

TIME SHARING: ISSUES ON A GROWING FORM OF HOME OWNERSHIP

by Roger W. Caves

While the search for the American vacation home continues, the rising cost of homes is making it exceedingly difficult for individuals to purchase vacation or second homes. This predicament has led to numerous private sector responses which are designed to increase vacation housing opportunities.

This paper examines the increasingly popular concept of "time sharing." It is divided into three main sections. The first section provides a general overview and definition of time sharing. The second one deals with public policy responses to time sharing. The final section analyzes the court handling of individual time sharing controversies.

Definition And Overview

Any discussion of time sharing must be preceded by its definition. Hart and Pfrommer define it as,

a method whereby a purchaser acquires either fee title "interval ownership" or a lease of license "right to use" to accommodations—usually in a resort area—for a designated period of time.¹

These accommodations could be a condominium, townhouse, or some other form of property. Although most individuals view time sharing in a resort context, variations of the concept have surfaced. One type, described by Madsen, is a form of "urban" time sharing,² which is popular with individuals desiring to take advantage of a city's cultural opportunities such as museums, art galleries or theaters. Companies are also taking advantage of urban time sharing opportunities. As Madsen points out, this provides an alternative to hotels and offers luxury



accommodations, cost savings, and, in the case of fee timeshares, the tax advantages of a real estate purchase.³

Many Americans have been exposed to the concept of time sharing. It is a common occurrence throughout the country for an individual to receive a letter indicating he/she has won a gift such as a meal, telephone, television or trip. In order to collect the gift, the individual must visit the time share project, which is often a resort area, and listen to a sales pitch designed to persuade him/her to enter into a time share arrangement.

The growth of the time sharing industry has been rapid. In 1975 time sharing represented a \$50 million business.⁴ In an article written in 1982, Smith noted that it has grown into an industry with annual sales in excess of \$1 billion.⁵ Industry experts estimated that at least 600 time share resort locations were established in this country and hundreds more worldwide.⁶ The practice of time sharing

Roger W. Caves is an assistant professor in the city planning program, School of Public Administration and Urban Studies, San Diego State University in San Diego. He previously served as a planner for the Delaware Department of Agriculture and as a community planner for the U.S. Forest Service.

certainly has developed into an established industry which is likely to continue to grow in the future.

Time sharing represents a complex area of inquiry. Questions concerning real property, zoning, subdivision regulations, and the health, safety and welfare of the general public, along with other issues can be raised. It is up to the various levels of government to develop rules and/or regulations which address these concerns.

Public Policy Responses

Although there is no federal legislation dealing specifically with time sharing, various pieces of legislation can affect potential time sharing projects in some way. For example, the Office of Interstate Land Sales Registration (OILSR) of the Department of Housing and Urban Development (HUD) is responsible for implementing the disclosure requirements of the Interstate Land Sales Full Disclosure Act of 1968.⁷ This Act makes it illegal to sell land that is part of a common promotional scheme comprised of 50 or more lots, prior to the filing of a Statement of Record⁸ with OILSR. Its registration requirement represents an attempt to protect consumers from deceptive individuals who try to market undeveloped land through the mail.

Five years later, through the Federal Trade Commission Act,⁹ the Federal Trade Commission (FTC) was vested with the power "to . . . prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in or affecting commerce."¹⁰

The federal government also publishes a variety of materials on time sharing. The FTC publishes a brochure that gives nine tips to help prospective time share buyers:

- 1) Be wary of giveaway promotions.
- 2) Is an exchange program available?
- 3) What is the investment potential of the property?
- 4) What are the total costs?
- 5) Rely on legal counsel.
- 6) Are all promises in writing?
- 7) Is the developer reputable?
- 8) What about unfinished lots?
- 9) Evaluate default protection.¹¹

Prospective time share buyers should examine all available information before reaching any decision.

As noted earlier, the time sharing industry has grown tremendously in a relatively short period. One can be certain that additional pieces of legislation will enter the picture.

Situations differ in individual states. Time sharing may be a growing or controversial concern in some areas. These states may need to develop and implement specific pieces of legislation concerning time sharing.¹² Other states may not feel the need to develop new legislation and simply amend existing legislation to handle the problem.¹³

California has an extensive amount of time sharing legislation. It defines a time share project as:

one in which a purchaser receives the right in perpetuity, for life, or for a term of years, to the recurrent, exclusive use or occupancy of a lot, parcel, unit, or segment of real property, annually or on some other periodic basis, for a period of time that has been or will be allotted from the use or occupancy periods into which the project has been divided.¹⁴

A license, or contractual or membership right of occupancy, in a time share project which is not coupled with an estate in the real property constitutes a time share use.¹⁵

A major portion of the legislation deals with the requirement that anyone intending to offer subdivided land has to submit a subdivision public report for a time share project. The report will be deemed a "substantially complete application" if it contains, among other items, such information as:

- 1) Completed subdivision questionnaire and supplemental questionnaires where applicable.
- 2) Current preliminary title report for all dwelling units comprising the time share project.
- 3) Copy of proposed agreement for management of the project.
- 4) Evidence of financial arrangements for any guarantee or warranty included in the offering.
- 5) Copies of all contracts and promotional and informational materials pertaining to a program included in the time share offering involving the exchange of occupancy rights by owners in the project with owners in interests in other time share projects.¹⁶

The California legislation also covers other items such as the creation of a time share interest owners association. It contains requirements ranging from members' voting rights,¹⁷ governing body election and make-up,¹⁸ dissemination of financial and other information to all members,¹⁹ to disciplining owners for violations.²⁰

While California has developed extensive time sharing legislation, other legislation could also have an effect. For example, California has enacted legislation prohibiting discrimination in housing.²¹ These pieces of legislation are certain to be cited as allegations of discrimination in time share housing.

Some states have even created committees or commissions to study the condominium industry. At the request of the Maryland General Assembly, the Governor of Maryland created the Commission on Condominiums in 1977.²² The Commission's mandate was,

to investigate the condominium industry in Maryland, review and evaluate existing laws pertaining to condominiums, ascertain what problems exist in development and operations, report its findings to the Governor and General Assembly, and make recommendations for legislative action.²³

Although the idea of creating another committee or commission to study a problem may seem to be adding to the already confusing bureaucratic maze of government, logic dictates that one must understand a problem before one can design actions which could lead to its alleviation.

Individual states do not have to go through the difficult task of creating acts to regulate time sharing. If they so desire, they can investigate the feasibility of partially or fully adopting two Model Time Sharing Acts: 1) Uniform Model Real Estate Time Share Act of 1979 (URETSA),²⁴ and/or 2) American Land Development Association/National Association of Real Estate Law Officials (ALDA/NARELLO) Model Timesharing Act.²⁵

The URETSA,²⁶ developed by the National Conference of Commissions on Uniform State Laws in 1979, addresses time sharing in a thorough manner. It examines time sharing from the beginnings of a proposed project to the aspect of consumer protection. The URETSA was approved by the American Bar Association.

The ALDA/NARELLO Act is a type of disclosure statute. This requires a time share developed to issue a public statement which gives prospective buyers information concerning a particular time share project. It is unfortunate that ways to maneuver around the requirements became evident. Consequently, a new act was drafted to better protect the consumer. Burnett notes that it goes beyond disclosure and calls for compliance with a number of requirements which are designed to ensure the following:

- 1) Each time share program will be created with the necessary legal protections for the buyer.
- 2) The consumer's right will be protected against any underlying encumbrances or foreclosures on the property.
- 3) The function and capabilities of exchange networks will be disclosed.
- 4) All advertising and presentations made to the prospect will be truthful and representative of the subject.
- 5) The state agency regulating time share sales will have the power to issue Cease and Desist Orders and impose sanctions.²⁷

Localities also have the power to control time sharing either directly or indirectly. Through the police power, localities can place restrictions on the use of land for the purpose of promoting and protecting the health, safety, welfare and morals of its residents. These restrictions can take the form of zoning or subdivision ordinances, including subdivision maps, street size, sidewalk size, sewage disposal, or building permit requirements, or architectural reviews.

In addition, most localities are required to develop general plans. A housing element, found in each plan, is required to be consistent with the overall plan. Consequently, any proposed time sharing project will have to be consistent with the housing element.

Recent Court Cases

As the time sharing industry continues to grow and as more and more governments enact rules and regulations affecting time sharing and condominium use, there are certain to be related court cases. Several cases dealing with issues facing time sharing and condominiums are examined here.

Can condominium associations adopt rules and regulations regarding the use of condominiums and condominium grounds? The answer is yes, providing the rule or regulation is reasonable. This issue has been raised in a number of cases.²⁸ It is unfortunate that what is considered reasonable in one case may not be in another. Thus, what constitutes a reasonable rule or regulation must be decided on a case by case basis.

*White Egret Condominium v. Franklin*²⁹ dealt with a situation where an individual purchased a condominium and conveyed one half interest in it to his brother and family. The condominium association believed that the arrangement would violate a condominium restriction which did not allow children under 12 years of age to reside in the units. Moreover, the condominium association felt that the two brothers and their families would violate the single-family use restriction. The basic issues facing the court were whether the condominium association could place restrictions on the inhabitants and uses of the condominium and whether these restrictions were reasonable.

The Supreme Court of Florida held that a condominium restriction could be enforced if it served a legitimate purpose and was reasonably applied.³⁰ In this case, the restrictions were arbitrary, unreasonable and selectively applied. For example, there were children under 12 years of age residing in other units. Furthermore, the Court held that "age restrictions cannot be used to reasonably or arbitrarily restrict certain classes of individuals from obtaining desirable housing."³¹ Concerning the single-family residence issue, the Court concluded that since only one brother and his family would reside in the condominium at a time, this would constitute a single-family use.³²

*Cal-Am Corporation v. Department of Real Estate*³³ represents an important time sharing case in California. Cal-Am sold membership interests in approximately 154 units of a 385 condominium resort which entitled members to the use of a one-bedroom condominium unit at the Royal Kuhio Building, Honolulu, Hawaii, for one or more weeks each year until December 31, 2041.³⁴ In essence, it established a time sharing program.

Two issues had to be decided in this case. First of all, did the membership interests being sold constitute the sale or lease of an interest in a subdivision or subdivided lands as defined by California law? Secondly, did the California Department of Real Estate have jurisdictional authority to regulate the sale of time share interests in resort condominiums? The California Court of Appeals for the Second District held that the sale of membership interests in the use of resort condominium units constituted a sale

or lease of interest in a "subdivision or subdivided lands" and, as such, was within the jurisdictional authority of the California Department of Real Estate.³⁵ Thus, the Department assumed the authority to develop rules and regulations concerning time sharing.

*Laguna Royale Owners Association v. Darger*³⁶ contained several issues found in time sharing controversies. This case dealt with a leasehold condominium owner trying to assign interests in his condominium to three different parties. Darger owned a condominium in an estate containing 78 units. In other words, he owned a 1/78 interest in the estate. Due to heavy work responsibilities, which he assumed after purchasing the condominium, Darger, who resided in Salt Lake City, Utah, was unable to utilize his condominium to any great extent.

Faced with the fact that he and his family would not be able to take full advantage of their condominium, Darger decided to sell shares in his unit. He wrote to the Laguna Royale Owners Association and advised them of his intentions. He noted that the new individuals were advised of all rules and regulations. He proceeded to state that not more than one family would use the unit at any one time.

The Laguna Royale Owners Association went to its attorney for a legal opinion on Darger's letter. In his letter, the attorney for the association stated:

It is my opinion that if such parties otherwise qualified indicate no intended use of the apartment other than single-family owner's use, there would be no legal basis to refuse such transfers. However, state law restricts more than four transfers of undivided interests, without qualifying as a subdivision.³⁷

He went on to state that some members of the association's Board of Governors voiced their concerns that multiple ownership would adversely affect the other Laguna Royale owners.

Darger continued his plan to sell interests in his condominium. After meeting with the association's Board of Governors and being advised of a violation of California's subdivision laws regarding the transfer of undivided interests, Darger reduced the total number of owners to four in order to adhere to state law. This did not satisfy the association. In a subsequent letter from the association's attorney, Darger was informed that his transfer:

would create and impose an undue, unreasonable burden and disadvantage on the other owners and residents' enjoyment of their apartments and the common facilities . . . contrary and in conflict with the close community living nature of Laguna Royale and would be contrary to the single-family character of the private residential purpose to which all apartments are restricted.³⁸

Darger proceeded to file a formal letter with the association requesting approval to transfer the unit to three other individuals and himself. He asked the association to specify the reasons for refusal should it deny his request. In yet another letter, the association held:

it is obligated to protect and preserve the private single-family residential character of Laguna Royale, together with the use and quiet enjoyment of all apartment owners of their respective apartments and the common facilities, taking into consideration the close community living circumstances of Laguna Royale.³⁹

Moreover, concerns for complex security and general quality of life had to be considered. Darger was advised that:

four family ownership . . . would compound the use of the apartment and common facilities well beyond the normal and usual private single-family residential character to the detriment of other owners and would frustrate effective controls over general security, guest occupants and rule compliance.⁴⁰

Darger continued his efforts to sell interests in his property by executing agreements with the various parties. As a result of his actions, the association filed an action seeking a declaration that the assignments were invalid. The Superior Court, Orange County, ruled in favor of the association.

On an appeal, the Court of Appeals in the Fourth District had to determine whether the association had acted in a reasonable manner in reaching its decision. The association asserted that it wasn't required to adhere to a standard of reasonableness but could withhold approval or consent for any reason or for no reason at all.⁴¹ The Court of Appeals was not persuaded by this assertion and noted:

in exercising its power to approve or disapprove transfers or assignments, the association must act reasonably, exercising its power in a fair and nondiscriminatory manner and withholding approval only for a reason or reasons rationally related to the protection, preservation and proper operation of the property and the purposes of the association.⁴²

The association gave three reasons for denying Darger's request:

- 1) Multiple ownership of undivided interests,
- 2) Use proposed would violate a bylaw restricting use of all apartments to single-family residential use,
- 3) Use would be inconsistent with private single-family residential character.⁴³

The court was not persuaded by the association's rationale. First of all, multiple ownership does not necessarily denote intensive use.⁴⁴ After all, any number of people could own interests in a condominium and lease it to one person on a long-term basis. Secondly, no evidence was presented which proved that the defendants proposed to use the property for anything other than single-family purposes.⁴⁵ Finally, it was established that only one family at a time would reside in the condominium.⁴⁶ As a result, the association's action was unreasonable.

The court's verdict was not unanimous. Presiding Justice Gardner issued a short dissenting opinion focusing on the

potential spillover effects of time sharing. He felt that the association acted in a reasonable manner. Labeling time sharing as a gimmick, he questioned who would benefit from such a situation. Justice Gardner went on to observe that time sharing "ordinarily brings enormous profits to the seller and in this case would bring chaos to the other residents."⁴⁷ He proceeded to question where the whole process of conveying transfers would stop. According to him, "only greed would prohibit the occupant from conveying to 52 or 365 other occupants."⁴⁸

The Future

Time sharing has become an established and profitable industry. Time share projects are continuing to surface throughout the United States and the rest of the world. As the different levels of government impose rules and regulations which directly or indirectly affect time sharing, the number of legal cases focusing on some aspect of time

sharing is bound to grow. However, time share developers must not fear close scrutiny from the different levels of government. As Bloch so rightfully noted:

The developer who creates a financially sound, well-managed timesharing program, and who provides adequate protection to his purchasers as well as careful and complete disclosure of the terms and conditions involved, need not fear regulation: his house will be in order. It normally is abuses, or the results of abuses, which prompt stringent regulatory action. Evidence of unacceptable business practice is easily discovered.⁴⁹

Overall, controversies involving time sharing or some specific aspect of time sharing are bound to continue. Only time will tell what shape these controversies will take. Nevertheless, we must continue to enact rules and regulations which protect the time share developer, time share purchaser, and neighboring parties.

NOTES

1. Christopher W. Hart and Sara Pfrommer, "Financing the Time-Share Project," *The Real Estate Securities Journal* 4 (Winter 1983), 27.
2. Stephany A. Madsen, "Urban Timesharing," *Urban Land* 42 (February 1983), 14-20.
3. *Ibid.*, 14.
4. Lynn Langway et al., "Guaranteed Getaways," *Newsweek* 94 (December 17, 1979), 104.
5. Jeremy D. Smith, "Urban Time-Sharing: A Major Growth Area," *Real Estate Review* 12 (Summer 1982), 69.
6. Stuart Marshall Bloch, "Regulation of Timesharing," *Journal of Urban Law* 60 (Fall 1982), 23.
7. 15 U.S.C. Sections 1701-1720 (1976 and Supp. IV 1980).
8. *Ibid.*, Section 1703(a)(1)(A).
9. 15 U.S.C. Sections 41-58 (1973).
10. *Ibid.*, Section 45(a)(6).
11. As noted in *real estate today*® 16 (February 1983), 21.
12. For example, see, VA. CODE Sections 55-360 to 400 (1981) and Hawaii Rev. Stat. Sections 514 E-1 to E-15 (Supp. 1981).
13. For example, Colorado has a statute creating fee sharing, which was enacted in 1977 as part of the Condominium Ownership Act, Colo. Rev. Stat., Title 38, Art. 33; also see, James R. Martin, "Timesharing in Colorado," *The Colorado Lawyer* 11 (November 1982), 2804-2810; see, the Utah Code Ann. Tit. 57, Ch. 8.
14. California Business and Professional Code, Section 11003.5(a).
15. *Ibid.*, Section 11003.5(c).
16. 10 California Administrative Code, Section 2810(a)(b)(c).
17. *Ibid.*, Section 2813.1.
18. *Ibid.*, Section 2813.2.
19. *Ibid.*, Section 2813.5.
20. *Ibid.*, Section 2813.7.
21. For example, see, *California Fair Housing Law* (California Health and Safety Code, Sections 35700-35745) and the *Unruh Civil Rights Act* (California Civil Code, Sections 51-52).
22. Maryland Resolution No. 41, Acts of 1977.
23. As described by Gregory A. Stiverson, *Maryland Manual 1981-1982* (Annapolis, Maryland: Department of General Services, 1981), 293.
24. National Conference of Commissioners on Uniform State Laws, *Model Real Estate Time-Share Act*, 7A U.L.A. 247 (West. Supp. 1982).

25. American Land Development Association and National Association of Real Estate License Law Officials, *Model Time-Share Ownership Act* (ALDA/NARELLO, 3d draft, September 1982).
26. For a discussion of URE TSA, see, Anthony S. Burek, "Uniform Real Estate Time-Share Act," *Real Property Probate and Trust Journal* 14 (Winter 1979), 683-691, and Patrick J. Rohan and Melvin A. Reskin, *Condominium Law and Practice*, Vol. 1, Part 3: *Real Estate Transactions* (New York: Matthew Bender, 1982), 17c-422.77.
27. Gary B. Burnett, "Today's Boon is Booming," *real estate today*® 16 (February 1983), 23.
28. For example, see, *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180 (Fla. App. 1975) which concerned a condominium association rule prohibiting the use of alcoholic beverages in the clubhouse and adjacent areas and *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637 (Fla. App. 1981) which involved a condominium use restriction in drilling a well.
29. 379 So. 2d 346 (Fla., 1979).
30. *Ibid.*, at 350.
31. *Ibid.*, at 351.
32. *Ibid.*, at 352.
33. 163 Cal. Rptr. 729 (Ca. App. 1980).
34. *Ibid.*, at 731.
35. *Ibid.*, at 729.
36. 174 Cal. Rptr. 136 (Ca. App. 1981).
37. *Ibid.*, at 139.
38. *Ibid.*, at 140.
39. *Ibid.*
40. *Ibid.*, at 141.
41. *Ibid.*, at 142.
42. *Ibid.*
43. *Ibid.*, at 145.
44. *Ibid.*
45. *Ibid.*, at 146.
46. *Ibid.*
47. *Ibid.*, at 148.
48. *Ibid.*
49. Bloch, "Regulation of Timesharing," 49.