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# THE SECOND-HOME MARKET

## TIME-SHARING OWNERSHIP — LEGAL AND PRACTICAL PROBLEMS†

THOMAS J. DAVIS, JR.\*

It has been said that there is nothing new under the sun. With regard to time-sharing ownership of real estate,<sup>1</sup> this is both true and false at the same time: true because the legal components of the time-sharing concepts now in existence in the United States have been with us since merry old England; false because the result — ownership of a specified portion of the fee each year — is quite unique and exciting in its possibilities. This article will examine those areas significant to the “state of the art” of time-sharing ownership.

### VEHICLES IN USE

As recently as 1972, anyone attempting to draft time-sharing documentation was faced with the prospect of operating without the assistance of forms, authorities, case law, or any other guidance. Furthermore, a majority of the legal community was skeptical as to whether such an objective could be achieved.

Today, however, this situation has turned full circle. There are almost as many methods of conveying time-shared titles as there are developers in the field. Many of them are unsound, amateurish attempts at accomplishing a complex legal result. Many of the early buyers may wind up with problems, either legal or practical, due to the bungling of the early draftsmanship, in some cases done by the developer without benefit of legal counsel.

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† Much of the content of this article is drawn from a recent seminar on time-sharing held in Miami, Florida. The author extends his gratitude to the participants: Kenneth Knight, who was at that time Assistant to the Vice President of Corporate Relations of the Deltona Corporation; Boyce Outen, Vice President and Assistant General Counsel of Lawyers Title Insurance Corporation; Sheldon Kurland, of Fort Lauderdale, Florida, an attorney and certified public accountant; Hal Simon of Tenenbaum, Topping and Simon, certified public accountants; Mario F. Rodriguez, formerly President of Interval Incorporated, and now President of Property Planning Consultants, Inc., Miami, Florida; and William Hutcheson, President of Encore Resorts International, Inc.

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<sup>1</sup> Time-sharing consists of dividing the fee into separate time periods, from two weeks to several months, and giving different owners, *i.e.*, those having an interest in the fee, the right to exclusive occupancy for that period only. The right to the period usually recurs annually for a predetermined length of time.

There are currently three main types of time-sharing which are in use in this country today, all of which have a firm legal basis. Of course, each has its advantages and disadvantages. For ease in identification, I will refer to them as follows: a) the vacation license; b) the tenancy in common with an agreement to use a specific time period; c) the interval method.

### *The Vacation License*

Each time-sharing method has become identified, more or less, with a particular developer. The vacation license is associated with Caribbean International,<sup>2</sup> a Miami based firm. The vacation license is a right to use.<sup>3</sup> The developer or sales firm, as the case may be, retains the fee interest. The purchaser receives a right to use a recurring time period each year for a limited number of years. The time periods are sold in multiples of one week. Proponents of the vacation license feel it has some definite advantages. They argue that since the license is not an interest in real estate, sales can be handled by salesmen without real estate licenses in most states. This view, if upheld, could conceivably lead to sales by travel agents and through other atypical outlets. Moreover, if the license is not such an interest, it may escape most, if not all, governmental regulation of real estate.<sup>4</sup> The advantage of a non-real estate interest is that it provides an easy, quick, and inexpensive "start up" with no need to comply with federal, state, and local land sales rules. Furthermore, there is a broad spectrum of available outlets, without the necessity of licensed real estate salesmen and brokers.

<sup>2</sup> Further discussion of the Caribbean International programs can be found in a promotional booklet, *The Vacation License Resort Program and the Caribbean International Club* (1973) (on file in the St. John's Law Review office).

<sup>3</sup> A license consists of "a privilege in *A* to use land possessed by *B*, so long as *B* fails to cancel the privilege. . . . [I]ts duration is at the will of the servient owner." 3 R. POWELL, POWELL ON REAL PROPERTY § 428, at 526.62 (rev. ed. 1973).

<sup>4</sup> "[T]he courts have regarded a license as carrying with it no property interest . . . which the law will recognize and protect." Walsh, *Licenses and Tenancies for Years*, 19 N.Y.U.L. REV. 333, 340 (1942). *But see* 3 R. POWELL, POWELL ON REAL PROPERTY § 428, at 526.63-64 (rev. ed. 1973), wherein the author states:

- Such a revocable privilege is an "interest in land" as that term has been defined in Section 5 of the *Restatement of Property* . . . . This does not mean . . . that the revocable privilege should be treated as a *substantial* interest in land . . . . The evanescent, fleeting, revocable character of the interest justifies a denial of treatments accorded to more substantial interests in land but does not justify a denial of its character as an interest in land, while it lasts. So long as it continues, a license derogates from the completeness of the servient owner's ownership and this requires its recognition as an "interest in land."

Moreover, if it is labeled in any sense an "interest in real estate," the license will probably be subject to the recording acts, since the term "interest" therein is very broadly construed to include any right or title to property. *See* *Stewart Transp. Co. v. Ashe*, 269 Md. 111, — 304 A.2d 788, 799 (1973); *Pennsylvania Range Boiler Co. v. City of Philadelphia*, 344 Pa. 34, — 23 A.2d 723, 725 (1942).

The pitfall here is that the advantages are all contingent on the license being classified as something other than an interest in real estate. The question is: what is it if not an interest in real estate? The old "substance over form" argument looms as an ominous spectre in the background.

Even granting the lack of real estate attributes, there may be other significant disadvantages. For example, it may be deemed a security, necessitating registration with the Securities and Exchange Commission.<sup>5</sup> One developer, fearing this line of reasoning, has put restrictions on its licenses to the effect that an owner may not sell one at a gain. Similarly, in the event the licensee is unable to use his time period in any given year, he is not allowed to rent it to a third party, even on his own.<sup>6</sup> These limitations are definite marketing drawbacks.

Since the licensee has no direct interest in the underlying fee, he has very little protection against the improvident actions of the developer. The license is usually an unrecorded instrument guaranteeing the licensee nothing as far as protection from encumbrances by, or creditors of, the developer who holds record title. On the other hand, there is a strong possibility that a title company would look upon the license as a cloud on the title of the underlying fee, thus acting as a double-edge sword. The licensee is unprotected, and the developer holds a potentially unmarketable title. One further drawback, from a marketing standpoint, is psychological: the purchaser cannot be offered that intangible pride of real estate *ownership*.

#### *The Tenancy in Common with an Agreement to Use a Specific Time Period*

The second and third legal concepts are more alike than they are different. They are both direct interests in real property. The purchasers of both acquire a remainder interest in the fee. The tenancy in common approach consists of conveyances of undivided interests in the fee to the purchasers as tenants in common, coupled with execution of an agreement wherein the holders of the undivided interests agree among themselves for the use of specific time periods. The time periods are determined by the purchase price, the "in season" time periods drawing higher prices than the "off season" periods.

The tenancy in common method does away with the disadvantages of the license. It does, however, have several drawbacks. The main

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<sup>5</sup> See SEC Securities Act Release No. 5347 (Jan. 4, 1973); Dickey, *What Lies Ahead for Real Estate Regulation*, 3 REAL ESTATE REV., Spring 1973, at 13. See also note 20 *infra*.

<sup>6</sup> Interval Incorporated provided for the need for this kind of flexibility in an interesting manner with regard to its Bird Rock Falls resort. See note 14 *infra*.

problem to be contended with by developers utilizing this concept is partition. An enforceable covenant against partition must be embodied in the conveyance; yet, in many states this is not possible.<sup>7</sup> California developers had to seek a change in the law in their state allowing such a covenant to run with the land.<sup>8</sup> Before embarking on a time-sharing program based on tenancies in common, a developer should have competent legal counsel thoroughly investigate the law of the jurisdiction.

A second problem, while not nearly as great, is presented by the possibility of the property being sold to satisfy outstanding tax assessments against one of the tenants in common.<sup>9</sup> The Internal Revenue Code provides that "[a]ll persons . . . claiming any interest in the property involved in such action [to enforce the government's lien] may be made parties thereto."<sup>10</sup> Under that section, the nondelinquent tenants in common could see their property sold out from under them. Although the lien against one tenant in common is in no way a lien against the interests of the other nondelinquent tenants, it nevertheless could result in a judicially decreed sale of the property for satisfaction of the debt.<sup>11</sup> The right of the government to enforce its lien is not a defect or encumbrance on the title of the property; it is one of the incidents of ownership.<sup>12</sup> As a practical matter, there is little likelihood that the government would trigger such a sale in order to enforce its lien against one tenant in common, and issuance of the decree of sale is then discretionary with the court. Nevertheless, the potential for such occurrence is present.

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<sup>7</sup> The partition problem usually does not arise in the tenancy in common inherent in condominium ownership since the majority of state condominium acts prohibit partition of the common elements. Generally, the complex must cease being a condominium, either by obsolescence, destruction or unanimous vote, before such an action would be allowed. For a detailed listing of the relevant statutes in the various states, see I P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 8.01, at 8-1 n.1 (1974) [hereinafter cited as ROHAN & RESKIN].

<sup>8</sup> CAL. CIV. CODE § 1468 (West Supp. VIII, 1974). The amendment, effective September 1973, allows a covenant providing for "the suspension of the right of partition or sale in lieu of partition for a period which is reasonable in relation to the purpose of the covenant" to run with the land. *Id.* While the revision itself stipulates that it "does not represent a change in, but is declaratory of existing law," the real estate community considered this an innovation.

<sup>9</sup> INT. REV. CODE of 1954, § 7403. A civil action could be filed in a district court, subjecting any property in which the delinquent taxpayer has an interest to the payment of the liability.

<sup>10</sup> *Id.* § 7403(b). If the sale is decreed, the distribution of the proceeds will be made "according to the findings of the court in respect to the interests of the parties and of the United States." *Id.* § 7403(c).

<sup>11</sup> *Id.*

<sup>12</sup> For example, many state condominium enabling acts include statutory provisions

*Interval Ownership*

This concept is not unique because it involves common law estates, as does the tenancy in common approach. It is unique, however, in that title and the right to occupancy co-exist and are created simultaneously by the same deed. There is no contract, no lease and no operating agreement or declaration which establishes the right to occupancy. The deed creates a revolving or recurring estate for years with a remainder over as tenants in common, at a designated future date.<sup>13</sup> The same two-week interval (or other time period of various multiples of one week) recurs annually. During the period of the recurring estate for years, the interest is not subject to partition or to tax liens on the interests of the other owners. Each estate is separate from the others in the same unit.<sup>14</sup> The remainder over as tenants in common does not occur until a time after the useful life of the unit has been expended. The reason for the remainder is, of course, to keep the arrangement within the Rule Against Perpetuities.<sup>15</sup>

## FINANCING A TIME-SHARING PROJECT

Assuming the legal documentation hurdle has been surmounted and properly handled, the subject of financing looms very large. There are two separate and distinct aspects — construction financing and end loans (the financing of the ultimate purchaser). Because of the novelty of the concept, acquiring financing for time-sharing may be difficult. However, the construction loan on a time-sharing development can be compared to many other developments. Generally, a time-sharing development looks like something else. It looks like a hotel or a condominium project or a detached housing resort development. Typically, it shares some of the same characteristics of present real estate developments. Financing will be structured as some percentage

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as to tax liens on the units. *See, e.g.*, FLA. STATS. ANN. § 711.19 (1969); MASS. ANN. LAWS ch. 183 A, § 14 (1969); N.Y. REAL PROP. LAW §§ 339-y, -z (McKinney 1968); ORE. REV. STATS. §§ 91.575-.580 (1969); VA. CODE ANN. § 55-79.42 (Supp. 1974).

<sup>13</sup> At the termination of the revolving estate, the parties, as tenants in common, have the option to either seek partition or reinstate the previous arrangement.

<sup>14</sup> On the other hand, Interval Incorporated has arranged for the estates to "co-mingle" in a beneficial sense to provide flexibility. By means of a computer, an owner is enabled either to change his time interval by trading with another owner in the same community or in another resort entirely.

<sup>15</sup> *See generally* 1 ROHAN & RESKIN § 10.03(2)(b); Boyer & Spiegel, *Land Use Control: Pre-emptions, Perpetuities and Similar Restraints*, 20 U. MIAMI L. REV. 148, 156-66 (1965); Browder, *Restraints on the Alienation of Condominium Units*, 1970 U. ILL. L.J. 231.

of total projected sellout. Due to the newness of time-sharing and the uncertainty in lenders' minds as to the potential market, an alternate use for the project should be determined in the event the time-sharing marketing effort fails. If there is no convertibility factor, the lender could end up with a very unhappy situation.

One possibility would be to restrict time-sharing sales to particular units until the time-sharing market has proven itself in the particular project. An additional safeguard would be to enter into early contracts giving the developer the right to rescind if a specified sales level is not met within a given time period. Of course, such a method requires a developer with substantial equity up front because, in the event of rescission, marketing costs and sales commissions on the rescinded sales will not be recoverable. Additionally, to be effective, such a program will require escrow of sales proceeds received. The developer will have to pick up the tab for all early "soft" costs. A pre-sales program can help to convince a lender; indeed, the lender may *require* a certain level of pre-sales before funding. This means another escrow situation with soft costs coming out of pocket.

End loans may also elicit reluctance from lenders. What is the security interest in the event of foreclosure on the loan? What will the lender take back? What can he do with the two-week time period he repossesses? Is there a secondary market? Will the recourse of the developer be worth anything, if given? The answers to these questions go to the stability of the developer and his ability to stand behind the early loans that go bad, until the lender can be convinced that there is a market for resale of the foreclosed unit.

From the promoter's point of view, having a lender provide construction and development loans as well as guarantee mortgage financing would remove much of his uncertainty. However, until time-sharing has proved itself, it is probable that the builders will continue to have to provide at least some equity financing. The lenders' present conservative and cautious attitude could change, of course, once time-sharing developments show that they have been accepted by consumers who will purchase new or resold units.

A very crucial part of the loan package will be the provisions for release of the units from the construction or other underlying mortgages. Ideally, the lender will release on a per time period basis. A more conservative lender will release on a per unit basis, an arrangement which can be worked with but which takes considerably more planning.

## STATE AND FEDERAL REGULATIONS OF TIME-SHARING

To date, only Hawaii has drafted legislation dealing specifically with time-sharing. The bill classified the "time period unit" as "not a tenancy in common or other common law concurrent undivided interest . . ."<sup>16</sup> The bill as enacted, however, was subsequently vetoed by that state's Governor. The regulatory agencies of California have guidelines applicable to time-shared projects, but these provisions are much less formal than those prepared in the Hawaiian legislative effort.<sup>17</sup>

Despite explicit reference, state<sup>18</sup> and federal<sup>19</sup> land sales acts may apply with equal force to time-shared sales as they do to more familiar projects. Furthermore, recent scrutiny of real estate offerings by the Securities and Exchange Commission (SEC)<sup>20</sup> should increase the vigilance of sponsors. However, the SEC recently determined that a developer's offering of a tenancy in common time-sharing condominium did not constitute a security within the meaning of section 2(1) of the Securities Act.<sup>21</sup> The offering involved the sale of 12 undivided interests in each condominium unit with the purchaser of the fee simple interest entitled to select 2 two-week occupancy periods each

<sup>16</sup> See S. 2197-74, Hawaii Leg. Sess. (1974) (enacted April 5, 1974 to amend § 513-2(23) of the Horizontal Property Act). The time period unit was defined as "an annually recurring part of a year specified and identified in the declaration as a period for which a unit as defined herein may be separately owned." *Id.*

<sup>17</sup> See 1 ROHAN & RESKIN § 3.05(2); 1A ROHAN & RESKIN, app. B-2, at app.-24 to 24.23. While the forms relate to condominiums in general, the questions regarding membership in a club or association, restrictions on use or occupancy of property, and special sales inducements could be particularly relevant in terms of time sharing.

<sup>18</sup> See, e.g., ARIZ. REV. STATS. §§ 32-2181 to 93 (Supp. 1973); FLA. STATS. ANN. § 711.24 (Supp. 1974); MICH. LAWS ANN. §§ 559.24-28 (1967); VA. CODE ANN. §§ 55-79.86-103 (Supp. 1974).

In New York, the registration requirements depend on whether the sale of the real estate constitutes simply a transfer of real property, N.Y. REAL PROP. LAW § 440-a (McKinney 1968), or a security transaction, N.Y. GEN. BUS. LAW § 352-e (McKinney 1968). See *Reiter v. Greenberg*, 21 N.Y.2d 388, 235 N.E.2d 118, 288 N.Y.S.2d 57 (1968); *Maxine Gerard, Inc. v. Fisher*, 64 Misc. 2d 291, 314 N.Y.S.2d 688 (Sup. Ct. New York County 1970).

<sup>19</sup> Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 *et seq.* (1968).

<sup>20</sup> See, e.g., SEC Securities Act Release No. 5347 (Jan. 4, 1973), wherein the Commission lists the factors that will convert condominium offerings into investment contracts necessitating registration under federal securities laws. A predominant consideration is the presence of a rental pool,

a device whereby the promoter or a third party undertakes to rent the unit on behalf of the actual owner during that period of time when the unit is not in use by the owner. The rents received and the expenses attributable to rental of all the units in the project are combined and the individual owner receives a ratable share of the rental proceeds regardless of whether his individual unit was actually rented.

*Id.*

<sup>21</sup> The Innisfree Corp., [1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,398 (SEC 1973).

year subject only to an agreement to restrict usage to the selected two-week periods. The no-action letter was based upon the absence of a rental or pooling arrangement in sales of this project.<sup>22</sup> The rules here are the same as with any standard condominium or Planned Unit Development (PUD), and legal counsel familiar with the securities laws should be consulted to assure compliance therewith.

#### MARKETING THE TIME-SHARED UNIT

Marketing starts at the inception of the project and is influenced by every step taken thereafter. Most important is the selection of the project: a poorly planned project will not be marketable despite its novelty. Time-sharing can buoy a soft market; it can create a whole new market in many instances. But the public will not buy a bad project, even a week at a time. A time sharing project should be chosen carefully, not because it is a "bargain." Another important consideration is the availability of a year-round season. In addition, as with all real estate ventures, location, proximity of potential markets, and accessibility are critical.

A time-sharing sales program is far different from a standard condominium or PUD program. Many more sales at a much lower average price are necessary. Accordingly, the median commission per sale is much lower.

The time-sharing sales effort is more likely an "on site" one, sales being closed at the property rather than in the buyer's home or in a "hospitality room" many miles away. The overriding reason is that the sponsor will be marketing the project as one intended for the buyer's own use, not for speculation. A major reason, from a strictly legal standpoint, is the dim view the SEC is currently taking of land sales structured as "investments." The condominium rental pools brought this consideration into sharp focus, and the knowledgeable and prudent developer steers clear of the earmarks of an "investment

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<sup>22</sup> *Id.*

The SEC has ruled that a condominium development corporation which offers a rental management program permitting owners to lease their properties when they are not in residence would not be an offering subject to section 2(1) of the Securities Act as long as:

- (1) The developer will not offer the rental service to owners until after purchase is completed;
- (2) salesmen do not initiate conversations with potential buyers on the rental investment aspects of home ownership;
- (3) there are no written representations made as to the rental service.

See Sunriver Properties, Inc. [1973-74 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,691 (SEC 1974).

package.”<sup>23</sup> This may be possible in the case of time-sharing since the land underlying the project is already enjoying its highest and best use, and, therefore, is not a prime candidate for any major price escalation. The unit is sold in the first instance at a top price. Time-sharing takes sales of resort units to their ultimate “retail” price — week by week. The analogy is to a man desiring two eggs with no place to store any he does not use. Would he be best advised to buy a dozen for a dollar, or two for fifteen cents each? If his need is for only two, buying the dozen would cost him an average of fifty cents a piece for the two he used since he would waste the rest. Even though the per unit price of the eggs bought individually is higher, they are clearly the best buy for his purposes. Such is the case in time-sharing. The buyer buys only what he needs, paying the developer a premium for the additional effort involved. So, the time-sharing buyer purchases for his own use, at true retail, not for speculation and monetary gain. To be sure, the time-shared unit might well represent a solid investment with future growth potential, but it is unlikely that it will be a “get rich quick” bonanza.

A further reason for the “on site” nature of the sale, of course, is the fact that a buyer wants to see, and get the feeling of, the place where he will spend what are to be his most enjoyable times — his vacations.

### *Profile of the Market*

The type of individual who will be purchasing time periods in time-sharing resorts has much to do with the limited success which an off site sales program will undoubtedly meet. Interval Corporation’s marketing study provides interesting data. The study was completed when approximately one hundred sales had been closed with an average dollar value of approximately \$3,000 per sale. The results indicated that the average buyer was in a reasonably high economic bracket. Sixty-five percent of the total number of buyers, representing some 75 percent of the total dollar value of the contracts upon which the study was based, were straight cash sales, despite the fact that extended payment terms were freely available. Secondly, the buyers were well educated. They included attorneys, doctors, real estate brokers, and educators, among others. Finally, the median age was somewhere between 35 and 40 years. These factors indicate a buyer who wants to investigate thoroughly and has the faculties to do so. He is educated, mobile, and

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<sup>23</sup> See note 22 *supra*.

capable of evaluating what he sees. It is therefore unlikely that a salesman sitting in the buyer's living room will be successful.

The only company in the field today claiming a market profile very different from that of Interval is Caribbean International. The latter firm, utilizing techniques borrowed from the land sales industry, has attempted to appeal to a broader market, including lower income groups, with apparent success. Despite the difference in market, however, Caribbean International has felt the need to utilize an "on site" sales approach. This fact tends to suggest that the general public is becoming much more sophisticated in the realities of real estate sales.

### *Credibility*

One legal hurdle to the time-sharing developer, and a major goal of the marketing program, is credibility. Because the concept is new the public is unsure about its efficacy. There has not yet been a real success, completely sold and in operation, to which the developer can point. Failures by a number of early entrants to the field has not helped the situation. It is important, therefore, that the time-sharing industry attack this problem with public relations and good, solid, well-conceived projects.

#### OPERATION OF THE RESORT BEFORE AND AFTER SELLOUT

Running a time-shared development is akin to innkeeping—guests expect that the management will maintain the quality of the accommodations, and the recreational and common areas.

But unlike hostelry, the developer of a time-sharing resort must carefully analyze annual operating expenses in advance, so that he can realistically allocate maintenance fees to prospective purchasers. With the exception of unique recreational amenities that may be offered to owners willing to pay additional fees—boat rentals or horseback riding, for example—the analysis must include all possible costs, and the promoter must prepare penalty and enforcement procedures that will protect nondelinquent owners from the arrearages of others.

The following checklist, by no means all-inclusive, is offered as a suggested method of approaching this vital aspect of marketing a time-sharing program. The developer should consider:

- (1) provisions for adjustments regarding assessment requirements or credits due;
- (2) provisions for inventory storage to facilitate periodic maintenance and repair problems;

- (3) setting aside periods of "down time" so that units will be vacant at predictable periods for repainting or redecorating;
- (4) providing security equipment or personnel to insure that owner-guests will have "peace of mind";
- (5) arranging for in-house communications, *i.e.*, intercoms, closed circuit television, etc.;
- (6) developing a professional check-in, check-out system that will aid quick turnover of units while providing time for routine housekeeping;
- (7) preparing a list of the variables that will be covered by annual maintenance fees. These might include: utilities, trash removal, insurance, linen service, supplies, an escrow account to replace furniture and appliances at the end of five years, salaries and related benefits, upkeep of grounds and recreational facilities, security costs, sewage, escrow for annual exterior-interior renovation, appliance maintenance contracts, vehicle maintenance costs, communications, emergency equipment costs, and the management fee.

### *Real Estate Taxes*

At this point, a word about real estate taxes is appropriate. Should they be included as a component of the maintenance fee? This depends to a great degree on local tax assessment policy. Unless each time period is assessed individually, the taxes can be imposed on the owner's association, which will, in turn, include them in the maintenance fee.<sup>24</sup>

The next question concerns the basis upon which the time-shared unit's tax valuation will be assessed. Sellout price as a time-shared unit is certainly not desirable, and may not be legal in that its value will then conflict with non-time-shared units with similar intrinsic values. A basis which disregards the time-sharing sales price pitfalls may likewise prove undesirable. It seems advisable to approach the tax assessor prior to the inception of the project for the purpose of reaching an agreement to minimize "surprises" later on.

### *Income Tax Aspects*

There are apparently no attributes of time-sharing which would cause any unique treatment by the Internal Revenue Service. Alloca-

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<sup>24</sup> Separate assessments, as opposed to subsequent proration of a total assessment by an association, is exemplified by New York's tax treatment of the condominium. N.Y. REAL PROP. LAW § 339-y (McKinney 1968). A cooperative, by comparison, is taxed as a whole with the assessment divided pro rata among ownersshareholders.

tion of the developer's basis for each time period sale will be important. A square footage allocation does not take seasonal factors into consideration. Using a percentage of the sales price is probably the soundest course.

If the buyer uses the unit for strictly business purposes, appropriate expenses would be deductible, including depreciation of the buyer's basis in the unit.<sup>25</sup> The usual real estate tax and interest deductions (in the event of a time purchase) are available.<sup>26</sup> The "hobby loss" rules will most certainly apply where there is partial business and partial personal use.<sup>27</sup> Since it is highly unlikely the unit would ever serve as the taxpayer's residence, the tax deferral rules on sales or exchanged residence would not be applicable.<sup>28</sup> Aside from that, the time-shared unit meets the definition of a capital asset,<sup>29</sup> and, in my opinion, will be amenable to capital gains treatment on its resale.

### *Special Accounting Problems*

Under current guidelines for accounting for real estate transactions, as formulated by the American Institute for Certified Public Accountants, certain criteria must be carefully evaluated by those charged with accounting for companies engaged in time-sharing, particularly listed companies under the scrutiny of regulatory agencies, stock exchanges, and the public.<sup>30</sup>

There are two basic conditions that must be met to satisfy a sale from the accounting standpoint and one of those is that the burden of ownership must pass to the buyer. Briefly, that means that the seller is not obligated to perform any other significant activity after the sale is consummated. Secondly, the amount of revenue must be measurable. This means that the collectibility of the sales price is reasonably assured. While there are some gray areas as to the passing of ownership,

<sup>25</sup> INT. REV. CODE of 1954, §§ 162, 167.

<sup>26</sup> *Id.* §§ 163, 164(a)(1).

<sup>27</sup> *Id.* § 183.

<sup>28</sup> *See id.* §§ 121, 1034.

<sup>29</sup> Property used in the trade or business of a taxpayer of a character which is subject to the allowance for depreciation provided in section 167 and of real property used in the trade or business of a taxpayer is excluded from the term "capital assets" . . . . Property held for the production of income, but not used in a trade or business of the taxpayer, is not excluded from the term "capital assets" . . . .

Treas. Reg. § 1.1221-1(b) (1957).

<sup>30</sup> *See* COMMITTEE OF ACCOUNTING FOR REAL ESTATE TRANSACTIONS OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, ACCOUNTING FOR PROFIT RECOGNITION ON SALES OF REAL ESTATE (1973); COMMITTEE ON ACCOUNTING FOR REAL ESTATE TRANSACTIONS OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, ACCOUNTING FOR RETAIL LAND SALES (1972).

a more likely problem area is the assurance of collectibility. The test most universally applied is one of a sufficient investment on the part of the buyer to motivate him to complete his purchase.

Rules of thumb exist in the land sales accounting world as to percentage of the contract paid to meet this criteria. Since there are no past performances in the time-sharing industry, new rules will have to be worked out. For example, should a sale be recognized when 10 percent is paid in, or 25 percent? Until such time as the tests are met, accounting is done on the "deposit" method. Since the income is not reflected, the company's financial position begins in an unfavorable light. This, of course, is an unhappy position in most instances.

#### CONCLUSION

I have briefly touched on what I consider to be some of the major areas of time-sharing. It is my hope that this article will point out to the potential entrant into the time-sharing industry, whether as entrepreneur or adviser, the care that must be taken and the many factors to consider in developing a successful time-sharing facility.

To date, most of those in the field have been working independently of each other, guarding their "secrets" jealously. Cooperation among those in the industry can only work to everyone's benefit. The market is so vast that there is enough for everyone at this point. It is my belief that time-sharing will become the predominant vehicle of marketing resort and second home facilities within a short period of time. The explosion will be no less earth-shattering than was the condominium's effect on the primary residence market. There is no question that the time-sharing market, like all markets, will eventually grow overcrowded. However, I feel this day to be far down the road.

The attorney drafting time-sharing documentation must have some insight into the problems of marketing and maintenance, among others, or work closely with someone who possesses such acumen, since there are no available model forms considering these areas. Moreover, the time-sharing developer must work closely with competent counsel to assure that the intended result, a conveyance devoid of legal and practical problems, is obtained.

Time-sharing is currently a juvenile, and like all juveniles, the public hears far more about the bad ones than the good ones, and tends to judge all by the actions of a few.