IN THE SUPREME COURT OF FLORIDA

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.

CONSOLIDATED REPLY 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Laws of Florida

Florida Statutes (1983)

Florida Constitution

Other Authorities

THE FACTS AND THE CASE[1]

The material factual matter is uncontroverted and is accurately recited in the statement of facts in the Initial Brief. However, the answer briefs do not fairly define the issues, attribute contentions to Spanish River, or distinguish between fact and law. The overall effect is confusion in a case that is complex enough without it. A few corrections:

- The taxing authorities confuse the legal issue of what the Appraiser is authorized to appraise for taxation, with the distinct issue of appraisal methodology. The Appraiser valued timeshares and 13 condominium units. Mr. Callaway valued land and a building. The different appraisal subjects resulted from the different legal positions of the parties, and the primary issue in this case is which legal position is correct. This is not a battle between experts with different personal opinions as to what should be appraised; it is a contest between competing legal positions as to what the statutes and Constitution of Florida permit to be appraised.

- In the same vein, there is confusion between the legal subject of appraisal and the consideration of use in appraisal. Spanish River has never claimed that the building should be appraised "as if it were a rental apartment building." [Appr. Br. 25]. It should be appraised as a timeshare development. That there is a single value derived in

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[1]This is a consolidated Reply Brief, submitted in response to the separate answer briefs of the Appellees Property Appraiser and Department of Revenue, pursuant to the Court's order of March 25, 1987. In addition to the conventions adopted on page 2 of the Initial Brief, pages in the briefs will be designated [I. Br. ____], [Appr. Br. ____], and [DOR Br. ____], respectively. Unless otherwise noted all statutory citations are to 1983 Florida Statutes.

both instances does not justify the implication that Spanish River advocates ignoring the use of the building. Adding together the separate appraisals of timeshare interests is an abandonment of the building as the subject of appraisal.

- The Appraiser points out that there was no discrimination as between timeshare projects in the county, and notes the trial court's finding on this basis that there is no invalid classification of real property. [Appr. Br. 7]. But the judgment signed by the trial court incorrectly perceived the issue raised. Spanish River's position has always been that the challenged system of assessment discriminates against fee timeshare real property as a class.

- Contrary to the Appraiser's assertion [Appr. Br. 6], Spanish River proffered the specific percentages of timeshare purchase prices that are attributable to marketing and finance expense. [I. Br. 9].

- The Appraiser did not "consider" the cost approach or any other approach for purposes of appraising the land and buildings, as she implies. She also made no effort to determine what costs and expenses of sale were "typical" for timesharing, so it is difficult to understand what she claims to have "assumed" in valuing individual timeshares. [Appr. Br. 9-10].

- The Appraiser refers to "the petition" filed with the Property Appraisal Adjustment Board. [Appr. Br. 11]. In truth, Spanish River's general manager prepared, signed, and filed 3,672 separate petitions, after the Appraiser advised that this would be necessary. [R 181]. This advice was of course consistent with the taxing authorities' "separate parcel" thesis.

- Spanish River has never argued that any item of taxable property should be assessed at less than its just value. [Appr. Br. 32]. However, only the taxable item can be assessed. If the timeshare estate were deemed subject to separate tax appraisal, then the appraisal must value the timeshare estate as defined by law. Sections 718.103(19), 721.05(24), Florida Statutes (1983). The value of anything received by the purchaser other than the timeshare estate as so defined must not be included in the appraisal.

- The Appraiser's theories of nonexistent buildings and hypothetical assumptions will be addressed in argument. Suffice it to say here that the building which one might "see if driving by" [Appr. Br. 3] can also be touched. It will provide shelter from the elements. If it is not painted and maintained from time to time, its appearance will deteriorate. Its legal nonexistence becomes apparent only as a result of this property tax litigation.

POINT I.

THE COURT SHOULD EXERCISE JURISDICTION

Spanish River has no additional argument of this point.

POINT II.

THE SUBJECT OF TAXATION AND TAX APPRAISAL IS THE TIMESHARE DEVELOPMENT

Introduction

The essential premise for Point II on appeal is that there must be valid statutory authority for any system of taxation. Article VII, Section 1(a), Florida Constitution. Decisions standing for this proposition, including decisions involving the taxability of estates in land, are discussed in the Initial Brief. The taxing authorities do not acknowledge the constitutional requirement or the decisions cited. According to the Department, discussing the cases in the area would be a waste of time because they do not involve timeshare property. [DOR Br. 13].

However, the taxing authorities find the time to discuss many other decisions which involve neither timeshare property nor the taxability of any other estate in land. Included are cases upholding the discretion of the property appraiser in matters of valuation judgment. These cases are of a different nature than this case. As this Court explained in Blake v. Xerox Corp., 447 So.2d 1348 (Fla. 1984), cited by both taxing authorities:

> The property appraiser's determination of assessment value was an exercise of administrative discretion within the officer's field of expertise. Therefore, if the appraiser proceeded lawfully, then that determination was clothed with a presumption of correctness when the taxpayer challenged it. The burden was on the taxpayer to show that the appraiser departed from the requirements of the law or that the appraisal made was not supported by any reasonable hypothesis of legality. (emphasis added)

347 So.2d 1350. In other words, the Appraiser's "presumption" is confined to matters within her field of expertise. It does not extend to matters of law.

The primary issue in this case is whether the Appraiser was authorized by law to render tax appraisals of individual timeshare estates, without regard for the value of the underlying realty which is ultimately liable for the taxes. The disposition of this issue does not depend upon novel rationalizations about the continued legal existence of a building, upon the confused testimony of witnesses with respect to arcane propositions of property law, upon some professed concern over how many fee simple estates can "coexist," upon whether the Appraiser exchanges her own timeshare, upon whether a timeshare estate can be "surveyed," etc.

It also does not depend upon the appraisal of Robert Callaway. If the assessments are illegal, they must be set aside. Simpson v. Merrill, 234 So.2d 350 (Fla. 1970); Department of Revenue v. Morganwoods Greentree, Inc., 341 So.2d 756 (Fla. 1976). Whether Mr. Callaway's appraisal is to be adopted is a separate issue. At no time has Spanish River asked this Court to order the adoption of his valuation, as the Appraiser states. [Appr. Br. 36]. See pages 22-23, infra.

A. The Subject of Taxation

The Appraiser characterizes the timeshare estate as the "basic unit of ad valorem taxation." [Appr. Br. 25]. This is obviously incorrect insofar as the property liable for the taxes is the development. Section 192.037(9), Florida Statutes. Neither of the taxing authorities discusses the discrepancy between the item they wish to appraise and the item which bears liability for the tax. Neither of them explains how this discrepancy can be reconciled with the just valuation requirement or the basic nature of a property tax.

The term "development" is not defined in the statutes, and Spanish River has argued in the Initial Brief that the term must refer to "fee time-share real property" as defined in Section 192.001(14) because the two terms are used interchangeably. The Appraiser disagrees, apparently defining the "development" as all the 3009 "unit weeks" she assessed for a total of $18,735,900. [Appr. Br. 30]. With respect to the non-timeshare condominium units, she relies upon Section 718.120(1), Florida Statutes (1983) as authority to assess each of them separately. Thus, she explains that at a tax sale the purchaser would receive the "unit weeks," not the land and building.

There are three difficulties with this concept of "development." First, it is inconsistent with the required tax roll listing of fee timeshare real property, i. e., the land and buildings that the Appraiser claims do not exist. Section 192.001(14), 192.037(2), Florida Statutes. This is what should be listed, described on a tax certificate, and sold to a purchaser if the property is sold for taxes.

Second, the Appraiser's definition of "development" is inconsistent with Section 718.120(3), Florida Statutes, which neither of the taxing authorities cite:

> Condominium property divided into fee time-share real property shall be assessed for purposes of ad valorem taxes and special assessments as provided in s. 192.037.

"Condominium property" is defined as the "lands, leaseholds, and personal property that are subjected to condominium ownership . . . and all improvements thereon. . . ." Section 718.103(11), Florida Statutes. Thus, it is again the land and improvements that are assessed for real estate

tax purposes. Section 718.120(1) is inapplicable to fee timeshare real property.

Third, and most important, the Appraiser's "development" definition does not resolve the discrepancy between the subject of appraisal and the subject of taxation. Accepting her theory, the purchaser at a tax sale would acquire 3009 "unit weeks" in the aggregate. But she did not appraise 3009 unit weeks in the aggregate, and they could not possibly be worth, in the aggregate, the total amount she entered on the tax roll based upon individual appraisals.

The proper subject of the tax roll listing is the land and building. This is the "development." It is the property that should be described on a tax certificate and be subject to any sale for taxes. Therefore, unless the basic characteristics of the property tax and the just valuation requirement are to be abandoned, the land and building must be the subject of the tax appraisal.

B. Lack of Statutory Authority

The taxing authorities have cited no statute which directs the Appraiser to assess, appraise, or derive the value of individual timeshare estates. Compare Section 718.120(1), Florida Statutes (conventional condominiums). There is also no citation to a statute which declares the timeshare estate to be a "separate parcel of real property" for ad valorem tax purposes or for any other purpose. Compare Section 718.106(1), Florida Statutes; Section 193.481, Florida Statutes (subsurface mineral rights). Most significantly, there is no statute which makes the individual timeshare estate subject to the lien for taxes.

Because the taxing authorities devote so much emphasis to the fact that the Spanish River timeshares are fee interests, it should also be noted that there is no statute directing ad valorem tax assessment, appraisal, or valuation, of fee estates. If there were, the Appraiser would be appraising remainders in fee, reversions in fee, the fee interests of tenants in common, joint tenants, etc. She does not do this because there is no statutory authority for it. Her authority, with few exceptions, is to assess land and buildings, not the ownership interests therein.

Spanish River submits that the absence of affirmative statutory authority for the challenged assessments, without more, is fatal to the taxing authorities' case. Nothing in their lengthy briefs can fill the void or divert attention from it. Without the necessary statutory authority, the imposition of an oppressive system of assessment such as this is inexcusable. It is of no moment what the taxing authorities believe was intended, or what they believe should be the tax policy of Florida. It is not Spanish River who seeks a change in the law by "judicial fiat." [DOR Br. 17].

The lack of affirmative authority to appraise timeshares is not the taxing authorities' only statutory problem. As written, the law actually creates an affirmative statutory direction to appraise the development. The development is liable for the taxes, Section 192.037(9); the tax roll listing is of the land and building subject to the timeshare estates. Sections 192.037(2), 192.001(14). The "assessed value" to be entered on the tax roll is the assessed value of the development, Section 192.037(2), i.e., its fair market value, Section 192.001(2).

The answer briefs contain no response to the analysis of these provisions set forth in the Initial Brief. The "combined timeshare periods or timeshare estates" language in Section 192.037(2), upon which the taxing authorities originally relied in this litigation, is not addressed. The Appraiser's own testimony about "combined interest" appraisals and the judicial decisions that the Department declines to discuss have caused them to look elswhere in the statutes to develop a theory of legislative intent.

The ingredients of this speculation are another series of inferences. Spanish River will address these inferences, but the critical considerations have already been discussed. There is no statutory authority for this system of assessment. If the Legislature intended to enact such authority, it never perfected that intent.

C. The Inferences of Intent

It will be helpful to keep in mind that the issue in this case is not whether timeshare estates must bear the burden of ad valorem taxation. There is no claim that they should not. The issue is whether each timeshare is to be separately appraised like a lot in a platted subdivision, or assessed with the totality of interests like other real estate with divided ownership. See the Initial Brief at pages 20, 33.

Section 721.03(5), Florida Statutes (1983), relied upon by the taxing authorities, 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." This statute does not define the subject of appraisal. Indeed, it provides no direction other than to look elsewhere,

at statutes which clearly make the development the subject of taxation and appraisal.

Similarly, Section 718.503(1)(h), Florida Statutes requires a disclosure in contracts for sale that the managing agent acts as such for taxes levied "against a fee interest in a time-share estate." Rather than contemplating individual timeshare appraisals independently of the land, this could refer to an allocation of total value to the timeshare estate. Even the phrase "separate assessment" has been used to describe a procedure of attributing to each timeshare estate a proportionate share of the overall value of the physical realty, Board of County Commissioners v. Colorado Board of Assessment Appeals, 628 P.2d 156 (Colo. Ct. App. 1981). Further, the purpose of the statutory language is to inform the purchaser about the managing agent's function, not to define what is appraised.

There are far more references in the statutes to the subject of taxation as the underlying realty than the timeshare estate. See, e.g., Section 718.120(3) (condominium property divided into fee time-share real property shall be assessed); Section 192.037(3) (referring to "allocation" of value and taxes "on time-share property"); Section 192.037(5) ("taxes due on the fee time-share real property," are "allocated" to the owners); Section 192.037(7) ("taxes due on the time-share development"); Section 192.037(9) (enforcement of taxes is against the development). See also the title to Chapter 82-226, Laws of Florida ("providing procedures for assessment of fee time-share real property").

The provisions relating to allocation of value and taxes are particularly significant. It makes no sense that the Legislature would require the property appraiser to furnish "proportions" to the managing entity to be used in allocating value, if the idea was for the property appraiser to appraise each estate. If this had been the intent, there would be no need for an allocation. The property appraiser could simply furnish the managing entity the assessed values.[2]

The final two provisions forming the basis for the taxing authorities' speculation are subsections (4) and (9) of Section 192.037. Neither of these provisions comes close to directing the appraisal of timeshare estates. The answer to the Department's first rhetorical question [DOR Br. 16] is that without such a provision the decision whether to challenge taxation would be left to the sole discretion of the managing entity, which may own no interest in the property.

With respect to the second question, it is unclear what "protections" remain available to timeshare owners under Chapter 197. Under current law, the right of redemption, which is available to all other owners of realty interests (whether separately taxable or not) is denied to timeshare owners. Section 197.472(8), Florida Statutes (1986 Supp.).[3] Although the statute is unclear, there may also be rights to notice of a tax sale. Section 197.502(4), Florida Statutes (1985). However, such notice is also available to lienors and mortgagees, whose interests

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[2]In this regard, the Appraiser states that her statement of proportions "actually gives the amount of assessment applicable to each time-share estate." [Appr. Br. 45]. This is incorrect. [A 88].

[3]The circuit court decision attached to the Appraiser's brief was decided before December 31, 1985, the effective date of Section 197.472(8), Florida Statutes.

are not taxable. Therefore, no inference that the timeshares were intended to be separately taxable should be drawn from these "protections." In contrast with the Department's inference, subsection (9) of Section 192.037 unambiguously makes the development liable for the taxes.

The taxing authorities also draw an inference of intent from the mere fact that the law was enacted, without regard for its language. The Department characterizes the pertinent provisions of Chapter 82-226, Laws of Florida, as a "response to a potential crisis" with respect to timesharing, because of the "potential geometrical increase" in the number of taxpayers. [DOR Br. 3]. However, there could be no "potential crisis" unless one assumes a legislative intent to tax individual timeshare estates. The Department's inference thus assumes the proposition which it is invoked to prove.

There was also no actual crisis. Timesharing did not suddenly emerge on the scene in 1982, as the Department makes it appear, nor was 1982 the Legislature's first occasion to address the tax issue. Florida law had specifically provided for the taxation of timeshared condominiums since 1978, Chapter 78-328, Laws of Florida. By defining "timeshare unit" as a type of condominium unit, Section 718.103(20), Florida Statutes, the Legislature included timeshared condominiums within the separate assessment rule applicable to condominiums generally, Section 718.120(1), Florida Statutes. See Hausman v. VTSI, Inc., 482 So.2d 428 (Fla. 5th DCA 1985), rev. denied, 492 So.2d 1332 (Fla. 1986). This is why the Appraiser separately assessed each Spanish River timeshared

condominium unit in 1982. Since timeshare estates were not subject to taxation, the taxation of them created no administrative nightmare for the Legislature to address.

The taxing authorities assume that there could have been no reason for the enactment of Section 192.037 other than the one they espouse. They do not acknowledge the possibility that the Legislature: (1) concluded that separate assessment of timeshared condominiums makes little sense when each unit has up to 51 owners, and no one of them owns a reversion so as to constitute the "taxpayer"; (2) decided to remove fee timeshare projects from the condominium treatment and require taxation of the land, buildings and improvements; and (3) established a mechanism for administering such taxes which is consistent with the unit of appraisal and with the fact that all the owners of a "fee" project have interests of equal dignity.

The true nature of the taxing authorities' arguments is reflected on page 15 of the Department's brief:

> In view of the repeated use of the terms "fee" and time-share "estates" in the statutory language added by the act, it should be presumed by the courts that the Legislature intended to classify <u>fee</u> time-share <u>estates</u> in real property as separate parcels of property for ad valorem taxation. (emphasis in the original)

This was the view adopted by the lower courts, but it is not consistent with the law of Florida. Courts do not <u>presume</u> the intention to tax. Article VII, Section 1(a), Florida Constitution. The Attorney General knows this to be true, having previously taken the same position:

> All doubts and ambiguities are resolved in favor of the taxpayer. Taxes cannot be imposed except in clear, unequivocal language. <u>Taxation by implication does not exist.</u>

Atty. Gen. Op. 068-62 at 262. See also State v. Beardsley, 84 Fla. 109, 94 So. 660 (Fla. 1922), cited in the Initial Brief.

D. The Taxing Authorities' Nonstatutory Theories

The taxing authorities concentrate on argument which obscures the statutory problem. They use every combination of words the mind can conceive to conjure up the image of a "separate parcel of real estate." The Appraiser goes further, advancing the theory that the land and building do not legally exist because of the creation of condominium and timeshare ownerships. How any of this is relevant is not explained. If the statutes did not authorize the assessments, no amount of theorizing or semantics can supply the authority.

The taxing authorities dismiss Hausman v. VTSI, Inc., supra, because the current law was not yet in effect in tax year 1982. However, the case has continuing vitality for the proposition that the Appraiser cannot appraise timeshares without a statute authorizing such action. The "fee" character of the interest, the developer's "representations" in promotional material, the formalities of conveyance, etc. dominated the taxing authorities' argument in Hausman. It was all irrelevant, as it is here, to the dispositive question of legal authority. Spanish River will therefore respond only briefly.

The Timeshare Estate

The taxing authorities obscure the distinction between corporeal real property and the incorporeal interests that may be created therein. The Appraiser speaks of "occupancy" of and "living in" timeshare

estates. [Appr. Br. 9, 10]. Both taxing authorities emphasize the "fee" nature of the estates, the way in which they are promoted, and the formalities of conveyance. Many characterizations and testimony of witnesses are employed to support the thesis that these "separate parcels" are "fee real estate," and Spanish River is accused of "blatant incongruity" and "inconsistent posturing" in allegedly urging to the contrary.

The character of a timeshare estate is a legal question. As defined in Sections 718.103(19) and 721.05(24), Florida Statutes, a timeshare estate is not land, nor is it described as "real estate." It is an interest in real estate. It is an estate, like a life estate, reversionary estate, remainder, leasehold estate, etc. It does not become land by virtue of the way it is promoted, the formalities observed in its sale, the labels used to describe it, or the opinions of the taxing authorities. See also Section 192.001(14) (referring to land and improvements subject to timeshare interests).

As discussed in the Initial Brief, the Spanish River deeds convey two interests together. The first is described as an "estate for years." Estates for years are not subject to separate taxation in Florida. The second interest is a remainder as a tenant in common with other owners in the affected condominium unit. This is a fee interest, just as other remainders are in fee. However, remainders, like estates for years, and like the interests of tenants in common, are not subject to separate taxation (or tax appraisal) in this state.

Even before the remainder ripens into present possession, a timeshare estate is conceptually only a refinement of the traditional tenancy

in common. All the tenants own interests in the same physical space. The only significant difference is that the right of occupancy circulates among them over time. But they all share in the use of the same underlying realty, and also share in the expense of maintaining it, repairing it, and insuring it. These are not independent "separate parcels"; they are all interdependent interests in the same parcel.

Most people would have difficulty finding a sufficient number of cotenants to create their own timesharing scheme. The developer performs this function. In the process, he incurs expense which is recovered in the prices charged. He also hopes to recover some profit. But the land is still the land, and its value must be measured by applying the fair market value definition to it. The effect of the taxing authorities' position is to impose real estate taxation measured by the expected gross revenues of the timeshare business, rather than the fair market value of the realty.

"Blatant Incongruity"

Because Spanish River takes the position that for purposes of ad valorem taxation (as distinguished from loose conversational English), it is important to recognize the distinction between the corporeal real property and ownership interests therein, the taxing authorities accuse Spanish River of an inconsistency. Its argument is portrayed as a "blatant incongruity" with its promotional material and conveyancing documents. The Department implores the Court not to condone such "inconsistent posturing." [DOR Br. 19].

There is no incongruity or inconsistency. Spanish River need not frame its every utterance in accordance with the statutory definitions

of Section 192.001(12) and (14), Florida Statutes. The distinction between realty and ownership interests therein is routinely ignored in a variety of contexts, but cannot be ignored when government abuses the taxing power. The lower courts found great significance in this "incongruity," which is further evidence that they did not comprehend this case.

In any event, even the most duplicitous developer cannot change the truth by misstating it. The timeshare estate is not land, just as it is not a horse. Calling it a horse would not make it one, and calling it land would not change its essential character as an interest in land.

Finally, in advancing this bit of sophistry the taxing authorities overlook a crucial consideration. The parties before this Court include, in addition to the developer, all the timeshare owners who have never "represented" anything about the legal nature of the timeshare estate to anyone. They cannot be bound by a developer's "blatant incongruity."

The Existential Theory

The Appraiser contends that the Spanish River land and building, which one might "see if driving by" were nevertheless "not legally there" as of January 1, 1983. According to this thesis, the creation of condominiums and timeshares destroys the legal existence of the physical realty. It becomes only "hypothetical," along with its legal description. No authority is cited in support of this claim. It is advanced by the same litigant who, later in the same brief, becomes a proponent of "reality." [Appr. Br. 38].

If one can see the land and building driving by, it is difficult to conceive how they are not legally there. The difficulty is increased when one considers the statutory definition of "fee time-share real

property" as land and buildings subject to timeshare interests. Section 192.001(14), Florida Statutes. Although the law sometimes indulges in fictions to effect substantial justice, Spanish River is aware of no occasion on which an entire building and the ground underneath were held to have legally disappeared. Such a result, solely to accommodate increased taxation, would appear to defeat substantial justice.

The land and building remain, subject to whatever ownership interests have been created. Their legal existence is not "hypothetical." The reason conventional condominium parcels (defined as a unit plus share of common elements) are separately assessed is not because the recording of the Declaration destroys the legal existence of the building, but because Section 718.120(1) requires separate assessment (and clearly provides that the tax lien is on the condominium parcel).

It is interesting that the Appraiser does not regard the existence of other realty subject to divided ownership as "hypothetical." Even when appraising property subject to "fee" interests (such as remainders, reversions, etc.) she somehow manages to render a single appraisal of the land and improvements. She knows that the unfragmented fee title is not available for sale and is not likely to sell, yet she "hypothesizes" such a sale because she knows that is the way to measure real estate value. Yet, without any testimony on the point, her brief asserts an interpretation of professional standards that would render the same sort of hypothesis by another appraiser "unethical." [Appr. Br. 38].[4]

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[4]The Appraiser's brief confuses hypothetical conditions that affect the value of a property subject to an appraisal, with the single hypothesis that is the essence of every appraisal: an arm's length sale of the property appraised.

To conclude on the point, the logical result of the Appraiser's theory should not be overlooked. If it is still fair to assume that land and building are the source of the power to impose a real estate tax, the destruction of their legal existence would also defeat the exercise of that power. Without the continued existence of the land and building, Spanish River owners would be entitled to far more relief than they have sought.

E. Taxing Authorities' Position on Constitutional Issues

As noted previously, the taxing authorities have no response to the proposition that their interpretation of the relevant statutes violates the Just Valuation Clause. Article VII, Section 4, Florida Constitution. However, the Department asserts that the owners have shown no injury. Taxation at triple the amount the Constitution will permit, having one's "separate parcel" subject to a lien for taxes owed on other "separate parcels," and denial of procedural rights and protections afforded to other owners of taxable "separate parcels" are all apparently insufficient injuries to merit judicial attention. [DOR Br. 31].

Section 194.171, Florida Statutes, provides the remedy to challenge a tax assessment. Spanish River timely invoked that remedy, and is entitled to assert whatever grounds are available to it in pursuit of relief.

Correctly applied, the law requires a single appraisal of the development, with the notice and tax bill transmitted to the managing entity. Each timeshare owner owes an allocated share of the total taxes.

Contrary to the Department's implication, Spanish River has never challenged the "managing entity concept."[5]

As explained in the Initial Brief, the constitutional issues arise only because of the taxing authorities' position that every timeshare is a "separate parcel." More precisely, it is deemed a "separate parcel" only for appraisal purposes. When the time comes to pay one's taxes, the interest suddenly loses its "separateness," and the tax collector is prohibited from accepting less than all the taxes of all the owners. Section 192.037(7), Florida Statutes.

Spanish River acknowledges the presumption in favor of the constitutionality of legislation. However, the presumption is more than a cliche. It is to be applied in the context of determining whether substantial rights are infringed. This is missing from the taxing authorities' briefs. The only serious arguments they raise in defending the statutory scheme (as they interpret it) are that it is reasonable to employ a "managing entity concept" and that taxpayers do not have constitutional rights to separate tax roll listings and notices. However, these two propositions, taken in isolation, do not define the pernicious characteristics of the taxing authorities' scheme.

The desirability of the managing entity concept is no justification for the discrepancy with respect to the subject of taxation. One could employ the managing entity concept without this discrepancy, and without

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[5]Spanish River does object to the imposition of tax administration costs in addition to higher taxes. It is true, as the taxing authorities state, that no added expense was incurred in 1983. However, this is because the statutory mechanism was not followed. An estimate of taxes was collected with other common expenses in the form of annual maintenance fees. The statute does not mention maintenance fees, and clearly contemplates a different mechanism independent of maintenance fees.

the consequent violation of the just valuation requirement. The problem is not the managing entity concept; it is the taxing authorities' attempt to use the managing entity concept and the "separate parcel of real property" concept simultaneously.

The result is to increase the economic burden on the owners, by: a) increasing their taxes; b) denying them any meaningful opportunity for an early payment discount; c) subjecting them to delinquent interest, penalties, and costs (which are higher than they otherwise would be because of the higher taxes) if other owners do not pay their taxes; and d) exposing them to loss of their interests entirely if other owners are unable or unwilling to suffer the increased tax burden.

The taxing authorities also cite Equal Protection Clause cases for the Legislature's discretion to "classify" for taxation. However, Article VII of the Florida Constitution provides a more restrictive standard for ad valorem tax purposes. In particular, real property cannot be classified on the basis of ownership. Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973). This is precisely the result of this system of assessment.

If the Court concludes that each timeshare is subject to separate tax appraisal notwithstanding all of Spanish River's arguments to the contrary, the result reached by the District Court of Appeal, Fifth District, in High Point Condominium Resorts, Ltd., v. Day, 494 So.2d 508 (Fla. 5th DCA 1986), appeal filed, No. 69,519 (Fla.) must be sustained.

F. The Callaway Appraisal

Spanish River does not ask the Court to order adoption of Mr. Callaway's appraisal, as the Appraiser states. However, the trial court's conclusion

that the timeshare estate was the lawful object of tax appraisal rendered it unnecessary to address the proper methodology of appraising a timeshare development. Both decisions below responded to the Callaway methodology as if the same were offered to value individual timeshare interests. The order signed by the trial court states:

> While the methods used by Plaintiff's appraiser may be proper for certain assignments, such as a development loan on a property sold in "bulk," or on a wholesale basis, such methods are inappropriate to value individual condominium parcels or individual time share estates. [A 24].

"In bulk" and "wholesale" are merely the taxing authorities' derisive ways of referring to an appraisal of the land and building. The trial court has thus left open the possibility that Mr. Callaway's methods might be upheld if the land and building are the subject of appraisal under law.

Because the legal subject of appraisal is the timeshare development, this action must be remanded for entry of judgment in favor of Spanish River. On remand, the trial court should be directed to consider the issue of methodology on the basis of the correct legal premise. The court may then either decide that Mr. Callaway's methodology for appraising a timeshare development is appropriate, or it may order a reassessment. Whatever the disposition, it should occur with the issue squarely and fairly presented. A professionally accepted appraisal technique should not be condemned by the courts on the basis of confusion.

POINT III.

EVEN IF TIMESHARE ESTATES ARE SUBJECT TO SEPARATE TAX APPRAISAL THE ASSESSMENTS ARE UNLAWFUL

Although the taxing authorities portray Point III as raising issues of appraisal methodology, the issues are in reality legal in nature. Point III assumes that the Appraiser has statutory authority to render tax appraisals of timeshare estates, but submits that she departed from the requirements of law, in that she:

1) erroneously equated "timeshare estate" with "unit week," in disregard of statutory definitions, Sections 718.103(19), 721.05(24), Florida Statutes;

2) made no effort to exclude the value of vacation benefits and services, also in disregard of statutory definitions and the meaning of "real estate";

3) made no effort to ascertain or consider the costs of sale and financing at Spanish River or in the timeshare industry generally, and their proper role in the valuation, Section 193.011(8), Florida Statutes.

Simply stated, with the unit of appraisal identified as the timeshare estate, Point III poses the issue whether this is what the Appraiser actually appraised.

If the assessments are invalid for the reasons set forth in Point III, reassessments will be required. See e.g., Department of Revenue v. Morganwoods Greentree, Inc., 341 So.2d 756 (Fla. 1976).

Very little of the Taxing Authorities' argument is responsive to the Initial Brief. The decisions which they cite concerning the three

approaches to value, the application of Section 193.011, Florida Statutes, and the "presumption of correctness" presented no issue of whether more than real estate was being valued for real estate tax purposes. They each dealt exclusively with the methodology of appraising an item of property whose basic character was not in dispute. Like Point II, Point III thus presents issues of law, which must not be confused with issues of valuation judgment.

Neither of the taxing authorities cite any authority for the assumption that every timeshare estate is one week in duration. Neither of them cites Sections 718.103(19) or 721.05(24), Florida Statutes, which define the item they wish to appraise. Neither cites to the Spanish River Declaration, which provides that one week is the minimum duration of the timeshares created. [A 35]. Consistent with the objective of appraising the smallest item possible, the Appraiser simply decided to attribute a value to every "week."

The results are nonsensical. The Appraiser's thesis means that the right to occupy condominium unit 1007 for just eight weeks each year is worth more than the complete, undivided fee ownership of the identical unit next door. [I. Br. 9]. The taxing authorities' only answer to this is a reference to 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). These decisions involve the question whether the unit of appraisal for the taxation of lands held by a developer should be the aggregate unsold inventory or the individual lot. The issue arose because an allocated share of the fair market value of the entire inventory

is ordinarily less than the fair market value of an individual lot. If the owner of a lot which has sold must pay taxes based on the fair market value of the lot, while a developer-owned similar lot bears only an allocated share of the value assigned to an entire inventory, an inequity results. The Appraiser sees the same problem in the case at bar, arguing that "discounts based on ownership of multiple weeks would be the same sort of preferential treatment" proscribed in those cases.[6]

The analogy is misconceived because it erroneously assumes that every "unit week" is a separate interest, and it overlooks the distinction between land and interests in land.

In the subdivided acreage context, each lot has a separate physical and legal existence. In the timesharing context the timeshare estate (not the "unit week") has a legal existence. Timeshare estates are of varying durations, and some are therefore worth more than others. "Discounts" for multiple week sales merely reflect real differences in the fair market values of the interests. Two comparable timeshares of the same duration will have the same assessed values regardless of ownership. This does not destroy equity, but preserves it. Nothing in Interlachen Lakes or any other authority permits the Appraiser to disregard the true character of the item subject to taxation.

Turning to the question whether vacation and benefits and services are unlawfully being taxed, the Appraiser first suggests they are not included in the consideration paid for a timeshare estate. She points

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[6]The Appraiser also somewhat inconsistently implies that multiple week discounts were "recognized" in the assesments [Appr. Br. 41]. There was certainly no such "recognition" in the final result. Every "unit week" was assessed at a flat percentage of the list price for a single week, regardless of the number of weeks sold together.

out that timeshare owners pay operating expenses on a "pay as you go" basis. [Appr. Br. 41]. However, the timeshare purchaser also pays for the arrangement that makes these services possible, as part of the purchase price. Dr. Hewitt testified repeatedly and without contradiction on this subject. For example:

> The direct costs are paid year by year. The setup of the structure is paid initially. The establishment of the structure to provide the extensive services is really what we're talking about, as opposed to, for example, the changing of the sheets in a timeshare versus an ordinary condominium. Obviously, when you're there in the timeshare you pay for the starch and of the actual washing of the sheets. But the structure that establishes the maid service is built in before you buy the unit. It's part of your purchase price [R-733].

See also Dr. Hewitt's testimony at [R 731, 737, 740], where other service aspects of the timeshare management structure are discussed.

What begins as the contention that vacation benefits do not represent value in the purchase price, emerges as the inconsistent contention that these items are all real estate because they "logically flow from" ownership of the timeshare estate. [Appr. Br. 42]. The Appraiser has offered no citation of authority to support this position. The furnishings in the unit also "logically flow from" timeshare ownership, but the Appraiser does not argue that the personalty is real estate or assessable as such. There is no analytical consistency to the taxing authorities' positions.

The Appraiser dismisses the exchange privilege with a misconceived analogy to single family homes and horses. [Appr. Br. 42-43]. However, if a homeowner were by reason of his ownership entitled to participate in a sophisticated worldwide exchange network, or to borrow horses, or to do anything else beyond the rights of possession, exclusion, and

disposition of the home, he would have more than just a home. The rest is not real estate.

Two final points: first, the payment of documentary stamp taxes on the full amount of the purchase price is not a binding "admission" of the legal character of what is sold. [Appr. Br. 43]. The Appraiser's argument leads to the conclusion that Spanish River "admitted" that the tangible personal property in the units is real estate. Given the difficulty of accurately separating real estate value from nonrealty components, a business judgment has been made to pay documentary tax on the total consideration. The taxing authorities are the beneficiaries of this, but they nevertheless twist it into a "damaging admission."

Second, the Appraiser is in no position to rely upon Spanish River's failure to file disclosure forms with every deed to indicate that the costs of sale and financing under Section 193.011(8) are atypical. [Appr. Br. 44]. Pursuant to Section 195.027(6), such failure creates a presumption that the costs of sale and financing are "usual." The record is uncontradicted that the Appraiser made no effort to ascertain the usual costs of sale and financing <u>in the timeshare industry or at Spanish River</u>. [R 61-62, 357-358]. The record establishes an industry range of between 35% and 60% for marketing expenses alone [R 689, 817], with actual figures for Spanish River of approximately 55%. [A 76].

If the timeshare estate is to be the subject of separate tax appraisal, it is necessary that the taxing authorities recognize its true legal character. It is a recurring right of occupancy, which is not limited in duration to one week, and which is merely one important component of a larger package of benefits and services.

The Legislature could have easily defined this interest differently. It could have limited the duration of the timeshare estate, included within its definition all the benefits and services which accompany the interest, and excluded timeshare estates from the costs of sale and financing adjustments contemplated in Section 193.011(8). But the Legislature did not do so, and until it does, the taxing authorities must remain within the confines of the existing law.

The Final Judgment should be reversed, and a reassessment ordered.

CONCLUSION

The taxing authorities have not responded to the legal analysis in the Initial Brief. They did not respond below either. But their non-statutory theories apparently presented an attractive facade to the lower courts. It is important to the timeshare industry and thousands of owners that this Court penetrate beneath the facade.

If the Legislature wishes to authorize appraisal of one item for purposes of levying a tax on another; to define timeshares as "separate parcels" for appraisal purposes only; to multiply the tax liability of a property that is functionally identical to a hotel; to define the timeshare estate as a "unit week"; to expand the concept of real property to include vacation benefits and services furnished to timeshare owners; to create an exception from Section 193.011(8) for timesharing; if it wishes to create all these aberrations from the general property tax system, it must express these wishes with clear, comprehensive legislation. In the meantime, it should not be left to the taxing authorities or the courts to wrestle with such matters, and timesharing should not be taxed out of existence on the basis of inference, sophistry, or semantics.

The Final Judgment must be reversed and the cause remanded for entry of judgment in favor of Spanish River.

Respectfully submitted,

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CERTIFICATE OF SERIVCE

I HEREBY CERTIFY that true and correct copies of the foregoing Reply Brief of Appellants have been served upon Gaylord A. Wood, Jr., 304 S. W. 12th Street, Ft. Lauderdale, Florida 33315; Willa Fearrington, 509 North Dixie Highway, West Palm Beach, Florida 33401-4296; Robert C. Ross, Post Office Box 3466, West Palm Beach, Florida 33402; Larry Klein, Klein & Beranek, Suite 503 Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401; James M. Spoonhour, Lowndes, Drosdick, Doster, Kantor & Reed, 215 North Eola Drive, Orlando, FL 32802; and J. Terrell Williams, Assistant Attorney General, Department of Legal Affairs, LL04, The Capitol, Tallahassee, Florida 32301, by U. S. Mail this 1:30 A.M. 7th day of April, 1987.