STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES,	)	
Petitioner,	)	Case No. 02-2842
vs.	)	
RICHARD WALTERS AND ARSENIO CARABETTA,	)	
Respondents.	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on May 14 and 15, 2003, in St. Augustine, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joseph S. Garwood, Esquire
Department of Business and Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-2202

For Respondents: John Bamberg, Esquire
Post Office Box 409
St. Augustine, Florida 32085

STATEMENT OF THE ISSUE

The issues are whether Respondents are guilty of the following: (a) breach of fiduciary relationship in violation of

Section 718.111(1)(a), Florida Statutes; (b) failure to respond in writing to written inquiries in violation of Section 718.112(2)(a)2., Florida Statutes; (c) failure to properly notice a meeting in which regular assessments were discussed in violation of Section 718.112(2)(c), Florida Statutes; (d) failure to proportionately excuse payment of common expenses for all units owners after doing so for one unit owner in violation of Section 718.116(9)(a), Florida Statutes; and (e) willfully and knowingly violating Chapter 718, Florida Statutes, in violation of Section 718.501(d)(4), Florida Statutes.

PRELIMINARY STATEMENT

On or about June 17, 2002, Petitioner Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Petitioner) issued a Notice to Show Cause to Ocean Gate Phase I Condominium Association, Inc. (Ocean Gate), Respondent Richard Walters (Mr. Walters) and Respondent Arsenio Carabetta (Mr. Carabetta). The Notice to Show Cause was directed to Mr. Walters and Mr. Carabetta in their individual capacities as members of Ocean Gate's board of directors.

On or about July 8, 2002, Petitioner received a request for hearing from Mr. Walters, Mr. Carabetta, Homer Barrow, and Ocean Gate's board of directors. Petitioner referred the case to the Division of Administrative Hearings on July 19, 2002.

A Notice of Hearing, dated August 23, 2002, scheduled the hearing for September 30, 2002.

Petitioner filed a Motion for Continuance on September 12, 2002. The undersigned issued an order denying this motion.

On September 19, 2002, Petitioner filed a Second Motion for Continuance. An order dated October 3, 2002, granted a continuance and rescheduled the hearing for November 13 and 14, 2002.

Petitioner filed a Motion to Compel on October 21, 2002. The motion was granted in an order dated November 12, 2002.

On November 5, 2002, Petitioner filed a Motion to Dismiss Ocean Gate as a party in this case. An order dated November 12, 2002, granted the motion.

On November 8, 2002, Mr. Carabetta filed a Motion for Continuance. An order dated November 12, 2002, granted the motion and rescheduled the hearing for February 11 and 12, 2003.

On January 22, 2003, Mr. Walters and Mr. Carabetta filed a Motion for Continuance. An order dated January 24, 2003, granted the motion and rescheduled the hearing for February 26 and 27, 2003.

On February 7, 2003, the parties filed a Joint Motion for Continuance. An order dated February 11, 2003, granted the motion, requiring the parties to file a status report on or before March 10, 2003.

Petitioner filed a Status Report and Request for Continued Abeyance. An order dated March 13, 2003, placed the case in abeyance and required the parties to file a status report on or before April 10, 2003.

On April 11, 2003, Petitioner filed a Status Report, requesting that the case be rescheduled for hearing. A Notice of Hearing dated April 14, 2003, scheduled the hearing for May 14 and 15, 2003.

On April 16, 2003, Petitioner filed a Motion for Leave to File Depositions of Witnesses in Lieu of Live Testimony. The undersigned initially reserved ruling on this motion, then granted it in part and denied it in part on the record during the hearing. The motion was denied as it related to Richard Weaver's April 22, 2003, deposition testimony prior to the appearance of counsel for Mr. Walters and Mr. Carabetta.

On April 28, 2003, Mr. Walters and Mr. Carabetta filed a Motion for Protective Order and a Motion to Strike. In an Order dated April 29, 2003, the undersigned construed the Motion for Protective Order as a response in opposition to Petitioner's Motion for Leave to File Depositions of Witnesses in Lieu of Live Testimony. The April 29, 2003, Order reserved ruling on the Motion for Leave to File Depositions of Witnesses in Lieu of Live Testimony until such time that Richard Weaver's deposition

was filed with the Division of Administrative Hearings. The Motion to Strike was denied on the record at the hearing.

On April 28, 2003, Mr. Walters filed a Motion to Dismiss. The motion was denied in an order dated May 12, 2003.

On April 28, 2003, Mr. Walters filed a Motion for Separate Hearing and Motion for Continuance. The motions were denied in an order dated April 29, 2003.

On April 28, 2003, Mr. Carabetta filed a Motion for Separate Hearing, Motion for Non-Attorney Representative to Also Serve as an Interpreter and Motion for Continuance. The motions were granted in part and denied in part in an order dated April 29, 2003.

On May 5, 2003, Petitioner filed a Motion for Relief from Pre-Hearing Order. The motion was granted in an order dated May 12, 2003.

On May 5, 2003, Mr. Walters filed a letter requesting a continuance. The request was denied in an order dated May 7, 2003.

On May 7, 2003, Mr. Walters filed a letter requesting a continuance. After a telephone conference on May 8, 2003, the undersigned denied the request for further continuance in an order dated May 13, 2003.

On May 12, 2003, Petitioner filed a Motion to Strike Inadmissible Offer of Compromise and Motion in Limine. The motion was granted on the record at the hearing.

When the hearing commenced, Mr. Walters and Mr. Carabetta filed a Motion to Dismiss. The motion is hereby denied.

As a preliminary matter, Petitioner filed a Motion for Official Recognition of Court Records in a Related Proceeding. The motion is hereby granted.

During the hearing, Petitioner presented the testimony of Sama Sayer Carstens, Esquire; Edna Griffith; Thomas Klinehoffer, Rosanne Perrine, Esquire; Johnathan Peet; Eurkie McLenore; and Tracy Corbitt. Petitioner offered nine exhibits (P1-P9) that were accepted into evidence. Exhibit No. P9 is Petitioner's investigative report, which is attached as Exhibit No. 1 to Richard Weaver's April 22, 2003, deposition (Exhibit No. P1). For the reasons set forth on the record, Mr. Weaver's direct testimony on April 22, 2003, prior to the appearance of counsel for Mr. Walters and Mr. Carabetta, is not considered as evidence.

Mr. Walters and Mr. Carabetta presented the testimony of Allan Scott, Esquire, and John Williams.

Mr. Carabetta testified on his own behalf. He offered 13 exhibits (C1-C13) that were admitted into evidence.

Mr. Walters was sworn in but did not testify on his own behalf at the hearing. Mr. Walters' request to offer a post-hearing deposition in lieu of testimony was granted. Mr. Walters offered four exhibits (R51-R54) that were accepted into evidence.

On May 19, 2003, the undersigned issued a Posthearing Order. The order provided the parties with the opportunity to depose certain witnesses and to submit the depositions in lieu of testimony.

On May 20, 2003, Petitioner filed a Motion for Costs Associated with Interpreter. The motion was denied in an order dated May 22, 2003.

On June 30, 2003, Richard Weaver filed a letter explaining that he had accepted service of a subpoena on June 28, 2003, requiring him to appear for a deposition on July 2, 2003. According to the letter, Mr. Weaver would not be available to testify on July 2, 2003, due to long-standing travel plans. Mr. Walters responded with a letter requesting that Mr. Weaver be required to testify from his travel destination. Additionally, Petitioner filed a Motion to Quash Subpoena and for Protective Order. In an order dated July 2, 2003, the undersigned quashed the subpoena.

On July 7, 2003, Mr. Walters filed the telephone deposition of Homer Barrow in lieu of testimony at hearing. Mr. Barrow's testimony is hereby accepted into evidence.

On July 7, 2003, Mr. Walters filed his own unsworn statement, recorded via telephone on June 17, 2003. Mr. Walters' statement is hereby accepted into evidence over Petitioner's July 8, 2003, objection for the following reasons: (a) Mr. Walters had been sworn during the hearing with permission to submit his testimony post-hearing; (b) Petitioner's counsel admitted that he recognized Mr. Walters' voice in the July 17, 2003, telephone statement and could vouch for him; (c) Petitioner's counsel had an opportunity to cross-examine Mr. Walters in that instance; and (d) Petitioner's counsel agreed to proceed with the taking of Mr. Walters testimony/statement by telephone without condition as to the giving of an oath.

On July 8, 2003, Petitioner filed the telephone deposition of James Robinson in lieu of testimony at hearing. Mr. Robinson's deposition is accepted into evidence.

During the hearing, Mr. Walters ordered a copy of the hearing transcript. After the hearing, the court reporters' office advised the undersigned's office that Mr. Walters had refused to pay for the transcript. Accordingly, no transcript has been filed with the Division of Administrative Hearings.

Petitioner filed a Proposed Recommended Order on July 22, 2003. Respondents filed a Proposed Recommended Order on July 21, 2003.

FINDINGS OF FACT

1. Ocean Gate is a unit-owner controlled condominium located in St. Augustine, Florida. A three-member board of directors governs Ocean Gate. However, Article V of Ocean Gate's Articles of Incorporation states as follows in relevant part:

> This corporation shall have three (3) directors initially. Thereafter, the number of directors may be increased from time to time in the manner provided by the Bylaws, but shall never be fewer than three.

2. Ocean Gate's original developer was Robert Laurence/Ocean Gate Development, Inc. On or about June 16, 1999, the developer recorded Ocean Gate's Declaration of Condominium in the official record book 1417, page 1932, of the public records of St. Johns County, Florida. At that time, Ocean Gate's directors, as set forth in the Articles of Incorporation, were Roger W. McClain, Leslie Gallagher, and Robert J.L. Laurence.

3. The property at issue includes two buildings (2.1 and 2.2) containing a total of 10 units. Units 600, 604, 608, 612, 616, and 620 are located in Ocean Gate's 2.1 building. Units 605, 609, 613, and 617 are located in Ocean Gate's 2.2 building.

4. On June 16, 1999, the following deeds were recorded in the official record book of St. Johns County, Florida: (a) unit 600 to Mr. and Mrs. Grissom (later sold to the Mr. Barrow/Flag Development Corporation); (b) unit 604 to Mr. and Mrs. McNeely; (c) unit 608 to Dr. and Mrs. Blankenship; (d) unit 612 to Mr. and Mrs. Klinehoffer; (e) unit 616 to Mr. and Mrs. Pittman (later sold to Mr. and Mrs. Weaver); and (f) unit 620 to Mr. and Mrs. Carabetta.

5. The unit owners in the 2.1 building had to lend the developer funds to complete the construction of their units. Even so, these unit owners had to foreclose on that loan and spend additional funds to complete the construction on their units.

6. On or about July 1, 1999, Ocean Gate issued a Notice of Owners Meeting. The meeting was scheduled for July 17, 1999. The agenda attached to the notice included the following: (a) call to order; (b) establish a quorum; (c) waiver of 60-day notice; (d) introduction of May Management Services, Inc. (May Management); (e) official approval of management contract; (f) discussion of board members; (g) discussion of contract; and (h) adjournment.

7. Ocean Gate held its first unit owners' meeting on July 17, 1999. Mr. Klinehoffer, Mr. and Mrs. Pittman, Dr. and Mrs. Blankenship, Mr. and Mrs. McNeely, Mr. Grissom, and Mr. and

Mrs. Carabetta attended the meeting. The developer did not attend the meeting.

8. During the July 17, 1999, meeting, the unit owners accepted the resignation of Les R. Gallagher, as a director, and elected the following directors/officers: Mr. Grissom, president; Mr. Kleinhoffer, vice president; and Mrs. Pittman, secretary/treasurer. The representative of May Management announced that the developer had turned over $8,308.44 to the unit owners.

9. Ocean Gate conducted a unit owners meeting on December 4, 1999. Mr. Grissom and Dr. Blankenship attended the meeting. Mrs. Pittman attended by proxy. A representative of the developer was also in attendance. During the meeting, the unit owners approved Ocean Gate's 2000 operating budget.

10. On or about January 14, 2000, Mrs. Pittman resigned as a director and secretary/treasurer.

11. A unit owners meeting took place on January 29, 2000. Mr. Grissom, Dr. and Mrs. Blankenship, Mr. Carabetta, Mr. and Mrs. McNeely, and Mr. Weaver were in attendance.

12. In a notice dated March 22, 2000, Ocean Gate scheduled a unit owners meeting for April 15, 2000. The agenda included the following: (a) call to order; (b) establish a quorum; (c) approval of minutes of January 29, 2000; (d) financial report; (e) old business (release of lien payment for John M.

Williams); (f) new business, including election of director; (g) date of next meeting; and (h) adjournment. During the meeting, Mr. Weaver was elected to fill a vacancy on Ocean Gate's board of directors.

13. The Carabettas' unit, which is located in the 2.1 building, is the largest unit on the property. Mr. Carabetta refused to pay some of Ocean Gate's assessments because he did not believe Ocean Gate was properly maintaining his unit. In time, he filed at least one lawsuit against Ocean Gate and its board of directors. He also filed defamation and discrimination lawsuits against some of the unit owners in their individual capacities.

14. Mr. Carabetta testified at hearing that Ocean Gate failed to maintain his unit while expending funds to maintain the units of the Weavers, the Blankenships, the McNeelys, and the Klinehoffers. There is no persuasive evidence that the directors of Ocean Gate improperly refused to pay for maintenance/repair of the common elements in the 2.1 building, including the limited common elements directly affecting Mr. Carabetta's unit.

15. The 2.2 building was the subject of a foreclosure suit. It was sold on the courthouse steps to Flag Development Corporation on June 13, 2000. Pursuant to that sale, Flag Development Corporation also bought two additional condominium

developments, Ocean Gate Phase II and Ocean Gate Phase III, which are not a part of the property at issue here.

16. The record contains a Certificate of Title conveying real and personal property to Flag Development Corporation. The certificate refers to a description of real and personal property, "Exhibit A," which is not attached to the copy of the certificate in the record.

17. John Williams and Mr. Barrow are business associates affiliated with Flag Development Corporation. After receiving title to the 2.2 building, their company did nothing more than clean up the property. They did no construction, maintenance, or repair work.

18. In two letters, Jones & Pellicer, Inc., civil engineers and land surveyors, responded to Mr. Weaver's request for a survey to determine the square footage for each unit. The first letter dated May 31, 2000, referred to the survey of units 600, 604, 608, 612, 616, and 620 in the 2.1 building. The second letter dated July 31, 2000, referred to the survey of units 605, 609, 613, and 617 in the 2.2 building. According to the letters, the surveys determined the square footage for each unit using the floor area, as defined by Section 4.7-Unit Boundaries "A" and "B" in the Ocean Gate Declaration of Condominium.

19. Mr. Walters purchased the four units in Ocean Gate's 2.2 building from John Williams/Flag Development Corporation in late July or early August 2000. The purchase price was approximately one million dollars.

20. The record contains a copy of the corporate warranty deed conveying the 2.2 building to Mr. Walters. The deed states that the transfer of title is "subject to taxes for the current year, covenants, restrictions, and easements of record, if any." The attachments to the deed describing the property include Schedule A, Exhibit A, and Exhibit A Continued. The document identified as Exhibit A Continued, and which appears to be signed by the original developer, is not legible.

21. When Mr. Walters bought the four units, the 2.2 building had a roof, windows, walls, and doors from which the square footage of each unit could be determined. The building was about 45 percent complete but not sufficiently complete to qualify any of the units in the building for a certificate of occupancy.

22. Mr. Walters hired a contractor to complete the construction on his units. The construction, which involved a considerable sum of money, included work on the common elements and the interior of the units.

23. There were liens on the 2.2 building for Ocean Gate's assessments when Mr. Walters purchased his four units.

Mr. Walters refused to pay any past or ongoing assessments on his four units. In turn, Ocean Gate refused to expend any funds to maintain or repair the 2.2 building.

24. Ocean Gate continued to impose assessments on all unit owners, including Mr. Walters and Mr. Carabetta. Ocean Gate also had to impose special assessments on some unit owners to make up the shortfall when Mr. Walters and/or Mr. Carabetta refused to pay their regular assessments.

25. On October 17, 2000, Ocean Gate filed a Revised Claim of Lien against Mr. Walters for unpaid assessments and late charges. The Revised Claim of Lien alleged that Mr. Walters owed Ocean Gate a balance of $20,983.42.

26. In a letter dated October 18, 2000, Ocean Gate advised Mr. Walters that a foreclosure suit would be instituted if he did not pay the assessments and charges.

27. Early in 2001, Ocean Gate filed a Complaint seeking foreclosure of the liens against Mr. Walters in Case No. CA-01-85, in the Circuit Court, Seventh Judicial Circuit, in and for St. Johns County, Florida.

28. On or about March 1, 2001, Mr. Walters filed a Motion to Dismiss in Case No. CA-01-85, in the Circuit Court, Seventh Judicial Circuit, in and for St. Johns County, Florida. Mr. Walters took the position that he was not obliged to pay condominium assessment until a certificate of occupancy was

issued and that the original developer had never relinquished control of Ocean Gate.

29. Mr. Walters and Mr. Carabetta together owned over 51 percent of the total square footage in all units. Therefore, they controlled a majority of Ocean Gate's voting interests, which are directly proportional to the square footage in each unit. Specifically, Mr. Walters controlled a total of 36.207 percent of the membership voting interests and Mr. Carabetta controlled a total of 15.990 percent of the membership voting interests.

30. Mr. Weaver was Ocean Gate's president in September 2001. Mr. McNeely and Mr. Klinehoffer were also directors/officers. All three of the directors were named as defendants in one or more of Mr. Carabetta's lawsuits.

31. On or about September 26, 2001, Mr. Weaver issued the second notice of Ocean Gate's annual meeting of unit owners. The notice included the following agenda items: (a) roll call; (b) reading of minutes of last meeting; (c) reports of officers; (d) election of directors; (e) unfinished business; (f) original resolutions and new business; and (g) adjournment.

32. The annual meeting of Ocean Gate's unit owners took place on October 27, 2001. During the meeting Mr. Walters and Mr. Carabetta, in concert with one additional unit owner, used their majority voting interests to elect themselves as

directors. Mr. Walters and Mr. Carabetta received 64 percent of the votes. Dr. Blankenship, receiving 84.69 percent of the votes, became Ocean Gate's third director and "acting" president.

33. After the election of the directors, Mr. Walters expressed his frustration about the liens on his property and the pending foreclosure action involving at that time approximately $50,000 in assessments and interest. In an effort to resolve the conflict, Dr. Blankenship proposed the following as a global concept:

> 1. Homer Barrow and the newly elected Ocean Gate Phase I Condo Association Board will attempt to satisfy the concerns of the Carabetta's [sic] with regard to correction of deficiencies on their unit.
>
> 2. The Carabettas will dismiss all lawsuits and complaints against other unit owners and boards and pay overdue assessments.
>
> 3. Richard Walters will contribute $10,000 to the Phase I Association as final settlement of lien/foreclosure action.
>
> 4. Unit owners will end foreclosure action against Richard Walters and forgive existing liens against Richard Walters.
>
> 5. It is understood that the above action and commitments are interdependent and sequential in the order listed above.

Minutes of Meeting of the Unit Owners, October 27, 2001.

34. Mr. Walters initially objected to paying the $10,000. However, John Williams persuaded Mr. Walters to join in the proposed agreement.

35. After Dr. Blankenship's motion regarding the proposed agreement was seconded, the unit owners who were present at the October 27, 2001, meeting verbally approved the proposed agreement. The unit owners never reduced the proposed agreement to writing. They never signed a copy of the minutes containing the proposed agreement.

36. Mr. Klinehoffer was the only unit owner who was not present at the meeting. Mr. Klinehoffer had not given Mr. Weaver or any other unit owner his proxy to vote in favor of a settlement of the pending litigation against Mr. Walters. More importantly, the consideration of assessments and a settlement agreement regarding the foreclosure suit were not included as agenda items in the notice of the unit owners' meeting.

37. On November 17, 2001, Ocean Gate's directors held another meeting. They elected the following officers: Dr. Blankenship, president; Mr. Walters, vice-president; and Mr. Carabetta, secretary/treasurer.

38. During the November 17, 2001, meeting, Mr. Walters wanted to discuss implementing the proposed settlement agreement from the October 27, 2001, unit owners' meeting. In other

words, Mr. Walters wanted Ocean Gate to drop the foreclosure suit against him in exchange for $10,000. However, the minority unit owners asserted that Mr. Carabetta had not dropped his lawsuits against Ocean Gate and the other unit owners in the 2.1 building.

39. Mr. Weaver took the position that the proposed settlement agreement was not valid unless it was implemented sequentially beginning with coming to terms with Mr. Carabetta and Mr. Carabetta dropping all of his lawsuits. Mr. McNeely asserted that he would not agree to participate in the global agreement. Mr. Klinehoffer stated that he did not agree to the global agreement and specifically objected to any change in Mr. Walters' assessment responsibilities or liabilities.

40. On December 10, 2001, Mr. Walters and Mr. Carabetta conducted a board of directors meeting. A facsimile transmission had been sent to Dr. Blankenship as notice of the meeting, but he was out of town and had no actual prior knowledge about the meeting or its agenda.

41. The notice for the December 10, 2001, board of directors meeting was posted on Ocean Gate's property 48 hours in advance of the meeting. The agenda attached to the notice made reference to a non-specific item identified as "approval of resolutions" without reference to the subject matter and without mention of assessments or settlement agreements.

42. During the December 10, 2001, board of directors meeting, Mr. Walters proposed a resolution to allow him to pay $10,000 in lieu of his past due assessments, to release the liens on his four units, and to dismiss the foreclosure action. After Mr. Walters proposed the resolution, Mr. Carabetta provided a second and voted to pass the resolution.

43. Mr. Weaver and Mr. McNeely protested that Mr. Walters could not vote due to a conflict of interest and that without Mr. Walters' vote, the board of directors did not have a quorum. Mr. Walters then recused himself. Next Mr. Weaver contacted Dr. Blankenship by telephone. However, on faulty advice from Mr. Carabetta's personal attorney, Mr. Walters and Mr. Carabetta refused to let Dr. Blankenship vote on the resolution. Mr. Walters and Mr. Carabetta also refused to let Ocean Gate's attorney, Roseanne Perrine, participate in the meeting by telephone. Before the meeting adjourned, Mr. Walters declared that the resolution had passed and the matter was closed based on Mr. Carabetta's sole affirmative vote.

44. Next, Mr. Walters proposed that Ocean Gate terminate its contract with May Management. Mr. Walters then introduced a representative of Coastal Realty and Property Management, Inc. (Coastal). Over Mr. Weaver's objections, Mr. Walters and Mr. Carabetta voted to replace May Management with Coastal. The greater weight of the evidence indicates that May Management was

a reputable company with no major complaints from the unit owners.

45. In a letter dated December 11, 2001, Ms. Perrine reminded Mr. Walters and Mr. Carabetta that her firm represented Ocean Gate in the foreclosure action against Mr. Walters. She claimed that the resolution passed on December 10, 2001, was invalid. She asserted that she would withdraw as counsel of record if requested to dismiss the lawsuit based on the December 10, 2001, resolution.

46. In a letter dated December 12, 2001, Mr. Carabatta enclosed a copy of a check made payable to Ocean Gate in the amount of $8,062.54. According to the letter, the check represented the amount of Mr. Carabetta's assessments though year 2001. The letter stated that the check had been delivered to Coastal for deposit into an operating account for Ocean Gate. Finally, the letter demanded that May Management stop all foreclosure proceedings against Mr. Carabetta and release the lien of record against his property.

47. On December 12, 2001, Mr. Carabetta authorized Coastal to open new bank accounts for Ocean Gate using his check as an initial deposit.

48. Dr. Blankenship wrote a letter dated December 13, 2001, to Mr. Walters and Mr. Carabetta. In the letter,

Mr. Blankenship objected to the lack of notice regarding the December 10, 2001, board of directors meeting and its agenda. Dr. Blankenship's letter complained that he had not been allowed to vote when he was called during the meeting.

49. On or about December 16, 2001, the Circuit Court Judge in Case No.: CA-01-85, in the Seventh Judicial Circuit, in and for St. Johns County, Florida, entered an Order Granting in Part and Denying in Part Defendants Motion to Dismiss. The order states as follows in pertinent part:

> Third, the Defendants assert the Plaintiff is without standing to assess maintenance fees, file liens, or foreclose any lien because the developer never turned over control of the association to the unit owners pursuant to Article 8.5 of the Declaration of Condominium of Ocean Gate Phase I, A Condominium. Nothing contained in Article 8.5 of the Declaration supports the Defendant's assertion. The Association was given the authority to assess fees in Paragraph 7 of the Declaration, not Article 8.5. Paragraph 7 states:
>
> > Assessments. To provide the funds necessary for proper operation and maintenance of the Condominium, the Phase I Association has been granted the right to make, levy, and collect Assessments and Special Assessments against all Unit Owners and Units.
>
> Fourth, the Defendants' assert the condominium association had no authority to charge condominium fees since the buildings have not yet been completed, nor have certificates of occupancy been issued.

According to Ris Investment Group, Inc. v. Dep't of Business and Professional Regulation, 695 So. 2d 357 (Fla. 4th DCA 1997), the question before the Court is whether, in accordance with the Declaration, the term "unit" was intended to encompass raw land and/or condominiums which had not yet been purchased, or just land upon which the condominium units had already been built and/or purchased. A review of the pertinent portion of the Declaration is necessary to answer the foregoing questions.

Paragraph 7 of the Declarations states:

> Assessments. To provide the funds necessary for proper operation and maintenance of the Condominium, the Phase I Association has been granted the right to make, levy, and collect Assessments and Special Assessments against all Unit Owners and Units.

Paragraph 3 of the Declaration states:

> Definitions. 'Unit' means a part of the Condominium Property, which is to be subject to exclusive private ownership as defined in the Condominium Act.
>
> 'Condominium Property' means the parcel of real property described in Exhibit "A" attached hereto, together with all improvements built or to be built thereon, and the easements and rights appurtenant thereto.

A review of Exhibit 'A' and 'A-1' reveals that the term "Condominium Property" refers to the entire condominium complex, not just one unit.

Reading the pertinent portions of the Declaration, in toto, it appears as though

> the parties intended that the Association could assess fees from "units" which encompass any portion of the condominium property, whether improvements have been built or are to be built thereon. Accordingly the Defendant's assertion is without merit and the Motion to Dismiss in this regard is denied.

50. Around the first of January 2002, Mr. Walters tendered a check to Ocean Gate in the amount of $10,000. The front side of Mr. Walter's check, number 652, indicates that it was for association dues in full through December 31, 2001. The backside of the check states, "Endorsement of this instrument constitutes payment in full for association dues on 605, 609, 613, and 617, Mediterranean Way, thru December 31, 2001." There is no evidence that the $10,000 check was deposited to Ocean Gate's bank account.

51. After the December 2001 meeting, the Weavers, McNeelys, Klinehoffers, and Blankenships sent numerous letters by certified mail to Mr. Walters and Mr. Carabetta. The letters protested the manner in which Mr. Walters and Mr. Carabetta had conducted the December 10, 2001, and subsequent meetings, demanding that they remove themselves as directors, and inquiring about many other matters relating to the operation and management of Ocean Gate. Many of the letters specifically requested Mr. Walters and Mr. Carabetta to respond in writing

within 30 days as required by Section 718.112(2)(a)2., Florida Statutes.

52. Mr. Carabetta responded to one of the complaint letters. All subsequent complaint letters were referred to Alan Scott, Esquire. Mr. Scott did not provide a written response to the letters unless specifically directed to do so by Mr. Walters and/or Mr. Carabetta. Mr. Scott responded to one complaint letter.

53. On or about January 24, 2002, Mr. Scott, writing on behalf of Mr. Walters and Mr. Carabetta, sent a letter to Dr. Blankenship and May Management. The letter stated that a majority of Ocean Gate's voting interests (Mr. Walters and Mr. Carabetta) had entered into written agreements to remove Dr. Blankenship from his position as a director.

54. On January 29, 2002, Mr. Carabetta filed a Notice of Voluntary Dismissal without Prejudice in one of his lawsuits naming Ocean Gate as defendant. That case was Case No. CA01-858 in the Circuit Court, Seventh Judicial Circuit, in and for St. Johns County, Florida. Competent evidence indicates the Mr. Carabetta dismissed all of his lawsuits against his neighbors after the December 2001 meeting.

55. Ocean Gate's directors issued a notice dated

February 4, 2002. The notice indicated that the directors would meet on February 7, 2002. The agenda for that meeting included the following: (a) call to order; (b) roll call; (c) appointment of new director; (d) fill officer vacancies; (e) consider discharge of association attorneys and appointment of new association legal counsel; (f) consider discharge of May Management and appointment of Coastal; and (g) consider change of association mailing address and resident agent.

56. During the directors' meeting on February 7, 2002, Mr. Walters and Mr. Carabetta appointed Mr. Barrow as a director. The directors then elected Mr. Walters as president, Mr. Barrow as vice-president, with Mr. Carabetta retaining his office as secretary/treasurer.

57. Next, the directors voted to make the following changes: (a) to fire May Management and hire Coastal as Ocean Gate's management company; (b) to discharge Ms. Perrine and retain Mr. Scott as Ocean Gate's attorney; and (c) to update the corporate report data showing Mr. Scott as registered agent.

58. In a letter dated February 8, 2002, Mr. Klinehoffer, Mr. Weaver, Mr. McNeely, and Dr. Blankenship advised Mr. Walters and Mr. Carabetta that the February 7, 2002, directors' meeting had not been properly noticed. The letter alleged that the notice had not been posted on the property 48 hours in advance

of the meeting and that none of the minority unit owners had received notice by fax, phone, or letter.

59. By letter dated March 1, 2002, Mr. Walters, Mr. Carabetta and Mr. Barrows advised Ms. Perrine's law firm that her services as counsel for Ocean Gate were terminated. The letter directed Mr. Perrine to turn over her foreclosure file to Mr. Scott, who would replace her as counsel for Ocean Gate.

60. By letter dated March 25, 2002, the minority unit owners objected to the termination of Ms. Perrine as Ocean Gate's attorney.

61. During an April 10, 2002, directors' meeting, Mr. Carabetta and Mr. Barrows voted to accept Mr. Walters' payment of $10,000 in satisfaction of his past due assessments, penalties and interest. Thereafter, Mr. Walters tendered his check for $10,000 on the same day that Ocean Gate's new attorney, Mr. Scott, dismissed the foreclosure suit against Mr. Walters.

62. In a letter dated April 17, 2002, Mr. Weaver protested the actions taken by Mr. Walters, Mr. Carabetta, and Mr. Barrows during the April 10, 2002, directors' meeting. Additionally, the minority unit owners continued to send Mr. Walters, Mr. Carabetta, and Mr. Barrow letters complaining about various problems in the management of Ocean Gate and requesting a

response within 30 days. The minority unit owners did not receive any responses to these letters.

63. In a letter dated April 17, 2002, Petitioner's investigator, Eurkie McLemore, advised Mr. Walters about the complaints filed against him and Mr. Carabetta by the minority unit owners. Ms. McLemore requested a response to the allegations by April 30, 2002. The letter contained the following warning:

> Please note that if you as a MEMBER OF THE BOARD OF DIRECTORS AND OFFICER OF THE ASSOCIATION fail to respond to this letter, or if another complaint is received, the Division will pursue an enforcement resolution, which may result in civil penalties of up to $5,000 per violation. Therefore, you are urged to respond appropriately to this warning letter and to use your best efforts to comply with sections 718.111(1)(a), 718.116(9)(a), 718.112(2)(c), 718.112(2)(a)2., Florida Statutes, now and in the future.

64. By letter dated April 30, 2002, Ocean Gate's attorney, Mr. Scott, responded to Ms. McLemore's letter. According to the letter, Mr. Walters and Mr. Carabetta denied the allegations and did not indicate that any corrective action would be taken.

65. In June 2002 Ocean Gate's directors authorized Mr. Scott, as Ocean Gate's counsel, to file a voluntary dismissal with prejudice in the foreclosure suit against Mr. Walters.

66. Mr. Walters sold his units at an on-site auction in July 2002. Mr. Walters executed warranty deeds for the three successful bidders in August 2002.

67. As of January 31, 2002, Mr. Walters owed Ocean Gate past-due assessments plus interest in the amount of $62,943.56. The accrued interest on that amount as of June 16, 2003, was $15,767.36.

68. Mr. Walters paid his quarterly assessments at the end of March and June 2002. He also paid Ocean Gate $10,000 when the foreclosure suit was dismissed in June 2002. Therefore, the total amount that Mr. Walters owed Ocean Gate as of June 16, 2003, was $68,710.92

69. During the hearing, Mr. Walters presented evidence that he was entitled to an offset for his expense in maintaining and repairing the 2.2 building. However, the evidence presented is insufficient to determine whether Mr. Walters' expenses were related to maintenance and repair of common elements. The greater weight of the evidence indicates that Mr. Walters is not entitled to an offset.

CONCLUSIONS OF LAW

70. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties of this proceeding. Sections 120.569 and 120.57(1), Florida Statutes.

71. Petitioner has the burden of proving by a preponderance of the evidence that Mr. Walters and Mr. Carabetta are guilty of the following: (a) breach of fiduciary relationship in violation of Section 718.111(1)(a), Florida Statutes; (b) failure to respond in writing to written inquiries in violation of Section 718.112(2)(a)2., Florida Statutes; (c) failure to properly notice a meeting in which regular assessments were discussed in violation of Section 718.116(2)(c), Florida Statutes; (d) failure to proportionately excuse payment of common expenses for all unit owners after doing so for one unit owner in violation of Section 718.116(9)(a), Florida Statutes; and (e) willfully and knowingly violating Chapter 718, Florida Statutes, in violation of Section 718.501(d)(4), Florida Statutes. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

72. The Declaration of Condominium states as follows in relevant part:

> 3.2 'Assessment' means a proportionate share of the funds required for the payment of Common Expenses including, without limitation, Special Assessments, which from time to time is assessed directly against each Unit Owner.
>
> * * *
>
> 3.12 'Condominium Documents' means this Declaration and the attached exhibits

setting forth the nature of the property rights in the Condominium and the covenants running with the land governing these rights. All of the Condominium Documents will be subject to the provisions of this Declaration. The order of priority of the Condominium Documents will be as follows: (1) this Declaration; (2) Articles of Incorporation; (3) Bylaws; and (4) Rules and Regulations.

3.13 'Condominium Property' means the parcel of real property described in Exhibit "A" attached hereto, together with all improvements built or to be built thereon, and the easements and rights appurtenant thereto.

* * *

3.15 'Developer' means Ocean Gate Development, Inc., a Florida corporation, and the successors and assigns of its development rights.

* * *

3.27 'Developer' means Ocean Gate Development, Inc., its assignees, nominees and successors.

* * *

3.29 'Unit' means a part of the Condominium Property, which is to be subject to exclusive private ownership as defined in the Condominium Act.

3.30 'Unit Owner or Owner of Unit' means the record owner of a Unit.

* * *

4.3 Share of Common Elements and Common Expenses. There shall be appurtenant to each Unit an undivided share of the Common Elements. The undivided shares, stated as a

percentage, in the Common Elements which are appurtenant to each Unit are based upon the total square footage of each Unit in uniform relationship to the total square footage of each other Unit in the Condominium as set forth in Exhibit "D" attached hereto and made a part hereof. The proportion and manner of sharing Common Expenses and owning Common Surplus shall also be calculated as set forth in Exhibit "D".

7.0 Assessment. To provide the funds necessary for proper operation and management of the Condominium, the Phase I Association has been granted the right to make, levy and collect Assessments and Special Assessments against all Unit Owners and Units. The making and collection of Assessments against Unit Owners for Common Expenses shall be pursuant to the Bylaws and subject to the following provisions:

7.1 Authority to Impose. The Phase I Association, through its Board of Directors, shall have the power to determine and fix the sums necessary to provide for the Common Expenses . . . In addition, the Board of Directors shall have the power to levy Special Assessments against Units in their respective percentages if a deficit should develop in the payment of Common Expenses during any period that the level of Assessments has not been guaranteed by the Developer.

7.2 Share of Common Expense. Each Unit Owner shall be liable for a share of the Common Expenses and shall share in the Common Surplus in the same proportion as his ownership of the Common Elements . . . .

* * *

7.4 Lien for Assessments. The Phase I Association is hereby granted a lien on each Unit for any unpaid Assessments together with interest in the amount of ten percent

(10%) per annum, which lien shall also secure reasonable attorneys' fees and costs incurred by the Phase I Association incident to the collection of such Assessment or enforcement of such lien and a late fee in the amount of five percent (5%) of the unpaid installment or as otherwise determined by the Board. . . . Additionally, a Unit Owner shall be jointly and severally liable with the previous Owner for all unpaid Assessments that came due up to the time of the conveyance.

* * *

7.6 Special Assessments. The Board may impose special or individual Assessments on Unit Owners to meet expenses not anticipated to be incurred on a regular or annual basis or to cover the cost and expense of maintenance, repairs or replacements of a Unit for which the Unit Owner is responsible hereunder.

* * *

8.4 Membership and Voting Rights. The members of the Phase I Association shall consist of all of the record Owners of Units. Voting rights shall be allocated based upon the Unit Member's percentage share interest in the Common Elements so that 100% of the voting rights will be allocated among each of the Unit Owners based upon each Unit Owner's percentage share interest in the Common Elements set forth on Exhibit "D".

8.5 Transfer of Control. The initial Board of Directors, as set forth in the Articles of Incorporation, shall manage all of the affairs of this Condominium and shall approve all of the decisions of the Phase I Association and shall serve as the directors of the Phase I Association until the Developer voluntarily relinquishes control or until the first annual members' meeting

which shall be held not later than one (1) year after the recording of the Declaration. Provided, however, when Unit Owners other than the Developer own fifteen percent (15%) of the Units that will be operated ultimately by the Phase I Association, the Unit Owners shall be entitled to elect not less than one-third (1/3) of the members of the Board. Unit Owners other than the Developer shall be entitled to elect not less than a majority of the members of the Board (a) three (3) years after sales by the Developer have been closed on fifty (50%) percent of the Units that will be operated ultimately by the Phase I Association, or (b) three (3) months after sales by the Developer have been closed on ninety percent (90%) of the Units that will be operated ultimately by the Phase I Association, or (c) when all of the Units that will be operated ultimately by the Phase I Association have been completed and some of them have been sold and none of the other Units are being offered for sale by the Developer in the ordinary course of business, or (d) when some of the Units have been conveyed to purchasers and none of the others are being constructed or offered by sale by the Developer in the ordinary course of business, or (e) seven (7) years after recordation of the Declaration, whichever shall first occur. The Developer shall be entitled to elect not less than one (1) member of the Board so long as the Developer holds for sale in the ordinary course of business five percent (5%) or more of the Units.

* * *

16. Amendment.

16.1 By Developer. An Amendment to this Declaration of Condominium made by the Developer shall be evidenced by a certificate setting forth such Amendment executed by the Developer with the

formalities of a deed . . . and shall become effective when such certificate is recorded according to law. . . . [A]s long as the Developer owns five percent (5%) or more of the Units, the Developer may amend this Declaration of Condominium for any purpose . . . and such Amendment shall be effective without joinder of any Unit Owners, mortgagees or the Phase I Association; provided, however, that any Amendment or the Declaration of Condominium pursuant to this paragraph 16.1 which would be material and adverse to the interest of Unit Owners shall first be approved in writing by each Unit Owner and each Institutional Mortgagee holding a first mortgage upon any Unit to the extent such Units are affected by such material Amendment . . . .

16.2 By Unit Owners. An Amendment to this Declaration of Condominium made by Unit Owners shall be evidenced by: (a) a certificate setting forth such Amendment executed by the appropriate officers of the Phase I Association, with the formalities of a deed . . . and (b) an affidavit . . . certifying that the owners of seventy-five percent (75%) or more of the Units voted in favor of the Amendment. . . . This Declaration of Condominium shall not be amended without the approval of the Developer . . . if any of the following conditions exist: (i) the Developer owns five percent (5%) or more of the units; or (ii) such Amendment purports to modify, restrict, limit or otherwise affect any right of the Developer . . . [A]ny Amendment pursuant to this paragraph 16.2 which would be material and adverse to the interests of Unit Owners, shall first be approved in writing by each Unit Owner and each Institutional Mortgagee holding a first mortgage upon any Unit to the extent such Units are affected by such material Amendment.

* * *

> 16.5 Prohibited Amendments. Except as otherwise provided in this Declaration, no Amendment shall be passed which shall:
>
> * * *
>
> (a) [C]hange the proportional percentage by which a Unit Owner shares the Common Expenses and owns the Common Surplus unless the record owner thereof and all record owners of liens thereon shall join in the execution of such Amendment and unless a majority of record owners of all Units approve the Amendment;
>
> * * *
>
> (d) Discriminate against any Unit Owner or against any Unit or class or group of Units comprising part of the Condominium Property, unless the record owners of all affects Units and Institutional Mortgagees thereon shall join in the execution and acknowledgment of the Amendment.

The record does not contain a copy of the following exhibits, which are listed as attachments to the Declaration of Condominium: (a) Exhibit A-1, Site Plan Showing Roadway Easement; (b) Exhibit B, Survey, Plot Plan, and Floor Plans; (c) Exhibit C, Surveyor Certificate; (d) Exhibit D, Identification of each Unit and Percentage Interest in Common Elements; (e) Exhibit E, Phase I Amenities Lease; and (f) Exhibit F, Phase I Amenities.

73. Ocean Gate's bylaws provide as follows in pertinent part:

> 3.1 Qualification. The members of the Association shall consist of all Unit Owners of Units of Ocean Gate Phase I, A Condominium.
>
> * * *
>
> 4.3 Regular Meetings. Regular meetings of the members of the Association shall be held on the first business day of the month of March of each year.
>
> 4.4 Special Meetings. Special meetings of the members for any purpose may be called by the President, and shall be called by the President or Secretary at the request, in writing, of either a majority of the Board of Directors or of a majority of the Voting Members. Such request shall state the purpose of the proposed meeting.
>
> * * *
>
> 4.4.3 A special meeting of the Unit Owners to recall a member or members of the Board of Directors may be called by ten percent (10%) of the voting interests giving notice of the meeting as required for a meeting of Unit Owners, and the notice shall state the purpose of the meeting.
>
> * * *
>
> 4.4.5 Business transacted at all special meetings shall be confined to the objects stated in the notice thereof.
>
> 4.5 Notice. Written notice of every meeting, special or regular, of the members of the Association, stating the time, place, and object thereof, shall be delivered to each Condominium Unit or mailed to each

Voting Member at such member's address as shown in the books of the Association at least fourteen (14) continuous days prior to such meeting.

* * *

4.7 Transfer of Control of the Association. When Unit Owners other than the Developer own fifteen percent (15%) or more of the Units in the Condominium, the Unit Owners other than the Developer shall be entitled to elect no less than one-third (1/3), but no more than two-fifths (2/5), of the members of the Board of Directors of the Association. Unit Owners other than the Developer are entitled to elect not less than a majority of the members of the Board of Directors of the Association upon the earlier to occur of the following:

(a) Three (3) years after fifty percent (50%) of the Units that will be operated ultimately by the Association have been conveyed to purchasers.

(b) Three (3) months after ninety percent (90%) of the Units that will be operated ultimately by the Association have been conveyed to purchasers.

* * *

(d) When some of the Units have been conveyed to purchasers and none of the others are being constructed or offered by sale by the Developer in the ordinary course of business;

* * *

4.10 Vote Required to Transact Business. When a quorum is present at any meeting, a vote of the majority of the Voting Interests present and voting shall decide any question brought before the meeting. If the question is one, which requires more than a majority

vote by express provision of the Condominium Act or the Declaration of Condominium, Articles of Incorporation or these By-Laws . . . such express provision shall govern and control the number of votes required.

A majority of the Voting Interests of the Association present in person or represented by proxy, shall constitute a quorum at all meetings of the members for the transaction of business, except as otherwise provided by statute or the Condominium Documents.

* * *

5.1 Number. The affairs of the Association shall be managed by a Board of Directors, consisting of three (3) directors.

5.3 First Board of Directors. The first Board of Directors shall consist of three (3) persons appointed by the Developer, who shall hold office and exercise all powers of the Board at the pleasure of the Developer but not later than the Unit Owners' Initial Meeting.

5.4 Vacancy and Replacement. If the office of any director becomes vacant by reason of death, resignation, retirement, disqualification, removal from office or otherwise, a majority of the remaining directors at a special meeting of directors duly called for this purpose, shall by closed ballot vote choose a successor or successors who shall hold office for the unexpired term in respect to which such vacancy occurred. If the remaining directors are unable to agree on a successor, then the Association shall hold an election in accordance with the provisions hereof.

* * *

5.5.2 Proxies. Proxies shall in no event be used in electing the Board of Directors,

either in general elections or elections to fill vacancies caused by recall, resignation or otherwise.

5.5.3 Notice.

(1) Not less than 60 days before a scheduled election, the Association shall mail or deliver . . . to each unit owner entitled to a vote, a first notice of the date of the election.

* * *

5.5.6 Quorum. There is no quorum requirement or minimum number of votes necessary for election of the members of the Board of Directors, however, at least 20 percent of the Voting Interests must cast a ballot in order to have a valid election of members of the Board of Directors.

* * *

5.5.10 Interim Vacancies. Any vacancy occurring on the Board prior to the expiration of a term, except in the case of a vacancy caused by recall, may be filled by the affirmative vote of the majority of the Board of Directors, even if the remaining directors constitute less than a quorum or by the sole remaining director.

* * *

5.6 Removal. Directors may be removed with or without cause by an affirmative vote of a majority of the Voting Interests. A special meeting of the Voting Members may be called for this purpose by 10% of the Voting Interest upon giving notice of such meeting to all Voting Members as provided in Section 3.5 hereof, such notice to state the purpose of the special meeting.

* * *

5.7 Powers and Duties of Board of Directors. All of the powers and duties of the Association under the Condominium Act and the Condominium Documents shall be exercised by the Board of Directors . . . The Board of Directors shall have, without limitation, the following powers and duties:

5.7.1 Assessments. To make and collect Assessments and Special Assessments against members to pay the expense incurred by the Association and the power to make and assess members for capital improvements and replacements to the Common Elements, Units, or other portions of the Condominium Property pursuant to the Declaration of Condominium . . . .

* * *

6.2 Regular Meetings. Regular Meetings of the Board may be held at such time and place as shall be determined, from time to time, by a majority of the directors. Notice of all regular meetings shall be given to each director, personally or by mail, telephone or telegraph, at least 48 hours in advance of the time named for such meeting. Adequate notice of all regular meetings, which shall specifically incorporate an identification of agenda items, shall be posted conspicuously on the Condominium Property at least 48 hours preceding the meeting for the attention of the Unit Owners except in an emergency.

6.3 Special Meetings. Special meetings of the Board may be called by the President on 48 hours notice to each director. Special meetings shall be called by the President or Secretary in like manner and on like notice upon the written request of two (2) directors.

6.4 Waiver of Notice. No notice of a Board meeting shall be required if the directors meet by unanimous written consent.

* * *

6.6 Quorum. A quorum at a director's meeting shall consist of a majority of the entire Board. The acts approved by a majority of those present at a meeting at which a quorum is present, shall constitute the act of the Board, except when approval by a greater number of directors is required by the Condominium Documents.

* * *

8.1 The Association shall act through its Board of Directors and only the following matters shall require an affirmative vote of the Voting Members of the Association:

* * *

(7) Amendment of the Declaration [by] 3/4 of the Voting Interest of the Voting Members owning Units in the Condominium the Declaration of which is to be amended.

* * *

(9) Election of Directors and Officers [by a] majority of Voting Interests of the Voting Members.

(10) Removal of Directors and Officers [by a] majority of Voting Interests of the Voting Members.

* * *

10.2(a) Budget. The Board of Directors shall adopt a detailed budget for each calendar year which budget will include the estimated funds required to pay common expenses and provide and maintain funds for the foregoing accounts . . . as may be required by the Condominium Act.

* * *

> (c)(1) The Estimated Operating Budget which is Attachment 3 to the Prospectus is the budget the Developer intends to adopt as the formal budget for the Condominium. The Unit Owners of Units that have been sold by the Developer will be assessed for Common Expenses at the rates as stated in said budget, and the Developer will be assessed for the amounts by which the Common Expenses exceed the amounts assessed against the Owners of Units sold by the Developer.
>
> * * *
>
> 14.1 By-Laws. The By-Laws of the corporation may be altered, amended or repealed, unless specifically prohibited herein, at any regular or special meeting of the members by a three-fourths (3/4) vote of the Voting Interests of the Association. No modification or amendment to the By-Laws shall be valid unless set forth or annexed to a duly recorded amendment to the Declaration of Condominium.

The record does not contain a copy of the Estimated Operating Budget or the Prospectus referred to in Section 10.2(c)(1) of the bylaws. They are not listed as attachments to any of the condominium documents.

Breach of Fiduciary Duty and Disproportionate Assessments

74. Section 718.111(1)(a), Florida Statutes, states that "[t]he officers and directors of the association have a fiduciary relationship to the unit owners."

75. The original developer relinquished control of Ocean Gate for the following reasons: (a) he recorded the Declaration of Condominium in June 1999; (b) he failed to attend the properly noticed organizational meeting in July 1999 during which the unit owners elected new directors; (c) he gave $8,308.44 of the association's funds to the newly organized Ocean Gate at the July 1999 meeting; (d) he sent his representative to the December 4, 1999, meeting during which the unit owners adopted a proposed budget for 2000. See Section 8.5 of the Declaration of Condominium.

76. Section 718.301, Florida Statutes, provides as follows in pertinent part:

> (1) Following the time the developer relinquishes control of the association, the developer may exercise the right to vote any developer-owned units in the same manner as any other unit owner except for purposes of reacquiring control of the association or selecting the majority members of the board of administration.
>
> * * *
>
> (4) At the time that unit owners other than the developer elect a majority of the members of the board of administration of an association, the developer shall relinquish control of the association and the unit owners shall accept control.

77. Section 718.116, Florida Statutes, provides as follows in pertinent part:

> (1)(a) A unit owner, regardless of how his or her title has been acquired, including by purchase at foreclosure sale or by deed in lieu of foreclosure, is liable for all assessments which come due while he or she is the unit owner.
>
> * * *
>
> (9)(a) A unit owner may not be excused from payment of the unit owner's share of common expenses unless all other unit owners are likewise proportionately excluded from payment, except as provided in subsection (1) and in the following cases.

Based on the record, none of the exceptions to Section 718.116(9)(a), Florida Statutes, are applicable here.

78. Regardless of whether Mr. Walters became a unit owner or a successor developer when he purchased his four units, he owed "assessments" as defined in paragraph 7 of the Declaration of Condominium. The assessments applied to each of his "units" located on the "condominium property" as defined respectively in paragraphs 3.29 and 3.13 of the Declaration of Condominium.

79. Mr. Walters and Mr. Carabetta breached their fiduciary relationship to the unit owners in violation of Section 718.111(1)(a), Florida Statutes, by acting in Mr. Walters' interest to the detriment of other unit owners. They forgave Mr. Walters' past due assessments in excess of $50,000 and dismissed the foreclosure suit in exchange for his offer to pay $10,000, without reducing the assessments for other unit owners contrary to Section 718.116(9)(a), Florida Statutes. Other unit

owners were required to make up the shortfall by paying special assessments.

80. Any argument that Mr. Walters and Mr. Carabetta merely exercised their authority to implement the October 27, 2001, settlement agreement, allegedly unanimously agreed upon, lacks merit for several reasons. First, Mr. Klinehoffer was not at the meeting and did not give anyone a written proxy to vote on matters relating to assessments and/or settlement agreements. Second, consideration of assessments and settlement agreements was not identified in the agenda attached to the meeting notice as required by Sections 4.4, 4.4.5, 4.5, 6.2. and 6.3 of the bylaws. Third, the unit owners did not reduce the agreement to writing and sign it so as to give their written consent to an action, material and adverse to their interests, that was equivalent to an amendment to the Declaration of Condominium's provisions relating to assessments. See Section 16, Declaration of Condominium. Fourth, the proposed settlement agreement/amendment was never approved by 75 percent of the voting interests. See Section 16, Declaration of Condominium.

81. Finally, the minority unit owners made it clear that they no longer supported the settlement agreement at the November 2001 meeting during which Mr. Walters and Mr. Carabetta attempted to implement the agreement in a manner that was not interdependent and sequential. In fact, Mr. Carabetta took the

position during the November 2001 meeting that he was not required to drop all of his lawsuits against his neighbors in order to implement the agreement in favor of Mr. Walters.

Improper Notice

82. Section 718.112(2)(c), Florida Statutes, provides as follows in relevant part:

> Notice of any meeting in which regular assessments against unit owners are to be considered for any reason shall specifically contain a statement that assessments will be considered and the nature of any such assessments.

83. As set forth above, the October 27, 2001, proposed settlement agreement was improperly noticed. Additionally, it was not properly noticed as an agenda item for the December 10, 2001, board of directors meeting because the posted notice did not state that assessments would be considered. Despite a lack of quorum and the objections of the other unit owners to a lack of notice, Mr. Walters declared the settlement agreement approved and the matter closed.

84. The fact that Mr. Walters and Mr. Carabetta, acting in concert with Mr. Barrow, considered and approved the settlement agreement in April 2002 does not excuse the violation of Section 718.112(2)(c), Florida Statutes, that occurred in October and December 2001. However, as discussed below, their failure to properly notice the discussions of assessments in October and

December 2001 does not necessarily mean that they can be held personally accountable by the imposition of a civil penalty.

Failure to Respond to Letters

85. Section 718.112(2)(a)2., Florida Statutes, states as follows in pertinent part:

> When a unit owner files a written inquiry by certified mail with the board of administration, the board shall respond in writing to the unit owner within 30 days of receipt of the inquiry.

86. After the December 2001 meeting, Mr. Weaver, Mr. and Mrs. McNeely, Dr. Blankenship, and Mr. Klinehoffer sent numerous inquiry letters by certified mail to the directors. The letters raised legitimate concerns about the management and operation of Ocean Gate. Mr. Walters and Mr. Carabetta only responded to one or two of these complaint letters.

87. During the hearing, it was abundantly clear that Mr. Walters and Mr. Carabetta considered the flood of inquiry letters from the minority unit owners to have only nuisance value. Accordingly, they made a conscious decision not to respond to the letters in violation of Section 718.112(2)(a)2., Florida Statutes.

Willful and Knowing Violation of Statute

88. Section 718.501(1)(d)(4), Florida Statutes, states as follows in pertinent part:

> The division may impose a civil penalty individually against any officer or board member who willfully and knowingly violates a provision of this chapter. . . . The term "willfully and knowingly" means that the division informed the officer or board member that his or her action or intended action violates this chapter . . . . The division, prior to initiating formal agency action under chapter 120, shall afford the officer or board member an opportunity to voluntarily comply with this chapter. . . . An officer or board member who complies within 10 days is not subject to a civil penalty. A penalty may be imposed on the basis of each day of continuing violation, but in no event shall the penalty for any offense exceed $5,000.

89. Petitioner sent Mr. Walters and Mr. Carabetta a warning letter in April 2002. They responded to the letter but took no corrective action. Thus pursuant to statute, Mr. Walters and Mr. Carabetta acted willfully and knowingly in the following respects: (a) they breached their fiduciary duty by disproportionately relieving Mr. Walters of his obligation to pay assessments, in violation of Sections 718.111(1)(a) and 718.116(9)(a), Florida Statutes; and (b) they failed to respond to a minimum of 10 certified inquiry letters in violation of Section 718.112(2)(a)2., Florida Statutes. These were on-going statutory violations, which Mr. Walters and Mr. Carabatta had ample opportunity to correct after receiving Petitioner's warning letter.

90. Mr. Walters and Mr. Carabetta did not willfully and knowingly violate Section 718.112(2)(c), Florida Statutes. It is true that they failed to properly notice the consideration of assessments during the October and December 2001 meetings. However, the settlement agreement was considered and approved during the April 10, 2002, board of directors meeting before Petitioner sent its April 17, 2002, warning letter.

91. There is no evidence that the consideration of assessments was improperly noticed at the April 2002 meeting. Apparently, Mr. Walters and Mr. Carabetta had already corrected any problem with improper notice before receiving the Petitioner's April 17, 2002, warning letter.

92. Rule 61B-20.006(3), Florida Administrative Code, sets forth the aggravating and mitigating factors to be used in determining civil penalties. The following aggravating factors are applicable here: (a) financial loss to parties or persons affected by the violation; (b) financial gain to parties or persons who perpetrated the violation; and (c) failure to take affirmative or corrective action after receiving the warning letter. The only mitigating factor is the reliance of Mr. Walters and Mr. Carabetta on written professional or expert counsel or advice.

93. After consideration of the willful and knowing violations of Chapter 718, Florida Statutes, Mr. Walters and

Mr. Carabetta are subject to a civil penalty in the amount of $10,000 each.

94. Section 718.501(1)(d)2., Florida Statutes, provides as follows:

> The division may issue an order requiring the developer, association, officer, or member of the board of administration, or its assignees or agents, to cease and desist from the unlawful practice and take such affirmative action as in the judgment of the division will carry out the purposes of this chapter. Such affirmative action may include, but is not limited to, an order requiring a developer to pay moneys determined to be owed to a condominium association.

95. Under the facts of this case, Petitioner is justified in requiring Mr. Walters to make restitution to Ocean Gate in the amount of $68,710.92 in past-due assessments and interest plus interest on this amount from June 16, 2003, until the date payment is made.

RECOMMENDATION

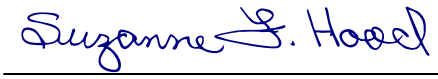
Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED:

That Petitioner issue a final order imposing a civil penalty on Respondents in the amount of $10,000 each and requiring Mr. Walters to make restitution to Ocean Gate in the

amount of $68,710.92 plus interest on this amount from June 16, 2003, until the date payment is made.

DONE AND ENTERED this 8th day of August, 2003, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of August, 2003.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.