53
3 aff

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,797

SPANISH RIVER RESORT CORPORATION, et al :

Petitioners, :

-vs- :

REBECCA E. WALKER, as Palm Beach County Property Appraiser, et al.,, :

Respondents. :

ANSWER BRIEF OF APELLEE,
REBECCA E. WALKER, as
Palm Beach County Property Appraiser

REVIEW OF QUESTIONS CERTIFIED BY THE
DISTRICT COURT OF APPEAL, FOURTH DISTRICT

Willa A. Fearrington
FEARRINGTON, CALKINS & HYMAN
509 North Dixie Highway
West Palm Beach, FL 33401
Tel: 659-2889

a n d

GAYLORD A. WOOD, JR.
304 S.W. 12th. Street
Fort Lauderdale, FL 33315
Tel: (305) 463-4040

TABLE OF CONTENTS

CITATIONS OF AUTHORITY

CASES

STATUTES

STATEMENT OF THE CASE

This appeal seeks review of a decision of the District Court of Appeal, Fourth District, 497 So.2d 1299 (Fla. 4th DCA 1986). Plaintiffs in the trial Court were Spanish River Resort Corporation ("Spanish River"), Spanish River Resort and Beach Club Association, Inc. ("Association"), and Spanish River Management Corporation ("Management"), Petitioners in this Court. Respondents are Rebecca E. Walker, as Palm Beach County Property Appraiser, Randy Miller, as Executive Director of the State of Florida, Department of Revenue; and Allen C. Clark, as Palm Beach County Tax Collector, who were Defendants in the trial Court.

Suit was timely filed pursuant to Sections 194.171 and 194.181, Florida Statutes, to contest tax assessments as of January 1, 1983, made by the Palm Beach County Property Appraiser. The assessments were on a variety of properties: 13 whole-unit residential condominium parcels which were not subject to time-sharing, nine commercial condominium parcels used as a restaurant, coffee room, patio area, offices and storage space, (all of which were owned by Spanish River); and a great number of time-share estates listed together as one item on the tax rolls as required by Section 192.037, Florida Statutes (1982) and assessed to Management. A separate parcel identification number and tax roll listing was assigned to each of the commercial parcels and whole-unit residential condominium parcels, and one tax roll listing included all the unit weeks in the Spanish River Resort and Beach Club. The assessments are described by parcel identification number and amount of assessment in the Appendix to

Petitioners' Initial Brief at A-30.

Trial was held before the Court, the Hon. Hugh MacMillan, which resulted in a final judgment dated June 14, 1985, which upheld the assessments. (A-15-30)

An appeal by Plaintiffs to the District Court of Appeal, Fourth District, resulted in an Opinion dated November 19, 1986, which affirmed the Final Judgment and certified two questions to this Court. (A-1-14)

References to the Record on Appeal shall be "R-(page number)", to the Initial Brief as "IB-(page number)", to the Appendix to Petitioners' Initial Brief, "A-(page number)", and to the Appendix hereto, "AA-(page number)".

STATEMENT OF THE FACTS

The Property Appraiser disagrees with the Statement of Facts as submitted by Spanish River, and with their contention at IB-3 that the "material facts are uncontroverted". There was much conflicting testimony and evidence, which was considered by the trial Court. Petitioners fail to state the facts to this Court most favorably to the prevailing parties below in both the trial Court and District Court of Appeal, and completely omit much important testimony and evidence.

Petitioners incorrectly state that "the subject matter in the case at bar is a relatively new realty interest...". Spanish River describes "the property" to be assessed as a "development" consisting of a "shared" single eleven story building, pool, two tennis courts, and a parking area". (IB-3) This may be what one would see if driving by, but is not what was legally there as of January 1, 1983. At IB-13, Petitioners contend that the property that should have been appraised has a "metes and bounds" description as shown at A-31. They instructed their appraiser, Mr. Callaway, to value property having that description instead of the properties that were legally there. This contention was rejected by the trial Court, which found as a mixed question of law and fact that an unterminated declaration of condominium existed on the land which formerly had that "metes and bounds" description as of January 1, 1983. (A-21-22) There was no entry on the 1983 Palm Beach County tax rolls for land so described. (R-935, 964) The Declaration of Condominium still being unrevoked, the metes and bounds land no longer legally existed.

(R-964) What existed instead were whole unit residential condominium parcels, which were owned in fee simple by Spanish River; commercial condominium parcels (blandly described at IB-3 as a restaurant, coffee room, fountain area, storage space and offices), also owned in fee simple by Spanish River, and time share estates where condominium parcels had been further subdivided by the recording of the first deed to a time share estate, according to the Declaration of Condominium. The land that Spanish River's appraiser, Mr. Callaway, purported to have appraised contained fee simple ownerships within it, namely, the whole-unit condominium parcels and the time-share estates. These various properties are what was appraised by the Property Appraiser, Mrs. Walker. The assessments of the time share estates did not include the assessments of the whole-unit condominiums that were not subdivided into time-share estates.

Spanish River is in the business of sub-dividing the residential condominium parcels into time-share estates, which were marketed to the public and represented to be "multi-demensional real estate". Their representational "blurb" was quoted verbatim by both the Circuit and District Courts:

> It's fantastic to think your family could be guaranteed a tranquil tropical vacation home, forever, at a price that doesn't keep climbing year after year. ...Unlike traditional real property concepts, interval ownership is multi-dimensional. You buy property and time. ...The person who buys at Spanish River Resort is an owner with deed and full rights of ownership. You may lend your property, sell it, rent it, or give it away during the weeks you own it. Or you can keep it forever. (e.s.) (A-6, 22))

At IB-4, Petitioners incorrectly describe what timeshare owners receive pursuant to their Warranty Deeds.

The Declaration permits but does not require the creation of time share estates within the individual condominium parcels. As required by Section 718.120(1), F.S., the whole-unit residential condominium parcels and the commercial units were assessed as such, rather than as some amorphous part of an overall "development", which was what was done by Spanish River's appraiser, Mr. Callaway. The trial Court found that a recurring or revolving estate for years is conveyed by warranty deed in fee simple to each owner. The owner thus actually has complete ownership of the stated condominium parcel in increments of one week, for a specified period of time each year until 12:00 noon on the first Saturday in the year 2020, at which time the estate terminates; together with a remainder over in fee simple absolute, as tenant in common with the other owners of all unit weeks in that condominium parcel. If financing was involved, a mortgage was recorded for the individual time share estate. A policy of title insurance is provided in the full amount of the purchase price. Documentary stamps were placed on the instrument of conveyance in the full amount of the purchase price of the time-share estate. (A-21) The Prospectus and Declaration of Condominium support the trial Court's findings of fact.

Petitioners claim at IB-4 that "units" are still rented when available; the former manager testified at R-170-177 that time share estates (not units) are sometimes made available for rental by their owners through a management company which charges 20% of the gross receipts for their services.

Petitioners make the strange assertion at IB-4 that the fact that the time-share estate owners have, through the

condominium association, hired a management firm to operate the property for the owners, is somehow a "benefit" which is not a "realty interest". The record indicates that the time share estate owners pay for all services provided by the management firm through their maintenance fees. (R-275)

Petitioners state at IB-6 that the developer must find "up to 51 buyers for each condominium unit". This is incorrect; the developer need find only one buyer for each time share estate.

Spanish River sought to introduce evidence concerning its marketing and financing costs, but did not seek to introduce evidence concerning the effect, if any, of marketing costs and financing expenses on the market prices charged the public. Spanish River recovers its "soft costs" through the sale prices charged for the time share estates, just as any developer recovers its marketing and soft costs through sales. (R-151)

Mrs. Walker was first appointed Property Appraiser in 1981 and was subsequently elected to office in 1982 and re-elected in 1984. (R-933) By the time of trial, Mrs. Walker had successfully completed some twenty-four appraisal courses sponsored by the Society of Real Estate Appraisers, the International Association of Assessing Officers, State of Florida Department of Revenue and the American Society of Farm Managers and Rural Appraisers. (R-934) She holds the Certified Florida Appraiser designation of the Department of Revenue of the State of Florida, and is a professional member of the American Society of Farm Managers and Rural Appraisers. She has held a real estate license and is licensed to instruct the salesmens' and brokers' courses for the State of Florida. (R-935) She is a recognized professional in

the appraisal of real estate.

Appellants claim that a "new" methodology was developed for the 1983 tax rolls. Actually, the policies that were in force for assessment of time share properties in 1982 were those of the former appraiser, who had been removed from office. (R-946, 961; see Reid v. State, 444 So.2d 975, [Fla. 4th DCA 1984]) Mrs. Walker was appointed to a select committee on time-share appraisals in 1982 by the Property Appraisers' Association of Florida. (R-948) There is nothing in the record to suggest that time-share properties in Palm Beach County were appraised differently than anywhere else in Florida. (See Oyster Pointe v. Nolte, 497 So.2d 1306 (Fla. 4th DCA 1986); the Circuit Court opinion therein indicates a remarkably similar approach to appraisal of time-share properties in Indian River and Palm Beach Counties.) Petitioners claim at IB-8 that this "new methodology" was developed essentially in a vacuum "through in house discussions". Her leadership through the Property Appraisers' Association of Florida and discussion with other Property Appraisers no doubt contributed to the decision that the time-share estate is what should be valued, and to consider the "three approaches to value" in doing so. Mrs. Walker testified that the Spanish River time share properties were not appraised differently than any other time share properties in Palm Beach County. (R-947) The trial Court found in Paragraph 11 of the Final Judgment that because of this, the Property Appraiser's methodology has not had the effect of creating an invalid classification of real property.

What is stated as a "fact" at IB-9, that "physically

identical units were assigned dramatically different total assessed values..." is highly argumentative. A time share estate is far less valuable than a whole-unit condominium parcel. An aggregate of all of the time share estates into which a condominium parcel has been subdivided will probably be more than the market value of a condominium parcel. This "fact" is no more meaningful than an allegation that the appraisal of a rental apartment building is different from the aggregate of the appraisals of a number of condominium parcels which are located in an identical building next door.

Petitioners claim at IB-10 that Mr. Hewitt, formerly an appraiser with the Federal Home Loan Bank Board, was unaware of any lender attempting to place unit week loans in a real estate loan category. The law which permitted this only became effective in October, 1982. (R-645)

It should be noted that most of Petitioners' references to the record concerning what the Property Appraiser did or did not do refer not to Mrs. Walker's testimony at the final hearing, but to her discovery deposition which was read into evidence from R-300-360. Mrs. Walker is thoroughly familiar with the concepts of time sharing; she and her husband personally own a "right to use" time share in Broward County. They had the "exchange privilege" that Appellants claim at IB-5 is "the main package sold with the property...and was described in testimony as a major motivation for buying", but subsequently decided they didn't want to keep it up. (R-945)

Mrs. Walker pointed out that there are two types of time sharing, the "right to use" such as she owns, and "fee" time

sharing. She testified that a time share estate is complete ownership in a condominium for a certain period of time each year. The time share estates at Spanish River are fee simple estates. (R-946)

The standard for the Property Appraiser's valuation was "just valuation", which is synonymous with "market value". (R-945) Mrs. Walker carefully considered each of the traditional "three approaches to value" in appraising the Spanish River properties. At IB-9, Petitioners claim that "[t]he Appraiser did not attempt to determine the replacement cost of the Spanish River building, and did not perform a cost approach...". She considered the "cost approach", but chose not to put much weight on it. (R-948) She stated that the reason is that when appraising a time share estate or condominium, it is hard to determine such things as marketing expense or hard and soft costs, and allocation is difficult. (R-948) She considered the income approach, but rejected its use, since people buy single family homes or time share estates basically to live in and not for their rental value. (R-948) She determined that the proper approach to use was the market data approach because she had so many sales of like estates and like condominium parcels. (R-949) Mrs. Walker was emphatic that she considered all of the eight criteria found in Section 193.011: "...When you're doing the standard approaches, market, income and cost, you consider all of those and you use the ones most appropriate." She testified that this consideration is automatic through the making of a standard appraisal. (R-949) Spanish River did not file the form called for by Sec. 195.027(6), F.S., thereby authorizing the Property Appraiser to assume that

the costs and expenses of sale and financial terms were "typical". (R-287) Mr. Dagher testified that the terms being offered at Spanish River were typical of the time-share industry in Palm Beach County in 1983. (R-277)

Mrs. Walker's Director of the Condominium and Townhouse Section is William Pate. Mr. Pate considered all three approaches to value in appraising the Spanish River properties. (R-991) He considered but did not use the cost approach in valuing any whole-unit condominiums in Palm Beach County. The market data approach was found appropriate for the appraisal assignment. (R-993) His determination that time-share estates should be assessed was made through the 1982 Legislature's legislative changes to the assessment laws.

The actual assessments were made by Mary Ann Wilber, who testified as an expert witness. (R-961) She testified that a time share estate is in effect ownership of a condominium unit for a given period of time each year. (R-962) She considered application of the cost approach to value in appraising the time share estates, and rejected its use because she did not feel it was applicable to the assignment at hand. She found that you can't add in the administrative costs except with great difficulty and that the cost approach does not take into consideration the size, location, and height in the building of the various condominium parcels and time share estates. (R-962-3) She considered the income approach to value, and found it not to be applicable; a time share estate is owner-occupied for residential purposes, and does not produce income. (R-964) Mrs. Wilber testified that people buy and sell whole-unit residential

condominiums to reside in, that she would not use the income approach to value in appraising a single family residence. (R-964)

Mrs. Wilber testified that the beginning point of the appraisal of the time share estates was to pull out every sale at Spanish River from the records, to correlate them as to unit week and apartment, and list them on a spread sheet, Plaintiffs' Exhibit 6. She had all recording information including information as to mortgages. (R-966) She attempted to obtain fair market value from the sales of the unit weeks, but found that by so doing, she could not maintain equity in the appraisals of the unit weeks. (R-967) From the price lists given, she determined that 75% of the list prices was close to what the weeks were selling for, and preserved equity among the various time share estates. (R-970) She removed the personal property as returned by Association, and then reduced the resulting number by another 15% since the assessments were still high. She had thought deduction of the personal property would accomplish this, but it did not. (R-973) The resulting values were still based on the market. (R-973)

After the petition was filed to the Property Appraisal Adjustment Board, Mrs. Wilber realized that a mistake had been made by including as time-share estates, those whole-unit residential condominium parcels where no deed had been recorded deeding out the first unit week (R-975) This error was corrected, and tax roll entries were created for the whole-unit condominium parcels. (R-975-6) A revised statement of proportions as required by Sec. 192.037, F.S., was given to Management. (R-977)

Even though the Property Appraiser sent a "statement of proportions" showing the assessment for each time share estate and from which the taxes applicable to each could be figured, the owners of the time share estates were only billed for the amounts shown in the operating budget. (R-244) The reason for this is that the developer, Spanish River, had guaranteed the amount of the budget. (R-240) In testimony critical to the claims that Section 192.037, Florida Statutes, causes additional expense to the managing entity, Mr. Dagher testified that no additional costs were actually incurred by Management in collecting the real estate taxes, over and above what was being spent to collect the maintenance fees from the owners. (R-210)

Mrs. Wilber's appraisals of the whole-unit condominium parcels were based on the market of like units outside Spanish River, since there were no whole-unit sales within the project. (R-961) She gave full consideration to the cost, market and income approaches to value in appraising the whole-unit condominium parcels. (R-962) There is not a shred of evidence in the record that would tend to discredit Ms. Wilber's appraisal of the whole-unit condominium parcels; Mr. Callaway, who has written an article in the Appraisal Journal of the American Institute of Real Estate Appraisers on appraising condominiums, chose to ignore them as if they didn't exist. In fact, Mr. Callaway placed a value on the two parcels that constitute the restaurant of $695,000--well in excess of the appraised value of those parcels. (R-818)

Substantial testimony in the record supports the proposition that fee time share estates are characterized by the

three "sticks" that constitute the entire "bundle of rights" which characterize real property. The trial Court found that the interval owner at Spanish River has all of the "sticks" which constitute the "bundle of rights" that is fee simple real estate: the complete right to use (or not to use) the property during the period of ownership; the right to exclude others during that period, and the right to mortgage, lease, sell, bequeath or give away the time-share estate. Every time share period is a unique ownership, even if it is located in part within the same physical space as the other time share estates in the same apartment. In short, it is a fee simple parcel of real estate. One of Spanish River's experts, Mr. Kinnard, testified that the time share estate owner has the full right to occupy or not to occupy during the period of ownership. (R-499) Although he pointed out that the owner has no right to redecorate the unit, he admitted that there are single-family neighborhoods where the homeowners' association even controls the color of the houses. (R-499) He agreed that the owner of a time share estate has the right to exclude the world during the period of ownership (R-500) and further has the right of disposition, including the right to create greater and lesser estates in the time share estate. (R-501) Richard Hewitt, another expert testifying for Spanish River, agreed that the owner of a time share estate has the same "sticks" that constitute fee real estate. (R-702-6) This belies Petitioners' assertions in the footnote at IB-4 that a time share estate is a "fractional interest" in a timeshare unit.

Michael Cannon, an expert who testified for the Property

Appraiser, was even more explicit. He testified that a time share estate is simply the "third dimension of real estate ownership", that it is the subdivision of the interests from a condominium unit into 52 weeks, whereupon 51 of them are normally sold to individuals. Once the warranty deed is given, the individual has the full rights to sell, give away, to do anything they want with that week. In Mr. Cannon's opinion, there is no difference between the nature of the sticks in the bundle of rights that is a time share and versus a whole unit condominium parcel. (R-396-7) Mr. Cannon testified that fee time share estates are real estate, and that they can be appraised. (R-397) He pointed out that there is no merger of estates; that if a person were to buy two time share estates, he can sell one of them and keep the other, without a merger having occurred. (R-401)

Harvey R. Harris, an expert surveyor, testified that in order to describe a parcel of real property, one must check the public records, and that if a declaration of condominium had been filed, it would certainly affect the parcel of land he was attempting to survey. (R-981) He stated that he would have to refer to land according to the declaration of condominium once it were in place, rather than the underlying metes and bounds description. (R-983) He testified that it is possible to survey a time share estate! He would survey the estate as a condominium unit and label the survey so as to reflect the time aspect within it; hence it is identifiable real property. (R-984)

Mr. Callaway testified correctly that it is impossible to have more than one fee simple absolute estate at a time in a given parcel of real estate. (R-833) He admitted that a condominium

parcel is a separate parcel of real property, capable of ownership in fee simple absolute, and that the declaration of condominium at Spanish River was in full force as of January 1, 1983. (R-834-5) Despite this, he determined that the property to be appraised should be the metes and bounds description of the property that had been submitted to condominium ownership. This is so even though he finally admitted that in the year 2020, the owners of the time share estates do not become tenants in common in the entire project, but only in the condominium parcel in which their time share estate was physically located. (R-841-2) Even were one to predicate acceptance of Mr. Callaway's "bulk" value on the theory that time share estates are undivided interests in a whole, rather than separately identified interests, they are each interests in a condominium parcel rather than in the project as a whole. The trial Court found that Mr. Callaway valued the wrong thing--the property that had been committed to condominium ownership, rather than the individual condominium parcels described in Exhibit "A-2" and the individual time share estates. The trial Court found that it is impossible for a property which is itself a fee simple estate, to contain within its boundaries other fee simple estates. This was admitted by Mr. Callaway. He agreed that the condominium parcels are each separate, fee simple estates. The Court found that the methods used by Plaintiffs' appraiser are inappropriate to value individual condominium parcels or individual time share estates. The record amply supports that finding.

Mr. Cannon testified extensively about the necessity that an appraisal be based on reality, on fact. There are ethical

requirements that if an appraiser assumes that a condition exists, there must be some reasonable probability that the condition will in fact occur in the foreseeable future. If this is not so, then the report is invalid. (R-403) He criticized Mr. Callaway's description of what he was appraising, a metes and bounds description that was somehow "subject to" the declaration of condominium. (R-405) This evidence contradicts Petitioners' contention at IB-11 that it is 'uncontroverted' that "the division of ownership interests in a property is no impediment to appraisal of that property".

The record is replete with instances of hypothetical situations that existed in Mr. Callaway's appraisal report, which led to its being rejected by the Court. The major hypothetical condition is his assumption that a parcel of real estate exists according to a certain metes and bounds description, when in truth and fact that particular real estate has ceased to exist as such and is now condominium parcels, some of which have been further subdivided into time share estates. Everyone admitted that there was no real probability of the declaration of condominium being revoked. The second major hypothetical situation was Mr. Callaway's assumption that all of the time share estates were actually available for sale, and owned by one owner. The record clearly showed that 1,850 time share estates had been sold to the public as of the January 1, 1983 appraisal date and were not in fact available for sale to the public.

THE DISCOUNTED SELL OUT APPROACH

In its Final Judgment, the trial Court found:

10. The "discounted sell out" method of appraisal is too

speculative to use in the valuation of property for ad valorem tax purposes, and the Court accordingly rejects its use. St. Joe Paper Co. v. Adkinson, 400 So.2d 983 (Fla. 1st.DCA 1981); Muckenfuss v. Miller, 421 So.2d 170 (Fla. 5th.DCA 1982); Roden v. G.A.C. Liquidating Trust, 462 So.2d 92 (Fla. 2d.DCA 1985).

Spanish River's valuation witness, Robert Callaway, based his entire opinion of value on the "discounted sell out approach" to value. (R-824) Although he performed what he called a "cost approach", he left out significant items such as the marketing costs, and developer's overhead and carrying cost after completion of the building but during the sell out period that are shown in a sample cost approach shown in his article, Condominiums Revisited, which was published in the Appraisal Journal for the American Institute of Real Estate Appraisers. (R-859-60) His so-called "cost/market approach" was based on sales of rental apartment buildings which were sold to time share converters--in no way comparable to whole unit condominium parcels and time share estates. (R-819-21) Mr. Callaway testified that he considered all of the time-share estates at Spanish River to have been available for sale, despite the fact that 1,850 of them had already been sold to members of the public. (R-811, 887) Mr. Callaway assumed that selling expenses would be incurred in the hypothetical sale of the time share estates that had already been sold, even though Mr. Dagher testified that once a time share estate has been sold, there are no further selling expenses to be paid in connection with it. (R-252)

In order to use discounted sell out, one must first determine the number of items in the inventory to be sold. As previously stated, Mr. Callaway determined that the inventory was all the time-share estates, even the ones that had already been

sold! (R-887) To utilize discounted sell out and arrive at a "bulk" or "wholesale" value of an aggregate of properties, it is necessary to accurately predict six different factors used in the formula, for each year of the sell out period: the number of items to be sold, sales price per item, expenses attributable to sales, expenses attributable to holding the property, administrative and overhead expenses, and a discount rate. This necessarily assumes thirty-six assumptions for a six year sellout, with a thirty-seventh assumption being the length of the sell out period. (R-888-9) Mr. Callaway admitted that there were actually only 2,176 time share estates available for sale by Spanish River, which would take a little over three years to sell (R-891) He projected that the expenses would be the same in each year of the sell out period. (R-894) For example, he used the 1983 tax rate for each of the years through 1989. (R-894) He admitted that the price lists for Spanish River were higher from 1980 through 1983, but hypothesized no increase in sales price over the sellout period. Even though he characterized the market as "stinking", he did not forecast a decrease in time-share estate sales prices. (R-901-2) He admitted that to hypothesize increased sales prices would result in higher values. (R-897) He had no idea of the cost of money in 1989, nor even 1987 or 1988, which was the basis for his discount rate. (R-897-8)

The appraisal witnesses from both sides did not agree that the "discounted sell out method" of valuation is an appropriate technique to determine the fair market value of the land and buildings of a time share project, as stated at IB-12.

Mary Ann Wilber testified that whole unit condominiums and

time-share estates owned by developers are appraised no differently than those owned by members of the public. (R-964-5) She testified that the "discounted sell out approach" was not applied because "that's wholesale, and we're going retail". (R-965)

Joseph Vick testified as an expert. He has taught 111 appraisal courses in 35 states, the Bahamas and Canada and has testified as an expert in eleven states. (R-1000) He testified that the "discounted sell out approach" results in a "wholesale" or "bulk" value of an aggregate of properties. The technique is not applicable to finding market value of any one of the items within that aggregate. He testified that the technique cannot be used when the bulk is not owned by the same owner, since at the wholesale level, one party must own or control all the pieces. (R-1001)

Mr. Vick testified that the discounted sell out approach is neither used nor is appropriate for use in valuing real property in Palm Beach County. The technique does not provide equity and involves too much speculation. It is simply an evaluation. (R-1005) He testified that to use the technique, it is necessary to make forecasts for each year of the sellout period. The analyst must forecast the holding costs, including property taxes. (R-1003) A forecast in Palm Beach County that assumed taxes would remain static over the sellout period (which was Mr. Callaway's assumption) is not realistic. (R-1004) It is necessary to compute a discount rate for each year of the holding period. (R-1005) Changing the assumptions, such as the volume of sales in each year of the sell out period, will have a dramatic

effect on the value. (R-1003) An important effect of use of the discounted sell-out technique is that its use would result in as much as a 20-30% difference in the value of two identical properties. This would neither be fair nor equitable, to value properties based on how much property one owner has. (R-1006)

Michael Cannon, a real estate appraiser, market analyst and consultant, testified on behalf of the Property Appraiser. He has appraised time share properties, published articles and testified as an expert in circuit court. He testified that the direct sales comparison method is the best method to appraise whole unit condominiums. He concurred with Mr. Vick that discounted sell out cannot be used when there are multiple owners of the aggregate of property that is involved in the selling process. (R-392) He referred to the "wholesale" level as "Level B", where the single owner attempts to sell to individual condominium owners. "Level A" is the individual unit owner. He testified that discounted sell out absolutely cannot be used to value individual properties, whether they be time share estates, whole unit condominium parcels, or vacant lots. (R-392)

At IB-11, Petitioners argue that there is "uncontroverted" testimony that when appraisers speak of "tiers" they are referring to "different units of appraisal", and argue further that the correct "unit" for property tax purposes should be at the 'project' level. Richard Hewitt, who testified for Spanish River, referred to an article in which he discussed the two "tiers" or levels of real estate values. (R-726) The first tier is value at the project level, or value to an interim purchaser. This could be "wholesale" value. He defined the "second tier" as the end

product users. The second tier buyers' properties cannot be appraised using discounted sellout techniques. (R-729) Mr. Hewitt also described a "third tier", which would be a sub-breakdown of a condominium unit into fifty-one weeks. (R-728) He testified that discounted sellout methodology is only applicable to appraisal of the first tier, i.e., at the project level. (R-729) He agreed that if the appraisal assignment were the market value of a single condominium unit, discounted sell out would not be appropriate. (R-749) He agreed that the technique would require, e.g., a forecast of what the discount rate will be in the year 1989, assuming a six year sellout as of January 1, 1983. (R-764)

Petitioners state that there is no evidence that the appraisal of timeshare estates is ever even attempted for other than tax purposes (assuming that they mean ad valorem tax purposes). They may have overlooked the testimony of Mr. Kinnard at R-536 where he testified that a time share estate could easily be appraised, and that the market approach to value would be the preferred valuation technique. He has heard that individual time share estates have been appraised. (R-539). The reason that individual time share estates have not generally been appraised is that the usual appraisal assignment given an appraiser is to value the entire project for a lender. (R-539) There is no reason that an appraisal of a time share estate could not be made if needed for estate tax purposes or to support the value claimed on an income tax return for a charitable donation.

The supposed "uncontroverted fact" that the gross sellout of a time share project is not the fair market value of the land

and buildings is not supported by the record. The gross sell out of a time share project ("market prices") may be indicative of the market values of the time share estates so transferred.

The 1986 Legislature considered a bill, Senate Bill 566, by Senator Deratany, which would have turned Petitioners' wishful thinking into law by amending Section 192.037(2) to make it read, "The assessed value of each time-share development shall be the present fair market value of the real property taken as a whole, not the value of the combined individual time share periods or time share estates contained therein". This amendment did not pass. (The existence of this proposed legislation was considered by the Fourth District Court of Appeal by way of Notice of Supplemental Authority). See AA-1 for the full text of this proposed law.

SUMMARY OF ARGUMENT

This Court has jurisdiction to review the questions certified by the District Court of Appeal, Fourth District.

Since January 1, 1983, the Legislature has specifically provided that time share estates shall be assessed in accordance with Chapters 192-200, Florida Statutes. Both the trial and District Courts correctly found that, as a mixed question of fact and law, each of the subject time-share estates at Spanish River are real property.

The trial Court correctly refused to follow Mr. Callaway's appraisal of a non-existent "metes and bounds" description, and correctly refused to use the speculative "discounted sell out technique", which is not even an appraisal technique but is a technique for evaluation of particular investments.

The Property Appraiser correctly considered the "cost", "income" and "market data" approaches to value. Having made a standard appraisal using the market data approach to value, the trial and District Courts correctly upheld the assessments in question.

Section 192.037, Florida Statutes (1983) is constitutional in all respects, and exactly tracks the method provided by Spanish River in the Declaration of Condominium for collection of property taxes by the managing entity along with the maintenance fees collected from the time share estate owners.

POINT I

The Property Appraiser agrees with Petitioners that this Court has jurisdiction to review the questions certified by the District Court of Appeal, Fourth District.

POINT II

THE SUBJECT OF TAXATION AND TAX APPRAISAL IS THE TIMESHARE DEVELOPMENT.

Point as Restated by Respondent Walker:

UNDER THE FACTS OF THIS CASE, WAS THE PROPERTY APPRAISER CORRECT IN ASSESSING EACH INDIVIDUAL TIME SHARE "WEEK", OR SHOULD THAT ASSESSMENT HAVE BEEN RESTRICTED TO THE FAIR MARKET VALUE OF THE ENTIRE CONDOMINIUM APARTMENT PARCEL WITHOUT REFERENCE TO ITS SUBDIVISION INTO TIME-SHARE INTERESTS?

Petitioners first contend that the Property Appraiser erred by not appraising the buildings and land which was once described by a metes-and-bounds description prior to 1980 when the Declaration of Condominium for Spanish River was filed. Their theory is that the time share estates at Spanish River are simply fractional interests in the parcel of property having a legal description shown at A-31, and that the Property Appraiser is required to appraise "all" such interests together and disregard the existence of the time-share estates. They contend that the Property Appraiser may only appraise smaller units when land is "physically subdivided" into new parcels. (IB-21)

An unsurmountable problem with Petitioners' hypothesis is that it disregards the essential nature of condominium and time-share--the fact that rather than being a "physical

subdivision", it is a legal subdivision of land and improvements. Once a declaration of condominium is filed, one no longer has "land" and "improvements"; one has "condominium units" and "common elements", which form "condominium parcels". (Sections 718.103(10), (6) and (23), Florida Statutes 1983) "Condominium parcels" so created are each separate parcels of real estate. (Section 718.106(1), Florida Statutes 1983) When "condominium parcels" have been further subdivided into time-share estates, Section 721.03(5), Florida Statutes, is the direction to the Property Appraiser as to what should be appraised. This section mandates that "the treatment of time-share estates for ad valorem tax purposes and special assessments shall be as prescribed in Chapters 192 through 200". (e.s.) This section was added by the same session law which enacted Section 192.037, Florida Statutes. There could be no clearer expression of the Legislature's intention to make time share estates the basic unit of ad valorem taxation when they have been created.

While Petitioners contend that Mrs. Walker should have made one appraisal of "the development" as if it were a rental apartment building, they do not urge here that she was incorrect in making separate tax roll listings for each of the commercial parcels and each of the whole-unit residential condominium parcels which had not been subdivided into time-share estates. Everyone agrees that those particular condominium parcels are themselves fee simple parcels of real estate. (See, e.g., Callaway, R-834; Kinnard, R-488) Section 718.120(1), Florida Statutes 1983, states:

Ad valorem taxes and special assessments by taxing

> authorities shall be assessed against the condominium parcels and not upon the condominium property as a whole. ...Each condominium parcel shall be separately assessed for ad valorem taxes and special assessments as a single parcel.

The existence of the whole unit condominum parcels as fee simple parcels of real estate at Spanish River precludes the co-existence of those parcels within another legal description, as a matter of law. Section 718.120(1), Florida Statutes has not been attacked by Petitioners as somehow being inconsistent with the time-share taxation scheme.

Spanish River has not explained how, in its view of things, those whole-unit condominium parcels that everyone agrees existed and were in fact fee simple real estate, could co-exist within the amorphous metes-and-bounds real estate they claim should be assessed. It is submitted, therefore, that at Spanish River, the existence of the whole unit condominium parcels and the requirements of Section 718.120(1), Florida Statutes, would preclude a single assessment being made of "the development". Petitioners are apparently not opting for a reading of the term, "the development" as being "all time share estates, less those parcels which are whole unit condominium parcels". Mr. Callaway's appraisal included the whole-unit condominium parcels as part of the total value, thus ignoring Section 718.120(1), Florida Statutes, and this is one of the many serious defects in that appraisal.

The 1981 Legislature passed Chapter 721, Florida Statutes, which is a comprehensive scheme to regulate and give the status of law to time sharing. Time-share developers actively sought this

legislation, since it solves some particularly sticky items as the fact that no partition of a time-share unit may be maintained. (Section 721.22, Florida Statutes) This also effectively prevents a judgment or tax lien against the owner of a time-share estate from allowing a sale of the entire unit in which that time share estate has been created, and allows individual mortgages to be given by the purchasers of time-share estates which can be foreclosed as to that time share estate only, without disturbing the other owners of time-share estates physically located in the same unit. The Declaration of Condominium of Spanish River likewise provides in Article XIV that no lien against the owner of a unit week shall encumber anything other than that owner's property. (A-40) Since no agreement as to the taxation of time share property could be reached, that act provided in Section 721.03(3), Florida Statutes, that nothing in Chapter 721 would be deemed to alter the existing procedure for the assessment and collection of property taxes on accommodations or facilities subject to a time sharing plan.

The 1982 Legislature enacted Chapter 82-226. Laws of Florida. This is a comprehensive revision of numerous provisions of law relating to such things as the definition of "taxpayer" as including the agent of a time-share period titleholder. The act likewise defined "fee time share real property" as a category of real property: as "the land and buildings and other improvements to land that are subject to timeshare interests <u>which are sold as a fee interest in real property</u>. (e.s., Section 192.001(14), Florida Statutes)

Spanish River picks and chooses from a variety of statutes

to conclude that the object the Legislature intended to be appraised was something other than a time-share estate. For example, Section 200.069(8), Florida Statutes, provides for notification to taxpayers of all kinds of property, the amount of the current assessment. Spanish River argues that this means that the "listing" of time share estates on the tax rolls should constitute an "appraisal" of those estates. The plain language of Section 192.037(2), Florida Statutes, makes it clear that what appears on the tax rolls in the case of time share property is simply a "listing" rather than an appraisal.

The trial Court found it to be a mixed question of law and fact as to whether the time-share estates at Spanish Rvier were fee real property. Substantial evidence was presented to show that these time-share estates, at this project, are each fee real property. The record amply supports the final judgment. This does not mean that all time-share estates created in all projects in Florida will be fee real estate, since there is no one "canned" set of time-share documents.

At R-396 et seq. Michael Cannon testified as an expert that the owner of a time share estate has all of the "sticks" that are fee real property--the right to use (or not to use), the right to exclude others, and the right to deal with the time share estate. These rights separately exist as to every fee simple time share estate at Spanish River. A time share estate can be separately appraised and even surveyed. (R-397) It can be dealt with just as any other parcel of real property can be. Mr. Cannon testified that a time share estate is "land, buildings and improvements to land", that it is the individual ownership rights

of the time share estate of that weekly interval that they are using, plus the undivided interest in the common elements. (R-406-7).

In any real estate appraisal, one appraises "land, buildings and improvements to land". It is clear from the case law that "real estate" is simply the "bundle of rights", and it is that "bundle of rights" which is the subject of the approisal. In Bystrom v. Valencia Center, Inc, 432 So.2d 108 (Fla. 3d.DCA 1983), the District Court of Appeal said:

> ...[T]he assessment must include the interest of all the lessees; the whole "bundle of rights" in the real property. Id. at 111

As previously mentioned, the "sticks" in the bundle of rights are (a) the right to use (or not to use) the property; (b) the right to exclude others from the property, and (c) the right of disposition of the property. Substantial evidence supports the Court's findings on this mixed question of fact and law.

Spanish River argues at IB-32 and 40 that were a tax deed to be sold for "the development", the time share estates would be destroyed. It is assumed for this portion of the argument that none of the individual time share estate owners, who are afforded the protections of Chapter 197, would choose to redeem their individual time share estates. Were any owners to do so, this would preclude the purchaser of the remaining time share estates from obtaining all of them in any one unit. If the buyer at a tax sale acquired all fifty one time share estates in any one unit, then that unit would, under the provisions of Articles III and X

of the Declaration, once again become the owner of a whole-unit condominium parcel, but only when the owner of all those time share estates requested the Condominium Association to convey the maintenance week in that parcel to such owner. (A-36-7)

Section 197.573, Florida Statutes (1985), would protect the entire time-sharing scheme from being dissolved by a tax sale, since the time-share deeds "in the chain of title contain restrictions and covenants running with the land". (See the form of deed at A-58) Were the 1983 taxes not paid, and were there a tax sale, the sale would be for the items as described on the tax rolls, namely, "All unit weeks in Spanish River Resort & Beach Club" (A-30), except of course for those time share estate owners who had redeemed their time share estates from the sale pursuant to Chapter 197. The whole-unit condominium parcels would not be involved in such a tax sale, since they were not included in that assessment. The buyer would not receive title to the metes-and-bounds land that was subject to the declaration of condominium in any event. The only way that could occur would be pursuant to Section 718.117, Florida Statutes (1985), by consent of all the unit owners and recording of a termination of the declaration of condominium in the public records. The buyer of the unit weeks would naturally have to acquire the whole unit condominium parcels or obtain their owners' consent in order to terminate the condominium declaration. Petitioners also engage in the rankest form of speculation and conjecture when they suppose the amount of money that <u>might</u> be realized at a tax-deed sale if some year's future taxes were not paid. For years after 1983, the Property Appraiser would be required to list the time share

estates in groups of 51 under a separate parcel identification number. Were time share estates redeemed from the sale, then the tax deed buyer would only acquire time share estates which could of course be resold on an individual basis.

Despite Petitioners' contentions at IB-41 and 43 that the individual time share estate owners have no right to redeem their properties from a tax certificate, the Fourth District Court of Appeal has recently ruled that they do. Clark v. Delray Associates, Inc., 497 So.2d 1226 (Fla. 4th DCA 1986), affirming without opinion an Order to that effect from the Fifteenth Judicial Circuit dated October 30, 1985, a copy of which is in the Appendix hereto at AA-3. Whether Section 197.472(8), Florida Statutes (1985) would apply is not an issue herein, since such section was not effective as of January 1, 1983, the lien date of the taxes contested by the action below. Section 197.176, Florida Statutes (1983), does not prevent time share estate owners from making a partial redemption were the 1983 taxes to go to certificate. No certificate has yet been sold for the unpaid portion of the 1983 taxes on the time share estates.

THE VISTANA CASE

At the time Hausman v. VTSI, Inc., 482 So.2d 428 (Fla. 5th DCA 1985), rev.den. 492 So.2d 1332 (Fla. 1986) was decided, Sections 192.037 and 721.03(5), Florida Statutes (1983) did not exist. It is for that reason that the District Court of Appeal, Fifth District, held that the Property Appraiser lacked the statutory authority to appraise time-share estates for the year 1982. The District Court of Appeal noted in its decision that it

was of limited precedential value because of the legislation which became effective in 1983.

Since the Property Appraiser was not permitted to appraise time-share estates in 1982, the Fifth District's comments about the proper way to appraise time-share estates are purely dicta. It is respectfully submitted that a reading of any of the "eight criteria" found in Section 193.011, Florida Statutes, holding that time-share estates should be appraised at a value less than "just value", which is defined by this Court as the "willing buyer/willing seller" amount without deductions of any sort, would necessarily conflict with all of the decisions of this Court which mandate appraisals at 100% of market value, i.e., at the "willing buyer/willing seller" amount and not at the amount the seller would put in his pocket after payment of all expenses.

THE HIGH POINT CASE

The Fifth District Court of Appeal could not have reached the conclusion that Section 192.037, Florida Statutes (1983) is unconstitutional in High Point Condominium Resorts, Ltd. v. Day, 494 So.2d 508 (Fla. 5th DCA 1986), without necessarily holding that each owner of a time-share estate at the High Point project owned a separate parcel of real estate. This part of the Court's holding is entirely consistent with the ruling of the Fourth District in this case.

The Record on Appeal in this case is far more developed than that in High Point. It is significant that the developer of the Spanish River project set up a method for the collection of property taxes that exactly parallels Section 192.037, Florida

Statutes:

> Ad valorem taxes on a Unit committed to Interval Ownership shall be paid by the Association and said taxes shall be collected as part of the maintenance fee in the event the Unit Week Owners are not billed individually for ad valorem taxes. (A-54)

This is possibly the reason that Petitioners here have "soft pedalled" the constitutional arguments raised in the High Point case.

VALUATION OF THE TIME-SHARE ESTATES

As was previously recited in the Statement of Facts, the evidence is uncontroverted that the Property Appraiser considered all eight criteria found in Section 193.011, Florida Statutes, in arriving at her assessments of the time share estates in question. The Property Appraiser found that there were sufficient market transactions of time share estates to indicate that a market existed, and valued the time share estates from market data.

A recent decision of the Third District Court of Appeal is a bravura summary of the case law pertaining to a property appraiser's discretion in the method of valuation and in the value reached. In Bystrom v. Bal Harbour 101 Condominium Association, Inc., ____ So.2d ____ (Fla. 3d DCA 1987), Case No. 86-579, Opinion of February 24, 1987, the Property Appraiser relied exclusively on the "market approach" to value in assessing condominium parcels. In upholding both the Property Appraiser's methodology and the values (and, incidentally, reversing the trial court), the Third District Court of Appeal held:

> The Appraiser presented evidence to show that the valuation was based upon prior sales of other similar units within the same building.
>
> ...The Appraiser testified to the fact that since there was recent data available concerning the sales of similarly situated units the "market approach" was used in arriving at the valuation of the property. This Court has previously held that where an appraisal is based on sales of comparable properties the Appraiser "necessarily considers all, and uses some, of the factors set forth in Section 193.011." Bystrom v. Valencia Center, Inc., 432 So.2d 108 (Fla. 3d DCA 1983), rev.den. 444 So.2d 418 (Fla. 1985); accord [Vero Beach Shores, Inc. v.] Nolte, 467 So.2d at 1042-43.
>
> ...Since the Appraiser substantially complied with Section 193.011, his valuation is entitled to the same presumption of correctness on appeal of the trial court's judgment as

it was below. Markham v. June Rose, 495 So.2d 865 (Fla. 4th DCA 1986); see also Nolte, 467 So.2d at 1041. Therefore, the mere fact that the taxpayers disagree with either the weight to be accorded each factor or the method to be utilized in arriving at the valuation of the property is not a sufficient reason to overturn the appraiser's valuation. See, Blake v. Xerox Corp., 447 So.2d 1348 (Fla. 1984) (method of valuation is within discretion of appraiser so long as the determination is lawfully arrived at and within the reasonable range of appraisals); Bath Club, Inc. v. Dade County, 394 So.2d 110 (Fla. 1981 (weight accorded each factor in assessing value is within discretion of appraiser); Straughn v. Tuck, 354 So.2d 497 (Fla. 1977) (same); Daniel v. Canterbury Towers, Inc., 462 So.2d 497 (Fla. 2d DCA 1984) (weight accorded each factor and method used to reach valuation within appraiser's discretion); Blake v. Oceancoast Corp., 417 So.2d 1002 (Fla. 3d DCA); rev.den. 424 So.2d 762 (Fla. 1982) (weight accorded each factor within appraiser's discretion); Bystrom v. Equitable Life Assurance Soc'y of the United States, 416 So.2d 1133 (Fla. 3d DCA 1982) (method used in valuation within discretion of appraiser), review denied, 429 So.2d 5 (Fla. 1983).

The Record on Appeal shows that the Property Appraiser exactly tracked the requirements of Bystrom v. Valencia Center, Inc., 432 So.2d 108 (Fla. 3d DCA 1983), rev.den. 444 So.2d 418 (Fla. 1985) in that she testified that she made a standard appraisal, considering the market, income and cost approaches to value. (R-949).

THE DISCOUNTED SELL-OUT TECHNIQUE

Petitioners argue at IB-31 et seq. that the building and land are worth $6.7 million, including the whole-unit condominium parcels which are themselves fee-simple ownerships. (See R-824) The Property Appraiser seasonably moved to strike Mr. Callaway's testimony as not being based on a correct notion of law, which motion was denied.

Spanish River argues that this Court should reverse and order the trial Court to accept Mr. Callaway's appraisal. (IB-38) The trial Court properly rejected his opinion of value. Mr. Callaway's methodology was attacked by the testimony of Michael Cannon and Joseph Vick, beginning with the instructions he was given as to what he should appraise. The trial Court accepted the Property Appraiser's expert testimony in that regard, and there is substantial, competent evidence in the Record on Appeal to support the trial Court's rejection of the "discounted sell-out technique" as too speculative to serve as a basis for property taxation.

Mr. Callaway made a serious error of law when he accepted the instruction to appraise a certain metes and bounds description, which does not appear on the Palm Beach County tax rolls and included whole-unit condominium parcels required to be separately assessed. Since this opinion rests on faulty legal premises, it cannot stand. Arkin Construction Co. v. Simpkins, 99 So.2d 557 @ 561 (Fla. 1957); Stubbs v. D.O.T., 332 So.2d 155 (Fla. 1st.DCA 1976); Hodges v. Jacksonville Transportation Authority, 353 So.2d 1211 (Fla. 1st.DCA 1977).

Mr. Callaway did not even consider the fact that time-share estates which were present at Spanish River did not exist in his so-called "comparable sales". When an appraiser's opinion of value is shown to rest on faulty factual premises, the conclusion must likewise fall. Gesco, Inc. v. Nezelek, Inc., 414 So.2d 535 (Fla. 4th.DCA 1982); Peebles v. The Canal Authority, 254 So.2d 232 (Fla. 1st.DCA 1971).

The most important reason not to use the "discounted sell out" method is that it necessarily arrives at a "wholesale" or

"bulk" value, and cannot be used to determine the market value of any item within the aggregate of property. Even though Mr. Callaway refused to acknowledge the concept of the "level of trade", Petitioner's witness Mr. Hewitt testified that there are several "tiers" of value, the first being at the developer-to-developer sales level, and the second "tier" being value of individual properties as sold to members of the public. It is at this level, or in the case of time-share properties, the "third tier" of time share sales, that the Property Appraiser is required to value property. The "discounted sell out" method of appraisal relied upon by Mr. Callaway has been found without exception by the Florida courts to be too speculative upon which to base an assessment for tax assessment purposes. In Muckenfuss v. Miller, 421 So.2d 170 (Fla. 5th.DCA 1982), the Fifth District Court of Appeal rejected the appraisal that had been made by the Marion County Property Appraiser of Deltona's unsold lots in Marion Oaks. The Court held:

> ...We also think the lower court correctly rejected appellants' appraisal because the method used was too speculative. Id. at 172-4.

The "discounted sellout" or "development" method has also been judicially rejected in the cases of Williams v. Simpson, 209 So.2d 262 (Fla. 1st.DCA 1968), R-C-B-S Corporation v. Walter, 225 So.2d 426 (Fla. 1st.DCA 1969), and found to be too speculative as a matter of law to be used for tax assessments in St. Joe Paper Company v. Adkinson, 400 So.2d 983 (Fla. 1st.DCA 1981). The method was again rejected in Palm Beach Development and Sales Corp. v. Walker, 478 So.2d 1122 (Fla. 4th DCA 1985), rev.den. 488 So.2d 831 (Fla. 1986). Petitioners incorrectly state at IB-38

that the St.Joe Paper Co. case, op.cit., only involved the application of the technique and not the technique itself. Mr. Callaway erred in at least one essential element of using the technique, the real estate taxes paid over the holding period, and did not even make a stab at predicting an essential element of the computation, namely, the discount rate in the year 1989.

One of the most serious flaws in Mr. Callaway's work is that it violates the principle of reality by assuming unitary ownership of the time share estates when the evidence showed that thousands of them had been sold by Spanish River. In Defendant's Exhibit 1, Canon 3 of the Code of Professional Ethics and Standards of Professional Practice of the American Institute of Real Estate Appraisers, it is stated that a Member or Candidate of the Institute is permitted to make an appraisal based upon a hypothetical condition only if the Member or Candidate makes a careful investigation and concludes that there is a possibility that such hypothetical condition may, in fact, come into being at some future date. Mr. Callaway's opinion of value makes several assumptions which are hypothetical in nature. The first of these is that the Declaration of Condominium for Spanish River would be terminated, so that a "metes and bounds" description would once again exist. He admitted that there is no reasonable likelihood of this happening. The second assumption is that one entity owns all of the time-share estates at Spanish River, and that as of January 1, 1983, they were all available for sale. (This is an essential assumption of the "discounted sell out" technique. R-1001) A major assumption inherent in the use of the discounted sell out technique is that any owner of a time share estate would

sell his property for less than its market value. If one were to take Mr. Callaway's opinion of the "bulk" or "wholesale" value of the time-share estates, $6,315,000 divided by the possible number of time share estates, 3,672, indicates a so-called "market value" of $1,719 per time share estate. It is totally conclusory and unsupported by the record to indicate that any member of the public who spent $5,000 or so for a time share estate would sell out for Mr. Callaway's presumed value of $1,719. Mr. Callaway also assumes that the thirteen whole-unit condominiums would be subjected to time-sharing, when there is no evidence to support that unwarranted assumption. In fact, his characterization of the time-share market as "stinking" would militate to exclude the whole-unit condominium parcels from the time-share calculations in the discounted sell out approach.

Petitioners spend a few pages discussing why they think Section 192.037, FLorida Statutes is unconstitutional if the correct object of assessment is the time-share estate. Respondent relies on the argument of the Department of Revenue, but would observe that this section exactly parallels the method of tax collection established in the Declaration of Condominium.

POINT III. EVEN IF THE STATUTES AND CONSTITUTION AUTHORIZE TAX APPRAISAL OF TIMESHARE ESTATES, THE ASSESSMENTS ARE UNLAWFUL.

(POINT AS RESTATED BY RESPONDENT: THE TAXPAYER TOTALLY FAILED TO PROVE THAT THE PROPERTY APPRAISER'S ASSESSMENTS OF THE TIMESHARE PERIODS SOLD AS FEE TIME SHARE ESTATES, AND THE WHOLE-UNIT CONDOMINIUM PARCELS, WERE NOT SUPPORTED BY ANY HYPOTHESIS OF A LEGAL ASSESSMENT.)

The polestar for assessments in Florida is "just valuation", which this Court has repeatedly determined to be legally synonymous with "market value" or the "willing buyer/willing seller" test, without any deductions whatsoever from that amount. See, e.g., Walter v. Schuler, 176 So.2d 81 (Fla. 1965); Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983). There is no difference in the techniques to be used in arriving at either "just valuation" or "market value", according to Spanish River's own expert, Mr. Kinnard. (R-509-510) Bystrom v. Bal Harbor 101 Condominium Association, Inc., ____ So.2d ____ (Fla. 3d DCA 1987) specifically upholds assessments of condominium parcels made through application of only the market-data approach to value, and should logically apply with equal force to assessments of fee time-share estates.

The Property Appraiser carefully considered the "cost", "income" and "market data" approaches to value in appraising the whole-unit condominiums, and there is not a scintilla of evidence in this extensive record to show that she did not.

Mrs. Walker testified that she carefully considered, but rejected, use of the "cost" and "income" approaches to value, and used the "market data" or comparison-sales approach to value in appraising the time-share properties. (R-948-9) She testified

without contradiction that that she considered all eight criteria in Section 193.011, Florida Statutes. (R-949) Mr. Pate and Mrs. Wilber also testified that careful consideration was given to all three approaches to value in making the assessments of the subject properties. (R-963, 992-3) Mr. Hewitt, Spanish River's appraiser, testified that if he were valuing either whole-unit condominium parcels or individual time-share estates, he would also use the market data approach. (R-752, 754)

Spanish River argues at IB-44 that the Property Appraiser failed to recognize multiple week discounts. This is contrary to the specific testimony of Mary Ann Wilber, who recounted the difficulties involved in reconciling the multiple-week sales to opinions of value. (R-969) Mrs. Wilber did not assign total values to any groups of weeks; every time-share estate was appraised at its market value, no matter by whom it was owned. To grant discounts based on ownership of multiple weeks would be the same sort of preferential treatment proscribed by this Court in Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973) and Palm Beach Development and Sales Corp. v. Walker, 478 So.2d 1122 (Fla. 4th DCA 1985), rev.den. 488 So.2d 831 (Fla. 1986).

Petitioners make the novel argument that by appraising time-share estates, the Property Appraiser has somehow appraised "vacation benefits and services". Mr. Dagher testified that all of the expenses of operating the time-share project, such as management, the front desk, maintenance, utilities, etc., are paid by the time-share estate owners (including Spanish River as to unsold time share estates) on a "pay-as-you-go" basis.

(R-239-240, 270) It cannot be said that any of the services that are provided the time-share estate owners are not those things that logically flow from the ownership of their properties, and that the "vacation benefits" are nothing more than the "right to occupy" stick in the "bundle of rights". Mr. Hewitt testified that in the event the owner of a time-share estate sold to another individual, that would be simply a sale of real estate and personal property. (R-571) The "vacation benefits" could not logically be something that would not be part of the market value of a time share estate sold by the developer, yet be included in the market value of the same time share estate if sold by one member of the public to another. These "rights" are not intangibles; there is no way that an owner of a time share estate could sell that time share estate to another person and keep any rights at Spanish River. (R-269) Any of those rights are simply the normal benefits flowing from the ownership of real estate.

Spanish River argues at IB-46, without record support, that the so-called "exchange privilege" was improperly assessed by the Property Appraiser. The "exchange privilege" is nothing more than the fact that if a project is registered with one of the "exchange companies" such as Resort Condominiums International, the owner of a time share estate can (for an annual fee) use to the services of this company. If the owner decides to exchange the use of his or her time share estate this year for one owned by someone in another location, another fee is paid to the exchange company for arranging the swap. (R-271) This is similar to organizations that will arrange for exchanges of the use of single-family homes. (R-272) There is an old saying, "The man

who owns a horse can borrow one." If the fact that you own a home enables you to enter into an agreement to exchange its use with someone else who owns a home, it cannot be said that this facet of your home's value is somehow not part of its market value.

Spanish River asserts at IB-41 that one should deduct marketing costs from the sales price of a time share estate in order to reach what it calls "the fair market value of the real estate component". Spanish River placed documentary stamps on the deeds of conveyance in the full amount of the purchase price of the time share estate. Section 201.02, Florida Statutes, only imposes the documentary stamp tax on deeds of conveyance in the full amount of consideration paid by the time share buyer for whatever it is such purchaser bought. This is a damaging admission by Spanish River that what it is selling to the public is in fact real estate.

Spanish River argues that the value of the real estate is increased by the marketing expenses involved in selling time-share estates. The record is devoid of evidence to support that contention. The price at which property is sold, as indicated by documentary stamps on the instrument, is prima facie evidence of its value. Southern Bell Telephone & Telegraph Company v. County of Dade, 275 So.2d 4 (Fla. 1973) This is particularly true when, as here, the seller has not filed the form mandated by Section 195.027(6), Florida Statutes, to indicate that the costs and expenses of sale or terms of financing are atypical. (R-287)

Spanish River at IB 46 faults the Property Appraiser for making no adjustments to selling prices of time share estates for financing expense. Only when financing is demonstrated to have an

effect on price should adjustments be made to recorded sales prices based on atypical financing. Bystrom v. Equitable Life Assurance Society of the United States, 416 So.2d 1133 (Fla. 3d.DCA 1982), at 1144, Headnote 17. Mr. Callaway made no deductions from his indicated selling prices in his "discounted sell out approach" based on supposed unusual terms of sale. There was no evidence in the record to show that the interest rates made available to the time-share estate buyers had an upward adjustment on the prices they paid. These interest rates were from 12-1/2 to 16%, depending on the down payment--hardly favorable financing terms. (R-277) The clincher to this argument is the fact that these terms were typical in the Palm Beach County time share market. (R-277) And, since Spanish River failed to file the disclosure form, the Property Appraiser was legally entitled to make no adjustments based on supposed favorable financing terms.

Petitioners argue at IB-48 that the assessment should be invalidated if the Property Appraiser were demonstrated not to have considered "in good faith" any of the eight criteria found in Section 193.011, Florida Statutes. This is not the law of Florida. Bystrom v. Whitman, 488 So.2d 520 (Fla. 1986):

> We begin our analysis by noting the general proposition that the core issue in any action challenging a tax assessment is the amount of the assessment, not the methodology utilized in arriving at the valuation. Homer v. Connecticut General Life Insurance Co., 213 So.2d 490 (Fla. 3d DCA 1968) An appraiser may reach a correct result for the wrong reason. City National Bank v. Blake, 257 So.2d 264 (Fla. 3d DCA 1972). Indeed, a taxpayer must carry a heavy burden in order to successfully challenge a tax assessment. A tax assessment carries a strong presumption of validity and, in order to prevail, the

taxpayer must present proof that excludes every hypothesis of a legal assessment. Blake v. Xerox Corp., 447 So.2d 1348 (Fla. 1984); Straughn v. Tuck, 354 So.2d 368 (Fla. 1977); Powell v. Kelly, 223 So.2d 305 (Fla. 1969).

POINT IV. WAS THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, CORRECT IN UPHOLDING THE CONSTITUTIONALITY OF SECTION 192.037, FLORIDA STATUTES?

The Property Appraiser adopts the arguments of the Department of Revenue concerning the constitutionality of Section 192.037, Florida Statutes.

It should also be noted that the scheme by which the statutory fiduciary of the time share estate owners collects taxes from those property owners is exactly the same scheme envisioned by Spanish River when it presciently filed the Declaration of Condominium in 1980. Mr. Dagher testified that no additional costs are incurred because the Association collects the taxes along with the maintenance amounts.

Since the relationship between each time share estate and the others would not ordinarily change from year to year, the proportions applicable to each time share estate would only have to be keypunched one time by the managing entity. However, the statement of proportions provided by the Palm Beach County Property Appraiser's office actually gives the amount of assessment applicable to each time-share estate, so the managing entity need not make that calculation.

Section 192.037, Florida Statutes, is not the wellspring of authority to separately tax time-share estates; this specific authority flows from Section 721.03(5), Florida Statutes 1983.

Section 192.037, Florida Statutes, works to the benefit both of the time share estate owner and the mortgage lenders who have financed such purchases. If the Association did not collect and pay the taxes, the lenders would have to establish escrow accounts for each loan, just like an ordinary home mortgage, in order to protect the security of their first mortgage lien from a possible loss through a tax deed sale.

The Legislature is given the greatest freedom in matters of ad valorem taxation. Miller v. Higgs, 468 So.2d 371 (Fla. 1st DCA 1985), rev.den. 479 So.2d 117 (Fla. 1985):

> The question before us is not whether this law is wise, fair, or well drafted. It is within the legislative prerogative to classify property for purposes of taxation, so long as the classification is based upon some reasonable distinction rationally related to the purpose for which the statute was enacted, and so long as it does not conflict with any provision of the state or federal constitution. Perfect equality in the operation of laws imposing a tax on real property is impossible. Id. at 377.

Section 192.037, Florida Statutes, is completely in harmony with the provisions concerning taxation of time-share estates scattered throughout the Florida Statutes, and the manner in which taxes would be collected envisioned by Spanish River through the Declaration of Condominium.

CONCLUSION

After a four-day trial, the Circuit Court found as a mixed question of fact and law that these time share estates at this project were fee parcels of real estate, and upheld the assessments on those properties. The Court found that there were no constitutional infirmities in the Legislature's direction that

the managing entity would collect the taxes from the time share estate owners as their fiduciary and remit the payment to the Tax Collector. Indeed, this is the very procedure that Spanish River established in its own documents as the most efficient way to collect the taxes and to avoid inadvertent loss of property through tax deed.

High Point, op.cit., has numerous errors concerning the privileges which Section 192.037, Florida Statutes, in fact extends not only to the managing entity but also the time share estate owners. No other class of property owners in Florida is so favored. Section 192.037, Florida Statutes, is constitutional in all respects.

The Circuit Court's findings of fact are supported by substantial, competent evidence in the Record on Appeal. The Court properly accepted the testimony of the Property Appraiser's experts and rejected that of those called by Petitioners.

This Court should answer both questions propounded by the District Court of Appeal, Fourth District, in the affirmative.

Respectfully submitted,

WILLA A. FEARRINGTON and
GAYLORD A. WOOD, JR.

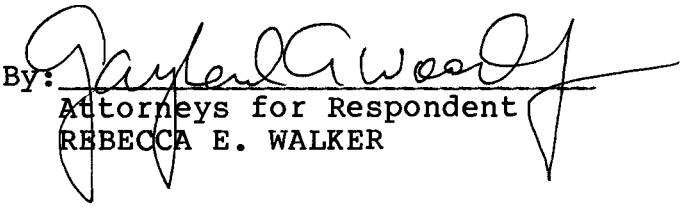
BY: Gaylord A. Wood, Jr.

I HEREBY CERTIFY that a copy of the foregoing Answer Brief and Appendix of Appellee, REBECCA E. WALKER, as Palm Beach County Property Appraiser, was served by mail this 11th. day of March, 1987, on MESSER, VICKERS, CAPARELLO, FRENCH & MADSEN, Suite 701, First Florida Bank Building, Post Office Box 1876, Tallahassee, Florida 32301, Attorneys for Petitioners; WARD WAGNER, JR., Attorney for Tax Collector, P.O. Box 3466, West Palm Beach, Florida 33402, JAMES M. SPOONHOUR, 215 North Eola Drive, Orlando, Florida 32802, and HON. ROBERT BUTTERWORTH, Attorney General, Room LL-04, The Capitol, Tallahassee, Florida 32304.

WILLA FEARRINGTON
Fearrington, Calkins & Hyman
509 North Dixie Highway,
West Palm Beach, Florida 33401
Tel: 659-2889

a n d

Law Offices Of
GAYLORD A. WOOD, JR.
304 S.W. 12th. Street
Ft. Lauderdale, FL 33315
Telephone 463-4040

By: 
Attorneys for Respondent
REBECCA E. WALKER