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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JAN 21 1987
CLERK, SUPREME COURT
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SPANISH RIVER RESORT CORPORATION, a Florida corporation, SPANISH RIVER RESORT AND BEACH CLUB ASSOCIATION, INC., a Florida corporation, not-for-profit, and SPANISH RIVER MANAGEMENT CORPORATION, a Florida corporation,

Plaintiffs/Petitioners

v.

CASE NO. 69,797

REBECCA WALKER, as Palm Beach County Property Appraiser, ALLEN C. CLARK, as Palm Beach County Tax Collector, and RANDY MILLER, as Executive Director of the Florida Department of Revenue, a state agency,

Defendants/Respondents.

**INITIAL BRIEF OF PLAINTIFFS/PETITIONERS,
SPANISH RIVER RESORT CORPORATION,
SPANISH RIVER RESORT AND BEACH CLUB ASSOCIATION, INC.,
AND SPANISH RIVER MANAGEMENT CORPORATION**

On Review of a Decision of the
District Court of Appeal, Fourth District

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STATEMENT OF THE CASE AND THE FACTS

Introduction

Petitioners bring this proceeding to invoke the jurisdiction of this Court pursuant to Article V, Section 3(b)(3) and (4), Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A). The District Court certified the following two questions of great public importance:

> 1. 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 unit without reference to its subdivision into time-share interests?
>
> 2. Are we correct in upholding the constitutionality of Section 192.037?

Additional grounds for this Court's jurisdiction are discussed in Argument.

This case will decide the merits of a protracted, statewide controversy between timeshare owners and developers on the one hand, and several property appraisers (with support from the Department of Revenue) on the other. The subject matter of the dispute is the proper ad valorem tax treatment of "fee timeshare real property." At the heart of the debate is the proper application and constitutionality of Section 192.037, Florida Statutes (1983).

Three other cases involving this statute are presently pending before this Court. One of them has been briefed as of this writing. Day v. High Point Condominium Resorts, Ltd., appeal filed, No. 69,519 (Fla.). The High Point case is unusual in that it raises only procedural matters arising under the statute and includes no issue with respect to valuation. The case at bar examines the statute in its entirety, and presents the thesis that a correct identification of the subject of taxation is dispositive of the timeshare owners' procedural rights and the valuation problem.[1]

The Plaintiffs in the trial court (Petitioners here) were: (1) Spanish River Resort Corporation, the developer of the Spanish River timeshare resort and the owner of unsold interests therein; (2) Spanish River Resort and Beach Club Association ("Association"), the managing entity and statutory representative of the many timeshare owners; and (3) Spanish River Management Corporation, a management company under contract with the Association. These parties will be referred to collectively as "Spanish River" in this brief.

Pursuant to Section 194.181, Florida Statutes, the Defendants below (Respondents here) were Rebecca Walker, Palm Beach County Property Appraiser ("Appraiser"); Allen C. Clark, Palm Beach County Tax Collector, and Randy Miller, Executive Director of the Florida Department of Revenue ("Department").

Accompanying this brief is an Appendix, which contains pertinent portions of the Record on Appeal. Pages of the Appendix and the Record on Appeal will be designated [A ____] and [R ____], respectively. Exhibits will be referred to as [P. Ex. ____] and [D. Ex. ____], respectively. Unless otherwise indicated: the facts relate to the January 1, 1983 assessment date; statutory references are to Florida Statutes (1983); all emphasis is Spanish River's; and "Appraiser" includes deputies and assistants.

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[1]The two other timeshare tax cases pending in this Court are Oyster Pointe Resort Condominium Association, Inc. v. Nolte, appeal filed, No. 69,794 (Fla.), Driftwood Management Company, Inc., et al. v. Nolte, et al., appeal filed, No. 69,796 (Fla.).

Despite four days of trial testimony, the material facts are uncontroverted.

Timesharing and Spanish River

The idea that real estate can be "shared" over time is not new. For example, the conventional lease confers the right to possession for a limited period, facilitating the use of property for residential or commercial purposes. The subject matter in the case at bar is a relatively new realty interest which also features a division of possession over time, but for a different purpose, that is, to facilitate vacations.

There are different types of timeshare interests. Some are perpetual (hence the term "fee") and consist of rights in a specific apartment unit; some fee interests "float" within a project; some timeshare interests are characterized as "leases," still others as licenses. The common thread between them is that there is land and a building which the various owners "share."

At Spanish River the owners share an eleven story building, pool, two tennis courts, and parking area. [P. Ex. 2]. The building houses 72 furnished residential apartment units, ranging in size from "studios" to two bedroom apartments, up to 1100 square feet in area. There is also a restaurant, coffee room, fountain area, storage space, and offices ("commercial units"). [R 50-54].

The building was constructed in 1969 for use as a hotel, and the resort is licensed as a hotel by the Florida Department of Business Regulation. It has a hotel front desk, switchboard and reservation department. In January, 1980, a Declaration of Condominium ("Declaration") was recorded. The Declaration contains provisions authorizing timesharing

[R 55-57; A 32-57], although units are still rented when available. [R 168].

Spanish River timeshare owners receive deeds conveying <u>two</u> interests in a condominium unit. These are: (1) a recurring right to occupy a condominium unit (and use the common elements) during a specified period each year until the year 2020; and (2) a remainder over as tenant in common with the other owners of timeshares in the same unit. The <u>remainder</u> is a "fee" interest. [A 58].

The interests conveyed at Spanish River are "timeshare estates," defined in Section 718.103(19), Florida Statutes as follows:

> "Time-share estate" means any <u>interest in a unit</u> under which the exclusive right of use, possession, or occupancy of the unit circulates among the various owners of time-share estates in such unit in accordance with a fixed time schedule on a periodically recurring basis for a period of time established by such schedule.

"Unit" here refers to a condominium apartment unit.[2] Section 718.103(16), Florida Statutes. Section 721.05(24) also defines "time-share estate":

> "Time-share estate" means a right to occupy a time-share unit, coupled with a freehold estate or an estate for years with a future interest in a time-share property or a specified portion thereof.

The minimum duration of a timeshare estate (hereafter "timeshare") at Spanish River is one week. [A 35]. Multiple sales of consecutive weeks are conveyed by a single deed. [R 294-295].

In addition to a realty interest, timeshare owners have the benefit of an arrangement which the developer created for the continued maintenance and management of the property as a resort. [R 58-60]. This arrangement

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[2] The District Court incorrectly employs the term "time-share unit" when referring to "timeshare estate." The timeshare unit is the apartment unit; the timeshare estate is the fractional interest created therein.

is established in the Declaration, which by its terms: (1) creates contract rights in the timeshare owners for future maintenance and management services; and (2) establishes the owners' Association to perform those services and to collect annual "maintenance fees" from the owners to pay expenses. [A 32-57; R 75-76].

Finally, Spanish River timeshare owners have the "exchange privilege." Spanish River is part of an international network of timeshare resorts, which exists to help owners "exchange" their occupancy with owners at hundreds of subscribing facilities worldwide. Resort Condominiums International ("RCI") arranges these exchanges, and is the largest such firm. RCI services are available only to timeshare owners at resorts which affiliate with RCI. The exchange feature is the "main package" sold with the property, is heavily emphasized in promotional efforts, is actively used by purchasers, and was described in testimony as a "major motivation" for buying. [R 59, 68-74, 78, 643; P. Ex. 39].

The management services and exchange feature described above are essential to the viability of timesharing at Spanish River. [R 60, 78, 81]. An issue addressed in Argument is whether these components of timesharing are subject to taxation as "real estate."

A condominium unit becomes "committed to interval ownership" upon the recording of the first deed to a timeshare estate therein. <u>This does not involve any change in the unit's physical characteristics</u>. [A 35; R 67-68]. As of January 1, 1983, 59 of the 72 Spanish River residential units had been committed to interval ownership, and timeshares representing 1840 unit weeks had been sold. [R 67, 185].

The timeshare business requires intensive marketing because a developer must find up to 51 buyers for each condominium unit.[3] [R 83-85]. The costs of these efforts and of financing must be recovered, and Spanish River's position below was that they do not contribute to the fair market value of the taxable real estate. Although the trial court excluded evidence of their magnitude [A 74-81, 85-87], Spanish River proffered that its costs of sale as of January 1, 1983 were approximately 55%; that commissions of comparable amount were charged by independent marketing firms; and that Spanish River's financing costs average approximately 13% of the purchase price. [A 76-77, 78-81, 87].

The Assessments

Prior to 1983, the Appraiser did not appraise timeshare interests for taxation. Each Spanish River condominium unit (including those that had been timeshared), was separately valued and listed on the tax roll. The aggregate 1982 valuation was less than $3 million. [P. Ex. 18]. Effective January 1, 1983, Sections 53, 54, and 58, Chapter 82-226, Laws of Florida changed the tax treatment of fee timeshare real property. The nature of this change, as a disputed matter, is addressed in Argument. For present purposes, suffice it to say that the new law makes the development as a whole the subject of enforcement of taxes, while also containing the following enigmatic sentence:

> The assessed value of each time-share development shall be the value of the combined individual time-share periods or time-share estates contained therein.

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[3]One week in each unit is reserved for annual maintenance [A 23].

On the basis of this legislation, the Appraiser in tax year 1983 valued each of the "unit weeks" which she deemed to exist at Spanish River. Her single "Notice of Proposed Property taxes" ("TRIM notice") for the Spanish River real estate reflected an "assessed value" of $22,171,100. [A 59]. However, this amount did <u>not</u> represent an appraisal of the land, buildings, and improvements comprising the resort. The $22,171,100 is a <u>summation</u> of 3672 unit week "values" (72 units x 51 weeks/unit).[4] [A 59; R 947]. The property described on the tax roll is "ALL UNIT WEEKS IN SPANISH RIVER RESORT & BEACH CLUB." [A 73].

Applying the "willing buyer/willing seller" definition of fair market value (in which the parties concurred), the "assessed value" on the TRIM notice and tax roll was not an estimate of what a hypothetical willing buyer would pay a willing seller for the Spanish River land and building in an arm's length transaction. Rather, there were 3672 hypothetical transactions, each involving the sale of a "unit week."

The Appraiser later notified Spanish River that the TRIM notice was in error, and that the nine commercial units and the thirteen residential units in which no timeshares had been sold should each be separately assessed. As a result, a new value of $18,735,900 was assigned to the 3009 unit weeks in the 59 timeshared units (59 units x 51 weeks/unit). The other 22 units were separately appraised and entered on the tax roll. The revised total valuation assigned to the resort was $19,136,222. [A 60-62; R 177-178; 352, 975].

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[4]The Appraiser did not assign values to the annual maintenance weeks.

To derive her "unit week" values, the Appraiser[5] first attempted to use actual selling prices. This effort was eventually abandoned because many sales involved multiple weeks, for which buyers were given discounts. Since the Appraiser was attempting to apply the willing buyer/willing seller market value definition to each individual "unit week," the discounts for the many multiple week sales created difficulties. [R 332-334, 969-970].

Her solution was to use a developer price list, which did not reflect actual selling prices, but which stated an asking price for each week. [A 63; R 334]. The Appraiser entered a flat percentage (70% for some, 75% for the others) of the list price of each "week" as an "assessed value" on a series of worksheets. [R 334, 463]. She then added the "values" together, and deducted her value estimate for furnishings in the units. [R 338, 341]. Another 15% was deducted because the total "was still a little high" [R 972]; the derivation of this 15% was not explained at trial.

Although she had never before valued timeshares for taxation, the Appraiser's methodology was developed through in-house discussions. [R 320-335]. She cited no appraisal literature as a source.

The Appraiser also furnished Spanish River with a computer printout showing a decimal number for each unit week. [A 88; P. Ex. 14]. One can compute the assessed value assigned to any unit week by multiplying the decimal listed by $18,735,900. The same proportions would apparently apply to the calculation of taxes. [R 178-179; 244].

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[5]The methodology and final value conclusions were developed by Mrs. Mary Ann Wilber of the Appraiser's staff.

As a result of the Appraiser's actions, physically identical units were assigned dramatically different total assessed values according to whether a deed conveying a timeshare had been recorded. For example, Unit 1006, in which no timeshares had been sold, was assessed for $25,000. [A 61-62]. Timeshare Unit 1007, next door and physically identical to Unit 1006, was assigned a total value of $236,634. [A 88]. Indeed, the total value assigned to just eight "unit weeks" in Unit 1007 exceeds the Appraiser's value estimate for the unencumbered, unfragmented fee in Unit 1006.

The Appraiser did not attempt to determine the replacement cost of the Spanish River building, and did not perform a cost approach or an income approach because the same were deemed "not applicable" to the appraisal of a timeshare estate. [R 350-355, 963-964]. Indeed, she made no effort to appraise the physical realty; only timeshare estates and 22 non-timeshared condominium parcels were appraised. [R 351-352]. She further testified that she was unaware of the financing arrangements that are typical in the timeshare industry; unaware of the financing costs in the industry and at Spanish River [R 357-358]; and unaware of the costs of marketing in the timeshare industry.[6] [R 61-62]. She had never visited the resort. [R 355].

A witness who testified on behalf of Spanish River was Richard Hewitt, an appraiser with doctoral studies in land economics. From 1977 through 1984, Dr. Hewitt was employed by the Federal Home Loan Bank Board as Chief District Appraiser for the southeastern United States.

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[6]A defense objection to the question concerning marketing costs was sustained; the evidence was proffered [R 359].

His duties caused him to become familiar with appraisal issues relating to timesharing, and portions of his testimony are instructive.

Dr. Hewitt's first contact with timesharing occurred in 1977 when he was asked to evaluate an industry request that the Board allow lenders to treat loans on "unit weeks" as real estate loans. Following Dr. Hewitt's recommendation, the request was denied. [R 632-638]. He explained his reasoning:

> That was because it was not clearly a totally real estate secured property. And that loan category was exclusive--the regulations related to exclusively real estate being collateralized. . . . The consideration was that in an individual time-share unit week there was more than real estate and that it was, number one, very difficult to estimate what the real estate portion was and that there were other things that were being transferred in the time-share situation.

[R 638-639]. Asked for the basis for his opinion that the timeshare purchaser acquires more than real estate, Dr. Hewitt explained:

> [W]hen you see what's actually being transferred when you've been involved with investigating the actual sales of time-share unit weeks, what is being sold is more than just the real property side of it in that you're being offered as a potential purchaser the right to exchange your unit. You're being offered vacations for a lifetime. You're being offered personal property. You're being offered quite a few other services and rather extensive services in some time-share properties that go extensively beyond what is typical to merely living in a unit or having the right to use a unit for a period of time.

[R 642]. Dr. Hewitt testified that during his entire time with the Federal Home Loan Bank Board, he was unaware of any lender attempting to place unit week loans in a real estate loan category. [R 646].

There was no evidence presented below to suggest that the vacation benefits and management services that are sold with timeshares are regarded as real estate in any other context, for any other purpose. Indeed, there was no evidence that the appraisal of timeshare estates is ever even attempted for other than tax purposes.

A few additional points made in the uncontroverted appraisal testimony are emphasized:

1) A threshold issue in every appraisal is the identification of the item to be appraised, that is, to which the fair market value definition is to be applied. The determination of the "unit of appraisal" is part of the appraisal assignment, not the appraisal process. [R 424-425, 514, 727, 844].

2) The division of ownership interests in a property is no impediment to appraisal of that property. Once the property subject to appraisal is identified, the appraiser applies the fair market value definition, estimating the willing buyer/willing seller sales price in a hypothetical arm's length transaction. A good example is the office building subject to leasehold interests. The Appraiser assesses the unencumbered fee title, even though the fee is encumbered by leases. In this way, she values the combined interests in the land and building. [R 409, 412, 686-687, 756-757, 952-953].

3) There is only one fair market value for a given item of realty. When appraisers speak of "wholesale," "retail," "tiers," and "levels of value," they are referring to different units of appraisal. [R 385-386, 603-604, 878-879].

4) The anticipated "gross sellout" of a timeshare project (a summation of expected sales prices) is not the fair market value of the land and buildings; it is a gross misrepresentation of value because the hypothetical purchaser of the development would deduct his anticipated expenses over

the sellout period. [R 468-469, 471-472, 546, 669-670]. A gross sellout appraisal does not conform either with federal guidelines or the standards of practice of the leading appraisal organizations. [R 669-701]. Dr. Hewitt testified that in his capacity with the Federal Home Loan Bank Board he reviewed many loans on timeshare projects that were in serious trouble, threatening the existence of the lending institution, as a result of faulty appraisal methodology. [R 661-3]. <u>The Appraiser has never contended that her summation approach produces the fair market value of the development</u>.

The <u>only</u> evidence of the fair market value of the development was the testimony of Spanish River's valuation witness (Mr. Callaway). Timesharing was deemed the highest and best use, and Mr. Callaway appraised the property for that use. One of three valuation methodologies he employed was the "discounted sellout." This involves estimating the gross sales revenues and expenses over the sellout period (in this case, six years), and discounting the difference to present value. [R 811-817, 889]. <u>The appraisal witnesses for both sides agreed that this is an appropriate technique to determine the fair market value of the land and buildings of a timeshare project</u>.[7] [R 414, 470-472, 673-674, 1014]. The three value indicators were within nine percent of each other. The resulting value conclusion as of January 1, 1983 was $6,705,626. [R 809-810, 818-821, 824].

The cause was tried nonjury from April 29, 1985 through the morning of May 3 before Circuit Judge Hugh MacMillan (Ret.), who entered Final

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[7]Spanish River has not advocated the discounted sellout technique for use in appraising timeshare estates, as the District Court seems to assume (Slip Op. p. 8).

Judgment in favor of the taxing authorities on every substantive issue. [A 15-30]. The District Court affirmed, but certified two questions of great public importance. Spanish River Resort Corp. v. Walker, 497 So.2d 1299 (Fla. 4th DCA) [A 1-14].

The District Court incorrectly credits Spanish River with several positions, the most critical of which is reflected in the first certified question. Spanish River has never maintained that the legal unit of valuation in tax year 1983 is the condominium apartment unit, but has consistently urged that the item appraised must be the item subject to the lien for taxes, i.e., the development as a whole.

Also, Spanish River has never suggested that real estate subject to a timeshare use should be valued as if it were not subject to timesharing, as stated in the first sentence of the District Court opinion. Spanish River's position has always been that the use must be reflected, but that reflecting the use of an item of property is not achieved by changing the appraisal assignment to a different item of property. The fair market value definition can be applied to a building subject to vacation timeshare interests, just as it can be applied to an office building subject to commercial "timeshare" interests called leases. Spanish River's position is that the building must be the subject of appraisal for tax purposes, because it is the property subject to the tax.

SUMMARY OF ARGUMENT

Article VII, Section 4, Florida Constitution requires that property subject to taxation be appraised at its just (fair market) value. The property subject to taxation under Section 192.037, Florida Statutes is the timeshare development as a whole. However, the Appraiser has not appraised the development, but has instead valued "unit weeks" and added her "values" together. As a result, the assessed valuation assigned to the property subject to taxation is nearly triple its fair market value.

The asserted statutory basis for the Appraiser's actions is the second sentence of Section 192.037(2), Florida Statutes:

> The assessed value of each time-share development shall be the value of the combined individual time-share periods or time-share estates contained therein.

If this language is read as authorizing a summation of values separately derived for timeshare interests, the statute is unconstitutional as a violation of the just valuation requirement. The development is subject to the tax, and <u>only</u> the development can constitutionally be appraised for the tax.

A literal application of the quoted provision will avoid the constitutional difficulty. Judicial precedent and appraisal testimony confirm that there is a difference between deriving a "summation of values" and deriving a single value of the <u>combined</u> <u>interests</u> in a parcel of real estate. Appraisal of the development in fee simple absolute will value the combined interests.

The effect of the Appraiser's scheme is to treat each timeshare interest as though it were the subject of taxation for appraisal purposes only. Unlike every other owner of property which is subject to tax appraisal in this state, the timeshare owner:

1) has no legal ability to pay his taxes and secure the release of his interest from the tax lien. If any one timeshare owner's taxes are not paid, the following consequences ensue for all the other owners:

a) loss of the statutory discount for early payment of taxes;

b) imposition of interest on delinquent taxes and costs associated with the sale of tax certificates;

c) clouding of titles;

d) sale of the entire development for taxes. By statute this would destroy all the timeshare interests;

2) is not entitled to notification of assessed value or taxes. Even the managing entity of the development, the purported statutory "agent" of the owners, is not given this information, but must compute it for thousands of interests;

3) is not given adequate opportunity to lodge timely protests of assessed value or proposed taxes, or to obtain the discount for early payment of taxes;

4) must pay someone (the managing entity of the development) to compute the taxable value of his interest, to compute the taxes due with respect to his interest, and to notify him of both.

These characteristics of the challenged system of assessment are without precedent or analogy. Before timesharing, no one ever suggested that the <u>subject</u> of taxation can be different for appraisal purposes than for all other purposes. Spanish River submits that the subject of an ad valorem property tax must be the property ultimately liable for the tax. This is the property which must be appraised.

Even if the Appraiser had authority to value timeshare interests, she misconceived their legal nature and generated excessive value as a result. In particular:

1) the Appraiser assigned a separate value to each "unit week." However, the "unit week" is not an interest in realty. Timeshare estates are realty interests of varying duration. Duration affects value;

2) the purchase price of a timeshare estate includes vacation benefits and contract rights to future services which are not real estate and may not be taxed as such;

3) a large portion of the timeshare purchase price is the cost of selling it. Deciding that there is a distinction between costs of "sale" and "marketing" expenses, the Appraiser refused to allow the deductions for costs of sale contemplated in Section 193.011(8). Her position requires one to accept that the costs of selling ("marketing") hundreds of interests in the same parcel of real estate increase the fair market value thereof.

The timeshare estate presents a novel and difficult appraisal problem. There is virtually no authoritative literature on the subject, and no evidence that such appraisals have even been attempted for any purpose other than ad valorem taxation. The record establishes this Appraiser's own confusion on the subject, but her appraisals are upheld as though she had all the answers. Since there is no statutory guidance either, there is nothing to prevent another property appraiser from having different answers and very different results. This system of assessment vests too much discretion in the local property appraisers.

Neither of the decisions below subjects this matter to the necessary scrutiny. The scheme is oppressive, and must be stricken. The subject of taxation is the development as a whole, and this must also be the subject of tax appraisal. If the Legislature wants to tax timeshare estates, it must: (1) clearly say so; (2) make the timeshare estate the subject of the tax lien; (3) afford timeshare owners the same rights as other taxpayers to receive assessment notices and tax bills and to pay their own taxes; and (4) provide property appraisers and timeshare owners with meaningful guidance with respect to the method of determining the real estate value of a timeshare interest.

The Court has jurisdiction. There are two certified questions of great public importance. The District Court decision also: (1) expressly and directly conflicts with two decisions of the District Court of Appeal, Fifth District; (2) upholds the validity of a state statute; and (3) expressly affects a class of constitutional officers.

ARGUMENT

POINT I.

THE COURT SHOULD EXERCISE JURISDICTION

There are four independent grounds for this Court's jurisdiction. First, the District Court certified two questions of great public importance, vesting jurisdiction pursuant to Article V, Section 3(b)(4), Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v).

Second, the decision below expressly affects a class of constitutional officers, namely the property appraisers. This vests jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iii). See, e.g., Bystrom v. Whitman, 488 So.2d 520 (Fla. 1986).

Third, the decision below expressly declares valid a state statute, Section 192.037, Florida Statutes. The Court has jurisdiction pursuant to Article V, Section 3(b)(3) and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i).

Fourth, the District Court decision expressly and directly conflicts with two decisions of the District Court of Appeal, Fifth District. In Hausman v. VTSI, Inc., 482 So.2d 428 (Fla. 5th DCA 1985), rev. denied, 492 So.2d 1332, the Fifth District held that the costs of selling timeshares do not contribute to the fair market value of the underlying real estate, and are properly deducted when using sales prices as indicators of value. Section 193.011(8), Florida Statutes. The District Court in the case at bar held squarely to the contrary. The Fifth District has also held Section 192.037 unconstitutional in High Point Condominium Resorts, Ltd. v. Day, 494 So.2d 508 (Fla. 5th DCA 1986), appeal filed, No. 69,519

(Fla.). The District Court in the case at bar upheld the statute. These conflicts support jurisdiction. Article V, Section 3(b)(3), Florida Constitution; Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

The High Point case is now pending before this Court, and focuses on procedural features of the statute. The case at bar presents an opportunity for the Court to receive argument with respect to the statute as a whole.

There are cases pending in several Florida counties raising the same or similar issues as the case at bar. The timeshare industry and many thousands of timeshare owners need a resolution of these issues.

The Court should exercise jurisdiction.

POINT II.

THE SUBJECT OF TAXATION AND TAX APPRAISAL IS THE TIMESHARE DEVELOPMENT

Basic Principles

The system of assessment in issue challenges historically accepted principles of property law and tax law.

One of the first principles of property law is that the greatest possible bundle of rights in a given parcel of real estate is the unencumbered fee simple absolute title. Recognizing this, the courts of this state have uniformly held that an appraisal of the fee in land values all the interests therein. Wolfson v. Heins, 149 Fla. 499, 6 So.2d 858 (1942); McNayr v. Claughton, 198 So.2d 366 (Fla. 3d DCA 1967). When one estimates what a hypothetical willing buyer would pay a willing seller for the land in an arm's length transaction, one determines the value of the totality of interests.

It follows that any system of assessment which produces a value which is less than the willing buyer/willing seller amount for the fee is not capturing all the real estate value. Century Village v. Walker, 449 So.2d 378 (Fla. 4th DCA 1984), rev. denied, 458 So.2d 271 (Fla. 1984); see also Bystrom v. Valencia Center, Inc., 432 So.2d 108 (Fla. 3d DCA 1983), rev. denied, 444 So.2d 418 (Fla. 1984). It also follows that any system of assessment which produces a value greater than the value of the fee is valuing more than real estate. For any given parcel, real estate value is fixed, by definition, by the willing buyer/willing seller hypothesis. The total value for real estate tax purposes is the value of the whole, no more, no less. Department of Revenue v. Morganwoods Greentree, Inc., 341 So.2d 756 (Fla. 1976).

The total value may change if land is physically subdivided so that new parcels are created. But then the principles apply to each subdivision parcel. Applying the fair market value definition to each parcel produces its real estate value. The same is true for a condominium, also a physical subdivision which creates new parcels. Section 718.106(1), Florida Statutes. There is only so much value in a condominium unit, and it is derived by applying the value definition to the unit. See Hausman v. VTSI, Inc., 482 So.2d 428 (Fla. 5th DCA 1985), rev. denied, 492 So.2d 1332.

Until recently, these principles were taken for granted. However, with the advent of vacation timesharing, taxing authorities have observed the sale of interests in land at prices which, when added together, far exceed the value of the land. The principal reason for this is the cost of selling timeshares. The developer must sell multiple interests in the same building to hundreds or thousands of buyers, and the costs of selling are recovered like all other costs in the sales price of the product. These costs do not increase the real estate value of the building. Nor does the developer's profit, if any. The real estate value of the building is, and will always be, what it could be expected to sell for in a hypothetical arm's length transaction.

Nevertheless, arguments and theories now abound to justify the capture of all the additional "value" based on timeshare selling prices for taxation, and to obscure the basic conflict between that objective and the fundamentals of real property law and tax law. For example, the timeshare interest is characterized by the taxing authorities as a "separate parcel of real estate." The imagery is of a physical subdivision which creates another defined piece of land. The timeshare interest is a temporal subdivision, however. It is an interest in the realty. The costs of selling such interests do not change the value of the realty, and only realty value may constitutionally be the basis for a real estate ad valorem tax.

The Hausman Case

In tax year 1982, the Orange County Property Appraiser valued the "unit weeks" at the Vistana timeshare development in Orlando. For each condominium unit, he issued a single assessment notice reflecting the summation of values assigned to the unit weeks. The taxpayers challenged the assessments upon the grounds: (1) that the law did not authorize the taxation of timeshare interests; and (2) the resulting value assigned to each unit far exceeded its real estate value because Hausman had failed to deduct the costs of sale and financing which were recovered through the purchase price. Section 193.011(8), Florida Statutes; Hausman v. VTSI, Inc., supra.

The taxing authorities countered that the interests sold at Vistana were "fee" interests, conveyed by warranty deed, and were therefore "separate parcels" of real property for tax purposes. They emphasized the developer's promotional literature, which informed purchasers that they were acquiring ownership of real estate. With respect to costs of sale and financing, the taxing authorities urged that the deductions for these items in Section 193.011(8) should be restricted to closing costs.

The trial court and the Fifth District Court of Appeal disagreed. Relying upon the constitutional injunction "No tax shall be levied except in pursuance of law," the District Court explained:

> The existing statutes did not authorize Hausman to appraise the partial time share interests created in VTSI's condominium units. Due to this lack of authority, the trial court correctly concluded that Hausman's appraisal based on the value of the unit weeks was unlawful. Since Hausman did not proceed lawfully, his assessment is not protected by a presumption of correctness. Blake v. Xerox Corp., 447 So.2d 1348 (Fla. 1984).

482 So.2d at 430.

The Hausman courts also agreed that the assessments exceeded the just value of the real property because Hausman refused to consider the developer's costs of sale. Although he had deducted 25% from sales prices, he did not explain the derivation of this amount.[8] The District Court concluded:

> Clearly, Hausman did not consider the statutory criteria. The conclusory twenty-five percent reduction by Hausman used to approximate fair market value is not a valid exercise of discretion. We suspect that if he had examined these extraneous costs, which add nothing to just value, the appraised value would approximate, if not equal, the value of the same condominium unit if owned by a single fee owner.

482 So.2d at 431.

The Hausman case stands for the propositions that there is no inherent power to tax; that the property appraisers of this state can proceed only in accordance with the statute law; that timeshare interests cannot be subjected to tax appraisal in the absence of explicit statutory authority; that the value to be assigned for purposes of real estate taxation is

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[8]A 15% reduction was allowed in the case at bar [R 342] and its derivation was also not explained.

real estate value; and that the costs of selling multiple realty interests do not increase real estate value.

The New Law

In 1982, the statutory subject of taxation for a timeshare condominium development was the condominium unit. In other words, the unit was the legal subject of appraisal and the legal subject of the tax lien. Such was the holding in Hausman.[9] However, effective January 1, 1983 the law was changed. Sections 53, 54, 58, Chapter 82-226, Laws of Florida. Most of the pertinent provisions are codified in Section 192.037, Florida Statutes.

The taxing authorities and the lower courts are of the view that this legislation evinces a legislative intent to authorize the assessment of a timeshare development by adding together the separately derived values for timeshare interests. The result is a total value added to the tax roll of triple the fair market value of the development in fee simple absolute. However, the new law cannot constitutionally be interpreted in this manner because:

1) the subject of taxation, the property ultimately liable for the tax, is the development. Therefore, the subject of the tax appraisal must also be the development. Article VII, Section 4, Florida Constitution requires that property subject to ad valorem taxation be assessed at its just valuation;

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[9] Unlike the Orange County Property Appraiser, the Appraiser in the case at bar complied with the law in 1982, valuing each timeshared condominium unit (and not the timeshare interests) at Spanish River.

2) the total real estate value of the development is the fair market value of the development appraised in fee simple absolute. Appraisal of the development includes the value of all the interests, and cannot be exceeded for purposes of real estate taxation.

Further, a careful analysis of the new legislation demonstrates that its literal meaning does not authorize an assessment equal to a summation of hundreds of values, but directs a single appraisal of the combined interests. The difference in wording seems subtle, but it is clear from judicial precedent and appraisal testimony that an appraisal of the combined interests is an appraisal of the development in fee simple absolute. Applying the statute literally thus: (1) vindicates timeshare owners' constitutional right that "No tax shall be levied except in pursuance of law," Article VII, Section 1(a), Florida Constitution; (2) conforms the subject of taxation with the subject of tax appraisal so as to comply with the just valuation requirement; (3) ensures that only real estate is assessed for purposes of real estate taxation; and (4) preserves the constitutionality of the statute.

A. The Subject of Taxation

The fundamental defect in the challenged system of assessment is its inconsistency with respect to the subject of taxation. On the one hand, the property ultimately liable for the tax is the development as a whole. On the other hand, the Appraiser treats each timeshare interest as a separate taxable item. Among the taxing authorities now before this Court, there is a difference of view as to the subject of taxation under Section 192.037.[10]

The subject of taxation is purely a legal question. Selection of the objects of taxation is purely a legislative function. It is not within the power of taxing officers to decide who and what should be taxed. Overstreet v. Ty-Tan, Inc., 48 So.2d 158 (Fla. 1950); Maas Brothers, Inc. v. Dickinson, 195 So.2d 193 (Fla. 1967). A valid assessment is the first prerequisite to a valid tax, and an assessment not authorized by statute is void. Lewis State Bank v. Bridges, 115 Fla. 784, 156 So. 144 (1934); C.D. Utility Corp. v. Maxwell, 189 So.2d 643 (Fla. 4th DCA 1966).

Section 192.037(9) provides in pertinent part:

> All provisions of law relating to enforcement and collection of delinquent taxes shall be administered with respect to the time-share development as a whole and the managing entity as an agent of the time-share period titleholders. . . .

Further, Section 192.037(7) provides:

> The tax collector shall accept only full payment of the taxes and special assessments due on the time-share development.

The development is liable for the taxes. It is the development that will be described on a tax certificate, and the development that will be sold at public auction if taxes are not paid. Such a sale will destroy all the timeshare interests. Section 197.271, Florida Statutes (1983),

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[10]The Appraiser (and the lower courts in the case at bar) view the subject of taxation as the timeshare estate, and characterize the statute as a requirement that these "separate parcels" of taxable property be "listed together" on the tax roll. The Property Appaisers Association of Florida, appearing as amicus in the High Point case, strenuously disagrees, arguing that the subject of tax assessment is the development and that Section 192.037 prescribes the valuation thereof.

197.552, Florida Statutes (1985). The purchaser at a tax sale will thus acquire the development in fee simple absolute.

The fact that the economic burden of the tax is on the development means that it is necessary to look no further to identify the subject of taxation. However, two other provisions are instructive. The first sentence of Section 192.037(2) provides:

> Fee time-share real property shall be listed on the assessment rolls as a single entry for each time-share development.

"Fee time-share real property" is defined in Section 192.001(14) as follows:

> (14) "Fee time-share real property" means the land and buildings and other improvements to land that are <u>subject to</u> time-share interests which are sold as a fee interest in real property.

According to the introductory portion of Section 192.001, this definition "shall apply in the imposition of ad valorem taxes." The listing on the assessment rolls is thus the "fee time-share real property," i.e., the land and building <u>subject</u> <u>to</u> the time-share interests. The statute does <u>not</u> direct the "listing on the tax rolls of all the time-share estates together," as stated in the Final Judgment. [A 27]. The Appraiser listed "unit weeks." [A 73].

Thus, the property listed on the tax roll is the same property that is liable for the tax. This is consistent with the general system of ad valorem taxation in Florida. See also the second sentence of Section 192.037(2), which provides for a determination of "the assessed value of each time-share <u>development</u>."

That the subject of taxation is the development is consistent with the general rule in Florida that the subject of real estate taxation is land, and not the separate interests therein.

Pursuant to Sections 192.001(12), 192.032, and 196.001, Florida Statutes, the Appraiser is directed to assess "real property," defined as follows for ad valorem tax purposes:

> "Real property" means land, buildings, fixtures and all other improvements to land. The terms "land," "real estate," "realty," and "real property" may be used interchangeably.

Section 192.001(12), Florida Statutes.

Together, these provisions direct that land and buildings are the general subject of real estate ad valorem taxation. They do not authorize separate taxation of realty interests, and in the absence of a special statute which overrides these general provisions, the Appraiser cannot lawfully render such assessments. This is why she does not value the interests of tenants in common, life estates, reversions, remainders, or leases.

Florida courts have uniformly reached the same conclusion. In Wolfson v. Heins, 149 Fla. 499, 6 So.2d 858 (1942), this Court held that the easement was destroyed by the tax sale because "in this state, the levy and assessment is on the realty itself, regardless of the existence of estates in it." 6 So.2d at 860-861. In McNayr v. Claughton, 198 So.2d 366 (Fla. 3d DCA 1967), the Third District Court of Appeal rejected a lessee's contention that only his leasehold interest was being taxed, observing that "the law requires an assessment of the value not of one interest in the land, but of the land." 198 So.2d at 368.

This Court spoke again in Department of Revenue v. Morganwoods Greentree, Inc., 341 So.2d 756 (Fla. 1976):

> [D]espite the mortgage, lease, or sublease of the property, the landowner will still be taxed as though he possessed the property in fee simple. The general property tax ignores fragmenting of ownership and seeks payment from only one "owner."

341 So.2d at 758. In other words, the assessment is of the real estate, not the ownership interests.

This is the answer to the District Court's reliance upon Section 721.03(5), Florida Statutes, which provides that "the treatment of time-share estates for ad valorem tax purposes and special assessments shall be as prescribed in Chapters 192 through 200." From this the court inferred an "unmistakable expression" of legislative intent "to bring individual time-share units or 'weeks' within the ambit of ad valorem taxation." If by this the court means that the timeshare estate has been made a subject of ad valorem taxation, the short answer is that this inference is directly refuted by the fact that the development is liable for the tax.

The Legislature has the power to depart from the general rule and direct taxation of individual realty interests. See Park-N-Shop, Inc. v. Sparkman, 99 So.2d 571 (Fla. 1957) (Legislature had power to direct assessment of leases in publicly owned land, but had not done so). Homer v. Dadeland Shopping Center, Inc., 299 So.2d 834 (Fla. 1969); Hausman v. VTSI, Inc., supra.

There are only three limited exceptions to the statutory directive to appraise land and buildings for ad valorem tax purposes. They are: (1) subsurface mineral rights, Section 193.481, Florida Statutes; (2) certain private leaseholds in publicly owned land, Section 196.199(2)(b), Florida Statutes; and (3) non-timeshared condominiums, Section 718.120(1).[11] In each case there is clear legislation creating the exception. See

[11]Pursuant to Section 718.120(3), Florida Statutes, condominiums subject to fee timesharing are assessed pursuant to Section 192.037, Florida Statutes.

Section 193.481(1), Florida Statutes, (". . . such subsurface rights shall be taken and treated as an interest in real property subject to taxation separate and apart from the fee"); Section 196.199(2)(b) (leaseholds in public land "shall be taxed as real property" under prescribed conditions); Section 718.120(1) ("each condominium parcel shall be separately assessed").

There is no such affirmative legislative declaration in the present case. If there were, the same would be in direct conflict with the provisions which make the development liable for the taxes. Tax liability is the final, dispositive test for identifying the property subject to an ad valorem tax.

It must be noted that the taxing authorities have differing views as to the meaning of the "development." The Appraiser in the case at bar defines the term as the "unit weeks," and excluding any portions of a building which are not timeshared (such as offices, storage areas, etc.). This is why she replaced her original single assessed value with 23, one for the "unit weeks," 22 for the non-timeshared units.

In 1985, the Department of Revenue promulgated a rule which defines "development" as a timeshare [condominium] unit. Rule 12D-6.06(2)(d), Fla. Admin. Code. Neither the Appraiser's contention nor the Department's is consistent with the statutes, which clearly employ the term "development" interchangeably with "fee time-share real property." This is the land, building, and improvements subject to timeshare interests. Section 192.001(14), Florida Statutes.

B. The Subject of Tax Appraisal as Required by the Constitution

Article VII, Section 4, Florida Constitution, requires a "just valuation of all property for ad valorem taxation." Just valuation is legally synonymous with fair market value. Walter v. Schuler, 176 So.2d 81 (Fla. 1965); Southern Bell Tel. & Tel. Co. v. County of Dade, 275 So.2d 4 (Fla. 1973). This is the amount the property subject to taxation would be expected to sell for in a hypothetical, arm's length transaction. Id.

The entire structure of the ad valorem tax system is built upon the proposition that the subject of the tax appraisal is the same as the subject of the tax. The just valuation requirement surely must be founded on this premise. Otherwise, the requirement would be meaningless. Except for property classified by express constitutional authority, all taxable property is assessed at its fair market value in Florida. See Section 192.001(2), Florida Statutes ("assessed value" means just or fair market value).

No one would seriously contend that parcel A should be liable for taxes levied based upon the value of parcel B. This is simply an abandonment of the just valuation standard for purposes of taxing parcel A, and could not pass constitutional muster. See, Franks v. Davis, 145 So.2d 228 (Fla. 1962); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973); ITT Community Development Corp. v. Seay, 347 So.2d 1024 (Fla. 1977).

The case at bar is an extreme example of taxing one item of property based upon the value of something else. The property ultimately subject to the tax is the timeshare development, worth $6.7 million, but the measure of the tax is based upon the separately derived values of hundreds of "unit weeks," totalling $19 million. The result is no different than it would be had the Appraiser simply chosen an assessment standard of three times market value for the timeshare development.

The most obvious consequence of this scheme is that the owners of the development are called upon to pay triple the amount in ad valorem taxes than the owners of another building also worth $6.7 million. In other words, because the use of the building is for timesharing, its tax liability is triple the amount its value can justify.

If for any reason the taxes are not paid, the development will ultimately be sold at public auction. The proceeds of sale go first to satisfying the tax liability (plus interest and costs), then to other lienors, then to the owners. Section 197.582(2), Florida Statutes (1985). Section 197.552 provides in pertinent part:

> Except as specifically provided in this chapter, no right, interest, restriction, or other covenant shall survive the issuance of a tax deed. . . .

Assume that at the time of a tax sale of a timeshare development there are no liens other than for taxes.[12] There will be three consequences of significance here: (1) the proceeds of sale disbursed to the timeshare owners will not approach the "value" used to determine tax liability; (2) the amount of taxes and interest deducted from the proceeds prior to disbursement to the owners will be far greater than it would have been if the property had been assessed at its fair market value; and (3) the owners will be left without their interests. The taxing power will have literally destroyed the item which the Appraiser deems subject to taxation.

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[12]For simplicity, Spanish River has assumed a constant real estate market between the assessment date and the date of the tax sale.

The just valuation requirement protects against such consequences. It is not an empty promise. The property subject to the tax and subject to sale for the tax is the property which must be valued for the tax.

C. The Subject of Tax Appraisal as Required by Statute

The lower courts concluded that the Legislature intended to implement this scheme of taxation. The principal basis for this conclusion is the second sentence of Section 192.037(2), Florida Statutes which provides:

> The assessed value of each time-share development shall be the value of the combined individual time-share periods or time-share estates contained therein.

A superficial reading of this language suggests a summation of separately derived values for timeshare interests. Indeed, an early draft of the legislation clearly required a summation of values. [A 64-72]. However, the language was changed during the legislative process, and its literal meaning as enacted is precisely the opposite of the meaning attributed to it by the taxing authorities and lower courts.

Judicial decisions cited earlier in this brief make clear that an assessment of land values all the interests therein. McNayr v. Claughton, 198 So.2d 366 (Fla. 3d DCA 1967). Such an assessment includes the totality of the interests. Bystrom v. Valencia Center, Inc., supra; Century Village v. Walker, supra.

At trial, the testimony of four appraisers, including the Property Appraiser, was that an appraisal of land and buildings in fee simple absolute values the combined interests in the realty. Before timesharing, such an appraisal was always thought to be the way one measured the total amount of real estate value which a given parcel possesses.

The literal language of Section 192.037(2) closely tracks the judicial commentary and appraisal testimony on this issue. Further, the opening phrase refers to the "assessed value of each time-share development." "Assessed value" is defined in Section 192.001(2) as fair market value. The law thus contemplates a determination of the fair market value of the development, i.e., what a willing buyer would pay a willing seller for the land and building in a single, arm's length transaction.

The words "the value" are in the singular; the Appraiser is directed to derive a single value, not several thousand, and "the value" which the statute prescribes is the value of the "combined estates." A summation of independently derived values is not an appraisal and therefore not an "assessed value" as defined in Section 192.001(2). To infer that a summation approach is envisioned is therefore to depart from the statutory definition of a term which is basic to the property tax system. The statute as written affirmatively requires that the subject of the appraisal be the development, which coincidentally is the property subject to the tax. The juxtaposition of words which leads to this result is subtle, but has an enormous effect on value.

Spanish River acknowledges the importance of legislative intent, as a general matter, in the interpretation of statutes. However, the lower courts erred in refusing to apply Section 192.037(2) literally, for three reasons. First, the evidence of a legislative intent to authorize this system of assessment is insufficient. Rather, in almost every respect, the literal language of the statutes tracks the general property tax. The property subject to taxation is the subject of the tax roll listing, the subject of the tax appraisal, and the subject of the tax lien. The assessed value of the property is reported on a single assessment notice, and a single tax bill is sent to the taxpayer.

The District Court found significance in the use of the word "fee" throughout the 1982 enactment. However, this only establishes that a new scheme was created for fee timeshare real property. Clearly, fee projects are different because there is no one "owner" to whom notices can be sent. This is the reason for designating the managing entity as agent of the owners. But it in no way suggests that the subject of appraisal is anything other than the subject of taxation.

Second, timeshare owners are entitled to a strict interpretation of the tax laws. Article VII, Section 1(a), Florida Constitution provides "No tax shall be levied except in pursuance of law." This Court has repeatedly held that taxing statutes must be strictly construed in favor of the taxpayer. Harbour Ventures, Inc. v. Hutches, 366 So.2d 1173 (Fla. 1979). As the Court explained in Overstreet v. Ty-Tan, Inc., 48 So.2d 158 (Fla. 1950):

> A cardinal rule for construing taxing statutes requires that they impose the tax in clear and specific terms, otherwise they will be held not to impose it. Taxing statutes should be liberally construed in favor of the taxpayer. It is not within the power of taxing offices or this court to say who shall be taxed or to impose a tax on any person or class unless the Legislature in clear and specific terms authorizes the tax.

48 So.2d at 160. See also State ex rel. Seaboard Air Line R. R. Co. v. Gay, 160 Fla. 445, 35 So.2d 403 (1948).

Article VII, Section 1(a) of the Constitution and the jurisprudence of this state require that when the Legislature intends to exercise the power of taxation, it must express that intent in clear and unmistakable terms. The rule of strict construction is in large measure unconcerned with legislative intent. It represents a recognition that the power to tax is exclusively legislative, and a judicial refusal to engage in legislating by drawing inferences of intent. It reflects a presumption that "the Legislature, which was unrestrained in its authority over the subject has so shaped its law, as without ambiguity or doubt, to bring within it everything that was meant should be embraced." State v. Beardsley, 84 Fla. 109, 94 So. 660, 664 (Fla. 1922).

The issue in Beardsley was whether the assessor had statutory authority to back assess personal property. Although there were several provisions which supported an inference of legislative intent, this Court declined to draw the inference:

> To hold otherwise would require us to introduce into the act words or provisions omitted from it by the Legislature, and thus by remedying what may be viewed by some as a defect in the statute, we should be making laws, not interpreting them. It is clear that the Legislature, which is to determine all questions of policy or discretion in ordering and apportioning taxes and which must make all the rules and regulations by which the taxes must be collected, must be left to supply the authority. . . .

94 So. at 664.

In the case at bar, the Legislature could easily have adhered to the language of an earlier draft which specifically required a summation of values. The reasons for the change are not apparent. Perhaps the original language did not express the majority intent, or perhaps there was concern over the obvious constitutional problems with a "sum of the parts" assessment. Perhaps there was even a conscious effort to avoid any clear expression of intent, so that the matter would be left to the courts to decide.

Whatever the reason, the result is litigation throughout the state, in which even the taxing authorities cannot agree on the subject of taxation. They do seem to agree on the subject of appraisal, but they have absolutely no experience or statutory guidelines with respect to the proper methodology. The Court is encouraged to read the Appraiser's description of her procedures and to examine the reams of worksheets she generated. [R 318-360; P. Ex. 6, 7, 8, 10, 12, 13]. The process would be amusing if its results were not so oppressive and capricious.

There must be more than an inference of intent. There must be a clear expression of intent, and there must be some guideline prescribed to facilitate implementing that intent. There is no precedent for an extension of the taxing power based upon a statute which by its terms requires the opposite result. The constitutional injunction "No tax shall be levied except in pursuance of law" stands as an impenetrable obstacle to such taxation.

The most compelling reason why the statute should not be interpreted as authorizing a summation of timeshare interest values for use in assessing a timeshare development is that to do so would render the statute unconstitutional. Having chosen the timeshare development as the subject of taxation, the Legislature must accept that it is assessed at its fair market value like other buildings. Otherwise, the just valuation clause becomes a meaningless abstraction.

D. Spanish River's Appraisal of the Development

It is necessary to emphasize a distinction between two issues which is obscured in the decisions below. The first issue is whether the Appraiser had statutory and constitutional authority to appraise timeshare interests. If not, the assessments must be set aside, and Spanish River is at a minimum entitled to a reassessment. Department of Revenue v. Morganwoods Greentree, Inc., supra.

The second issue is whether Spanish River's appraisal of the development should be accepted in lieu of a reassessment. Because the lower courts disagreed with Spanish River on the first issue, it was unnecessary to reach the second. Nevertheless, both courts criticized the methodology employed by Spanish River's appraiser, and the District Court appears to have the erroneous impression that this methodology was advocated for the appraisal of timeshare estates.

Whatever the ultimate disposition of this cause, the treatment of the discounted sellout appraisal technique by the taxing authorities and the lower courts does a disservice to the jurisprudence. Judicial decisions are now being cited for the proposition that the technique (which is in substance an income approach to value) is invalid as a matter of law, so that its suitability is no longer considered in the context of a particular appraisal assignment.

Of the three decisions cited by the District Court, only two mention the discounted sellout technique. 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), rev. denied, 430 So.2d 451 (Fla. 1983). Both involve improper applications of the technique. Compare, Boynton v. Canal Authority, 265 So.2d 722 (Fla. 1st DCA 1972), where the court approved the technique and discussed the situations when the same is and is not appropriate.

Like any method, the discounted sellout technique may be too speculative in some instances, and not in others. If the appraisal profession finds the technique suitable in a given application, it is not appropriate for a court, which possesses no appraisal expertise, to decide that the technique is invalid as a matter of law.

Therefore, it is not subject to judicial criticism. An appropriate disposition of this issue is to direct that it be reconsidered on remand. In the case at bar, the appraisal witnesses for both sides agreed that it is the preferred technique for valuing the land, buildings, and improvements of a timeshare development.

E. High Point

The District Court of Appeal, Fifth District, has held that Section 192.037 is unconstitutional because it denies timeshare owners the procedural rights afforded all other taxpayers. High Point Condominium Resorts, Ltd. v. Day, 494 So.2d 508 (Fla. 5th DCA 1986), appeal filed, No. 69,519 (Fla.). Among the many pending cases arising under this statute, High Point is unusual in that no issue is raised with respect to the subject of taxation. The parties and the District Court in that case appear to have assumed that the subject of taxation is the timeshare estate. However, this is the key issue which determines the procedural rights of timeshare owners, just as it determines the subject of tax appraisal.

As explained previously, Spanish River's view is that the subject of taxation is clearly the development because the development is ultimately liable for the taxes. The consequence of this conclusion is that the real estate is treated the same as real estate generally in Florida. Taxation is of the land, not the individual interests therein.

Because all the interests in land are included in an assessment of the unencumbered and unfragmented fee title, the interests are not separately valued or listed on the tax roll. The interest is not the subject of taxation. Its owner is not entitled to notice of assessed value and taxes because no assessed value is derived and no taxes are imposed with respect to the interest. With the three limited exceptions prescribed by statute and discussed previously, the division of ownership interests in land is simply of no concern to government for purposes of ad valorem taxation.

Because the land is liable for the taxes, the land is subject to the tax lien and ultimate sale if the taxes are not paid. Unless a special statutory exception appears in Chapter 197, the tax sale destroys all the interests in the land. Sections 197.271, Florida Statutes (1983), 197.552, Florida Statutes (1985).

A legislative declaration that an interest in realty shall be subject to separate taxation has the effect of treating the interest as though it were a separate parcel of real estate. This Court has upheld the Legislature's authority to tax realty interests as separate parcels. Williams v. Jones, 326 So.2d 425 (Fla. 1975), appeal dismissed, 429 U.S. 803, 97 S.Ct. 34, 50 L.Ed.2d 63 (1976). However, the Court has never held that this power can be exercised in a way that denies the owner the same procedural rights as other taxpayers (or that results in total valuation in excess of the real estate value). There would certainly be no fairness in such a holding.

The analysis in the preceding portions of this brief leads to the conclusion that the timeshare interest has not been legislatively identified as a subject of taxation in Florida. The subject of taxation is the timeshare development, and timeshare owners therefore have no right to insist upon their own assessment notices, tax bills, and other procedural rights afforded the owners of taxable property. If the law is applied in accordance with its literal meaning, timeshare owners are treated no differently than other owners of realty interests, and the statute need not be declared invalid.

However, if the law is to be read as creating one subject of taxation for lien purposes and another for appraisal purposes, it cannot stand. If each interest is a "separate parcel of real property," as the taxing authorities and lower courts opine, then it is not too much to ask that the owners have the same rights and benefits as all other taxpayers.

Chief among these rights is the right to pay one's own taxes and release his property from the tax lien. This right is expressly denied because the tax collector is prohibited from accepting less than full payment of <u>all</u> the taxes due on the entire development. Section 192.037(7), Florida Statutes. The effect is to make every interest liable for the taxes on all the others. It is the functional equivalent of a scheme by which: (a) the Appraiser values all the homes in a residential subdivision, adds the values together, and sends out a single assessment notice; (b) a single tax bill is issued; and (c) the tax collector is prohibited from accepting anything less than the total amount billed.

The District Court in the case at bar rejected the <u>High Point</u> court's analysis, essentially on the ground that the inequities cited by the Fifth District do not exist. Spanish River has a few comments on this that might be helpful.

Starting with the beginning of the process, it is important to note that the value assigned to each "unit week" is not even reported to the managing entity. A "statement of proportions" is furnished [A 88] from which the value of each "week" can be computed. For a project the size of Spanish River, this means 3672 computations. This is an expense which only timeshare owners must bear, in addition to the higher taxes they are called upon to pay.

The Notice of Proposed Property Taxes ("TRIM" Notice), contains a great deal more information than merely the assessed value. Also included is information relating to how the assessment might be protested, and the schedule of budget hearings for various taxing authorities. Section 200.069, Florida Statutes. This TRIM notice goes to the managing entity. If the managing entity is to forward the computed value to each owner, an additional expense is incurred for mailing.

A petition to the property appraisal adjustment board must be filed within 25 days following the mailing of the TRIM notice. Section 194.011(4)(d), Florida Statutes. Therefore, it is plain that timeshare owners are <u>not</u> treated the same as other taxpayers. They are at a substantial disadvantage because they do not receive notice of their share of the total assessment until the managing entity completes its computations and effects a mailing. The 25 days is barely sufficient even for a taxpayer who receives his own TRIM notice.

The situation is similar with respect to tax bills. The managing entity receives the bill, computes each owner's share of taxes, then mails another notice. There is a four percent discount for taxes paid within 30 days of the mailing <u>by the tax collector to the managing entity</u>. Section 197.012, Florida Statutes (1983), 197.162, Florida Statutes (1985). Thus, timeshare owners, who may be scattered all over the world, are impaired in their ability to obtain the discounts available to other taxpayers.

Of course, the greatest obstacle to the discount is the fact that none will be allowed unless all owners' taxes are paid. As previously explained, the whole scheme is invidious because one owner's failure to pay his taxes prevents the others from doing so. Yet the District Court concludes that timeshare owners are afforded the same rights as other taxpayers.

The inability to pay one's taxes prior to delinquency is absolute. After the delinquency date, taxes can only be paid with interest at 18% until a tax certificate is sold. Section 197.062(3), Florida Statutes (1983), 197.402, Florida Statutes (1985). There was previously a right of partial redemption, which has now been withdrawn from timeshare owners. Section 197.472(8), Florida Statutes (1985). Thus, the timeshare owner remains at the mercy of the other owners of these so-called "separate parcels."

The rights conferred after an application for a tax deed are in no sense adequate to protect the timeshare owner from being in that situation in the first place.

It appears that the taxing authorities ask for too much. They want all the value they can muster to add to the tax roll, with a minimum of administrative burden. They want to treat timeshares as "separate parcels," but for no other purpose than valuation.

If, as the Fifth District assumed, the timeshare estate is the subject of taxation, Section 192.037 must fall.

POINT III.

EVEN IF THE STATUTES AND CONSTITUTION AUTHORIZE TAX APPRAISAL OF TIMESHARE ESTATES THE ASSESSMENTS ARE UNLAWFUL

A. The Appraiser Did Not Appraise Timeshare Estates

The Appraiser assumed that every "unit week" which had been or could be created in the 59 timeshared units at Spanish River is a separate realty interest. In her eyes, the recording of the first deed conveying a timeshare estate in a unit creates 52 timeshare estates.

One week is the minimum duration of a timeshare estate as defined in Sections 718.103(19) and 721.05(24). It is neither realty nor an interest in realty. Nothing in Florida Statutes or the Declaration equates "time-share estate" with "week," or provides that 52 timeshare estates are created with the first deed. Instead, two are created: the one conveyed, and the one retained by Spanish River (which may be up to 51 weeks in duration).

The consequence of the Appraiser's assumption is increased value. For example, as of January 1, 1983 Spanish River owned a timeshare estate of 30 weeks duration in unit 1101. To determine fair market value, the Appraiser should have estimated what a willing buyer would pay and a willing seller would accept for this interest. Instead, she assigned these "weeks" a total value of $155,507, a summation of anticipated sales prices in 30 separate conveyances of one "unit week" each [P. Ex. 14]. This fails to recognize multiple week discounts or the time value of money.

The Appraiser's own statement of proportions reveals that many Spanish River timeshare owners owned multiple consecutive weeks [P. Ex. 14; R 294-5]. The taxes which these people are called upon to pay should be based upon the values of their own interests, not some hypothetical interests of shorter duration. The Appraiser's approach is the functional equivalent of appraising a ten-year lease by adding together the values of ten one-year leases. All the economies of scale are ignored. Her approach may have been simpler, and it clearly resulted in increased value, but it did not appraise the timeshare interests as they actually existed. The assessments must be set aside.

B. The Appraiser has Assessed More than Real Estate

A timeshare interest is not land, it represents rights in land. Spanish River has no quarrel with the general proposition that realty interests may be "classified" as real estate for purposes of ad valorem taxation. Williams v. Jones, supra. However, such classification cannot be used as a subterfuge to facilitate assessed valuations which exceed the value of the land. The Legislature has recognized this in other contexts. See, Section 193.481(3), Florida Statutes (separate assessment of subsurface mineral rights shall not result in total assessed value in excess of value of land in fee).

In the case at bar, it is uncontroverted that the assessments added to the tax roll far exceed the value of the development. There is no statute or judicial precedent authorizing this unprecedented result, only arguments in which the "bundle of rights" theory of real property is reshaped to achieve a desired result.

The rights contained in the real estate "bundle" are the right to use the real estate, the right to exclude others from the real estate, and the right to dispose of the real estate. They are all rights in the land. Not included are contract rights for the future maintenance of the land, or the annual opportunity to exchange one's right of occupancy for another on the opposite side of the world. See Muckenfuss v. Miller, 421 So.2d 170 (Fla. 5th DCA 1982), rev. denied, 430 So.2d 451 (Fla. 1983) (promise of future improvements contained in agreements for deed not includable in present value for tax purposes).

As Dr. Hewitt testified, timeshare owners pay for these benefits in addition to the recurring right of occupancy defined as a "time-share estate." Section 718.103(19), Florida Statutes. Presumably, they also pay some premium for the fact that they are given possessory rights without the necessity to own the entire parcel (or at least a condominium unit) in fee. But the value of the land remains defined by the application of the fair market value hypothesis to the land. It is not changed by the creation of 51 "timeshare interests" any more than by the existence of 51 tenants in common. Why there should be a difference in the way the two are treated for tax purposes has never been explained.

There is no statute purporting to define each timeshare estate as a "separate parcel of real estate," or purporting to deem all the benefits and services that go along with an otherwise worthless recurring right of occupancy in a building to be real estate for ad valorem tax purposes. The only testimony in the case from the real world is to the contrary.

C. The Eighth Criterion

The prior discussion focuses upon what the timeshare buyer receives. However, the same result follows from the perspective of the seller. Again, there is clear and direct statutory authority for Spanish River's position, and no authority for that of the taxing authorities.

Section 193.011(8), Florida Statutes (1983), prescribes the eight factors which the Appraiser is required to consider, including criterion (8):

> The net proceeds of the sale of the property as received by the seller, after deduction of all of the usual and reasonable fees and <u>costs of sale</u>, <u>including the costs and expenses of financing</u>, and allowance for unconventional or atypical terms of financing arrangements. * * *

The Final Judgment, quoted by the District Court, attributes to Spanish River the contention that "development and marketing costs should be deducted from the market value" pursuant to this provision. [A 11]. This is incorrect. Rather, Spanish River's position has always been that these costs must be deducted from the sales price of a timeshare estate in order to <u>reach</u> the fair market value of the real estate component.

The eighth criterion does not require a deduction from market value; it requires that the Appraiser <u>consider</u> certain costs and determine whether they contribute to the taxable value of the item being appraised. The costs of selling timeshares in a building (including the cost of financing the business) do not contribute to the value of the building. The building stands inert and indifferent to these costs, and so does its value.

In <u>Hausman v. VTSI, Inc.</u>, <u>supra</u>, the Fifth District Court of Appeal held that these costs of sale must be deducted in using timeshare sales prices to derive the real estate value of a condominium unit subject to timesharing. That proposition has continuing vitality under the current law, except that the resulting assessment is of the development rather than the unit.

However, in the case at bar, precisely the opposite result was reached. The same costs which the Fifth District found should be deducted from sales prices as a matter of law were not even admitted into evidence by the Circuit Court in the case sub judice. Hausman is not cited in either of the lower court decisions.

The arguments of the taxing authorities, adopted by the lower courts, rely on a simplistic construct that proceeds as follows: Each timeshare estate is a "separate parcel of real estate." Just value means fair market value, and every parcel must be appraised for tax purposes at fair market value. To deduct costs of sale from timeshare sale price is to deviate from the market value standard. Moreover, the property appraisers are not required to apply any of the eight criteria under any circumstances. All that is required is that they consider them.

The first premise is faulty. A timeshare estate is not land. The taxing authorities' analysis affords no consideration to the true nature of the item being appraised. Further, the idea that the Appraiser need only "consider" the statutory factors does not assist the Appraiser in the case at bar. The testimony was clear that she made no effort to ascertain the nature or magnitude of the sales and financing expenses incurred at Spanish River or in the timeshare industry generally. Having failed to learn what they are, the Appraiser cannot have meaningfully considered them, or formed any judgment as to whether they contribute to taxable value. See Muckenfuss v. Miller, supra (failure to consider in good faith any of the factors in Section 193.011 invalidates assessment); Palm Corp. v. Homer, 261 So.2d 822 (Fla. 1972); Lanier v. Walt Disney World Co., 316 So.2d 59 (Fla. 4th DCA 1975), cert. denied, 330 So.2d 19 (Fla. 1976).

In the District Court, Spanish River explained another dimension of this problem. There is no secondary market for timeshares. The only "market" is that created through the developer's own promotional efforts. Since the costs of these efforts is so high, and since the typical purchaser does not have the same marketing machinery, the point was made that a purchaser will have difficulty recovering his purchase price in a sale to a third party. The District Court characterized this analysis as an admission that the developer overcharged its purchasers. This is like saying that Sears overcharges the customer who purchases an appliance. The customer does not have a showroom or catalog operation to attract buyers, so he may not be able to resell the item for the price he paid. This does not mean he was "overcharged."

Spanish River does not quarrel with the notion that real estate is subject to taxation at its fair market value, or with the practical necessity of affording discretion to the property appraiser. However, the timeshare interest presents an appraisal problem that calls for more than the blind application of concepts evolved in the context of appraising land. The combination of simplicity and increased value may well be attractive to some, but the fair administration of a tax system requires a measure of serious analysis.

The Appraiser's "unit week" appraisals cannot stand because she failed to understand the nature of the item she was attempting to value. The discussion also serves to reinforce the arguments advanced in Point II, that the law should not be interpreted as authorizing such appraisals at all. The scheme employed here is arbitrary and unworkable.

CONCLUSION

The famous admonition that the power to tax includes the power to destroy is more than an abstraction in this case. The way the taxing authorities are administering the taxation of timeshare property is a recipe for the destruction of the timeshare interests of thousands of people, as well as the industry. The whole scheme rests far too heavily on inference and home-spun theory, rather than clear statutory authority, to be sustained. The constitutional injunction "No tax shall be levied except in pursuance of law" means what it says.

The Court should answer the first certified question by holding that the subject of taxation and tax appraisal is the timeshare development as a whole. With respect to the second certified question, the Court should hold that Section 192.037, Florida Statutes is unconstitutional only if the Court deems the statute to authorize tax appraisals of timeshare interests. The decision of the District Court should be quashed, with directions that judgment be entered in favor of Spanish River.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the Initial Brief of Plaintiffs/Petitioners, together with the Appendix, have been served upon Gaylord A. Wood, Jr., 304 S.W. 12th Street, Ft. Lauderdale, FL 33315; Robert C. Ross, Cone, Wagner, Nugent, Johnson, Roth & Romano, Post Office Box 3466, West Palm Beach, FL 33402; J. Terrell Williams, Assistant Attorney General, Department of Legal Affairs, Room LL04, The Capitol, Tallahassee, FL 32301; and James M. Spoonhour, Lowndes, Drosdick, Doster, Kantor & Reed, 215 North Eola Drive, Tallahassee, FL 32802, by U. S. Mail this 20th day of January, 1987.

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