

VARIOUS CLUB PRODUCTS INCLUDING FRACTIONALS

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Clubs, clubs and more clubs. Perhaps this is the result of there being seventy-eight million “boomers” turning fifty by the end of this year and according to the boomer report their spending “two trillion dollars a year on goods and services and just shopping around.” (See info at boomerproject.com).

These Clubs include, as stated by Ragatz Associates a leading statistician in the resort industry, one hundred and sixty-seven fractional ownership projects existing as of the end of the first quarter of 2004, seventy-five of which fall into a category that is referred to as Private Residence Clubs. They include one of the twenty plus clubs operating as Destination Clubs, an estimate cited by the Destination Club Association (DCA). And, they include timeshare resorts a product estimated by the American Resort Development Association (ARDA), as being enjoyed by over three million U.S. households and 6.7 million households world wide.

Even with that number at hand Econometrics, as cited in a hotel on-line special report from December, 2005, estimates that in 2006 thirty-nine (39) additional timeshare plans, including single site and multi-site vacation clubs, are forecasted to open having three thousand nine hundred ninety-eight (3,998) dedicated timeshare units and, thirty-two (32) projects with four thousand eight hundred and thirty-one (4,831) condo hotel units are forecasted to open. This in coupled with an estimate that there exists one hundred and forty-two projects of regular hotel construction that included some form of private residential development, whether condominium residences inside the hotel or condominium townhouses and signal family homes adjacent to the hotel.

These summaries and discussions do not even take into account the traditional country club whether associated with a subdivision or not, nor do they take into clubs that have nothing to do with lodging but focus on other activities such as cruise ships.

Perhaps the starting place to clear out the fog of what all these clubs offer and what exists in respect to their creation is to create an encyclopedia of terms and plug those terms into products with which the author is familiar.

(a) The County Club: The traditional Country Club is generally focused upon the use of a golf course and the structure, generally speaking, would be the member making a deposit all or a portion of which is refundable in accordance with the plan documents. This is a simple arrangement and one that thrives through out the United States.

(b) The Golf Club Subdivision: Taking the concept of the Country Club and advancing into a lot subdivision location adds levels of legal complexity. For example, not only must the golf club membership be structured, organization of the lots consistent with State and Federal law need to be accomplished.

This may include compliance with, or the possible application of an exemption from, the Interstate Land Sales Full Disclosure Act (the Federal Act). State law may also be applicable to the offering of the lots requiring a determination of registration under those laws or, potentially, exemption therefrom. In some jurisdictions, application of the state law is not relevant merely as a result of compliance with the Federal Act. On the other hand, this is not always the result and compliance with a state land sales act may, additionally be required.

As well, coordination between the Country Club and the use of the golf course, with the adjacent lots becomes essential. This is normally handled through the creation of the Declaration of Covenants, applicable to the lot community within which is contemplated a variety of easements, encroachments, and assumption of risk provisions as relate to the playing of golf on the adjacent golf course. Participation in the golf club may generally be required by those who acquire a lot in this type of development. There may, as well, be classifications of other types of members beyond the lot members (many times referred to as resident members of the golf club).

Whether the facilities of the golf club are available for use by the public as well as by members of the club becomes another issue within this type of arrangement. More usually, the more exclusive the development, the less likely public access will be allowed. An example of a golf club existing within the lot community would be Reynolds Plantation at lake Oconee, Georgia and Palmetto Bluff in South Carolina.

(c) Lot Sales/Sporting Club: As an extension of the concept of the lot sale community with the related golf club, some developers have massaged the offering into a "Sporting Club," or perhaps even an "Equestrian Club." In this type of arrangement more attention might be placed, by the developer, on the variety of recreational or sporting opportunities presented to those who buy a lot and become a member of the club. This may include, for example, a sporting club like The Ford Plantation near Savannah, Georgia, where the opportunity is to belong to a sporting club related to the lots and includes equestrian, marina/boating, shooting, hunting and fishing opportunities, golfing and health and exercise facilities. The concept here is to provide for membership opportunities beyond solely the use of golf facilities and extend the opportunity into a sporting way of life. While the membership relationship to the club, on a legal basis, maybe quite similar to the more traditional golf club offering, the bushel of benefits provided is much more expansive. As a result, club representatives not only include the golf pro as would be the case in a lot sale community, but

also may include barn managers, health and fitness managers, naturalists, and sporting (hunting/fishing) administrators. In this type of club relationship, one may pay a refundable deposit, all or part of which is refunded in accordance with the plan documents at such time as a member resigns. In many of these relationships, membership in the sporting club, as is the case in the golfing club, is related to acquisition of a lot in the community but membership may also be independent from lot acquisition such as classes applicable to the marina or otherwise.

Derivative to this type of club may be a sporting club but with a specific agenda. This may include for example, a lot subdivision with a club that is limited to a marina club. This type of arrangement is the result of the absence of the construction of a golf course and the developer's determination that the community lot sales are more desirable by those involved in boating. Examples of this type of community are, quite obviously, found in water way areas whether along the coast or adjacent to lakes where marinas might be offered.

Lot sales with equestrian clubs offer the same situation.

(d) The Condominium Club: Moving away from lot sales and into the world of condominiums, a residential condominium is sometimes marketed as a form of club. Normally, in this type of arrangement the developer determines that titling the condominium development a "club", gives some marketing distinction and provides the opportunity to promote the facilities as may be within the condominium or otherwise available to those who purchase condominium units. The format of the condominium, of course, requires compliance with the state condominium act. This necessitates the preparation of a Declaration of Condominium submitting the condominium property to the terms of the act and preparation of related documents generally including by-laws, and articles of incorporation of the association, as well as surveying and architectural work, all to be accomplished in compliance with the State Condominium Act. The format of the condominium plan, as a club, follows what otherwise might be seen as general principals of condominium law including taking into account whether the development will be a phase development with rights of expansion, or a single phase developed at one time. As well, in planning this type of development, one should carefully consider whether opportunities exist to include in the condominium declaration concepts of withdrawal of space, relocation of unit boundaries, subdivision of units, convertible space, and developed reserved rights, all principals existing in many states as established consistent with the provisions of the uniform condominium act.

(e) The Fractional Club and the Private Residence Club: Here is where some confusion begins. Traditionally speaking, fractional ownership constitutes a form of timeshare. It is a bigger piece of the pie than the normal one week interval that might be associated with a timeshare plan or club. The fraction may be any fraction of a particular dwelling, including a condominium unit, such as a one twelfth allowing for a months use of a month, a quarter allowing for thirteen weeks of use or some other fraction. The arrangement is documented by the adoption of the declaration of covenants and restrictions as might be applicable to the particular premises, inclusive of condominium unit or other improvement. In many cases an entire condominium development is subject to the fractional regime and if so, the principles of the condominium law, discussed above come to bear. Basically, the fractional development is shared ownership and is promoted as such. Given its nature as a timeshare, it would generally be

required to comply with timeshare laws, including proper registration where existing and where sold.

The fractional club introduces also a new definition, the private residence clubs. This is where the level of service and the quality of the facility moves to a higher level. The Ragatz studies make this distinction and focus upon the private residence club having a higher price per fraction, than the fractional development and higher real estate criteria, services available, and buyer profile. To clarify this distinction, usually, the private residence club fractional development (as compared to the fractional development club otherwise) has a higher price per interest, starts with higher priced real estates, and offers greater services than the traditional fractional club. As a result, quite obviously, the buyer profile including the buyer income increases for the private residence club.

Whether a fractional interest club or a private residence club, both normally take the form of a deeded interest. This is consistent with the majority of timeshare developments in the United States with some statistics indicating that up to 99% of the timeshare developments in the United States are deeded interests. As such, the creation of these types of clubs not only requires the establishment of the regime by creation of the condominium development (if the condominium structure is used) but also consideration of what real estate interest will be actually granted. As with timeshare, the fractional interest club including private residence club, may involve an undivided tenant in common interest to a particular unit, an interval real estate concept (essentially an estate for years with a remainder over) and perhaps may even involve an undivided tenant in common interest to an entire building. In any of these events, a deed exists and the real estate property interest is granted to the buyer.

While it is conceivable that the private residence club and or fractional interest club could take the form of membership participation, this is not the prevalent way by which these clubs are created. In some jurisdictions, the creation of a membership interest as opposed to a deeded interest may be disadvantageous based upon provisions of a relevant timeshare act inclusive of unfavorable escrow and rescission regulations. As well there may be a variety of sales and use tax implications on a local basis and federal income tax and or securities implications on a federal basis.

(f) The Destination Club: A more recent phenomena, perhaps advanced in publicity by the success of clubs such as Exclusive Resorts and Ultimate Resort, is the destination club. The destination club sometimes commonly referred to as a destination club, should not be confused with fractional interest club or private residence club. While some commentators, including Ragatz Associates, characterize non-equity clubs as a sub category of private residence clubs, this is probably more confusing than it is of assistance in understanding the different types of clubs existing in the marketplace.

The most significant difference between the destination clubs and the private residence club is the absence of a deeded ownership interest. In each of the destination clubs the member does not acquire any ownership interest by deed and, as suggested by those involved with the specified or particular accommodation. Instead, destination clubs do not acquire any use rights similar to services of allowing reservations in whatever accommodations may exist are provided.

A dramatic difference in the current destination clubs from the typical private residence club is not only the absence of a deed or membership participation interest but also is the existence of the refund obligation. Destination clubs, including clubs such as Exclusive Resorts, and Ultimate Resort, all provide for an opportunity not only to use the homes that are available through the club but also the opportunity to receive a refund of the membership deposit upon cancellation. In many of these clubs, the homes are in the multi-million dollar category and almost always are in luxury vacation locations. In many cases the price of ownership is in excess of \$200,000.00 although there is some opportunity with some of these clubs for participation at lesser amounts. However in each circumstance, the refund obligation is operative to provide a refund of the membership deposit in some pre-arranged percentage (normally 80%) based upon resignation/cancellation of participation and re-sales thereafter occurring. At least one commentator has suggested that the non-equity clubs provide exclusive services and locations “in the extreme.”

While the issue of destination clubs being possibly subject to timeshare acts is still a debate to some, the position of the DCA and the destination club industry is that their product is different and to seek to regulate as timeshare is contrary to their basic business model.

(g) The Timeshare Plan Club: Structured differently than some of the clubs referenced above but perhaps similar at its heart to the fractional interest or private residence club is the club structured as a basic timeshare plan. In these settings, what may exist is a timeshare arrangement structured under the law of the jurisdiction where the property exists but the nomenclature “club” attached to the plan. This is not that dissimilar to the condominium club referred to above where the label “club” is attached purely and simply for positioning in the marketplace. In these types of arrangements, there is a single site timeshare plan with the terminology “club” used to stake a marketing position. In some jurisdictions the use of the word “club” might be frowned upon in this occasion if the plan consists of only one site or location and future sites and locations are not made available to the purchasers in a timely manner. To format this type of club, one complies with the underlying timeshare act and if the format is predicated upon a condominium regime, the state condominium statute. As is the case with the fractional interest/private residence club, the format of the timeshare plans in the United States is predominantly deeded interests and not merely a membership right to use.

(h) The Multi-site Timeshare Club (Vacation Club): The foundational use of the term of the word “vacation club” in the setting of this presentation stems from the multi location timeshare opportunity made available to timeshare purchasers. With the advent of part two of the Florida Timeshare act (F.S. Chapter 721) the nomenclature “Vacation Club” was advanced in the marketplace. Part two of Chapter 721 advanced the regulatory structuring of multi-site timeshare vacation clubs and provided a regulatory skeleton upon which the vacation club structure is to be created. The first vacation club filed under the part two of the Florida Timeshare act is the current operating Bluegreen Vacation Club which operates on the basis of a trust mechanism. Not all vacation clubs operate on a trust mechanism and some vacation clubs use an internal exchange mechanism. The exchange structure essentially creates the interrelationships between component sites on the basis of a contract (denominated exchange affiliation agreement) existing between a respective component site and the exchange provider. As such, the relationship between the respective site and the exchange provider is subject to the

terms of the drafted contract and hence the benefits received from within the club, and between the sites, are subject to the terms of that affiliation agreement. Timeshare multi location vacation clubs include those that are offered not only by Bluegreen, but also by hotel brands including Marriott and Starwood.

(i) Crossover: Some cross over should be noted. For example, there may be a multi location vacation club organized under the respective timeshare acts which is formatted as a private residence club. An example of this is the Ritz Carlton Club. Each site within this multi location timeshare vacation club is established as itself a fractional private residence club and in turn associated with other fractional private residence clubs through the mechanisms of the reservation system. The end result is that while individually a site might be denominated a private residence club, collectively the various sites are denominated a vacation club. This should not be confused with the destination club referred to above as might be offered to participants without a deed and without membership participation but instead positioned as the offering of services as discussed above.

Other crossovers to consider include the club within the club. For example, there may exist a lot/golf club operation in which the homes thereat provide an opportunity to the owners to become resident owners of the golf club. If a home in this type of community is acquired by a destination club, then the destination club is the functional equivalent of the resident member of the golf club. The layers of the inter relationship then between the resident member, being the destination club, and its participation through its members in the golf club, need careful consideration and structuring.

The above is merely a glossary of clubs known to the author. Candidly, by the time this article comes to print there probably will be other club concepts.