STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES

IN RE:

PETITION FOR DECLARATORY STATEMENT
OCEAN VILLAGE CLUB CONDOMINIUM ASSOCIATION, INC.

DS 97-015

Petitioner. Docket No. DS98004

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes (division) hereby issues this Declaratory Statement pursuant to Sections 718.501 and 120.565, Florida Statutes (1997).

PRELIMINARY STATEMENT

1. On December 17, 1997, the Division received a Petition for Declaratory Statement from the Ocean Village Club Condominium Association, Inc., (the Petitioner), by and through its counsel, Ronald W. Brown.

2. On January 15, 1998 the division sent the Notice of Receipt of the Petition for
Declaratory Statement to the Florida Administrative Weekly for publication, and a copy of the petition to the Joint Administrative Procedures Committee.

3. Also on January 15, 1998, the division requested that the Petitioner provide the following information: the statutory provision, rule or order that Petitioner believes applies to his set of circumstances, copies of the relevant condominium documents, a copy of the agreement with the successor developer and any other information which would show whether a declaration or phase amendment was recorded bringing the unbuilt units into existence. The letter advised the Petitioner that the 90 day period provided under section 120.565, Florida Statutes (1997) would be tolled pending receipt of the information requested.

4. On January 30, 1998, the Division published the Notice of Receipt of the Petition for Declaratory Statement in the Florida Administrative Weekly. No response to the Petition has been received to date.

5. On February 10, 1998, the Division received from Petitioner the requested information.

FINDINGS OF FACT

1. The Division is the state agency charged with enforcing Chapter 718, Florida Statutes, the Condominium Act, and the administrative rules promulgated thereunder.

2. The Petitioner is the condominium association responsible for the operation of the Ocean Village Club Condominium, a 348 unit condominium located in St. John's County, Florida, pursuant to chapter 718, Florida Statutes (1997).

3. The Declaration of Condominium for the Ocean Village Club Condominium was recorded on May 20, 1985. This is a phase condominium so, initially, the property comprising only
156 units were submitted to condominium form of ownership at the time the declaration was recorded.

4. Article IV of the Declaration describes the plan to develop the remaining units in phases and states, in part:

A. The developer plans to develop the Condominium in twenty-one (21) phases, (eighteen (18) if the Alternate Plot Plan is used) for a total of 348 units. Phases I, II, III, IV, V, VI, VII and VIII are being submitted to condominium ownership herewith. . . . Developer shall have the right, but not the obligation, to add additional phases to the Condominium. Developer shall have the absolute discretion as to whether or not to proceed with the development of any or all of the phases of this Condominium. Each subsequent phase will be consecutively numbered as Phases IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, IXX, XX, and XXI (stopping at XVIII if the Alternate Plot Plan is used) respectively, as each phase is added to the Condominium. ...

* * * * *

C. Phase I, II, III, IV, VI, VII, VIII consist of one (1) building each containing the following number and type of unit as follows:

<table>
<thead>
<tr>
<th>Phase</th>
<th>Number of Units per Building</th>
<th>Letter of Building</th>
<th>Type of Unit</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>18</td>
<td>A</td>
<td>I</td>
</tr>
<tr>
<td>II</td>
<td>18</td>
<td>B</td>
<td>I-A</td>
</tr>
<tr>
<td>III</td>
<td>18</td>
<td>C</td>
<td>I</td>
</tr>
<tr>
<td>IV</td>
<td>24</td>
<td>O</td>
<td>III</td>
</tr>
<tr>
<td>V</td>
<td>24</td>
<td>P</td>
<td>III</td>
</tr>
<tr>
<td>VI</td>
<td>18</td>
<td>D</td>
<td>II-A</td>
</tr>
<tr>
<td>VII</td>
<td>18</td>
<td>E</td>
<td>II</td>
</tr>
<tr>
<td>VIII</td>
<td>18</td>
<td>F</td>
<td>II</td>
</tr>
</tbody>
</table>

5. Article VII of the Declaration of Condominium states, in part:
A. Each unit shall have as an appurtenance thereto an undivided 1/156th share in the land, common elements, and limited common elements and in the common surplus.

B. The common expenses shall be borne by the condominium unit owners and the said unit owners shall share in the common surplus in the proportions set forth in paragraph A of this Article.

E. In the event and upon the submission of any additional phase hereto, the shares of each unit as specified herein shall be equal, and each unit shall have an equal undivided share in the land, common elements, limited common elements, surplus and expense. Each unit shall have an equal ownership in the Association and each unit shall have one (1) vote. The formula for determining a unit’s share of ownership, as each phase is added, shall be a fraction with the number one (1) as the numerator and with the denominator being equal to the total number of units in the Condominium. Assuming, for example, that the phases are added in sequence, the shares of ownership would be as follows:

<table>
<thead>
<tr>
<th>Phase</th>
<th>Undivided Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>IX</td>
<td>1/174</td>
</tr>
<tr>
<td>X</td>
<td>1/192</td>
</tr>
<tr>
<td>XI</td>
<td>1/216</td>
</tr>
<tr>
<td>XII</td>
<td>1/240</td>
</tr>
<tr>
<td>XIII</td>
<td>1/258</td>
</tr>
<tr>
<td>XIV</td>
<td>1/276</td>
</tr>
<tr>
<td>XV</td>
<td>1/294</td>
</tr>
<tr>
<td>XVI</td>
<td>1/312</td>
</tr>
<tr>
<td>XVII</td>
<td>1/330</td>
</tr>
<tr>
<td>XVIII</td>
<td>1/348</td>
</tr>
<tr>
<td>IXX</td>
<td>1/348</td>
</tr>
<tr>
<td>XX</td>
<td>1/348</td>
</tr>
</tbody>
</table>
6. Several amendments adding phases were recorded. The Eighth Amendment was recorded on or about March, 1987 and added Phase XV (18 units). The Ninth Amendment was recorded on or about July, 1987 and added Phase XVI (18 units). The Tenth Amendment was recorded on or about January, 1988 and added Phase XVIII (18 units). The Eleventh Amendment was recorded on or about March, 1988 and added Phase XIV (18 units). The Thirteenth Amendment was recorded on or about April, 1989 and added Phase X (18 units). The Fourteenth Amendment was recorded on or about January, 1990 and added Phase IX (18 units). As each amendment was recorded, the ownership shares were changed accordingly.

7. Amendment 15 was the last amendment to add phases. It added 102 units in phases VIII, XI, XII, XIII, XVII to the condominium. It was recorded in the public records of St. John's County, Florida on May 21, 1992, by the successor developer.

8. As of the date of the recordation of the Fifteenth Amendment, a total of 348 units had been created in the Condominium.

9. The Fifteenth Amendment, paragraph 9 states:

The undivided share in the common elements appurtenant to each unit in the condominium is an undivided 1/348 share and each unit's share of the common expenses and common surplus is a 1/348 share after the submission of phase VIII,

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3 Phases IXX, XX, and XXI add land only to the condominium and do not add any type of unit. See: Article IV-E of the Declaration.

2 The lands comprising Phase VIII were initially submitted to condominium form of ownership in the original Declaration of Condominium recorded in May, 1985. In any event, phases totaling 348 units were recorded and added to the Condominium.
phase XI, phase XII, phase XIII, and phase XVII, pursuant to the formula set forth in Paragraph E of Article VII of the Declaration.

10. According to the Petition, the original developer of the condominium turned over control of the Association several years ago. At the time of the turnover, five buildings encompassing 102 additional residential units had not been built. The Resolution Trust Corporation took control of the unused development rights and sold them to a successor developer who filed the additional units with the Bureau, and recorded the Fifteenth Amendment to the Declaration adding the units.

11. According to the Petition, the successor developer entered into an agreement with the Association to fund the budget deficit in lieu of paying the monthly assessments due on the unbuilt units.

12. The terms of the agreement with the successor developer were memorialized in Amendments 16 and 17 to the Declaration. The Sixteenth Amendment, paragraph 7, amended paragraph XXX of the original declaration and was recorded in December, 1996. The amendment provides the developer's guarantee for the 102 units described in the 15th Amendment and held by the successor developer. Paragraph 7 states, in part:

A. ASSESSMENTS NOT PAID BY THE DEVELOPER. As provided by Section 718.116(9)(a)(2), Florida Statutes (1995), the Developer shall be excused from payment of the common expenses and assessments related thereto on Condominium Units which it owns until January 1, 1999. However, the Developer recognizes the need to provide assurances that the expenses of management and operation of the condominium property are fully met during the development of the final phases of the condominium. Accordingly, the Developer guarantees to purchasers of units in Phases VIII, XI, XII, XIII, and XVI that during the Guarantee Period the monthly assessment for common expenses and limited common elements of the condominium imposed upon the unit owners will not exceed $220 and obligates itself to pay any amount of common expenses incurred during the Guarantee Period
and not produced by the assessments at the guaranteed level receivable from other unit owners and the Interim Assessment described below.

During the Guarantee Period, Developer shall not be required to pay monthly assessments on units it owns, but shall instead pay the sum of $1,200 per month to the Association as a monthly Interim Assessment, which shall not be included as revenue for budgeting purposes. This Interim Assessment shall be applied to any deficit in the Association's income for that month. If there is no such deficit, then the interim monthly assessment shall be placed in a reserve account maintained by the Association and shall be applied to any future deficits. If at the expiration of the Guarantee Period, there are funds remaining in that reserve account, they shall be transferred to any of the Association's reserve or general account. As individual units are sold by the Developer, the Association shall collect the regular monthly assessment from those unit owners and the Interim Assessment shall be reduced by 1/102 for each unit paying the regular assessment. Upon the expiration of the Guarantee Period, the Association shall collect regular monthly assessments from all owners of units in Phases VIII, XI, XII, XIII, and XVII. ...Emphasis added.

13. The Seventeenth Amendment, also recorded in December, 1996, recognized that "the Sixteenth Amendment did not conform to the requirements of chapter 718, Florida Statutes (1995) in that it erroneously . . . limits the guarantee to new purchasers." The documents were amended to show that the developer's guarantee applied to all unit owners. Thus, assessments for all unit owners could not exceed $220 during the guarantee period:

... Accordingly, the Developer guarantees to purchasers of units in Phases VIII, XI, XII, XIII, and XVI all unit owners that during the Guarantee Period the monthly assessment for common expenses and limited common elements of the condominium imposed upon the unit owners will not exceed $220.

14. At the time this Petition was filed, two of the buildings totaling 48 units have been completed and sold to owners who are now members of the Association. The remaining units are under construction.

15. On March 10, 1997, the Association filed a complaint with the Division against the
successor developer for failure to pay the deficit as per the developer's guarantee.\footnote{See Bureau of Condominiums, case number 970313 C'C 17983.} On March 25, 1997, the Association withdrew the complaint stating that the successor developer had paid all deficit guarantee payments due and owing to the Association.

16. According to the Petition, the Association has discovered a need to install security gates at the two entrances to the condominium property and desires to levy a special assessment to cover the cost of the installation.

17. The Developer's Guarantee does not reference special assessments.

18. The association has the power to "make and collect assessments against members to defray the costs, expenses and losses of the Condominium." Article III, paragraph 1.(a) of the Articles of Incorporation. The association is authorized to "exercise and enjoy all powers rights and privileges granted to or conferred upon corporations formed to operate condominium buildings under the provisions of chapter 718, Florida Statutes (1977) as amended, now or hereafter in force." Article III, paragraph 3, Articles of Incorporation. Article X, paragraph 1, of the Articles of Incorporation further provides that:

All assessments paid by the owners of Condominium units for the maintenance and operation of the condominium shall be utilized by the Association to pay for the costs of said maintenance and operation, as set forth in the Declaration and By-laws.

19. The By-laws of the Association, provide that:

The Board of Directors shall have all of the powers vested in it under common law, and pursuant to the Florida Condominium Act, as amended from time to time... such powers shall include, but shall not be limited to:

(b) Making and collecting assessments from members for the purposes of operating and managing the condominium, paying all costs and expenses...

(c) Maintenance and repair of the condominium property...
(d) Reconstruction of improvements after any casualty, and the further improvement of the condominium property . . . (Emphasis added). By-laws, Article V, section 11.

. . . Special assessments shall not exceed the sum of $100.00 per year, per unit, unless the same has been approved by at least 66% of the vote at a duly called meeting of the association ... By-laws, Article VII section 5(c); and

. . . All assessments paid by members of the Association for the maintenance and operation of the condominium shall be utilized by the Association for the purposes of said assessment. By-laws, Article VII, section 7.

20. The petition seeks a statement from the division, on three questions:

1. Whether under section 718.116 (9)(a)2, Florida Statutes and Rule 61B-22.004, Florida Administrative Code, the special assessment may be apportioned equally among "units in existence before construction of the new units, new units built by the subsequent developer and sold to owners who are now members of the association and who are beneficiaries of the developer's deficit funding guarantee, and phantom units."

2. If, under section 718.116 (9)(a)2, Florida Statutes and Rule 61B-22.004, Florida Administrative Code it is required that the units be assessed equally, and currently the new unit owners pay monthly regular assessments in an amount totaling $42 less than the maximum assessment guaranteed in the budget deficit agreement, whether these owners owe the additional $8.00 or whether the successor developer must owe the difference.

3. Whether pursuant to section 718.116 (9)(a)2, Florida Statutes and Rule 61B-22.004, Florida Administrative Code, the special assessment levied against phantom units falls within the deficit funding guarantee.
CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 718.501, and 120.565, Florida Statutes (1996).

2. Section 120.565(1), Florida Statutes (1997) states as follows:

   (1) Any substantially affected person may seek a declaratory statement regarding an agency’s opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner’s particular set of circumstances.

Thus, the purpose of a declaratory statement is to set out the agency’s opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to a petitioner in his or her particular set of circumstances only. In this case, the Petitioner is the Condominium Association seeking a ruling from the division as to how to allocate a special assessment to be levied for the construction of two security gates, under the provisions of section 718.116(9)(a)2., Florida Statutes and Rule 61B-22.004, Florida Administrative Code. A statement issued on this matter requires an investigation of the specific terms of the Petitioner’s declaration and phase amendments to determine if there is a conflict with the Condominium Act and the applicable rules promulgated thereunder. The facts concerning this inquiry are unique in that this is a post turnover association with a successor developer guarantee. Further, the Petitioner as the condominium's association, is substantially affected by the statutory provisions cited above and has standing to seek this declaratory statement.

3. The Petition alleges that "there are currently three categories of units: units in existence before construction of the new units, new units built by the subsequent developer and sold
to owners who are now members of the association and who are beneficiaries of the developer's deficit funding guarantee, and phantom units." This statement is not supported by the statute, rules, case law or by the terms of the Declaration and its phase amendments.

4. Neither the act nor the documents distinguish between unbuilt but declared (phantom) units and constructed units. Neither the act nor the documents distinguish between the units in existence before construction of the new units and the new units. Under this declaration and its phase amendments, all the units were created at the time the declaration or its phase amendments was recorded, regardless of the state of construction of the units:

"[a]n amendment of a declaration is effective when properly recorded in the public records of the county where the declaration is recorded." Sec. 718.110(3), Florida Statutes Stat. (1979). Thus, property submitted to condominium ownership by amendment becomes subject to the declaration upon recording of the amendment by operation of section 718.104(2). Just as the failure to complete the construction prior to recording the declaration does not prevent the formation of the condominium on the subject property, the failure to complete the construction in a phase prior to recording the amendment does not prevent the inclusion of the land in the condominium, because the amendment is effective when recorded. Any construction that a condominium was not created because the property was not later developed would put the declaration at odds with the specific statutory language and would leave the recorded amendment with no effect at all. Winkelman v. Toll, 661 So. 2d 102 (Fla. 4th DCA 1995).

See also: § 718.104, 718.403, Florida Statutes; Estancia Condominium Ass'n, Inc. v. Sunfield Homes, Inc., 619 So. 2d 1008 (Fla. 2d DCA 1993); Hyde Park Condominium, Ass'n v. Estero Island Real Est., Inc., 486 So. 2d 1 (Fla. 2d DCA 1986); DBPR v. Sports Shinko (Florida) Co. Ltd., (Ellzey 12/8/97) Final Order No. BPR -97-09929.

5. Section 718.115(2), Florida Statutes, provides that funds for the payment of common expenses shall be collected by assessments against unit owners in the proportions or percentages provided in the declaration and its phase amendments.
6. Section 718.116(1)(a), Florida Statutes, requires that all unit owners are liable for assessments for common expenses which come due while he or she is the unit owner. Section 718.116(2), Florida Statutes, provides that the liability for assessments may not be avoided by waiver of the use or enjoyment of any common element or by abandonment of the unit for which the assessments are made. Section 718.116(9)(a), Florida Statutes, provides that no unit owner may be excused from the payment of his or her share of the common expense of a condominium unless all unit owners are likewise proportionately excused from payment.

7. Thus, all the units in the Ocean Village Club Condominium, whether built or unbuilt, must be assessed in the same proportion and percentages of ownership as stated in the declaration and its amendments. s. 718.116, Florida Statutes. In this case that proportion is 1/348.

8. The only exception to the provision that all unit owners must pay assessments on the their units in equal proportions to the other unit owners is the developer guarantee provision of section 718.116(9)(a)2, Florida Statutes, which states that:

   2. A developer or other person who owns condominium units or who has an obligation to pay condominium expenses may be excused from the payment of his or her share of the common expense which would have been assessed against those units during the period of time that he or she has guaranteed to each purchaser in the purchase contract, declaration, or prospectus, or by agreement between the developer and a majority of the unit owners other than the developer, that the assessment for common expenses of the condominium imposed upon the unit owners would not increase over a stated dollar amount and has obligated himself or herself to pay any amount of common expenses incurred during that period and not produced by the assessments at the guaranteed level receivable from other unit owners. The guarantee may provide that after an initial stated period, the developer has an option or options to extend the guarantee for one or more additional stated periods.

9. In this case, the Sixteenth and Seventeenth Amendments to the declaration were recorded establishing the successor developer's guarantee that assessments would not rise over $220
per unit, per month. Thus, this successor developer would not be liable for assessments on the units that it currently owns, (built or unbuilt) as long as the guarantee is in effect.

10. The Petition describes the owners of the new units built by the subsequent developer as being the only "beneficiaries of the developer's deficit funding guarantee." This conclusion is not supported by the terms of the documents or the applicable statute and rule cited herein. Rule 61B-22.004, Florida Administrative Code (7/11/93), "Guarantees of Common Expenses Under Section 718.116(9)(a)2., Florida Statutes", states:

(1) Establishment of the guarantee. If a guarantee is not included in the purchase contracts, declaration, or prospectus, any agreement establishing a guarantee shall be effective only upon the approval of a majority of the voting interests of the of the unit owners other than the developer. Approval shall be expressed at a meeting of the unit owners, voting in person or by limited proxy; or by agreement, in writing without a meeting if provided in the bylaws. Such guarantee shall meet the requirements of this rule.

(2) Guarantee period. The period of time for the guarantee shall be indicated by a specific beginning and ending date or event.
(a) The ending date or event shall be the same for all of the unit owners of the condominium, including unit owners in different phases of phase condominiums, but may vary for each condominium operated by a multi-condominium association.
(b) The guarantee may provide for different intervals of time during a guarantee period with different dollar amounts for each such interval.
(c) The guarantee may provide that after the initial stated period, the developer has an option to extend the guarantee for one or more additional stated periods. The extension of a guarantee is limited to extending the ending date or event; therefore, the developer does not have the option of changing the level of assessments guaranteed.

(3) Maximum level of assessments. The stated dollar amount of the guarantee shall be an exact dollar amount for each type of unit identified in the declaration. Regardless of the stated dollar amount of the guarantee, assessments charged to a unit owner shall not exceed the maximum obligation of the unit owner based on the total amount of the adopted budget and the unit owner's proportionate ownership of the common elements. (Emphasis added)

The Seventeenth Amendment, recorded in December, 1996, recognized that "the Sixteenth
Amendment did not conform to the requirements of chapter 718, Florida Statutes (1995) in that it erroneously ...limits the guarantee to new purchasers." The documents were amended to show that the developer's guarantee applied to all unit owners. Assessments for all unit owners in all phases, except the developer, can not exceed $220 per unit, per month, during the guarantee period. Thus, all non-developer unit owners are beneficiaries of the developer's deficit funding guarantee. See also: §718.116(9)(a)2., Florida Statutes; In re: Springwood Condominium. Ass'n of Naples, Inc., Docket No. DS90065 (Solares/ Final Dec. Stmt.: 5/1/91) (amendment guaranteeing level of assessments must apply to all unit owners in all phases).

11. For the foregoing reasons the answer to questions 1 and 2 is that all the non-developer unit owners are liable for a 1/348 share of any assessment for common expenses, up to the $220 per unit, per month, guaranteed amount. Under section 718.116 (9)(a)2, Florida Statutes, and Rule 61B-22.004, Florida Administrative Code, and the terms of the Ocean Village Club Declaration and its amendments, the non-developer units must be assessed equally. Thus all non-developer unit owners, not only the new unit owners, should be currently paying monthly regular assessments in an amount totaling $42 less than the maximum assessment guaranteed in the guarantee.

12. In question number 3, the Petition asks whether the special assessment levied against "phantom units" falls within the deficit funding guarantee. The successor developer is the only owner of the declared but unbuilt (phantom) units. As stated above, the status of construction of the declared but unbuilt units does not affect their liability for assessments. The developer would owe assessments on its units if there were no guarantee in existence.

13. The Association in this case seeks to fund the installation of the security gates through a special assessment. All condominium unit owners were responsible for amounts found to be
expended by successor developer for maintaining, repairing, or replacing common elements. Ocean Beach Resort, Inc. v. Rodack, 586 So.2d 365 (Fla. 3d DCA 1991). However, in this case, the Association is seeking to impose a special assessment to pay for the installation of security gates. The situation is rather unique in that normally, this type of capital improvement project is considered a developer expense. Also, normally, the developer guarantee is in effect only during the period of developer control of the Association.

14. Rule 61B-22.004, Florida Administrative Code (7/11/93), explains how payments are made by the developer during the guarantee:

(4) Cash funding requirements during the guarantee. The cash payments required from the guarantor during the guarantee period shall be determined as follows:
(a) If at any time during the guarantee period the funds collected from unit owner assessments at the guarantee level are not sufficient to provide payment, on a timely basis, of all common expenses, including the full funding of the reserves unless properly waived, the guarantor shall advance sufficient cash to the association at the time such payments are due; and,
(b) No revenues or capital contributions other than regular periodic assessments, and cash payments by the guarantor as provided in paragraph (4)(a) of this rule, may be utilized for the payment of common expenses during the guarantee period. This restriction includes items such as interest revenues, vending revenues, laundry revenues, other non-assessment revenues and capital contributions.

(5) Calculation of guarantor's final obligation. The guarantor's total financial obligation to the association at the end of the guarantee period shall be determined on the accrual basis using the following formula:
(a) The guarantor shall fund the total common expenses incurred during the guarantee period; less,
(b) The total periodic assessments earned by the association from the unit owners other than the guarantor during the guarantee period regardless of whether the actual level charged was less than the guaranteed amount.

15. Under rule 61B-22.004(5), Florida Administrative Code, the guarantee obligation is not calculated at the time of the assessment. The guarantee is calculated as an expense in accordance with Rule 61B-22.004(5), Florida Administrative Code. The developer's total financial obligation
to the association at the end of the guarantee period is determined on the accrual basis using a formula by which the developer funds the total common expenses incurred during the guarantee period less the total periodic assessments earned by the association from the unit owners other than the developer during the guarantee period regardless of whether the actual level charged was less than the guaranteed amount. In this case the developer is making periodic payments which would be deducted also from the total common expenses incurred during the guarantee period. Thus, if this were a regular monthly assessment payment, all the unit owners other than the developer should be paying their assessments for common expenses at the same rate as their documents provide (1/348). Under the guarantee, the unit owners other than the developer could not be assessed more than the guaranteed amount, ($220). Because of the guarantee, the developer would not owe 1/348 for each unit it owns but would pay the deficit regardless of whether the actual level charged was less than the guaranteed amount according to the formula in rule 61B-22.004. At the end of the guarantee period all of the expenses incurred during the guarantee are added up and the assessments charged to the unit owners during the guarantee period are added up. If there is an excess of expenses over the unit owner assessments then the developer is obligated to make a payment in this amount to the association. If the developer overpays his obligation because he is making $1,200 interim payments, then the association would be obligated to reimburse the developer. However, in this case, the parties agreed to amend Article III, paragraph A, to provide that any excess would be kept by the Association in its reserve or general account:

During the Guarantee Period, Developer shall not be required to pay monthly assessments on units it owns, but shall instead pay the sum of $1,200 per month to the Association as a monthly Interim Assessment, which shall not be included as revenue for budgeting purposes. This Interim Assessment shall be applied to any deficit in the Association's income for that month. If there is no such deficit, then the interim
monthly assessment shall be placed in a reserve account maintained by the Association and shall be applied to any future deficits. **If at the expiration of the Guarantee Period, there are funds remaining in that reserve account, they shall be transferred to any of the Association's reserve or general account.** (Emphasis added.)

16. The question then becomes is the developer liable for a special assessment imposed by a post turnover association? The expense for installation of a security gate would appear to be a capital improvement and the assessment is sought to be imposed by a post turnover unit owner controlled board levied against (among all other unit owners) a developer who is currently holding units for sale. Normally, the guarantee period has expired by the time the board is controlled by the unit owners, so there would be no prohibition on the board levying a special assessment.

17. "Common Expenses" are defined as "all expenses and assessments which are properly incurred by the association for the condominium." § 718.103(8), Florida Statutes (1997). "Special assessment" is defined as "any assessment levied against unit owners other than the assessment required by the budget adopted annually." § 718.103(21), Florida Statutes (1997).

18. Section 718.116 (10), Florida Statutes provides that:

The specific purpose or purposes of any special assessment approved in accordance with the condominium documents shall be set forth in a written notice of such assessment sent or delivered to each unit owner. The funds collected pursuant to a special assessment shall be used only for the specific purpose or purposes set forth in such notice. However, upon completion of such specific purpose or purposes, any excess funds will be considered common surplus, and may, at the discretion of the board, either be returned to the unit owners or applied as a credit toward future assessments.

19. Section 718.116(9)(b), Florida Statutes, states as follows:

If the purchase contract, declaration, prospectus, or agreement between the developer and a majority of unit owners other than the developer provides for the developer or another person to be excused from the payment of assessments pursuant to paragraph (a), **no funds which are receivable from unit purchasers or owners and payable**
to the association or collected by the developer on behalf of the association, other than regular periodic assessments for common expenses as provided in the declaration and disclosed in the estimated operating budget pursuant to s. 718.503(1)(b)6. or s. 718.504(20)(b), shall be used for payment of common expenses prior to the expiration of the period during which the developer or other person is so excused. This restriction applies to funds including, but not limited to, capital contributions or startup funds collected from unit purchasers at closing. (Emphasis added.)

20. Since section 718.116(9), Florida Statutes, provides that no funds other than periodic assessments may be used for the payment of common expenses during the guarantee period, money from special assessments cannot be used to pay for common expenses. Thus, the section precludes special assessments during a guarantee period.

21. Further, since the expense is for a capital improvement the developer may be able to exclude this expense from its guarantee obligation. This is a post-turnover unit owner controlled association. Section 718.301(3)(a), Florida Statutes (1997), provides that if, after turnover, a developer holds units for sale in the ordinary course of business, the association may not assess the developer as a unit owner for capital improvements without approval in writing by the developer.

22. Thus, the developer must approve the expenditure in writing pursuant to section 718.301(3)(a), Florida Statutes. If this expenditure is not approved by the developer, then the assessments should be levied only against the non-developer owners.

23. Under section 718.301(3)(b), Florida Statutes, the unit owner controlled association cannot take any action that would be detrimental to the sale of units by the developer. However, an increase in assessments for common expenses without discrimination against the developer is not deemed to be detrimental to the sales of units.

24. In this situation, the association could treat the expense of the installation of the gates
as a regular expense to be paid by regular assessment rather than as a one time special assessment. If the association is assessing less than the guaranteed level of assessments, the association, could, with the approval of the developer, amend the annual budget to accommodate the expense of adding the gate.

WHEREFORE, the division DECLARES that:

1. The answer to questions number 1 and 2 is that generally monthly regular assessments must be apportioned in the same proportions and percentages stated in the declaration and its phase amendments, which in this condominium is 1/348 of the common expenses regardless of the time that the particular unit was purchased. However, in this case, the developer-owned units are excused from payment of the regular monthly assessments because there is a developer guarantee in effect.

2. The answer to question number 3, is that under the terms of the declaration, sections 718.104, 718.115, 718.116 (9)(a)2. Florida Statutes, and existing case law, the "phantom units" exist for purposes of assessments, regardless of their state of completion, as they were added to the condominium property at the time the declaration and its phase amendments were recorded. In this case, the developer owned units do not pay regular periodic assessments due to the developer guarantee.

3. In this case, the association, controlled by the unit owners, may not impose and collect a special assessment for the installation of security gates. Such an assessment could not be made without the developer's written consent. Even if the developer consented, section 718.116(9)(b), Florida Statutes, prohibits the imposition of a special assessment during the guarantee period. Money from such special assessment cannot be used to pay for any common expenses
including capital improvements.

4. The Association may, however, choose to raise the funds needed to install the security gates by amending the budget and increasing the amount of the regular periodic assessments. This could only be done if the unit owners and the developer agree to the addition of the gates. Under the guarantee, all non-developer unit owners would pay only if the new assessment payment does not rise over the $220 guaranteed amount. The developer would be liable for the excess amount not covered by the regular periodic assessments paid by the other unit owners.

DONE this 24th day of April, 1998, at Tallahassee, Leon County, Florida.

Sincerely,

[Signature]

Melanie Anderson, Deputy Secretary

Department of Business and Professional Regulation
Northwood Centre
940 North Monroe Street
Tallahassee, Florida 32399-1030

RIGHT TO APPEAL

THIS DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, (1996) AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL ACCOMPANIED BY APPROPRIATE FILING FEES, AND WITH THE AGENCY CLERK FOR THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, 1940 NORTH MONROE STREET, TALLAHASSEE, FLORIDA 32399-0792, WITHIN 30 DAYS OF THE RENDITION OF THIS DECLARATORY STATEMENT.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Declaratory Statement has been furnished by U.S. Mail to Ronald Brown, Attorney for the Ocean Village Club Condominium Association, 66 Cuna Street, Suite A, St. Augustine, Florida, 32084, this _____ day of April, 1998.

______________________________
Kristie L. Harris
Docket Clerk

Copies furnished to:

Martha F. Barrera,
Assistant General Counsel

Dr. Philip Nowicki, Chief
Bureau of Condominiums

Jonathan Peet, C.P.A.,
Chief Financial Analyst

Don Smith, Supervisor
Enforcement Section

Leann Ramseur, REDS
Bureau of Condominiums