Report to St. Maarten Timeshare Association on Pelican/Simpson Bay Resort Closure

An analysis of events leading to the closure, possibilities for the future, and its impact on the St. Maarten timeshare industry and the Island of St. Maarten in general.

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Executive Summary

The recent closure of the Simpson Bay Resort and Marina, formerly known as the Pelican Resort Club (PRC) and Marina Residences (PMR), has sent shock waves throughout St. Maarten and well beyond its shores as it is one of the largest timeshare properties in the Caribbean. The St. Maarten Timeshare Association (SMTA) immediately set in place a program to accommodate on St. Maarten as many displaced timeshare owners as possible, both on humanitarian grounds and in an effort to limit the economic and public relations damage.

The resort was auctioned in December 16, 2010 as a result of a foreclosure proceeding by Quantum Investment Trust (QIT), holder of the resort property's mortgage rights as a result of default in the terms of the construction loan for the Pelican. The only bidder at this auction was the lender, QIT, which assumed full control of the property in January 26, 2011. Due to financial decisions made by the previous owner, which was the Tenants Association of Pelican Resort Club (TAPRC), there was a significant shortfall in the maintenance revenue collected and available for operation of the resort in 2011.

The new owner through its management advisor Royal Resorts (RR) and its new management company, Simpson Bay Resort Management Company B.V (SBRMC) negotiated prior to the takeover date with the Windward Islands Federation of Labor (WIFOL), which was the union representing the permanent staff of the previous owner in an effort to reduce costs on the resort payroll, the largest item in the budget and the only one with the potential for enough savings to make the operation viable. When these negotiations broke down QIT through the management company informed the union workers that they were no longer needed and began operations, with a non-union staff of greatly reduced numbers. A court injunction brought by the WIFOL resulted in a ruling to reinstate all employees with full benefits and seniority, including missed pay, as had existed prior to the takeover. QIT then opted to close the resort rather than assume further financial burdens.

The situation today is that the resort is trying to re-open as quickly as possible through negotiations with WIFOL, assisted by a government mediator, which has not yet produced results. Other actions to this effect include a court case to be heard this week brought by timeshare owners who claim that their rights of use have been violated and stipulates the re-opening or the return of paid in 2011 annual maintenance fees, and also an appeal filed by SBRMC on the WIFOL case, for which a date has not been set.

The potential consequences of a protracted closure are extremely negative for our economy and somewhat negative for our industry. One area of concern is a typical over-reaction on the part of government concerning timeshare legislation. We already have a body of legislation regarding our industry, which does need updating as SMTA has been pointing out to successive governments for the past 7 years, but not some draconian punishment as at least 2 Members of Parliament have recently stated. In the body of this report will be some areas that legislative shortfalls have contributed to a worsening of the situation, but they not those that have been reported in the media and on the net.

Historical Perspective

1996 -2002

The history of the Pelican Resort dates back to its start in 1982, but for purposes of this report, the history from 1982 to 1996 will be abbreviated to state that Martin Vlietman was the original developer, whose control of the resort lapsed in 1996 as a result of a bankruptcy. This was well documented in the 1996 DEPOS study on the impact of timeshare in St. Maarten. The resort was owned from 1996-January 2011 by the Pelican Resort Club, the Owner Company N.V. and managed by the Pelican Resort Club, the Management Company N.V., both of which were wholly owned by the TAPRC, comprised of all timeshare owners who were then in good standing. As weekly intervals were sold from that date, each interval carried with it a membership in the TAPRC.

The acquisition of the property was mostly financed by the bankruptcy trustee of the Vlietman phase, with the resort being valued at $8,500,000 based upon unsold timeshare intervals and a starting debt to the trustee of $6,500,000 to be paid over 18 months. The trustee later accepted an extension of the time to pay off the purchase as the TAPRC did not have the funds.

From November of 1996 through July of 1997 the resort had major problems as a succession of General Managers produced nothing but failed attempts. On July 31, 1997, the TAPRC hired the Royal Resorts Group (RR), one of the world's leading developers and management companies with a stellar reputation as a co-managing director of the management company and to provide management services to straighten out what was a fiscal and operational mess. During that time estimated losses were 1.5 million dollars.

Over the next several years there were continuing shortfalls in operating money including sorely needed repairs and replacements. Due to the shortage of funds, RR was not paid its fee and the trustee was only partly paid. A review of the annual statements shows that timeshare owners' maintenance fees were subsidized via a combination of sales of unsold inventory, exploitation of commercial concession rentals and the eventual creation of a loan facility in 1998 called the Pelican Capital Improvement Program (PCIP) where individual timeshare owners would loan – unsecured - the resort money for major replacements and repairs, a normal component of maintenance fees and also for working capital and to pay off the loan to the trustee. Supplemental maintenance fees, or SAs, failed to raise sufficient funds for these purposes. RRs advice on maintenance fees were not followed by the TAPRC board, and RR's learning curve in adapting to St. Maarten's culture combined to result in below expectation performance. Controlled by a volunteer board of timeshare owners, the resort did not make efforts to collect outstanding fees that would normally be done resulting in large write-offs of outstanding maintenance fees and assessments.

In order to satisfy accumulated debt to RR group and in an effort to have 100% of potential contribution of revenues of maintenance fees, all 4,004 unsold inventory were sold by the owning company to Friendly Island Properties (FIP) in 2000 and 2001, an affiliate of RR, and over the next two years all these intervals were sold or transferred to individuals – almost exclusively to RR's membership base in Cancun, Mexico. This resulted in the first year of no operational losses in 2001 and again in 2002,

however, these “profits” could be considered to be fictional as the resort was continuing to suffer shortfalls in needed investments on major replacements and repairs. Some of this shortfall was made up in 2003 resulting in another year of fiscal losses.

Part and parcel of the FIP plan was also a potential long term solution to accumulated debts and shortfalls in upkeep. Voting rights of the FIP intervals were maintained by the RR group in order for RR’s professional management to also extend to the board of the TAPRC. From 2000 on, RR was able to now vote approximately 20% of rights at the annual TAPRC meetings and get representation on that board. This was done with an eye to providing stability to the enterprise which included developing an additional 83 new units, the PMR project, and to use the profits from that development in part to complete the lagging resort renovations and to retire all debts. This plan, conceived by the TAPRC Board and RR group in 1999 should have worked, but events over the next 8 years would conspire to doom these efforts. The future events to unfold were complex and few of them could have been foreseen.

2003 - 2009

These years saw the development of the PMR project move forward from its initial idea to reality. Conceived as an upscale project it fit the type of development that consumers were looking for, better than some of the lower quality projects that were part of the timeshare mix popular in the 1980s. The resort’s timeshare owners were still reluctant to increase maintenance fees to a sufficient point to bring the resort up to proper standards out of fear that each raise in fees would result in people abandoning their timeshares. Ironically it can also be argued that keeping the fees too low also resulted in deterioration of the product that resulted in people abandoning their timeshares.

By the end of 2004 the TAPRC group finally paid off the original bankruptcy trustee for the purchase of the property – again through borrowing. The system deciding who to owe money to, continued to be a drag on operations, but interestingly RR group consistently forgave all or most of any interest owed on accumulated debts to it over the years. Consistent operational losses continue to weaken the capital of the property resulting in a complex web of planned and budgeted borrowing via the PCIP and deferred payments to various parties. RR and TAPRC were both looking to the PMR as the panacea.

Timeshare construction loans and the required receivable financing loans were not easy to obtain in the Caribbean. None of the local banks had an interest in this and there were very few banks and lending institutions that would even consider a Caribbean project and all of these were requiring personal financial commitments of the developers; despite its internal discussion, something not available to TAPRC and affiliates. RR was able to arrange these loans through personal connections with QIT without the personal guarantees but with full collateralization of the immovable assets of the resort, not just the new project. These personal connections were fully disclosed. By 2005 this loan was finalized in order to be able to proceed with permits. As part of a standard clause in these types of loans, a contract with an experienced and successful sales and marketing company was required; this was supplied by the already-in-place RR group.

In 2006 as a result of a structural increase in maintenance fees the resort showed an operational profit and the management company paid significant profit tax. Again this profit was more fictional than real

as replacements and repairs were still behind and those costs were not factored in due to our tax laws. 2007 saw an increase in maintenance fees below rising costs and another loss was incurred.

PMR sales began in 2006 pre-construction and through 2008 performed reasonably well, but by the end of 2008 were below a “break even” position relative to the payment of the construction loan and a stop-gap operation loan in 2006 provided by QIT as well, resulting in payments in arrears. Serious questions on the part of the outside financial auditing company, Ernst and Young were raised in 2008 on the sustainability of the operation as balances on equity, and income were all in negative territory.

In 2009, at Pelican as well as throughout St. Maarten and the rest of the western world timeshare industry sales literally fell through the floor as the “Great Recession” took deep roots in discretionary spending of the upper-middle and middle classes. The resort and QIT renegotiated the terms of the financing at this time in an effort to forestall foreclosure on default. Interest rates were reduced and the loans were fully restored to good standing.

In summary of this period, one can look at what was considered a reasonable plan to resolve financial issues that began in 1996, whereby initial undercapitalization and a non-stop cycle of debt and consequent interest payments constantly threatened the resort as a going concern. Initial shortfalls in funding at the time of the 1996 takeover by TAPRC and failure to raise needed capital early on through maintenance fees or special assessments resulted in debt service that prevented the TAPRC from having a sustainable business plan. The PMR project, seen as the silver bullet, fell prey to the changes in St. Maarten’s timeshare industry that occurred from 2004 onwards, and is summarized in the section below:

Adverse Developments in the St. Maarten Timeshare Industry 2004-Present

Off Property Contact (OPC) programs generating property tours for sales presentations were the mainstay of timeshare sales and development on the Island, with in-house programs accounting for a bit less than half the volume at larger resorts with established occupancies. These programs rely heavily on efficiencies related to cost of tour acquisition (lead generation) and the conversion rates of those tours. This relies in turn on a professional sales staff of high caliber when presenting the product honestly. OPC program costs ballooned during this time and conversion rates went down.

The major factor in determining cost of sales and marketing and the conversion rates, and overall volume is labor related. St. Maarten had a laissez-faire policy on both legal and illegal immigration right up until 2000. Each year since has seen a tightening of policy on the issuance of work visas and the penalties for hiring illegals. The difference in results, depending upon the quality of the sales team can be quite significant. After 2000 the number of foreign sales people working on the Island dropped. The obtaining of work permits for sales management, TOs and trainers is time-consuming. There a very few locals want to learn and work in the sales of timeshare and are willing to work in a commission based program, even with a wage guarantee. Knowledge of the system is essential to avoid delays in filling key positions in the time sensitive environment one experiences during active marketing and delays in the processing of permits make this extremely challenging. The pool of OPCs has also shrunk from the hundreds to the dozens. Finding new OPCs has become more difficult; given the tight immigration and

labor policies (no permits to be issued for OPC and the lack of local interest in the position again even with wage guarantees).

During these years the number of resorts engaged in active OPC marketing dropped steadily, and even the most successful properties were experiencing combined costs of sales and marketing in excess of 50% and in some cases as high as 65%, all well over the 45% commission rate to the RR group for PMR sales. Factors that led to this huge fall out and reduction of properties in active marketing are summarized by: labor shortages due to government policies, fewer and fewer tourists paying rental rates that would justify timeshare purchasing as average daily rates have been in steady decline for quite some time, higher tour acquisition costs and lower conversion rates. By 2009 only 2 properties remained in active outside marketing and these were seriously impacted by the Great Recession and began to limit outside programs. PMR was not considered to be in active marketing as it could not afford an OPC program on its commission structure. Even in the USA, where labor shortage issues were not present many large and previously successful timeshare projects suspended in 2009 all outside marketing.

In addition to the timeshare industry, other developments also experienced hardships, delays, and indefinite postponements including but not limited to; Indigo Bay, Barbaron, Westin Dawn Beach, and Mullet Bay Resort.

2010 timeshare sales on St. Maarten saw little improvement even though the recession was officially over as consumer discretionary spending has not yet reached to prospective timeshare buyers. Past recessions in the 1980s, 1990s, and early 2000s saw sales affected for a period of months not the current period of years.

PMR was considered fairly successful up until late 2008 in selling its intervals, but it should be noted that it faced serious headwinds due to various groups of Pelican timeshare owners that were for a long time publicly engaged in bashing RR group, who also improperly sought access to all TAPRC timeshare owner contacts, blaming all financial problems on RR. Proof of this has been all over the internet, which has become increasingly powerful. Without this headwind the superior quality of the PMR project could have produced far better results. It should also be noted that the absorption rate of the in-house sales was, as early as 2007, below what was required to retire the debt and to generate the desired profits of the PMR project to solve the resort's problems. RR did not, or was not able within strict legal guidelines on employment and residence permits, and within its sales commission budget, to generate sufficient sales through off-property marketing. Had RR been willing to take the risk of flouting the labor laws to put more salespeople and OPCs to work, and had it negotiated a raise in sales commissions it might have proved possible to make the project viable.

Recent Events, 2010 to Present

QIT, like every lender the world over, was faced with the choice to foreclose on non-performing loans or to work with the project during the recession. Evidence exists that QIT was extremely cooperative in

debt restructuring through 2009. Foreclosure was and still is an unattractive option for any lender in this situation, as it would result in almost guaranteed losses to the lender. During 2010 this situation changed as the TAPRC board in place from the beginning of the year increasingly displayed well-documented hostility towards both the lender and the RR group, and had initiated overt actions to have the RR group removed from its managing and sales roles. TAPRC further fanned the flames in June of 2010 when it decided to stop paying the loan servicing and demanded another renegotiation of the loan terms. This might have worked in other situations, but faced with what was now seen as a hostile resort owner (borrower) deeply in debt and arrears that was further threatening the stability of the entire project by attempting to remove RR with no clear plan or prior management and sales credibility, QIT acted within its legal rights in defense of its outstanding loans of over $20,000,000 and subsequently foreclosed on the entire property.

A major factor in deeming the resort to no longer being a going concern was the decision by the TAPRC to not allow any maintenance fee increases for 2010 and 2011. This was done despite RR's recommendation for increases of 3% per year, in line or below what other St. Maarten timeshare properties were finding necessary due to rising resort operations costs, which were in excess of general inflation rates. In 2010 this action led to the closing of units, the reduction in work-week from 5 days to 4 for union and non-union employees, and reduction in needed repairs and replacements. TAPRC's vision was to delay payments to government, vendors and the lender even further for 2011; a short-term solution with no exit strategy.

The foreclosure resulted in a public auction that occurred on December 16, 2010. This auction was unsuccessfully challenged in court prior to the auction date by TAPRC. The judge then ruled that TAPRC could then in no way supply reasonable proof that it would be in a position to cure its default within any reasonable time. The financial history and all the correspondence were evaluated by the court at that time as a basis for the decision. This independent analysis of the documentation confirms this opinion.

QIT was now faced with an interesting challenge to protect its investment. Raising a special assessment carried risks of timeshare owners opting to surrender their weeks. The number of surrenders had increased fourfold in 2008 when a special assessment was levied to offset the huge spike in electricity and water as a direct result of oil reaching $140+ per barrel in July of 2008. Closing the resort also carried major risks attached to surrender by more timeshare owners, deterioration of the assets or high costs associated with protecting those assets, and the uncertainties of valuation surrounding a non-operating project. The other choice was to legally use the change of ownership to reduce the operating costs by a significant amount by choosing not to take on the current employees under their old conditions. This last was the course that was chosen as it offered the greatest possibilities for success.

QIT through RR, which was the most logical management company to retain, negotiated with WIFOL to make this plan a reality for when it was scheduled to assume full control January 26, 2011. A settlement was agreed to on January 19, 2011 by RR and the WIFOL President, which was not ratified by the union members within the prescribed time period and therefore QIT ultimately decided not to take on any employee on January 26 based upon a union agreement. It then began operations under its new management and owning companies, the SBR group with no union employees.

One choice for the previous employees was to make claims against the PRC management company, with whom it had its working relationship for termination benefits according to the CLA. Rather than taking this course, WIFOL instituted a quick injunction case to have their CLA recognized by the SBR group. The court ruled on February 8, 2011 that it saw SBR as essentially the same entity as the PRC group and that the workers should be immediately and retroactively compensated as the CLA was ruled to be still binding.

This independent analysis finds the court's February 8th ruling to be surprising. In an attempt to pierce the corporate veil its finding that *"It can be derived from this that the actual control over the corporations that operate Pelican Resorts has remained with QIT and Royal Resorts also after January 26, 2011, and that the management (through Royal Resorts) remained in the hands of Sutton and Corso. The reorganization described above has not caused any other material change than the termination of – briefly stated – the influence of tenants association TAPRC. The newly established legal entities perform exactly the same activities as the "former": to operate the Pelican Resort in the same building for the same timeshare owners"* is erroneous.

TAPRC was more than just an influence. It was the actual shareholder and through instructions to RR which are substantiated by extensive documentation, PRC groups under its direct ownership made independent and unilateral decisions regarding, budgets, payment and non-payment of loans, and assessing of maintenance fees. RR had previously surrendered its FIP voting rights and was not party to the decisions made, nor represented on the TAPRC board by 2010. This ruling that RR had full decision making rights directly or even had it indirectly, does not seem to fit the facts that were present in early 2011. This was not a friendly transfer from one entity to another that might have justified the injunction ruling of February 8, 2011.

As a consequence of this ruling QIT decided that unexpected liabilities and a guaranteed substantial loss for 2011, necessitated its decision to close the resort property with effect from February 13^{th,} 2011. Government, WIFOL and the SBR group are in negotiations and as of this writing there is an initialed agreement that would see the resort re-opened for at least a period. This agreement, which should be ratified, will not solve the long term issues, but can provide a short term workaround.

Cause of the Crisis

An analysis of where to assign blame is not fruitful, but understanding of what did go wrong can be productive in finding solutions and guiding legislative processes.

There is a very real possibility that absent the Great Recession, the TAPRC would have remained a viable entity. Since inception in 1996, the TAPRC was way undercapitalized for the project and efforts to improve this were hampered by a lack of strong commitment until the plan to develop their way out of their problem emerged. This involved some risk taking as any developer must do, whether it is an individual, a group or in this case 12,000 timeshare owners. With no capital cushion, the risk in this case

resulted in a loss to the developer. This is a normal occurrence in business, which cannot be regulated by law.

The current board of the TAPRC is attempting to show that this was some sinister plot on the part of RR and QIT to “steal” their property. Had TAPRC properly funded itself from the beginning, there would have been no need to assume additional risk. The debt service it had from the beginning, as even countries such as our own Netherlands Antilles discovered, was resulting in financial failure. Beyond unsubstantiated allegations, there is nothing to show that RR acted in anything other than good faith in attempting to shepherd the timeshare owners through their trials. The number of supportive deals and forgiving of debt and timely payment on the part of RR is well substantiated. It is unreasonable to suppose that RR acted only as a Good Samaritan and did not consider its own interests; it is in business and of course protected and looked for its own interests as well. This one would assume would have been well understood by the TAPRC and indeed as it was successful in business, one reason that RR was selected for management guidance. That RR was ultimately not successful in this, is a valid criticism, but is far from the criminal conspiracy being alleged.

Persons who are now TAPRC board members have long stated that RR’s 10% management fee has been way too high and is the cause of the resort’s financial difficulties. Research has shown that the average management fee for the timeshare industry is between 8-12% placing RR’s fee completely in line with standard business practice.

Maintenance fee increases in St. Maarten as a whole are a real threat to sustainability and can be taken as a core issue leading to the TAPRC decline. Taken as a competitive destination for tourism and recognizing that timeshare represents sustainable tourism beyond that of hotels, maintenance is high for our level of product and service. Labor costs, which represent our biggest expense, versus productivity are high on St. Maarten compared to our competitors. Should we fault the unions the way some USA states are now doing? It is fairly common knowledge that the Pelican Resort had the highest paying CLA on the island and this can be seen as a contributing factor to high maintenance fees and high dissatisfaction. Electricity is our second largest expense and is much higher than other Caribbean islands further compounding issues with timeshare owners over our escalating maintenance fees.

The actions of the current TAPRC can also be seen as helping to increase the tensions. As a result of their consistent refusal to increase maintenance fees and aggressive actions against their lender QIT, the foreclosure took place, and undermining via a strong internet campaign among owners the credibility of the project all helped to reduce sales of the PMR in addition to influence of the recession. Argued from the TAPRC point of view, they were simply championing their rights to correct perceived short comings in the results of RRs guidance, however, their lack of a clear plan for success made the effort counterproductive in the final analysis. Had they been successful in terminating the relationship with RR, the problem of finding a company to handle the sales and marketing of PMR would have remained and given the years that it would take to establish one on St. Maarten they would have had the same result of foreclosure even had the lender been agreeable.

The ruling of the judge on February 8th discussed earlier was the final ingredient in this phase of the resort's troubles leading to the closure.

Future Outlook for the Resort

The pending court cases initiated by the TAPRC can have major consequences. TAPRC is trying to have the auction annulled, which if successful could result in another closure due to lack of funds to operate by the TAPRC. Another potential area of problem is that TAPRC was the owner of the resort furnishings, these not being part of the loan collateral, and recently transferred the ownership of the furnishings to a foundation. TAPRC has demanded the sum of $5,000,000 for the furnishings from SBR. SBR has responded with an offer to forgive the monies used by TAPRC group for 2010 expenses taken from the 2011 maintenance fees collected starting in October of 2010. As the resort was operating in arrears this amount is quite substantial, so the SBR offer seems to be quite fair. TAPRC has also initiated efforts to find RR group guilty of fraud, deception and other torts. It seems likely at this time that TAPRC will maintain a series of court cases for as long as they can afford to pay legal fees.

For SBR group there is a possibility to turn the resort around. Some of the unknowns at this time are how much of the liabilities of the TAPRC group the SBR group will have to bear, and whether the resort will be up for sale by QIT. There is also the question of how the loans will be restructured to the new SBR owning company and how the $3.4 million unsecured PCIP loans of PRC will be dealt with. With 70% of the weekly Marina Residences interval still available for sale representing approximately 3000 weeks there is a chance for the lender to break even, but that is far from guaranteed. Regarding the sustainability of the property there will still be many challenges, including building up a larger sales and marketing force which can take years to do and not doing, can undermine the ability of the owner to recoup his investment (or loan, however you want to call it).

If SBR is successful in a significant reduction of labor costs, then the potential for a turnaround goes up dramatically. Maintenance fees are already at a top price point where new sales are slowed and retention of existing owners is not always easy. If labor costs go down meaningfully then there will be sufficient funds to operate without incurring new losses and carry out needed repairs and replacements. If labor costs cannot be reduced should SBR prove unsuccessful in its court case / negotiations with the union then there will be little option for SBR to try to operate without a substantial structural increase in maintenance fees of 20 to 30% and a special assessment to cover the shortfalls for 2011. This will be a huge negative with the timeshare owner base, and will likely see TAPRC using this to harm the resort's ability to collect fees from the owner base in addition to normal difficulties.

Impact on Other Timeshare Resorts and the Island

During the last 6 months a great deal of media attention has been focused on the problems of the Pelican Resort. A major source of negative publicity was attributed to anonymous Pelican timeshare owners, public airing of the disputes between TAPRC group and RR group and WIFOL, and even one Member of Parliament quoted twice in the newspapers as saying that timeshare in St. Maarten was a "Free-for-all" and erroneously stating that St. Maarten has no timeshare legislation. In addition to

traditional local media, which is now picked up on the internet by many of St. Maarten's timeshare owners, there are numerous web blog and other internet sites that carry mostly negative news and views– this is to be expected as the saying "bad news travels faster than good" is very true.

The negative publicity has caused great concern among many timeshare owners at other properties and has negatively impacted sales and increased tensions and uncertainty. The SMTA was very proactive in limiting the damage from the sudden closure of the resort. SMTA was very successful in organizing discounted alternate accommodations for displaced Pelican/Simpson Bay owners and with the cooperation of SBR, SHTA, AHSM, TAPRC and others we were able to successfully relocate many visitors who otherwise would have either left the island early or would not have come. Interestingly a number of the displaced timeshare owners bought more time at the member resort that hosted them at maintenance fees.

There are other timeshare resorts with financial, maintenance and owner relations issues. The American entrepreneur, Mr. Jeff Berger, through his very well known website is actively engaged in a web campaign to solicit St. Maarten timeshare owners to unite in a call for timeshare legislation. He is doing this after being sent our timeshare legislation both on the Island level and from the civil code. Rather using his site to solicit potential improvements to our legislation, he is using the concerns of timeshare owners to promote his commercial interests and claiming that there is no legislation here. He published the following to his website subscribers:

> *"Yet when arrogance, greed, and profiteering possessed many timeshare developers — and those same timeshare owners turned to the government for help, the government ignored them. It wasn't just a deaf ear, it was a total stone wall.*
>
> *Timeshare owners at Pelican, Atrium, Flamingo, Royal Palm, Sapphire, and Caravanserai were (and still are) victimized by a government they are convinced could not possibly care less about them and by a court system that they believe rewards arrogance, greed, and contempt for consumers while ignoring common sense.*
>
> *Putting together investigative committees that systematically exclude timeshare owners – the island's single most loyal visitors – is obnoxious, insulting, insensitive, and not the least bit wise, but the government has done precisely that."*

Jeff Berger is echoing in his "sensationalist journalism" what is still a minority opinion of disgruntled consumers, but is one that is persistent on the internet. Even our well respected courts are slandered by implication in this communication. In every bad situation there exists the seeds of something good and the SMTA must take this an opportunity to make improvements to public perception. Part of this will be working to update our existing legislation so that it is seen to be proper and sustainable. We must also work with Jeff Berger and other internet timeshare lobbyists to improve the reality and also the public perception of that reality.

There is no doubt that even the short closure of the resort has had negative economic impact on the Island. Not all affected timeshare owners came to stay at other properties, and there are a number who have vowed never to return to St. Maarten as a result of their emotional and financial loss. Even if there is a re-opening of the resort soon, the numerous issues that still threaten the short term viability of the

project could well lead to another more protracted closure. If this were to happen then there will be job losses in the thousands and a severe impact on our economy. It would be the equivalent of losing 1/3 of the cruise ship business.

Legislative Issues

In recent weeks we have had recognition from many sources that our timeshare legislation is not up to standards. Could timeshare legislation have stopped the Pelican from going under a 2nd time? Could legislation have prevented a closure? The answers to this are complex and we should look this over carefully below. While there is no doubt that our legislation in the civil code, book 7 lacks some specifics, there are other areas of the civil code that do apply in general terms should a court case be sought. However, having more court cases to settle disputes between resorts and timeshare owners to establish clear jurisprudence is not desirable, and only leads to expense and ill-will. Our Island ordinance on business licenses, as amended in 2003, does attempt to resolve some issues, but is not the correct place for some of the needed concepts.

One item of legislation that is clearly needed, which would have solved some of the financial issues that not only Pelican faced but also impacts all properties is to exempt reserves for major repairs and replacements and hurricane damage from profit tax. Currently unused maintenance fees billed in a given year are considered as taxable profit. A significant 34.5% of funds needed to be saved for these often non-recurring core items disappear as taxes, resulting in resorts not building up required funds for what are clearly expenses that need to be deferred. As resorts currently do not build up reserves due to the tax liability, there would be no effect on government revenues that would prevent adoption of this tax legislation. There was one year that Pelican did attempt to build reserves and wound up with a huge tax as punishment.

A hot topic now as a result of the closure of Simpson Bay Resort is the concept of the user rights. TAPRC and other owners of timeshare rights have started a court action protesting their denial of rights on the part of SBR by means of its decision to close. The web is full of people claiming that St. Maarten has no laws protecting their rights, but this is not the case. The rights of usage are clearly established by contract law, by civil code book 7, and by prior jurisprudence. What is a complicating factor in the current court case is the TAPRC's own timeshare usage contract that specifically refers to no fault of closure applying in certain conditions. It is possible that those conditions were present at the time of closure. Here is the clause: *"In the event that the MANAGER is undertaking any restoration or reconstruction of any buildings which prevents the occupancy and use of the Unit Week by the MEMBER, or should the Unit not be available due to acts of God or other reasons beyond reasonable control of the MANAGER, the MANAGER shall have the right to either relocate the MEMBER to another Unit deemed by the MANAGER to be comparable to the Unit undergoing restoration or reconstruction or to extend the MEMBER'S benefits for the MEMBER'S unit for the length of time for which occupancy and use was not available."* SBR has offered the extension of the benefits and may well have no further liability if the court would decide that the above conditions were indeed met.

Another interesting concept that applies to the redress of wrongs sought by TAPRC in the closure is that it was actually the documented decisions of the TAPRC that led to the shortage of maintenance fees billed to cover the actual costs that the resort had under the union CLA, and that the February 8th ruling that TAPRC was only advisory and not party to this damaged SBR's position to operate. If one is the cause of a problem can one expect compensation for it as the TAPRC was acting on behalf of the very timeshare rights that it is claiming loss from? Also of important consideration is that, if the new owner is forced to accept adverse conditions to grant the usage rights of the timeshare owner, then it is equally the responsibility of the timeshare owners to be assessed in full their obligatory share of the costs of providing those usage rights. This could result in the timeshare owners being legally obliged to pay more money immediately to pay for their share of the expenses, an unintended consequence of their quest for protection of rights.

Some clarity in legislation can be looked for, but the particular series of events relating to Pelican appears impossible to legislate. Can government in any capacity impose strict enough rules that would prevent either poor business decisions or decisions that would be considered well within the norm of good business practice, that extraordinary circumstances such as the recent recession or an even worse depression would cause unfavorable consequences? The PMR development is a good example, that risks associated with any business activity cannot be eliminated to prevent failures within any concept of good governance or good jurisprudence.

There are several areas whereby timeshare (and condominium buyer) consumer protections can be strengthened including:

1. Pre-construction sales – performance bonds or escrowed funds until completion
2. Disclosures on subsidized maintenance fees with realistic projections for reserves
3. Required reserve funds that could be built up over a period of years to proper levels and rules on management of those funds
4. Setup of discrete maintenance accounts which would not be comingled with other accounts, whereby unsold units are for the account of the owner and rules on access to view records
5. Controls on gift solicitation for timeshare sales presentations in the case of sweepstakes, raffles and lotteries

This list is not exhaustive but is merely some suggestions for a starting point. There is a real need to set up a new Timeshare Advisory Committee with the goals of protecting tourism, industry, consumers and government, and citizens, all of whose interest ultimately coincide on these issues. Public relations issues need to be addressed in the short term and the TAC in the near term.