer, as well as unusual benefits for the unit owners.

The basic concept behind phase condominium development is that through purchase of a condominium parcel in a phase

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condominium, the unit owners give their consent to the developer to unilaterally amend the Declaration in the future to add additional land or additional land and improvements to the condominium in "phases", until development of the phase condominium plan is complete. The future land and improvements which may be added are described extensively in the Declaration as well as, in the case at bar, numerous survey and other exhibits which have been included in the record on appeal to this Court. Each phase adds additional common elements to all of the condominium parcels within the condominium. Therefore, in a phase condominium, all unit owners have their condominium parcels increased in physical size and obtain additional use rights each time a phase is added. This is true even though a unit owner's pro-rata ownership share of the common elements may actually decrease percentage-wise because additional condominium parcels are created by the phases which share ownership of the common elements. All persons having any record interest in any mortgage encumbering the interest in the land being submitted to condominium ownership, whether by phase or separately declared, must consent to the Declaration. See, Section 718.104(3), Florida Statutes and Section 718.403(7), Florida Statutes.

Section 718.403, Florida Statutes, titled "Phase Condominiums", sets forth special requirements which apply to phase condominiums. Some of the more important provisions in the statute other than those described above are as follows:

a) Section 718.403(1)

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A developer may develop a condominium in phases if the original declaration submitting the initial phase to condominium ownership provides for and describes in detail all anticipated phases; the impact, if any, which the completion of each subsequent phase would have upon the initial phase; and the time period within which each phase must be completed.

b) Section 718.403(2)(a)

The original declaration of condominium shall describe the land which "may" become part of the condominium, and a legal description of the land for each phase.

c) Section 718.403(2)(c)

The original declaration of condominium shall describe each units' percentage ownership in the common elements as each phase is added.

d) Section 718.403(2)(d)

The original declaration of condominium shall describe those facilities or areas which may not be built or provided if any phase or phases are not developed and added as part of the condominium.

e) Section 718.403(2)(e)

The original declaration of condominium shall describe the membership vote and ownership in the association attributable to each unit in each phase, and the results if any phase or phases are not developed and added as part of the condominium.

f) Section 718.403(3)

The developer shall notify owners of existing units of the commencement of, or the decision not to add, one or more additional phases. Notice shall be by certified mail addressed to each owner at the address of the unit or at the last known address.

g) Section 718.403(4)

If one or more phases are not built, the units which are built are entitled to 100 percent ownership of all common elements within the phases actually developed and added as part of the condominium.

h) Section 718.403(5)

If the declaration requires the developer to convey any additional lands or facilities to the condominium after the completion of the first phase and he fails to do so within the time specified, or within a reasonable time if none is specified, then any owner of a unit or the association may enforce such obligations against the developer or bring an action against the developer for damages caused by the developer's failure to convey to the association such additional lands or facilities.

i) Section 718.403(6)

In spite of the provisions of Section 718.110, Florida Statutes, amendments adding phases to a condominium shall not require the execution of the amendments or consents by unit owners other than the developer.

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Thus, phase condominium development has many special features that typical, non-phase condominiums do not have.

As stated above, Sections 718.403(7), and 718.104(3), Florida Statutes, authorize property encumbered by a mortgage to be submitted to condominium ownership as long as the mortgagee consents to the declaration. In view of this, and the fact that there is no other provision in the Condominium Act requiring that land to be submitted to a condominium be free and clear of encumbrances, it is clear that unit owners in a phase condominium do not have a statutory right to obtain the benefits of ownership without potential financial responsibility for the improvements constructed for their use and benefit if the sums due the lender are not otherwise paid.

The developer may promise in the declaration or the purchase contract to submit the property free and clear, and sometimes this occurs so that the developer can obtain better prices and quicker sales of condominium parcels. However, this is just a benefit of the particular bargain which is made. The Declaration in the case at bar has no such language. Also, every phase contains units as well as additional common elements, and it will be difficult if not impossible for the developer to sell those units if the property is encumbered beyond that which is necessary to finance the acquisition of the land or construct the improvements on the land to be conveyed to the unit owners by phase amendment. However, in that unlikely event, the developer would be liable to the unit owners for breach of fiduciary duty,

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because the developer has a relationship of trust and confidence to the owners in the phasing process since he is acting pursuant to their consent to submit additional lands to the condominium as part of the phase plan of development.

There is nothing illegal or inequitable where, as in the case at bar, the property ultimately submitted as a phase in the condominium is encumbered by a mortgage securing a loan from which the improvements ultimately owned by the unit owners were constructed.

APPLICABLE PROVISIONS OF THE SUNSHINE MEADOWS DECLARATION OF CONDOMINIUM

All unit owners, potential unit owners, mortgagees and potential mortgagees had constructive notice from the phase plan described in the Declaration that all condominium parcels could be increased in physical size by the addition of more common elements in the future, and that the decision to do so, as well as whether the property to be phased-in was encumbered, was the developer's. Implicit in the bargain for unit owners and mortgagees was that the unit owners' real estate interest and use rights would be increased by the addition of specifically identified properties and improvements.

Each unit owner is, by virtue of the Condominium Act, an owner of a fractional share of all of the common elements in the condominium. In the case at bar, the Declaration was drafted in compliance with Section 718.401(2)(c), Florida Statutes, which requires that the fractional share of common elements owned by

each unit owner be set forth in the Declaration. (A. 212-215, Exhibit "D" to the Declaration). There is no reason to guess at the amount of liability exposure of each unit owner within the condominium for mortgages attaching to the common elements of the condominium, because each unit owner's pro-rata share of the common elements is clearly expressed as an exhibit to the Declaration, which was duly recorded.

Article XI of the Declaration (A. 121), titled "Ownership of Common Elements, Common Expenses and Common Surplus", provides:

> (A) The fractional undivided interest in and to the Common Elements and/or Condominium Property which each Unit Owner shall own by reason of his ownership of a Condominium Unit, (both initially and after a subsequent Phase or Phases are included within the condominium Property by Amendment hereto) is set forth in Exhibit "D" attached hereto and made a part hereof.
>
> (B) The fee simple title to each Condominium Parcel shall include both the Unit and the undivided interest in the Common Elements and/or Condominium Property in the percentages set forth in Exhibit "D" even though the description in the instrument of conveyance or encumbrance may refer only to the title to the Unit. Any attempts to

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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. (Emphasis added).

(C) The common expenses of the Condominium including the monthly maintenance charges shall be borne and paid by each of the Unit Owners in the same fractions of the whole as are set forth in Exhibit "D" hereto, and each Unit Owner shall share in the common surplus of the Condominium in the same fractions of the whole as such Unit Owner shares in the common expenses.

Article II of the Declaration disclosed that the developer's land was subdivided into twelve phases for the purpose of "financing, constructing and completing the improvements thereon...." (A.109, Article II). It is undisputed that the Bank One loan was a construction loan in which all of the proceeds were used for construction of the building which ultimately became part of the common elements of the condominium (A.283-285, 226,233, 234, 246, 439).

Anyone who desired to purchase a unit within Sunshine Meadows or any lender securing a mortgage on property within the condominium had clear notice that the development was a phase condominium with plans to submit future phases. Furthermore,

Bank One's mortgage had been duly recorded in the Public Records of Palm Beach County, Florida, (A.235-239), and Bank One signed a consent for the submission of the land which was encumbered by the mortgage to the condominium form of ownership. The consent was recorded in conjunction with the amendment to the Declaration filed on April 23, 1987 (A.255).

The Condominium Act provides for the protection of unit owners who purchase in a phase condominium because it forces developers to disclose their intentions with regard to the property. Unit owners and prospective unit owners in a phase condominium are also given protection by Section 695.01, Florida Statutes, which forces mortgagees to record their mortgages in the public records. In the case at bar it is undisputed that the mortgage on the phased-in 1.43 acres was duly recorded.

The crucial issue in this case is whether Bank One's mortgage became a lien on each condominium parcel by operation of law. The dynamics of the Condominium Act compel an answer to this issue in favor of Bank One and other similarly situated lenders. The illustrations contained in Bank One's Appendix, (B.A. 1-5), are very helpful in understanding the case.

The chart at (B.A. 1) shows Phase One being submitted to the condominium upon the recording of the Declaration in June, 1983. The Declaration expressly and specifically disclosed to the unit owners that the development was a phase condominium. The Declaration authorized the submission of up to twelve additional phases in the future, with each phase consisting of more

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condominium units and more common elements to become appurtenant to all declared (i.e., then existing) units along with the submission of the units within the phase. Exhibit D to the Declaration sets forth the undivided pro-rata share ownership of the common elements appurtenant to each condominium parcel as each phase is added (A.212-215). The illustrations show how the submission of each additional phase adds common elements to all of the units in the condominium, not just the units that were declared in each phase.

It would be helpful at this point to begin thinking about mortgages on condominium property. Assume that after June, 1983, a unit owner in Sunshine Meadows purchased a condominium parcel from the developer, and in financing the purchase granted a mortgage to a lender which encumbered the condominium parcel at the time of the purchase. Subsequently, as Chart A shows, Phases I, II and IV were submitted to condominium ownership by amendment to the Declaration in April, 1987. The 1983 mortgage now encumbers a physically larger real estate interest than it did when the mortgage was given because land and improvements in other phases subsequently submitted have become part of the common elements of the condominium which are appurtenant to the mortgaged unit. Thus, in the event of a default in the 1983 purchase mortgage, a physically larger condominium parcel would have to be foreclosed than that which was encumbered by the original mortgage.

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Chart B (B.A. 2) explains that a unit owner's real property ownership interest in a condominium is the "condominium parcel". Section 718.103(17), Florida Statutes, defines "unit owner" and "owner of the unit" to mean the owner of a condominium parcel. Section 718.103(10), Florida Statutes, defines "condominium parcel" as a unit, together with the undivided share in the common elements which is appurtenant to the unit. (Emphasis added). "Unit" is defined by Section 718.103(16), Florida Statutes as the part of the condominium property which is subject to exclusive ownership, which may be in improvements, land, or land and improvements together, as specified in the Declaration.

Chart B also shows that the unit and the undivided pro-rata share in the common elements appurtenant to the unit, all of which comprise the condominium parcel, are bonded by law and are indivisible. This is provided in the Condominium Act and the Declaration of Condominium of Sunshine Meadows.

Section 718.106, Florida Statutes, titled "Condominium parcels; appurtenances; possession and enjoyment" provides as follows:

> (1) A condominium parcel created by the declaration is a separate parcel of real property, even though the condominium is created on a leasehold.
>
> (2) There shall pass with a unit, as appurtenances thereto;
>
> (a) An undivided share in the common elements and common surplus.
>
> (b) The exclusive right to use such portion of the common elements as may be provided by the declaration.

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* * *

(3) A unit owner is entitled to the exclusive possession of his unit, subject to the provisions of s. 718.111(5). He shall be entitled to use the common elements in accordance with the purposes for which they are intended, but no use may hinder or encroach upon the lawful rights of other unit owners.

Section 718.107, Florida Statutes, titled "Restraint upon separation and partition of common elements", provides as follows:

(1) The undivided share in the common elements which is appurtenant to a unit shall not be separated from it 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 units are undivided, and no action for partition of the common elements shall lie.

Similarly, Article XI(B) of the Declaration (A. 121), provides in pertinent part that the fee simple title to each condominium parcel shall include both the unit and the undivided interest in the common elements and/or the condominium property in the percentages set forth in Exhibit "D", even though the description in the instrument of conveyance or encumbrance may refer only to the title to the unit. It states further that any attempt 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.

The illustration in Chart B focuses on one unit in the condominium. It shows that an appurtenance to the unit which cannot be separated from it is an undivided pro-rata interest in all of the common elements of the condominium. All of the units in the condominium share the common elements together, and own them together in the undivided proportions set forth in the Declaration, which cannot be separated.

Chart C (B.A. 3) shows that the submission to Sunshine Meadows Condominium of each of the additional four phases added more common elements to the condominium, which the unit owners own in undivided proportions. Pursuant to the provisions of Sections 718.106, Florida Statutes, 718.107, Florida Statutes, and Article XI(B) of the Declaration, the additional common elements which were added to the condominium by each phase became bonded to all of the condominium parcels in the condominium, and are inseparable. The phasing-in of the property encumbered by Bank One's mortgage (the building in Phase II containing the grooms' quarters, restaurant facility and office space depicted in yellow in B.A. 5) provided the unit owners with additional common elements and use rights in those common elements. The unit owners have used and have had the right to use those facilities since they were phased-in to the condominium in April, 1987.

Chart D (B.A. 4) illustrates the dynamics of a mortgage foreclose in a phase condominium. It shows that the same principle applies, whether it is Bank One foreclosing its

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mortgage, or some other mortgagee foreclosing its mortgage whose foreclosure rights are superior to Bank One. In every case a mortgagee in a phase condominium must foreclose the entire condominium parcel as it exists at that time. This is true whether the lender's mortgage encumbers property which subsequently became common elements by being phased-in, or whether the mortgage only encumbered the condominium parcel as originally declared by the Declaration, but which has additional common elements subsequently added by phasing.

The illustration in Chart D shows that in every case the result is the same, the entire condominium parcel of the unit owner as it exists at the time must be foreclosed. This is because the Condominium Act requires that a condominium parcel must be treated as a single entity which has no component parts. That is why the undivided share in the common elements which is appurtenant to a unit passes with title to the unit, whether or not they are separately described (Section 718.107(1), Florida Statutes); that is why the share in the common elements appurtenant to a unit cannot be conveyed or encumbered except together with the unit (Section 718.107(2), Florida Statutes); and that is why the shares in the common elements appurtenant to units are undivided, and no action for partition of the common elements will lie. See Section 718.107(3), Florida Statutes.

Bank One's mortgage was recorded years before submission of the phase to condominium. When real estate is submitted to the condominium form of ownership, liens are created by operation of

law. An encumbrance on real estate (or on part of it) which pre-exists the submission to the condominium form of ownership, no matter what portion of the property is encumbered, always becomes a pro-rata lien on every condominium parcel when the property becomes condominium property.

Despite the novelty of this particular case, this principle is not new to condominium law. The Condominium Act recognizes that once the declaration is recorded, liens are created against condominium parcels, and that no liens of any nature are valid against the condominium property "as a whole" (i.e., one lien encumbering the entire condominium) except with the unanimous consent of the unit owners. Section 718.121(1), Florida Statutes.

The Condominium Act also recognizes, as do the Courts of this State, that a lien which arises because labor or materials were furnished to the common elements of a condominium at the request of a condominium association becomes a lien by operation of law against all of the condominium parcels in the proportions for which the unit owners are liable for common expenses. Section 718.121(2), Florida Statutes. This principle was recognized in Royal Ambassador Condominium Association, Inc. v. East Coast Supply Corp., 495 So.2d 932 (Fla. 4th DCA 1986). Each unit owner has the right to relieve his condominium parcel of the lien by payment of the proportionate amount attributable to the condominium parcel. Section 718.121(3), Florida Statutes. This is how the condominium form of ownership operates. Encumbrances

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on condominium property operate differently than non-condominium property because the condominium form of ownership is unique.

In the final analysis, all that happened in this case is that the mortgage lien of Bank One changed its form as required by Section 718.121(1), Florida Statutes, to comport with the change in the form of ownership of the property when it became a condominium. The mortgage lien has merely become reallocated by law pursuant to the unit owners agreement on sharing ownership and liabilities. All unit owners and mortgagees were on notice, through the Declaration, that the property subject to Bank One's mortgage lien would be phased into the condominium eventually, and the Condominium Act inextricably links the phased-in property to all of the units within the condominium because the phased-in property is part of the common elements. All of the unit owners and mortgagees knew of Bank One's mortgage by either actual or constructive notice, all of the unit owners and mortgagees knew that the property was condominium property and all unit owners and mortgagees were on notice, by the Condominium Act, that each unit owner is responsible for its pro-rata share of expenses pertaining to the common elements.

Bank One cannot properly be prohibited from foreclosing its mortgage. The remedy of foreclosure of a mortgage is not only inseparable from the mortgage, it is an essential ingredient of every mortgage. Homberg v. Hardee, 90 Fla. 787, 108 So. 211, 219 (1926). The holder of a mortgage has the right to foreclose it in equity. Section 702.01, Florida Statutes; Laing v. Gainey

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Builders, Inc., 184 So. 2d 897 (Fla. 1st DCA 1966). The right of a mortgage holder to foreclose the mortgage when a default has occurred is absolute, and not contingent upon extrinsic circumstances. See, Federal Home Loan Mortgage Corporation v. Taylor, 318 So.2d 203, 207 (Fla. 1st DCA 1975). No where in the Condominium Act or the Declaration is it stated or implied that a mortgage holder forfeits its statutory and contractural right to foreclose in the event of a default by consenting to a declaration or an amendment to a declaration in a phase condominium.

The 1.43 acres specifically described in Bank One's mortgage is part of the inseparable common elements of the condominium. Under the law as determined by the District Court in its opinion, Bank One can never foreclose on its mortgage, unless the condominium is terminated. However, this is illogical and as a practical matter, makes no sense. It is general knowledge that condominiums are almost never terminated. Furthermore, termination would probably occur, if at all, past the five year Statute of Limitations to foreclose a mortgage. See, Section 95.11(2)(c), Florida Statutes. Such a result, if affirmed by this Court, will shock an already beleaguered lending industry, and in particular, those lenders who previously gave mortgagee consent incident to development of condominium projects.

The proper answer to the question certified by the District Court is "yes". A lender who consents to the addition of property covered by its mortgage as a condominium common element

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in a phase condominium must be allowed to foreclose its mortgage as to all individual condominium parcels of all phases of the condominium, including prior phases, according to their pro-rata ownership shares, because the common elements become an appurtenance to each parcel, on a pro-rata basis, upon the developer's submission of the property to the phase condominium. An essential part of condominium living is that expenses and liabilities are shared just as the privileges are shared. Anyone who chooses to be a part of condominium life also accepts the benefits and the burdens of common ownership. While the Condominium Act and the declaration of condominium provide protection for the condominium unit owners, such protection does not extend to the eradication of legitimately established and recorded mortgages which are openly secured by property which becomes part of the condominium, for the use and enjoyment of the unit owners.

POINT II

THE OPINION OF THE DISTRICT COURT IS ERRONEOUS AND SHOULD BE QUASHED

The opinion of the District Court is flawed both legally and factually. The District Court stated in its opinion that "[n]owhere in any provision of the Declaration would any reader have been alerted to any potential future encumbrance on common elements." This statement overlooks Article II of the Declaration:

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Article II

The Land.

(A) The developer is the owner of the fee simple title to the lands (hereinafter called the "Land") particularly described on Exhibit "A-1" attached hereto and hereby incorporated herein by reference. The Land, for the purpose of financing, constructing and completing the improvements thereon is subdivided into twelve (12) phases, all as more particularly hereinafter described. Each phase shall consist of a certain portion of the Land and shall contain thereon, in addition to other improvements, condominium units.

(Emphasis added). (A.109, Article II).

Not only were prospective purchasers on notice of the fact that the future phases may be mortgaged, but they were told that the very purpose of subdividing the land into twelve phases was to finance the construction of the additional improvements. Clearly then, the Declaration alerted purchasers to the possibility of encumbrances on future phases. Also, the Declaration does not contain any representation that the future phases would be submitted free and clear. The District Court also overlooks the fact that the mortgage in dispute was of record in the Public Records of Palm Beach County, Florida.

In the following sentence of its opinion, the District Court states that the opposite conclusion may be drawn from the documents. In support, the District Court cites to the fact that there is no provision in the Declaration for the distribution of insurance proceeds to a mortgagee of common elements in the event of a casualty loss. However, this is immaterial because that

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type of provision would be meaningless. The lien of the pre-existing mortgage encumbering the fee simple property, upon submission to the condominium form of ownership, becomes a lien on each unit and on their appurtenant common elements according to their respective ownership interests in the common elements. Indeed, a lien which encumbers only common elements would violate Section 718.121(1), Florida Statutes. That section provides that while the property is subject to the condominium form of ownership, liens may arise or be created only against individual condominium parcels, not common elements alone. See also, Section 718.121(2), Florida Statutes. A "condominium parcel" is a unit, together with the undivided share in the common elements which is appurtenant to the unit. Therefore, since there would not be a lien on only the common elements, there would not be any reason to include such a provision in the Declaration.

The District Court's opinion is also factually and legally incorrect as it pertains to the description of Appellee's foreclosure request, and the interpretation of Section 718.121 (1), Florida Statutes. The District Court states that Bank One filed a foreclosure action, "...requesting foreclosure as to the entire condominium property, described in metes and bounds, including the interest of each unit owner." From this statement, the Court concluded that the use of the legal description of the property "as a whole" to foreclose the mortgage lien constituted a violation of Section 718.121 (1), Florida Statutes

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The District Court has overlooked the fact that after setting forth the metes and bounds description of the condominium property being foreclosed in Count I of the Second Amended Complaint, Bank One also specifically described that property as:

> Also known as Units 7-A, 7-B, 7-C, 7-D, 8-A, 8-B, 8-C, 8-D, 9-A, 9-B, 9-C, 9-D, 10-A, 10-B, 10-C, 10-D, 11-A, 11-B, 11-C, 11-D, 12-A, 12-B, 12-C, 12-D, 13-A, 13-B, 13-C, 13-D, 14-A, 14-B, 14-C, 14-D, 15-A, 15-B, 15-C, 15-D, 16-A, 16-B, 16-C, 16-D, 18-A, 18-B, 18-C, 18-D, 21-A, 21-B, 21-C, 21-D, 22-A, 22-B, 22-C, 22-D, 23-A, 23-B, 23-C, and 23-D and all common elements appurtenant thereto in SUNSHINE MEADOWS, a condominium, according to the Declaration thereof, recorded in Official Records Book 3974, at Page 1161, of the Public Records of Palm Beach County, Florida.

(R.199)

Further, Bank One, in its prayer for Count I of the Second Amended Complaint (R.203), requested that the Court enter a judgment of foreclosure against all of the common areas and all of the condominium units within SUNSHINE MEADOWS CONDOMINIUM, i.e., a request to foreclose all of the condominium parcels. Therefore, Bank One was not attempting to foreclose a lien against the condominium property "as a whole" without the unanimous consent of the unit owners. This case, of all things, does not involve an attempt to foreclose a lien against the condominium "as a whole". Foreclosure of the condominium as a whole would include a blanket lien on the entire condominium property that has no regard for the pro-rata liability of each condominium parcel. Instead, Bank One is trying to foreclose all of the condominium parcels, that is all of the common elements

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and all of the condominium units together, in payment of a debt for which each owner is liable according to their pro-rata ownership interest in the common elements (which happens to be the same). This is how common debt is paid in a condominium. This is consistent with, not contrary to, Section 718.121 (1), Florida Statutes. The District Court's conclusion that Bank One's foreclosure is contrary to Section 718.121 (1), Florida Statutes is erroneous.

The District Court has also confused the respective responsibilities of the parties involved, and thereby inappropriately penalized Bank One for the developer's alleged failures. Bank One is only a lender in this transaction. It gave the construction loan when the Phase II property was fee simple, and fully funded the loan to build the amenities that were conveyed to the unit owners. It did not participate in the plan of development, assume the developer's responsibilities or make unfulfilled representations to unit owners. Bank One's only "fault" is consenting to the conveyance of the Phase II property to the unit owners so they can use and own the amenities as part of the plan of development that they agreed to when they purchased.

The unit owners have a contractual relationship with the developer which is also governed by the Condominium Act. If the developer is deficient in its Impact Statement responsibilities, then that is a matter between the unit owners and the developer. Bank One did not participate in preparing the Impact Statement.

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The District Court states that if the impact of future phases is to incur an obligation on the Phase I owners to pay off obligations from improvements in subsequent phases, then notice of that is required in the Impact Statement required by Section 718.403(1), Florida Statutes. If this is true, then the unit owners' remedy is an action against the developer for any damages sustained, or an action to rescind the conveyance of the phase because of non-compliance with the Impact Statement. They did not do this. Instead, the owners continued to enjoy the use and benefit of the encumbered property which was constructed with money that Bank One loaned based upon the security of its mortgage.

The fact that there is no mention in the Declaration's Phase Impact Statement of a potential obligation to pay off a construction mortgage on common elements in future phases is irrelevant to Bank One's foreclosure action. Bank One duly recorded its mortgage as it was required to do. The very purpose of doing so is to place third-parties, such as the unit owners, on notice of encumbrances. It was after this that the unit owners accepted title to the property. It cannot be over-emphasized that Bank One duly recorded its mortgage on the fee simple property before the property was conveyed to the unit owners by submission of Phase II to the condominium. The unit owners accepted title to the property with record notice of the mortgage.

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The District Court makes much of the fact that Bank One was "perfectly capable of protecting its own interest", but from whom? The unit owners who were the beneficiaries of Bank One's consent to the conveyance of the Phase II amenities which they now own? If Bank One, or any lender, wants to protect its own interest under the District Court's interpretation of "consent" under Section 718.104(3), Florida Statutes, they will simply refuse to give it from this point forward. The District Court's opinion traumatizes mortgagees from consenting to the submission of property to the condominium form of ownership. On one hand the District Court acknowledges the necessity for mortgagee consent under the phase condominium concept, but on the other hand puts an impossibly high price on consent so that no lender would ever do this again. If, as the District Court has expressed, a major concern is what was anticipated by the phase condominium concept, then ruling as it has will discourage, not encourage, unit owners from receiving the benefit of the phase condominium concept. The reality is that no developers have the financial ability to own the land they submit to the condominium form of ownership free and clear, let alone pay for the improvements to be constructed as part of the condominium without financing. This is equally true of phase condominiums, of which there are many.

Perhaps most significant is that the District Court has reached an incorrect legal conclusion because it has

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misinterpreted and misapplied Section 718.104(3), Florida Statutes. Section 718.104(3), Florida Statutes provides that:

> All persons having 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.

The consent requirement of this section applies to <u>every</u> condominium, phase and otherwise.

The essence of the District Court's holding is that Bank One, by consenting under Section 718.104(3), Florida Statutes, to the submission of Phase II to the condominium form of ownership, has agreed to waive the right to foreclose its mortgage lien until the condominium is terminated (which we know almost never occurs). The District Court has equated "consent" under Section 718.104(3), Florida Statutes to a voluntary abandonment of the mortgage. Yet, this cannot be the correct interpretation of the statute because the result is absurd -- no rational lender would ever consent if the result is waiver of the security for the loan.

The District Court has overlooked the purpose of the consent requirement of Section 718.104(3), Florida Statutes. That section requires mortgagee consent for the submission of fee simple property to the condominium form of ownership <u>for the protection of the mortgagee</u>. Mortgagee consent is necessary for two reasons. First, the form of ownership of the property which collateralizes the loan will be changed by the recording of the

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Declaration, from fee simple to condominium, i.e., ownership in common with others. Condominium ownership is unlike fee simple ownership because every co-owner's interest is in the unit, together with the unit's pro-rata ownership share of the common elements. Thus, unlike owning all or part of a parcel of fee simple property, in condominium ownership the owner owns a unit separate and apart from the other co-owners, and shares ownership of the undivided interests in the common elements.

Second, mortgagee consent is required because the nature of the mortgage lien changes. Instead of the lien that the mortgagee had in the fee simple property subject to the mortgage, once the declaration is recorded, the lien, pursuant to Section 718.121(1), Florida Statutes, attaches to each unit and its undivided interest in the common elements according to the share ownership in the common elements. Under Section 718.121(1), Florida Statutes, once the property is submitted to the condominium form of ownership, liens may arise or be created only against individual condominium parcels, and not common elements alone.

A parcel of fee simple property encumbered by a mortgage, even if that property ultimately becomes common elements in a condominium, still becomes a lien on the units and common elements because Section 718.121(1)(2), Florida Statutes only permits liens to exist in this manner. It provides that liens cannot attach to the common elements alone.

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All construction loan mortgages and other mortgages that encumber fee simple property before it is submitted to the condominium form of ownership describe the property by a metes and bounds or other non-condominium legal description. This is because the property has not been declared yet, so there is no reason to identify condominium parcels. See, Section 718.109, Florida Statutes (legal description of condominium parcels). A pre-existing mortgage on fee simple property, when submitted to the condominium form of ownership, encumbers all of the condominium units and the common elements that are declared by the declaration according to their pro-rata ownership interest in the common elements. The mortgage is not invalid because it contains a metes and bounds description, and this is still true after the declaration is recorded with mortgagee consent. See, Section 718.104(4)(C), Florida Statutes. The District Court has overlooked that this analysis applies equally to Bank One's mortgage.

The District Court's interpretation of Section 718.104(3), Florida Statutes also overlooks the fact that there is absolutely nothing in that section which would put a lender on notice that consent is a waiver of the right to foreclose the collateral in the event of a default. The District Court supports its position by stating that Bank One "...could have refused to consent to the inclusion of Phase II in the condominium until its lien was paid off." However, this does not make sense. If the loan was paid off, the mortgage would be satisfied so consent would not be

needed. The District Court's other ground, that the lender could have required the developer to subject the condominium units in Phase II to the terms of its mortgage and required release prices upon their sale so that the lien of the mortgage could have been effective against the units of Phase II, is idle speculation that simply begs the question. Who knows what financing terms the developer was willing to agree to, or whether there were already other mortgages on what would become Phase II units? This entire line of reasoning by the District Court is simply beside the point.

According to the District Court, the mortgage became extinguished rather than the owners having to pay their pro-rata share of a pre-existing indebtedness on property they acquired with record knowledge of the indebtedness before the conveyance. This is not reasonable nor is it equitable.[2]/

It is apparent which result makes more sense under the law. Under the District Court's interpretation, every unit owner in the condominium acquired an ownership interest in the common element amenity property subject to the Bank One mortgage which was duly recorded before the submission to condominium, but the owners are excused from paying so much as one nickel. This is so despite the fact that every unit owner was on constructive notice

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[2]/ In its Answer Brief to the District Court, Bank One identified and argued various equitable principles which form the basis of the law on this subject. The District Court totally misperceived this argument and labeled it an "equitable lien" argument.

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of the mortgage at the time the property was conveyed to the unit owners when Phase II became part of the condominium.

Bank One submits that since the unit owners never took any action to rescind or enjoin the additional phase (assuming they had a right to do so), all unit owners are required to pay their pro-rata share of the debt incurred to construct the amenities that every unit owner acquired. It is undisputed that Bank One loaned $400,000.00 for the construction of the amenities, and that all of the money was used for its intended purpose. There was absolutely no wrong-doing by Bank One, and the property was not "over-mortgaged". There is nothing inequitable about Bank One's proposed result, and it makes sense of the law. It does not lead to an absurd result. It is fundamental that statutes will not be construed to lead to an absurd result. See, Winter v. Playa del Sol, Inc., 353 So.2d 598 (Fla. 4th DCA 1977).

Under the District Court's ruling, the unit owners obtained a windfall at Bank One's expense by receiving property which had a record encumbrance before they received it, but that encumbrance is now somehow extinguished by interpreting consent to the conveyance of the property to the unit owners as an agreement to waive foreclosure rights. Yet, the "consent" is the same consent that made it possible for the unit owners to obtain ownership of the valuable amenity property.

While the facts of this particular case may be unique, the legal principle involved, the interpretation of Section 718.104(3), Florida Statutes, has wide-spread application.

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Virtually every condominium development is declared on land that is encumbered by a construction or other mortgage. Mortgagee consent is a part of every condominium development. In both phase and non-phase condominium development, it is common for lenders to grant construction loans and obtain mortgages on land which will be submitted to the condominium form of ownership, for the purpose of constructing only amenities. The amenities will become common elements upon recording of the declaration. The amenities are almost always built first in order to induce purchasers to enter into pre-construction contracts. The consent of all mortgagees is required to submit the encumbered property to the condominium form of ownership. According to the District Court's opinion, all of the lenders who participate in this common practice are agreeing (and many have already unknowingly agreed) to waive the mortgage lien because the lien remains against the common elements only, and does not become a lien on each condominium parcel in accordance with their pro-rata ownership interests in the common elements. Yet for the reasons explained above, this is a legal impossibility. The District Court's opinion will have a chilling effect upon all condominium development, and especially phase condominium development.

The District Court cites two depression-era cases for the proposition that a lien of a mortgage covers only that property which is included in its description. Neither of these cases involve mortgages on condominium property, and indeed these cases pre-date the very concept of condominium by at least a quarter of

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a century. Obviously, they do not take into account the statutes comprising the Condominium Act. These cases clearly do not apply, and do not support the proposition stated considering the nature of this case. The case at bar is a condominium case, which must be decided under condominium law, not the common law of mortgages which pre-dates the Florida Condominium Act.

If the primary concern of the District Court was abuse of the phase condominium concept, that problem is simply not present in this case and this Court does not have to reach that issue. Obviously, if the lender is involved in inequitable conduct, that would be grounds to deny foreclosure of the mortgage. Also, if the developer has not fulfilled his legal requirements in the Impact Statement, then the unit owners can sue for damages, sue to preclude the developer from phasing in the additional property, or sue to rescind the conveyance of the property submitted to the condominium form of ownership. The District Court's opinion improperly rewards the unit owners by giving them an unintended windfall, when they themselves have failed to invoke any of their legal remedies. More importantly, all of this is at the expense of Bank One, who did nothing but loan a substantial amount of money for the construction of the improvements, and duly record a mortgage in the Public Records so all of the unit owners would know before they received the conveyance of the property that it was encumbered. The District Court's opinion is legally, factually and equitably wrong.

CONCLUSION

It is clear that the question certified by the District Court is a question of great public importance, and should be answered in the affirmative. Bank One must be allowed to foreclose its mortgage as the trial court ruled in its Order determining liability. The opinion of the District Court is erroneous, both legally and factually, and should be quashed. This Court should reinstate the trial court's Order Granting Partial Summary Judgment, quash the opinion of the District Court and answer the certified question in the affirmative.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 31 day of August, 1992 to: all persons listed on the attached Schedule.

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