

**CALIFORNIA COASTAL COMMISSION**

SOUTH COAST DISTRICT OFFICE  
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LONG BEACH, CA 90802  
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**Th14a**

**LCP-5-NPB-23-0020-2**

**(FRACTIONAL OWNERSHIP & TIME SHARE)**

**AUGUST 10, 2023**

**CORRESPONDENCE**

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August 4, 2023

**Agenda  
Item Th14a**

**VIA EMAIL**

Chair Brownsey and Honorable Commissioners  
California Coastal Commission  
455 Market Street, Suite 300  
San Francisco, CA 94105

Re: Agenda Item Th14a: De Minimis Amendment Determination for Proposed City of  
Newport Beach Amendment Number LCP-5-NPB-23-0020-2

Dear Chair Brownsey and Honorable Commissioners:

On behalf of Pacaso, Inc. (“Pacaso”), we write regarding the Coastal Commission’s consideration of the City of Newport Beach’s proposed Local Coastal Program (“LCP”) amendment, LCP-5-NPB-23-0020-2 (the “LCP Amendment”). The City’s LCP Amendment proposes to amend the definition of “time share use” to include “fractional ownership” of real property, thereby prohibiting various types of co-homeownership in residential areas of the City’s Coastal Zone. Contrary to the Staff Report’s assertions, this is a substantial change to the allowable use of land that conflicts with the Coastal Act’s Chapter 3 policies. As such, the LCP Amendment is inconsistent with the statutory criteria for a *de minimis* amendment and must be processed as a regular LCP amendment.

The LCP Amendment also deserves more robust study and thoughtful consideration than is provided in the six-page Staff Report because it implicates serious issues of coastal access and recreation, and adversely impacts the coastal home and visitor accommodations markets. Despite the City’s representations, the LCP Amendment as written does not differentiate among different types of co-ownership – such as friends or family members who jointly own a home or multiple individuals who each own a fractional interest in a shared home. Thus, any enforcement of the LCP Amendment’s time share restrictions against only fractional homeowners raises significant concerns of selective enforcement.

Accordingly, Pacaso strongly opposes the Executive Director’s determination that the LCP Amendment should be processed as a *de minimis* amendment. Pacaso respectfully requests that the Commission object to the Executive Director’s determination and set this item for further consideration at a future hearing. A proposed alternate motion is attached as **Exhibit A** on the Pink Sheet. Given the important issues presented by the LCP Amendment, and the fact that the Staff Report does not address these issues in detail, we further request that the Commission hold

**These materials have been provided to Coastal Commission Staff**

an informational workshop to consider the precedential effects of this LCP Amendment and others on coastal resources and housing in the Coastal Zone.

**A. The City's LCP Amendment Does Not Satisfy the Coastal Act's Requirements for *De Minimis* Treatment**

The Coastal Act allows an LCP amendment to be processed as a *de minimis* amendment only under narrow circumstances not present here. To be considered "*de minimis*," an LCP amendment cannot "propose any change in land use ... or any change in the allowable use of property," and must be "consistent with the policies of Chapter 3." (See Pub. Resources Code, § 30514, subd. (d)(1).) Because the City's LCP Amendment falls short of the statutory criteria for *de minimis* treatment, the Coastal Act prohibits the Commission from adopting it without further analysis. The Commission should not consider the LCP Amendment until staff has fully analyzed the LCP Amendment's potential impacts to coastal resources.

**1. The LCP Amendment Proposes a Change in Land Use and the Allowable Use of Property**

The Staff Report claims that *de minimis* treatment is warranted because the LCP Amendment would not change development standards that apply to time share uses. (See Staff Report, pp. 3-4.) The Staff Report's focus is too narrow. The issue is not the standards that apply to time share uses, but rather the standards that apply to fractional homeownership uses – which are a separate and distinct use from timeshares. A straightforward comparison of the LCP Amendment against the City's Municipal Code reveals that the LCP Amendment "propose[s] a] change in land use" and "the allowable use of property" as to fractional homeownership uses and therefore does not qualify for *de minimis* treatment.

The Newport Beach Municipal Code currently states that "time share uses" are "***not coupled*** with an estate in the real property." (Newport Beach Mun. Code, § 21.70.020 [emphasis added].) This condition exempts fractional homeownership because fractional homeownership *includes* an estate in the underlying real property. However, the LCP Amendment substantially broadens the definition of "time share uses" so that it applies "***regardless of whether [the uses] are coupled*** with ownership of a real property interest." (See Staff Report, Ex. 1, § 21.70.020 [emphasis added].) As a result, uses that were previously exempted from time share regulations because they were coupled with an estate in the underlying real property now can be regulated as time shares under the LCP Amendment.

Moreover, the LCP Amendment not only attempts to regulate fractional homeownership as time share uses for the first time, but it also proposes to prohibit fractional homeownership completely in residential areas—limiting fractional homeownership uses to commercially zoned areas. (See Staff Report, Ex. 1, p. 1.) The City claims—and the Staff Report repeats—that the LCP Amendment would merely "clarify" that fractional homeownership uses were already included under existing time share regulations. (See Staff Report, p. 1.) However, the LCP Amendment itself contradicts this position. The City's Ordinance adopting the LCP Amendment states that the Amendment emerged from the Planning Commission's recommendation "to ***broaden*** the definition of time shares ***to include fractional ownership uses***"—rather than merely

**These materials have been provided to Coastal Commission Staff**

clarify a prohibition that already existed. (See Newport Beach, Ordinance No. 2023-5, attached as **Exhibit B**, p. 6 [emphasis added].) The City’s broadening of the definition of time shares to include fractional ownership uses plainly constitutes a “change in land use” and “the allowable use of property.” (*Ibid.*; see also Pub. Resources Code, § 30514, subd. (d)(1)(B).)

In sum, the LCP Amendment expands the reach of time share regulations from uses “not coupled” with an ownership interest to uses “regardless of whether they are coupled” with an ownership interest. Further, the LCP Amendment attempts to regulate fractional homeownership for the first time and prohibit such ownership in residential areas. Contrary to the Staff Report’s assertions, the LCP Amendment proposes a “change in land use” and “in the allowable use of property” and, thus, cannot be considered as a *de minimis* amendment.

## 2. The LCP Amendment Is Inconsistent with the Coastal Act

The Staff Report asserts that the LCP Amendment is *de minimis* because there would be no impact to coastal resources and it is consistent with Chapter 3 of the Coastal Act. (Staff Report, pp. 3-4.) The Staff Report’s analysis is limited to a single paragraph with conclusory statements about how “[t]he proposed clarifications to the definition of time share uses will not reduce visitor serving uses within the coastal zone” and “will not adversely affect coastal resources.” (*Id.*, p. 4.) However, as explained below, the LCP Amendment is inconsistent with Chapter 3 policies because it restricts coastal accommodations, potentially impacting coastal access and recreational opportunities.<sup>1</sup> These potential impacts must be studied thoroughly before the Commission considers the LCP Amendment.

**Maximizing Coastal Access.** Coastal Act Section 30210 provides that “maximum access . . . and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.” (Pub. Resources Code, § 30210.)<sup>2</sup> The Coastal Commission has recognized that varied forms of coastal home ownership and visitor accommodations facilitate coastal access for all potential residents and visitors.<sup>3</sup> Indeed, “protect[ing] the public’s ability to

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<sup>1</sup> In addition, the LCP Amendment contradicts policies set forth in Newport Beach’s Land Use Plan. (See City of Newport Beach, Certified Land Use Plan (2019) (“LUP”).) Unless processed as a *de minimis* amendment, the Commission must evaluate an LCP amendment that proposes changes to an LCP’s zoning ordinances or implementation plan according to whether it conforms with or is inadequate to carry out the provisions of the local government’s certified land use plan. (See Pub. Resources Code, § 30513(b).) A local government’s LCP and any amendments thereto must in turn be consistent with the Coastal Act’s Chapter 3 policies. (See *Yost v. Thomas* (1984) 36 Cal.3d 561, 566; *McAllister v. Cal. Coastal Commission* (2008) 169 Cal.App.4th 912, 931.)

<sup>2</sup> Section 30210 overlaps with Newport Beach Policies 2.3.3-1 (“Lower-cost visitor and recreational facilities, including campgrounds, recreational vehicle parks, hostels, and lower-cost hotels and motels, shall be protected, encouraged and, where feasible, provided.”) and 2.3.3-2 (“Encourage new overnight visitor accommodation developments to provide a range of rooms and room prices in order to serve all income ranges.”). Thus, the LCP Amendment is also inconsistent with the Newport Beach LUP.

<sup>3</sup> Staff Report for City of Malibu LCP Amendment No. LCP-4-MAL-20-0083-2, (July 21, 2022), p. 2, <https://documents.coastal.ca.gov/reports/2022/8/F10a/F10a-8-2022-report.pdf> (“Malibu STR Staff Report”).

**These materials have been provided to Coastal Commission Staff**



recreate in and enjoy the coastal zone” is a “core goal of the Coastal Act” and is “particularly important for those not fortunate enough to live in coastal cities” on a fulltime basis.<sup>4</sup>

Every additional coastal accommodation and vacation home ownership opportunity benefits all potential coastal residents and visitors. The Commission has long acknowledged this ripple effect in the short-term rental context, where increased supply can “augment the stock of [all] overnight accommodations in coastal areas.”<sup>5</sup> The Commission explained that, by “increas[ing] the range of options available” and “providing a wider selection of overnight accommodations,” expanded supply in any one accommodation or housing type can “increase public coastal access” overall.<sup>6</sup> Fractional homeownership similarly expands total accommodations and coastal visitation opportunities for potential coastal visitors. Absent fractional coastal homeownership opportunities, individuals or families who cannot afford to purchase a fulltime coastal residence or vacation home may instead choose to occupy lower-cost short-term rental stock or hotel accommodations for longer periods, putting pressure on the supply available to others.

There also is no evidence that allowing fractional homeownership threatens coastal access by adversely affecting regional housing supply, long-term rental availability, or affordable housing. The Commission has repeatedly rebuffed claims that providing varied forms of coastal visitor accommodations endangers fulltime homeownership, long-term rentals, or affordable housing for coastal residents and visitors. For instance, in the short-term rental context, the Commission noted that short-term rentals are often “located in some of the most desirable areas . . . , where long-term rental would likely be out of reach for the vast majority of people even if those homes were made available that way.”<sup>7</sup> “Such homes,” the Commission has made clear, “do not provide affordable housing.”<sup>8</sup> Similarly, fractional ownership of vacation homes provides opportunities for coastal homeownership for those that cannot afford to buy a second home outright. Pacaso homes are approximately seven times more expensive than the average home in the City and, thus, are the type of home predominately purchased as second homes—not as primary residences for those living and working fulltime in the City. Instead of prohibiting fractional ownership in residential areas outright, the Commission should study the effect of fractional ownership on the housing stock in the Coastal Zone.

***Protection of Lower-Cost Uses.*** Coastal Act Section 30213 provides that “lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided.”

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<sup>4</sup>Staff Report for City of Newport Beach Major Amendment No. LCP-5-NPB-20-0070-3 (Sept. 30, 2021), p. 15, <https://documents.coastal.ca.gov/reports/2021/10/W14b/W14b-10-2021-report.pdf>.

<sup>5</sup> Malibu STR Staff Report, p. 2.

<sup>6</sup> Staff Report for City of Morro Bay LCP Amendment No. LCP-3-MRB-20-0050-1 (Aug. 20, 2021), p. 4, <https://documents.coastal.ca.gov/reports/2021/9/Th15a/th15a-9-2021-report.pdf>; Staff Report for City of Del Mar Major Amendment LCP-6-DMR-17-0083-3 (May 24, 2018), p. 28, <https://documents.coastal.ca.gov/reports/2018/6/th14d/th14d-6-2018-report.pdf>.

<sup>7</sup> Staff Report for City of Oxnard LCP Amendment No. LCP-4-oxn-20-0008-1 (June 18, 2020), p. 16, <https://documents.coastal.ca.gov/reports/2020/7/F13a/F13a-7-2020-report.pdf>.

<sup>8</sup> *Ibid.*

(Pub. Resources Code, § 30213.)<sup>9</sup> The Coastal Commission has recognized that a range of coastal home ownership and visitor accommodations facilitate access to the coast for potential residents and visitors, including those seeking more affordable accommodations and recreational opportunities. For example, in the short-term rental context, the Commission explained that short-term rentals should be viewed as “complementary lodging alternatives” to other types of coastal accommodations that enable enhanced public access beyond their target demographic.<sup>10</sup> Therefore, instead of prohibiting fractional homeownership outright, the Commission must evaluate how fractional homeownership affects total available accommodations and coastal visitation opportunities, including those seeking low-cost recreation.

In fact, fractional homeownership helps to support lower cost recreational facilities by increasing property utilization and maximizing local revenue from non-fulltime residents. The Commission has recognized that vacation rentals are often likely to remain empty and unrented for several extended periods or even most of the calendar year.<sup>11</sup> However, fractional homeowners of second homes contract to use their homes for specified periods throughout the year. Therefore, these fractional homeowners help drive more consistent year-round revenue for coastal businesses and community resources than short-term rentals or traditional second homes – including those that provide low-cost recreational opportunities for all visitors. The Commission should study these issues as part of a comprehensive review of homeownership and time share uses within the Coastal Zone statewide.

***Preserving Coastal Community Character.*** Coastal Act Section 30253 establishes that “[n]ew development shall . . . [w]here appropriate, protect special communities and neighborhoods that, because of their unique characteristics, are popular visitor destination points for recreational uses.” (Pub. Resources Code, § 30253.) Instead of recognizing the potential benefits of more frequent and consistent vacation home use, the Staff Report claims that “Fractional Ownership . . . has caused a rise in increased traffic, parking congestion, and noise” in residential areas. (Staff Report, p. 1.) But the Staff Report cites nothing other than the City’s own conclusions. (See *ibid.*) Like any other owner of a second home, fractional homeowners hold a significant investment in the community where their home is located. They are fundamentally different than short-term coastal visitors because they intend to stay in the home multiple times throughout the year and, as a result, they integrate into and invest in their property and the community. Thus, rather than rely on the City’s bare assertions, the Commission should require these issues be thoroughly evaluated before approving the LCP Amendment.

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<sup>9</sup> Section 30213 overlaps with Newport Beach Policies 2.3.3-3 (“Identify, protect, encourage and provide lower-cost visitor-serving and recreation facilities, including museums and interpretative centers.”) and 2.3.3-4 (“Encourage visitor-serving and recreational developments that provide public recreational opportunities.”). Therefore, the LCP Amendment is also inconsistent with the Newport Beach LUP.

<sup>10</sup> See Malibu STR Staff Report, p. 15.

<sup>11</sup> See Staff Report for San Luis Obispo County LCP Amendment No. LCP-3-SLO-21-0027-1-Part F (Jan. 11, 2022), p. 11, <https://documents.coastal.ca.gov/reports/2022/2/F16e/F16e-2-2022-report.pdf>.

In sum, the LCP Amendment cannot be processed as a *de minimis* amendment. The LCP Amendment proposes both a “change in land use” and “the allowable use of property,” and is inconsistent with the Coastal Act’s Chapter 3 policies. The Commission must assess the LCP Amendment’s potential impacts and consistency with the Coastal Act.

**B. The LCP Amendment Would Prohibit Everyday Behavior Common to Co-Owners of Coastal Properties**

The LCP Amendment also requires more careful study than is afforded a *de minimis* amendment because it could directly restrict conduct that is common to individuals who co-own properties, regardless of the arrangement. Despite the Staff Report’s assertions (Staff Report, p. 2), by its plain terms, the City’s LCP Amendment does not differentiate between different types of co-ownership arrangements, leading to significant unintended consequences that impact all co-ownership uses in the City’s Coastal Zone.

As described in Pacaso’s July 3, 2023, letter to Commission Staff, attached as **Exhibit C**, the LCP Amendment defines “time share uses” with reference to a “time share plan.”<sup>12</sup> A “time share plan” is defined as “any *arrangement, plan, scheme, or similar device*, . . . whereby a purchaser, in exchange for consideration, receives the *right to exclusive use* of real property . . . *for a period of time less than a full year* during any given year . . .” (Staff Report, Ex. 1, § 21.70.020 [emphasis added].) This broad definition, however, effectively bans common coastal visitor uses based on everyday behavior that are far from “time share uses.”

For example, the LCP Amendment does not define “arrangement, plan, scheme, or similar device.” Yet any communication between co-owners of a property could be an “arrangement, plan, scheme, or similar device,” such as an email chain between siblings or friends setting forth assigned weeks at a co-owned vacation home. The LCP Amendment also fails to define “right to exclusive use.” Virtually any agreement between a shared home’s co-owners allowing one co-owner to use a property exclusively could fall within the scope of the LCP Amendment. Thus, an agreement among branches of a family or friends to annually allocate stays at a vacation home among different groups over Memorial Day, the Fourth of July, and Labor Day satisfies the LCP Amendment’s “time share plan” definition and would be prohibited.

Finally, the LCP Amendment’s requirement that the use be for a “period of time less than a full year” is broad enough to capture various types of co-ownership arrangements. Like other second homeowners, co-owners of a shared vacation home likely do not intend to occupy the home at all times during the year. If they did, each purchaser would likely opt to instead purchase a vacation home for their sole use. Shared ownership, on the other hand, offers to reduce payments, utilities, and upkeep costs for each purchaser in exchange for more limited rights to use the property during any given year. There is no difference between family, friends, or other types of co-owners purchasing and using a vacation home this way.

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<sup>12</sup> Also enclosed with this letter is Pacaso’s May 9, 2023, letter to the City of Newport Beach regarding the City’s proposed time share ordinances.

As written, the LCP Amendment not only regulates fractional homeownership, but also other co-ownership arrangements, including those among family and friends. The Staff Report, however, ignores the LCP Amendment's unintended consequences. As such, the Commission must study the LCP Amendment's potential consequences for all types of co-owners in the Coastal Zone.

**C. The LCP Amendment Can Only Be Enforced Against Fractional Homeowners Arbitrarily**

Because the LCP Amendment could be broadly applied to regulate a wide range of co-ownership arrangements, any application of the Amendment to fractional homeowners exclusively – but not to family and friends who co-own property – would be impermissibly arbitrary and discriminatory.

The City has no way to discover when friends or family co-owners enter an exclusive use arrangement for a home, as defined by the LCP Amendment. As the Newport Beach Community Development Director publicly acknowledged, local government records usually shed light only upon a property's formal owner; such governments often do not “know anything about,” for example, “who owns [an] LLC,” its “partnership structure,” or the identities of a trust's trustees.<sup>13</sup> The City could, however, monitor property listings by fractional homeownership companies in an effort to enforce time share restrictions against them. This approach is plainly arbitrary and impermissibly distinguishes among types of homeowners based solely on their identity. (See *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 133 [“*In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users.*”] [emphasis original].)

Finally, although the City's Ordinance adopting the LCP Amendment claims that fractional homeownership results in “an increase in traffic and noise in residential neighborhoods” (see Ex. A, p. 2), the LCP Amendment ignores that anyone who co-owns a property can generate turnover and disrupt a community. Nothing stops one co-owner from treating a shared vacation home as a party house on holiday weekends, even if another is more respectful of community norms. There is simply no evidence that fractional ownership is more disruptive of a local community than any other co-ownership arrangement. In fact, as at least one local Newport Beach official noted: “***I don't see four or eight owners of a single house really destroying our City. ... I don't think [fractional homeowners] are here to destroy our community. I think they're here to enjoy it.***”<sup>14</sup> The LCP Amendment inappropriately tackles the common problems of noise and crowded streets by targeting fractional homeowners simply *because* they are fractional homeowners, even though any co-owner can cause disruptions and

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<sup>13</sup> See City of Newport Beach, Newport Beach City Council Meeting: November 16, 2021, YouTube, at 41:28-41:53, <https://youtu.be/nk1QT25nAUQ?t=2488>.

<sup>14</sup> Newport Beach City Council Meeting (Nov. 16, 2021), *supra*, at 54:22-54:58 (emphasis added).

**LATHAM & WATKINS** LLP

traffic congestion.<sup>15</sup> If the City wished to impose stricter noise and parking regulations on fractional homeownership, it certainly could have done so.

Given the undefined line between types of co-ownership, the LCP Amendment's singling out of fractional homeownership is completely arbitrary. The LCP Amendment's selective and discriminatory enforcement against fractional homeownership deserves closer evaluation.

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We appreciate the Commission's consideration of Pacaso's comments on the LCP Amendment. The LCP Amendment deserves thorough study in the context of a broader state-wide approach to time share uses and homeownership in the Coastal Zone. Therefore, Pacaso respectfully requests that the Commission object to the Executive Director's determination that the LCP Amendment is *de minimis* at its planned August 10, 2023 hearing and continue the item for full consideration at a future hearing.

Very truly yours,



Duncan Joseph Moore  
of LATHAM & WATKINS LLP

cc: Kevin Heneghan, Pacaso Inc.  
Purvi Doshi, Pacaso Inc.  
Naseem Moeel, Pacaso Inc.  
Susan McCabe, McCabe & Company  
Anne Blemker, McCabe & Company  
Natalie Rogers, Latham & Watkins LLP

Enclosures

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<sup>15</sup> See *College Area Renters & Landlord Assn. v. City of San Diego* (1996) 43 Cal.App.4th 677, 686-687 (“Owners and tenants are similarly situated with respect to the overcrowding problem—i.e., both groups can overcrowd a neighborhood.”). If the City wished to regulate noise and traffic in residential neighborhoods, “[n]oise . . . can be dealt with by enforcement of police power ordinances and criminal statutes. Traffic and parking can be handled by limitations on the number of cars (applied evenly to all households) and by off-street parking requirements.” (*Id.* at pp. 687-688.)

**These materials have been provided to Coastal Commission Staff**

# EXHIBIT A



**EXHIBIT A**

**ALTERNATIVE MOTION TO: EXTEND TIME LIMIT TO ACT UPON LOCAL COASTAL PROGRAM AMENDMENT LCP-5-NPB-23-0020-2 AND CONTINUE THE HEARING TO A FUTURE MEETING**

Pacaso, Inc. requests that the Commission extend the time limit to act on Local Coastal Program Amendment LCP-5-NPB-23-0020-2 and continue the hearing on this item to a future meeting.

**To extend the time limit to act on Local Coastal Program Amendment LCP-5-NPB-23-0020-2, and continue the hearing on this item to a future date, the following Motion is in order:**

**Motion:** I move that the Commission **extend the time limit** to act on City of Newport Beach Local Coastal Program Amendment Number LCP-5-NPB-23-0020-2 to October 5, 2024, and **continue** the hearing on this item to a future meeting.

**Moving Commissioner's Recommendation of Approval:** I recommend a **YES** vote.

**RESOLUTION TO EXTEND THE TIME LIMIT TO ACT ON LOCAL COASTAL PROGRAM AMENDMENT NUMBER LCP-5-NPB-23-0020-2:**

The Commission hereby extends the time limit to act on Local Coastal Program Amendment Number LCP-5-NPB-23-0020-2 to October 5, 2024, and continues the hearing on this item to a future meeting.

**These materials have been provided to the Coastal Commission Staff**

# **EXHIBIT B**

## ORDINANCE NO. 2023-5

### AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF NEWPORT BEACH, CALIFORNIA, APPROVING AND AUTHORIZING SUBMITTAL OF A LOCAL COASTAL PROGRAM AMENDMENT TO THE CALIFORNIA COASTAL COMMISSION AMENDING TITLE 21 (LOCAL COASTAL PROGRAM IMPLEMENTATION PLAN) OF THE NEWPORT BEACH MUNICIPAL CODE RELATED TO TIME SHARES (PA2022-0202)

**WHEREAS**, Article XI Section 7 of the California Constitution authorizes cities to make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws;

**WHEREAS**, California Government Code Section 65850 *et seq.* authorizes a city to adopt ordinances that regulate land uses as a valid use of its police powers;

**WHEREAS**, Section 200 of the City of Newport Beach ("City") Charter vests the City Council with the authority to make and enforce all laws, rules, and regulations with respect to municipal affairs subject only to the restrictions and limitations contained in the Charter and the State Constitution, and the power to exercise, or act pursuant to any and all rights, powers and privileges, or procedures granted or prescribed by any law of the State of California;

**WHEREAS**, in 1982, the City Council adopted Ordinance No. 82-14 which is attached hereto as Exhibit "A," and incorporated herein by reference prohibiting the development of time share projects within Newport Beach to protect against unique problems associated with transient occupancy;

**WHEREAS**, in 1996, the City Council adopted Ordinance 96-7 which is attached hereto as Exhibit "B," and incorporated herein by reference providing a narrow exception to allow time share projects in commercial districts subject to a conditional use permit but continuing to prohibit the use of residential property for time shares;

**WHEREAS**, the City is a popular tourist destination known for its beaches and temperate weather;

**WHEREAS**, over the past three years, Newport Beach and cities that serve as tourist destinations, have experienced a wave of purchases of single-unit residences, which are then re-sold to persons purchasing fractional shares;

**WHEREAS**, for example, over the past 15 months, the number of fractional-owned residences has nearly tripled with at least 12 fractionally owned homes in Newport Beach;

**WHEREAS**, under this new model, the ownership of the residence is usually divided into eight shares and sold to different persons with stays ranging from two to fourteen nights in duration with back-to-back stays prohibited resulting in frequent turnover of the properties' occupants and its commercial management;

**WHEREAS**, a representative of a commercial management company who manages this type of use, Pacaso, Inc. ("Pacaso") has stated in correspondence to the California Department of Real Estate, which is attached hereto as Exhibit "C," and incorporated herein by reference, that Pacaso homes are sold as time share interests as defined in Business and Professions Code Section 11212(z);

**WHEREAS**, fractionally owned homes create impacts on the City's housing supply and character of residential neighborhoods by converting dwelling units from a full-time owner-occupied residence to a frequent rotation of vacation stays of less than a month;

**WHEREAS**, public testimony indicates that this change in the use of dwelling units results in an increase in traffic and noise in residential neighborhoods, as well as a change to the fabric of the community due to the short-term nature of the stays;

**WHEREAS**, with respect to the housing supply, Governor Gavin Newsom declared a housing crisis in the State of California and called for the development of 3.5 million new homes to be built by 2025, to meet the population's housing needs,

**WHEREAS**, as a result, the State of California has adopted a number of housing bills such as Senate Bill Nos. 8, 9, 10, 35 and 330, and an aggressive Regional Housing Needs Assessment ("RHNA") for the 6th Cycle Housing Element covering the period 2021-2029 ("6<sup>th</sup> Cycle Housing Element");

**WHEREAS**, the City's RHNA for the 6th Cycle Housing Element is 4,845 new housing units, which units are intended to meet the housing needs of existing and future residents within the jurisdictional boundaries of Newport Beach;

**WHEREAS**, according to the 6<sup>th</sup> Cycle Housing Element, which is attached hereto as Exhibit "D," and incorporated herein by reference, whereas the median home price in the State of California was \$579,770 as of 2020, the median home value of single-unit homes and condominiums in Newport Beach was \$2,407,454;

**WHEREAS**, the fractional ownership of single-unit residences as a second home further exacerbates the housing supply in Newport Beach making it harder to meet housing demand;

**WHEREAS**, in accordance with Ewing v. Carmel-by-the-Sea, (1991) 234 Cal. App. 3d 1579, which upheld the City of Carmel-by-the-Sea's right to impose zoning restrictions on short-term rentals, the Newport Beach City Council adopted Ordinance No. 92-13, which is attached hereto as Exhibit "E," and incorporated herein by reference on May 11, 1992, establishing regulations for the operation of short-term lodging units to mitigate the impact of this use on the residents of the City;

**WHEREAS**, on May 11, 2004, the City Council adopted Ordinance No. 2004-6, which is attached hereto as Exhibit "F," and incorporated herein by reference prohibiting the issuance of new short-term lodging permits after June 1, 2004, to any dwelling unit on a parcel zoned as a single-unit residence or designated for single-family residential use as part of a Planned Community Development Plan, Specific Area Plan or Planned Residential District;

**WHEREAS**, in 2020 and 2021, the City Council adopted Ordinance Nos. 2020-15, 2020-26, and 2021-28, which are attached hereto as Exhibits "G" – "I," and incorporated herein by reference amending the City's short-term lodging regulations based upon evidence and documentation attesting to the need to further regulate and control short-term lodging units in residential zones to ensure that, among other things, short-term lodging units are regulated in a way to maintain harmony with surrounding uses;

**WHEREAS**, due to the proliferation of short-term rentals and their impact on neighborhoods and long-term housing, Ordinance No. 2021-28 placed a cap of 1,550 on the number of short-term lodging permits allowed in the City;

**WHEREAS**, fractionally owned homes are a time share and operate much like short-term lodgings in that they limit occupancy by owners of a fractional interest in a property to less than 30 consecutive days;



**WHEREAS**, Section 30500 of the California Public Resources Code requires each county and city to prepare a Local Coastal Program ("LCP") for that portion of the coastal zone within its jurisdiction;

**WHEREAS**, in 2005, the City adopted the City of Newport Beach Local Coastal Program Coastal Land Use Plan as amended from time to time;

**WHEREAS**, the California Coastal Commission effectively certified the City's Local Coastal Program Implementation Plan on January 13, 2017, and the City added Title 21 (Local Coastal Program Implementation Plan) ("Title 21") to the City of Newport Beach Municipal Code ("NBMC") whereby the City assumed coastal development permit-issuing authority on January 30, 2017;

**WHEREAS**, on November 16, 2021, the City Council conducted a study session to address concerns raised by the public regarding impacts of fractional homeownership;

**WHEREAS**, during this study session public testimony was given that these homes operate as short-term lodging with residents expressing displeasure with the impacts that these homes were causing including an increase in the noise and traffic in the residential neighborhood;

**WHEREAS**, on September 13, 2022, the City Council conducted a second study session to discuss the fractional ownership uses a report on how other jurisdictions were addressing fractional ownership uses and was presented with a report, which is attached hereto as Exhibit "J," and incorporated herein by reference that 15 of the 22 jurisdictions surveyed classify fractional ownership as a time share;

**WHEREAS**, additional public testimony included concerns about increases in traffic, noise, and trash, as well as fractional ownership uses having an adverse impact on the character of the existing residential neighborhoods consistent with the impacts identified by the cities of Carmel-by-the Sea, Hermosa Beach, Palm Desert, Sonoma and St. Helena whose ordinances and evidence in support of such ordinances are attached hereto and incorporated herein by reference as Exhibits "K" - "O";



**WHEREAS**, on September 27, 2022, the City Council adopted Resolution 2022-61, initiating code amendments to Title 20 (Planning and Zoning) ("Zoning Code Amendment No. PA2022-0202") and Title 21 (Local Coastal Program Implementation Plan) ("Local Coastal Program Amendment No. 2020-0202") of the NBMC and directed staff to work with the Planning Commission to develop regulations related to fractional ownership uses in the best manner that would protect the character of residential neighborhoods;

**WHEREAS**, on October 6, 2022, the Planning Commission conducted a study session to discuss fractional ownership uses and receive public testimony;

**WHEREAS**, public testimony included fractional owners in favor of allowing the use, and neighbors who expressed frustration with the increased impacts caused by the operation of fractional ownership homes;

**WHEREAS**, at the conclusion of study session, the Planning Commission expressed the desire to form an ad-hoc committee to work closely with staff to formulate appropriate regulations to ensure that they were able to thoroughly investigate the appropriate approach to fractional ownership uses;

**WHEREAS**, on October 20, 2022, the Planning Commission formed an Ad-Hoc Committee to evaluate potential amendments to Title 20 and Title 21 of the NBMC related to fractional ownership uses within the City;

**WHEREAS**, the Ad-Hoc Committee met a total of seven times, during which the Committee discussed potential regulatory schemes with the Community Development Department, City Attorney's Office, representatives from Pacaso and several concerned citizens to ensure the Committee members had a full understanding of the issue;

**WHEREAS**, during this process, Pacaso proposed an ordinance, which is attached hereto as Exhibit "P," and incorporated herein by reference, regulating, Pacaso-managed homes by way of a regulatory permit with a cap of 500 on the number of regulatory permits the City would be required to issue to such fractionally owned homes;

**WHEREAS**, on February 3, 2023, the Ad-Hoc Committee presented their findings to the Planning Commission with the Planning Commission making two recommendations to the City Council including the preferred recommendation which was to broaden the definition of time shares to include fractional ownership uses, and an alternative recommendation of creating a separate regulatory scheme to allow fractional ownership uses in all zones, except the Single-Unit Residential (R-1) Zoning Districts;

**WHEREAS**, on March 14, 2023, the City Council considered the Planning Commission's recommendations and, after receiving further public testimony, the City Council directed staff to move forward with the Planning Commission's preferred option of broadening the definition of time share;

**WHEREAS**, the Planning Commission held a public hearing on April 20, 2023, in the City Council Chambers, located at 100 Civic Center Drive, Newport Beach, California. A notice of time, place and purpose of the hearing was given in accordance with California Government Code Section 54950 *et seq.* ("Ralph M. Brown Act") and Chapter 21.62 (Public Hearings) of the NBMC. Evidence, both written and oral, was presented to, and considered by, the Planning Commission at this hearing;

**WHEREAS**, at the conclusion of the hearing, the Planning Commission adopted Resolution No. PC2023-018 by a unanimous vote (6 ayes - 0 nays) recommending the City Council authorize submittal of the amendment to Title 21 of the NBMC to the California Coastal Commission;

**WHEREAS**, pursuant to Title 14 of the California Code of Regulations ("CCR") Section 13515 (Public Participation), drafts of the Local Coastal Program Amendment were made available and a Notice of Availability was distributed at least six weeks prior to the final action date;

**WHEREAS**, the City Council held a public hearing on May 9, 2023, in the City Council Chambers located at 100 Civic Center Drive, Newport Beach, California. Notice of time, place and purpose of the public hearing was given in accordance with the Ralph M. Brown Act, Chapter 21.62 (Public Hearings) of the NBMC, and 14 CCR Section 13515. Evidence, both written and oral, was presented to, and considered by, the City Council at this public hearing; and

**WHEREAS**, the City Council and Planning Commission agenda item and supporting evidence, attached hereto as Exhibits "Q" – "V" and incorporated herein by reference.

**NOW, THEREFORE,** the Newport Beach City Council does hereby ordain as follows:

**Section 1:** The City Council of the City of Newport Beach does hereby authorize City staff to submit the Local Coastal Program Amendment No. PA2022-0202 to the California Coastal Commission to amend Title 21 (Local Coastal Program Implementation Plan) of the Newport Beach Municipal Code related to time shares as set forth in Exhibit "W," which is attached hereto and incorporated herein by reference. This decision is made based upon the evidence in the record and is consistent with the General Plan and Coastal Land Use Plan Policies set forth in Exhibit "X," which is attached hereto and incorporated herein by reference.

**Section 2:** The Local Coastal Program Amendment No. PA2022-0202 shall not become effective until approval by the California Coastal Commission and adoption, including any modifications suggested by the California Coastal Commission, by resolution and/or ordinance of the City Council of the City of Newport Beach. Findings that Local Coastal Program Amendment No. PA2022-0202 is *de minimis* are attached hereto as Exhibit "Y," and incorporated herein by reference.

**Section 3:** The LCP, including this Local Coastal Program Amendment No. PA2022-0202, will be carried out in full conformity with the California Coastal Act.

**Section 4:** The recitals provided in this ordinance are true and correct and are incorporated into the substantive part of this ordinance.

**Section 5:** The City Council of the City of Newport Beach finds the Local Coastal Program Amendment No. PA2022-0202 is not subject to environmental review under the California Environmental Quality Act ("CEQA") pursuant to Section 15060(c)(2) of the CEQA Guidelines, California Code of Regulations, Title 14, Division 6, Chapter 3, which states that an activity is not subject to CEQA if the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment or will not have the potential for causing a significant effect on the environment. Time share uses are not permitted in residential zones, however, the City has seen a trend in the fractional use of residences wherein the property is usually divided into eight shares and sold to different persons with stays ranging from two to fourteen nights in duration with back-to-back stays prohibited resulting in frequent turnover of the properties' occupants and its commercial management. This Local Coastal Program Amendment will not result in a direct or indirect physical change to the environment nor does it have the potential for causing a significant effect on the environment since it would simply clarify definitions related to time share uses. This Local Coastal Program Amendment does not alter the manner in which time shares are regulated and therefore would not result in a physical change in the environment. Additionally, the Local Coastal Program Amendment is categorically exempt pursuant to Section 15308 because the ordinances involve regulatory actions to assure protection of the environment.

**Section 6:** If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity or constitutionality of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance, and each section, subsection, sentence, clause or phrase hereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases may be declared invalid or unconstitutional.

**Section 7:** Except as expressly modified in this ordinance, all other sections, subsections, terms, clauses and phrases set forth in the Newport Beach Municipal Code shall remain unchanged and shall be in full force and effect.



**Section 8:** The Mayor shall sign, and the City Clerk shall attest to the passage of this ordinance. The City Clerk shall cause the ordinance, or a summary thereof, to be published pursuant to City Charter Section 414. This ordinance shall be effective thirty calendar days after its adoption and approval by the California Coastal Commission.

This ordinance was introduced at a regular meeting of the City Council of the City of Newport Beach held on the 9<sup>th</sup> day of May, 2023, and adopted on the 23<sup>rd</sup> day of May, 2023, by the following vote, to wit:

AYES: Mayor Blom, Mayor Pro Tem O'Neill, Council Member Avery, Council Member Grant, Council Member Kleiman, Council Member Stapleton, Council Member Weigand

NAYS: \_\_\_\_\_

ABSENT: \_\_\_\_\_

  
\_\_\_\_\_  
NOAH BLOM, MAYOR

**ATTEST:**

  
\_\_\_\_\_  
LEILANI I. BROWN, CITY CLERK



**APPROVED AS TO FORM:**  
CITY ATTORNEY'S OFFICE

  
\_\_\_\_\_  
AARON C. HARP, CITY ATTORNEY

Attachment(s):

Exhibit A - July 26, 1982, City Council Meeting Minutes and  
Ordinance No. 82-14

City of Newport Beach

- Exhibit B - March 11, 1996, City Council Meeting Minutes and Ordinance No. 96-7
- Exhibit C - Correspondence from Pacaso to the California Department of Real Estate
- Exhibit D - 6<sup>th</sup> Cycle Housing Element
- Exhibit E - April 27, 1992, City Council Meeting Minutes and Ordinance No. 92-13
- Exhibit F - April 27, 2004, City Council Agenda Item No. 3 Adopting Ordinance No. 2004-6 and Supporting Material
- Exhibit G - June 23, 2020, City Council Agenda Item No. 19 Adopting Ordinance No. 2020-15 and Supporting Material
- Exhibit H - October 13, 2020, City Council Agenda Item No. 18 Adopting Ordinance No. 2020-26 and Supporting Material
- Exhibit I - November 30, 2021, City Council Agenda Item No. 26 Adopting Ordinance No. 2021-28 and Supporting Material
- Exhibit J - Sage Crest Planning + Environmental Report
- Exhibit K - City of Carmel-by-the Sea Time Share Ordinance and Supporting Evidence
- Exhibit L - City of Hermosa Beach Time Share Ordinance and Supporting Evidence
- Exhibit M - City of Palm Desert Time Share Ordinance and Supporting Evidence
- Exhibit N - City of Sonoma Time Share Ordinance and Supporting Evidence
- Exhibit O - City of St. Helena Time Share Ordinance and Supporting Evidence
- Exhibit P - Ordinance Proposed by Pacaso Adding Chapter 5.98
- Exhibit Q - September 13, 2022, City Council Agenda Item No. SS2
- Exhibit R - September 27, 2022, City Council Agenda Item No. 1
- Exhibit S - October 6, 2022, Planning Commission Agenda Item No. SS.2
- Exhibit T - October 20, 2022, Planning Commission Agenda Item No. 6
- Exhibit U - February 23, 2023, Planning Commission Agenda Item No. 6
- Exhibit V - March 14, 2023, City Council Agenda Item No.12
- Exhibit W - Local Coastal Program Amendment No. PA2022-0202
- Exhibit X - Findings of Local Coastal Program Amendment No. PA2022-0202 Consistency with the General Plan and Coastal Land Use Plan
- Exhibit Y - Local Coastal Program Amendment No. PA2022-0202 *De Minimis* Findings



# EXHIBIT C



July 3, 2023

**VIA E-MAIL**

Fernie Sy  
Coastal Program Analyst  
California Coastal Commission  
301 E. Ocean Blvd., Suite 300  
Long Beach, CA 90802

Re: Newport Beach Local Coastal Program Amendment (LCPA): PA2022-0202 (Time Shares)/Coastal Commission Reference No. LCP-5-NPB-23-0020-2 – Response to June 21, 2023, Letter re: Notice of Incomplete Submission

Dear Mr. Sy:

We are writing to provide a response to the City of Newport Beach's June 27, 2023, response to Coastal Commission Staff's June 21, 2023, Notice of Incomplete Submission letter concerning proposed Local Coastal Program Amendment PA2022-0202 (the "LCP Amendment"). The LCP Amendment specifically revises the LCP's regulations concerning time share uses in the Coastal Zone in an effort to make those same rules apply to fractional homeownership. As explained in **Attachment A**, the LCP Amendment fails to distinguish between shared vacation homes by family and friends in residential areas and homes that are fractionally owned. Thus, the LCP Amendment's broad scope would prohibit a wide variety of co-owned properties within residential areas of the City's Coastal Zone. Further, while the City claims it will be able to distinguish between different types of home co-ownership in enforcing the LCP Amendment, such enforcement is inconsistent with the LCP Amendment's plain text and would be impermissibly arbitrary and discriminatory.

In addition, the proposed LCP Amendment does not qualify as *de minimis* under the Coastal Act. A *de minimis* LCP amendment must "not propose ... any change in the allowable use of property," and must be "consistent with the policies of Chapter 3." (Pub. Resources Code, § 30514(d)(1).) The City's LCP Amendment does not satisfy either requirement because it proposes to impose time share regulations upon a new class of single-family home uses in the Coastal Zone. The LCP Amendment also undermines Coastal Act policies aimed at promoting increased coastal access. (See, e.g., *id.*, § 30210.) Fractional homeownership augments the stock of overnight accommodations in the Coastal Zone, relieves pressure on the local vacation rental market, increases vacation rental stock, and lowers costs for other Coastal Zone visitors. Therefore, the LCP Amendment fails to meet the requirements for treatment as *de minimis* and should be processed through the Commission's standard LCP amendment procedures. Such processing will allow the Coastal Commission to evaluate the broad policy implications of the

City's proposal under the Coastal Act, and avoid piecemeal regulation that would create inconsistencies with long-standing Coastal Act policies.

We appreciate Staff's time and attention to this matter. If and when Staff find the City's LCP Amendment submission to be complete, we request that Staff determine that the LCP Amendment is not *de minimis* so that this important matter may be set for a future hearing before the Commission.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'Kevin Heneghan', with a long horizontal flourish extending to the right.

Kevin Heneghan  
VP, Legal & Public Affairs

Enclosure

cc: Zach Rehm, California Coastal Commission  
DJ Moore, Latham & Watkins  
Susan McCabe, McCabe & Company

**ATTACHMENT A**  
**Response to Staff's Notice of Incomplete Submission Letter for LCP-5-NPB-23-0020-2**

- 1) *Please expand on how the LCPA would distinguish between shared vacation homes owned by family and friends in residential areas from those homes that are fractionally owned and prohibited in residential areas.*

**Response:**

The City of Newport Beach's proposed LCP amendment ("LCP Amendment") does not distinguish shared vacation homes owned by family and friends in residential areas from homes that are fractionally owned and would be prohibited in residential areas. Instead, the LCP Amendment would impact behavior between nearly all types of co-owners in shared residential properties within the Coastal Zone. Only arbitrary and discriminatory enforcement by the City potentially could insulate some – but not all – family and friends co-owners in residential areas from the LCP Amendment's broad reach.

**I. THE LCP AMENDMENT WOULD APPLY BROADLY TO CONDUCT AMONG ALL TYPES OF CO-OWNERS**

The City states that the key to understanding how the LCP Amendment would apply to fractional ownership homes and not to homes bought jointly by family and friends lies in the LCP Amendment's definitions of "time share use," "time share property," "time share instrument," and "time share plan." (See City NOI Response (June 27, 2023), p. 1.) Thus, according to the City, the LCP Amendment prohibits the use of real property pursuant to an arrangement, plan, scheme, or similar device, where a purchaser, in exchange for value, receives the right to exclusive use the property for a period of time less than a full year during any given year, on a recurring basis. (*Id.*, at p. 2.)

Although the City claims the LCP Amendment's definitions "make clear" what the LCP Amendment prohibits, the LCP Amendment fails to define the operative terms within these definitions. As a result, the LCP Amendment captures – and would prohibit in residential zones – *any* shared property use by any type of co-owners, including family and friends, who merely seek to efficiently share and enjoy their homes. Given the City's own estimates that 56% of all single-family homes in Newport Beach are owned in an LLC or trust, which could accommodate several underlying co-owners, the LCP Amendment's broad reach and resulting impact are staggering.<sup>1</sup> As City Planning Commissioner Lowery noted: "I'm nervous with the definition not as descriptive as I'd like to see it . . . with the current ownership structures. . . . This is going to court . . . There is going to be problems here with the way that 30% of [the housing] stock . . . could get pulled into this code for various reasons. I think it's a big concern and I think it's a Pandora's box."<sup>2</sup>

***Arrangement.*** Notably absent from the City's response is any discussion about the breadth of the terms "arrangement, plan, scheme, or similar device" as used in the LCP

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<sup>1</sup> See City of Newport Beach, Newport Beach City Council Meeting: November 16, 2021, YouTube, at 41:19-41:28 (Nov. 17, 2021), <https://youtu.be/nk1QT25nAUQ?t=3260>.

<sup>2</sup> See City of Newport Beach, Planning Commission Meeting: April 20, 2023, YouTube, at 1:08:22 to 1:09:27, <https://www.youtube.com/watch?v=Bd81u0usDd4>.

Amendment. The plain meaning of these terms means that virtually any type of agreement, whether oral or written, would fall within the LCP Amendment's scope. By the LCP Amendment's plain text, an "arrangement, plan, scheme, or similar device" need *not* be a formal contract executed by the co-owners.<sup>3</sup> Thus, any agreement – even an informal plan among family or friends – to separately use a single co-owned property could trigger the LCP Amendment's application.

In fact, the City's language could be interpreted so broadly that *any* communication or discussion establishing a shared property's use between co-owners *automatically* could constitute an "arrangement." For example, an "arrangement" could include an email chain between siblings setting forth assigned weeks at a co-owned vacation home; a shared electronic calendar outlining weekends when friends will use their co-owned property exclusively; or even a group text chain where co-owners check availability for and claim the right to use a shared residence.<sup>4</sup>

Moreover, the LCP Amendment does not define or provide guidance as to what constitutes a "declaration" dedicating the property to the agreed-upon arrangement.<sup>5</sup> Nothing in the proposed text requires that the "declaration" carry some legal significance or strict formality.<sup>6</sup> Without any guidance, the LCP Amendment renders the term "declaration" universally applicable to family and friends who co-own a shared vacation home. For instance, a group email subject line or shared calendar's title (*e.g.*, "The Beach House Family Schedule") could amount to a declaration. Thus, the LCP Amendment's condition that a time share use be established by an arrangement and accompanying declaration is easily triggered regardless of the type of co-owner involved.

***Exclusive Right to Use.*** The City also contends that the LCP Amendment differentiates between family and friends who jointly acquire a home and owners of interests in a fractional ownership home on the basis that family or friends enjoy "unlimited rights" to use the property. (City NOI Response, at p. 2.) The City's claim is non-sensical. Virtually any agreement between co-owners would allow one co-owner the right to use a property exclusively and without needing to include or accommodate the other co-owner(s). For instance, an agreement among branches of a family or friends to annually allocate stays at a vacation home among different groups over Memorial Day, the Fourth of July, and Labor Day appears to constitute

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<sup>3</sup> "Time share plan" means "any arrangement, plan, scheme, or similar device, whether by membership agreement, bylaws, shareholder agreement partnership agreement, sale lease, deed, license, right to use agreement, ***or by any other means...***"

<sup>4</sup> Further, the LCP Amendment defines "time share instrument" to include not just "time share plans," but any document "*governing the operation of* a time share plan." Under this provision, written "house rules" or cleaning procedures for a shared property could be sufficient to trigger the LCP Amendment's applicability, even if the co-owners never documented the exclusive use arrangement itself.

<sup>5</sup> A "time share instrument" must include a "***declaration*** dedicating accommodations to the time share plan."

<sup>6</sup> Such an interpretation would appear unnatural when considered alongside the sweeping language employed to define a time share plan in the first instance (an "arrangement, scheme, ***or similar device***, whether by membership agreement, bylaws, ... ***or any other means***"). Similarly, the City's choice to define "document" broadly ("by whatever name denominated") rather than as a legal contract or binding agreement renders a strict formal interpretation of "declaration" exceedingly unlikely.

exclusive use under the LCP Amendment. An agreement that co-owners should each have the right to exclusively use a shared property during their respective wedding anniversaries or birthdays could also trigger the LCP Amendment. Such an arrangement regarding the right to use property is no different than typical fractional ownership arrangements in which owners enjoy the same type of control of their home.

Former City Councilmember (now Mayor) Blom expressed these exact same concerns about the sweeping extent of the City's proposed LCP Amendment:

The one thing that jumped out the most is that a lot of ownership in Newport Beach is held in LLCs and trusts, and there's . . . a portion of residents here that have multiple homes within the City and some of those might be held in different entities, and if we start getting into the definition of not allowing fractional ownership, well, it frightens me because all of a sudden we're in an LLC and trust issue where that can be litigated in a way that might not be beneficial to a huge amount of our residents that are maybe giving ownership of that Balboa Island cottage to their four children, or something where maybe an operating agreement has the benefit of family in mind as well as the benefit of financial well-being.<sup>7</sup>

***Period of Time Less Than a Full Year.*** The City further contends that the LCP Amendment would not apply to family and friends co-owning a home because they are not paying for a limited time interval. (City NOI Response, at p. 2.) The City fails to explain, however, how friends, family, or others who purchase a vacation home together are not paying for a period of time less than a full year. The entire purpose of sharing in the ownership of a home, whether among friends, family or otherwise, is to be able to use the home only for a portion of the year and avoid having to pay for and utilize the home for the entire year. There is simply no difference between family, friends, or other types of co-owners purchasing and using a vacation home.<sup>8</sup>

Because the LCP Amendment's conditions for regulation as a "time share use" do not distinguish between family and friends uses and fractional homeownership, several commonplace and informal uses may trigger the City's regulation. The LCP Amendment would almost certainly extend to families and friends who allocate the right to use a shared property in a formal LLC agreement or trust instrument – documents that govern over half of Newport Beach single-family homes.<sup>9</sup> In addition, each of the following would constitute a "time share use" under the plain language of the LCP Amendment:

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<sup>7</sup> See Newport Beach City Council Meeting: November 16, 2021, *supra*, at 51:30-52:32.

<sup>8</sup> It is equally possible that other scenarios could trigger the LCP Amendment's regulation beyond friends and family jointly purchasing a home. For example, siblings who inherit a property may nonetheless qualify as purchasers for consideration if one sibling buys out another's interest. Similarly, divorcees may fall within the scope of the LCP Amendment if they agree to separately use a property in exchange for relinquishing rights in other assets.

<sup>9</sup> See Newport Beach City Council Meeting: November 16, 2021, *supra*, at 41:19-41:28.



1. Four co-workers purchase a vacation home to share among their families. Over email, they agree that each should have exclusive access to the home during their respective wedding anniversaries.
2. Three siblings inherit their parents' home on the coast. One sibling offers their share for purchase to the others. After purchasing the sibling's interest, the remaining siblings create a Google Calendar titled "Newport Beach House Schedule." Each reserves the weekends surrounding their individual family members' birthdays every year.
3. Two friends purchase an investment property. They allow their children to use the property from time to time and they draft "House Rules" and post them on the refrigerator to ensure everyone staying in the home understands how to respect and care for the property and its contents.
4. Five young couples pool their money to purchase a small vacation home. While celebrating the purchase, they agree that the surfers among them should take a surfers-only weeklong trip to the home every summer. The non-surfers readily agree. The couples memorialize this agreement via text message in their collective group text chain to solidify the planned annual surfing trip.

In each of these cases, (1) co-owners purchased an interest in a shared property for consideration (2) arranged for the exclusive use of their property for some period during a year and memorialized that arrangement, or rules relating to the arrangement, in a document (3) and provided a declaration committing to use the property in accordance with the arrangement. Accordingly, under the LCP Amendment, each of these uses would be time share uses prohibited in residential zones.

In sum, nothing in the text of the LCP Amendment creates an obvious distinction between family and friend co-owners and fractional homeowners who would be prohibited in residential zones.

## **II. THE LCP AMENDMENT'S BROAD REACH WILL LEAD TO ARBITRARY ENFORCEMENT**

Given the LCP Amendment's broad application to a wide range of co-ownership arrangements, any application of the LCP Amendment only to fractional homeowners – but not to family and friends who co-own property – would be completely arbitrary.

*First*, the City cannot enforce the LCP Amendment where only formal contracts regarding the exclusive use of property exist. The LCP Amendment's plain text does not provide a basis for such a distinction. As described above, the LCP Amendment's terms are defined broadly, ambiguously, or not even at all. Further, enforcing the LCP Amendment only where legal formalities exist draws a plainly arbitrary distinction. Such a policy would discourage family and friends who co-own a shared property from creating formal documents memorializing their agreement regarding its use, even though documents provide assurances to families who may feel uneasy about sharing a vacation home with loved ones and friends concerned about investing in a property together. The significant portion of Newport Beach single-family homes

already owned in an LLC or trust evidences the value many families and friends see in utilizing formal legal documents to govern their property rights. The LCP Amendment puts these residents at a crossroads: caught between their preference to memorialize their exclusive use arrangement in a formal document and their desire to avoid exposure to regulation as a time share use.

*Second*, the City has no way to discover when friend or family co-owners enter an exclusive use arrangement for a home. As the City’s Community Development Director acknowledged, the City’s records only shed light upon a property’s formal owner; the City does not “know anything about,” for example, “who owns [an] LLC,” its “partnership structure,” or the identities of a trust’s trustees.<sup>10</sup> Similarly, the City cannot detect when a shared property’s co-owners enter an exclusive use arrangement. Yet, the City could monitor property listings by well-established fractional homeownership companies within its jurisdiction in an effort to enforce the LCP Amendment against them. This approach is plainly arbitrary, distinguishing between fractional ownership and family and friends co-owners based solely on the method through which the co-owners acquired the property. Further, the approach would single out fractional homeownership companies based on their market share, previous success, and name recognition, and would not capture smaller companies or single-purpose LLCs engaged in exactly the same business.

*Third*, the City ignores that friends or family who co-own a shared property can generate turnover and disruptive behavior in a community – regardless of whether a formal agreement exists between them governing property’s use. There is nothing stopping one sibling from treating a shared vacation home as a party house on holiday weekends, even if others family members who own the home are more respectful of community norms. There is simply no evidence that fractional ownership is more disruptive of a local community than any other co-ownership arrangement. In fact, as then-City Councilmember Blom noted: “I don’t see four or eight owners of a single house really destroying our City. ... I don’t think [fractional homeowners] are here to destroy our community. I think they’re here to enjoy it.”<sup>11</sup>

Nevertheless, given ambiguities in the LCP Amendment, the City will be forced to implement the LCP Amendment arbitrarily against fractional homeowner arrangements, even though such arrangements are functionally no different than friends or family co-owners.

### **III. CONCLUSION**

The LCP Amendment fails to distinguish between friends and families who share a property and fractional homeowners because the two groups are largely indistinguishable. Enforcing the LCP Amendment against fractional homeowners, but not against family and friends co-owners, would require the City to draw arbitrary distinctions between the two groups. Absent such arbitrary enforcement, the LCP Amendment’s plain language would capture most shared property uses in the City, including those by families and friends. The City has failed to demonstrate otherwise.

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<sup>10</sup> Newport Beach City Council Meeting: November 16, 2021, *supra*, at 41:28-41:53.

<sup>11</sup> Newport Beach City Council Meeting: November 16, 2021, *supra*, at 54:22-54:58.

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SEOUL  
SHANGHAI  
SINGAPORE  
TOKYO  
TORONTO

May 9, 2023

**Via Email**

Honorable Mayor Noah Blom & Council Members  
City of Newport  
100 Civic Center Drive  
Newport Beach, CA 92660  
[citycouncil@newportbeachca.gov](mailto:citycouncil@newportbeachca.gov)

Re: City of Newport Beach Proposed Ordinance Nos. 2023-4 and 2023-5

Dear Mayor Blom & City Council Members:

We write, on behalf of Pacaso, in response to the City of Newport Beach's (the "City") recent efforts to regulate and prohibit home co-ownership through proposed Ordinance Nos. 2023-4 and 2023-5, which would amend Title 20 and Title 21 (Planning and Zoning) of the Newport Beach Municipal Code ("NBMC") Related to Time Shares (PA2022-0202) (collectively, the "Proposed Ordinance"). The Proposed Ordinance threatens property rights and interferes with Pacaso's homeowners' ownership of property in Newport Beach and their ability to use their homes consistent with the rights of all other homeowners within the City. The City's attempts to meddle with and restrict such rights, seemingly at the behest of a few vocal Newport Beach residents, is ill-advised and unlawful. We urge the City not to pass this unlawful and unconstitutional Proposed Ordinance.

As set forth herein, the City's efforts to update NBMC Section 21.48.025 (Visitor Accommodations) so as to "modif[y] the definition of time share to clearly include fractional ownership units" is unlawful. Any attempt to regulate Pacaso and homeowners owning their residence through a co-homeownership model under this proposed amendment is flawed for several reasons—not the least of which is that such

regulation runs afoul of the law and infringes property rights. (Newport Beach City Council, Staff Report *Ordinance Nos. 2023-4 and 2023-5: Code Amendments Related to Time Shares (PA2022-0202)* 1 (May 9, 2023) (hereinafter the “May 2023 Report.”) First, the Proposed Ordinance is unconstitutionally vague and ambiguous because it fails to provide individuals and entities a reasonable opportunity to know what conduct, speech, or uses are prohibited. Second, the Proposed Ordinance is overly broad because it extends to a substantial number of impermissible applications, including non-commercial and political speech, and has a chilling effect on free speech. Third, any application of the Proposed Ordinance against Pacaso would exceed the scope of the City’s police power and the permissible scope of its zoning authority because the ordinance regulates property ownership and identity rather than use of land. Fourth, the Proposed Ordinance invades the privacy rights of Pacaso homeowners because it invades how homeowners can come together to own and use property together. Fifth, if the City were to enforce the Proposed Ordinance against Pacaso, the City would be selectively enforcing the ordinance against Pacaso, where other similarly situated homeowners are not being targeted by the City. Sixth, the Proposed Ordinance is inconsistent with Chapter 3 policies in the California Coastal Act and does not qualify as *de minimis* under the Coastal Act.

Pacaso’s mission is to enrich lives by democratizing the ownership of second homes. In Newport Beach, second home ownership has typically been possible only for very wealthy buyers. Pacaso lowers the barriers to the second home market by simplifying and streamlining the co-ownership process by reducing costs and making ownership possible at a more accessible price point. Pacaso organizes the ownership group, manages the legal process, and provides a management service to streamline the home ownership process for the co-owners. The concept of co-ownership through an LLC is not new, and in fact is used by many residents in the City; but Pacaso simplifies this process in a way that makes the experience accessible to people who have traditionally been restricted from this type of homeownership. As a result, Pacaso has made second home ownership available to a broader set of people, including those in traditionally diverse and underrepresented communities. Pacaso has also shifted demand away from the more limited supply of affordable homes by pooling the resources of second home buyers, which allows them to afford co-ownership of a home at a higher total price point. Pacaso homeowners are not transient; like all other homeowners, they have made a material investment in the property they call home and its surrounding community.

## **1. The Proposed Ordinance Is Unconstitutionally Vague And Ambiguous**

The Proposed Ordinance fails for being vague and ambiguous on its face and as applied to Pacaso (if it even applies in the first instance). “[I]t is a basic principle

of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011) (citation omitted). “An ordinance may be void for vagueness” if it “fails to give a ‘person of ordinary intelligence a reasonable opportunity to know what is prohibited,’” among other things. *Id.* (citation omitted).

Here, the Proposed Ordinance fails to provide individuals and entities—including Pacaso, homeowners, real estate agents, brokers, and persons of ordinary intelligence, among others—a reasonable opportunity to know what conduct, speech, or uses are prohibited, or any guidance as to how to determine whether their conduct, use of a home, or speech with regard to time share uses falls within the prohibited conduct. *See id.*

The Proposed Ordinance provides:

No time share use or time share unit shall be established or permitted in any zoning district except as authorized in the Code. Unless authorized by this Code, no person including, but not limited to, an owner of a time share unit, an agent, or a broker shall:

1. Develop or establish a timeshare use in the City;
2. Convert a property or unit in the City to a time share use or time share unit;
3. Advertise or cause to be printed, published, or disseminated in any way and through any medium, the availability for sale, in its entirety or a fraction thereof: (a) any property or unit in the City that is used for a time share use or as a time share unit; or (b) any entity where the ownership thereof, in whole or in part, entitles the owner thereof to use a property or unit in the City for a time share use; and/or
4. Manage a unit or property in the City that is being used for a time share use or as a time share unit.

(May 2023 Report Ex. H, Proposed Code Text Changes (Redlined), at 3.)

A “time share use” is defined as “the use of one or more time share accommodations or any part thereof, as a time share property.” (*Id.* at 7.) A “time share property,” means “one or more time share accommodations subject to the same time share instrument, together with any other property or rights to property

appurtenant to those time share accommodations.” (*Id.* at 6.) A “time share instrument,” in turn, means “one or more documents, by whatever name denominated, creating a time share plan or governing the operation of a time share plan, and includes the declaration dedicating time share accommodations to the time share plan.” (*Id.*) In turn, a “time share plan” is defined as “any arrangement, plan, scheme, or similar device . . . whereby a purchaser, in exchange for consideration, receives the right to exclusive use of real property, or any portion thereof, whether through the granting of ownership rights, possessory rights or otherwise, for a period of time less than a full year during any given year, on a recurring basis for more than one year, but not necessarily for consecutive years.” (*Id.*) A time share plan “shall be deemed to exist whenever such recurring rights of exclusive use to the real property, or portion thereof, are created, regardless of whether such exclusive rights of use are a result of a grant of ownership rights, possessory rights, membership rights, rights pursuant to contract, or ownership of a fractional interest or share in the real property, or portion thereof, and regardless of whether they are coupled with ownership of a real property interest such as freehold interest or an estate for years in the property subject to the time share plan.” (*Id.*)

Taking these definitions together, the May 2023 Report states that a “‘time share use’ is defined as ‘any arrangement, plan, scheme, or similar device’ that limits the owner to the right for ‘exclusive use of real property, or any portion thereof’ for ‘less than a full year during any given year, on a recurring basis for more than one year.’ This means the use of any real property in which an owner has exclusive use of said property for less than the full year would be classified as a time share.” (May 2023 Report at 3.)

The Proposed Ordinance provides no guidance or criteria as to how its vague definitions apply in many circumstances, such as when co-owners, who are not Pacaso clients, make arrangements concerning when or how they can use a jointly owned property. As one example, the City fails to define what “pursuant to a plan” means. As a result, it is unclear whether the Proposed Ordinance applies to a family that purchased and co-owns a house among cousins and who use a Google calendar allotting times in which certain family members intend to use the house. Likewise, it is unclear whether the ordinance prohibits siblings who own a home who have allotted times in which they can each enjoy using the home. The Proposed Ordinance also potentially implicates friends who share a home but who stagger the periods of the year that they use and enjoy that home, and bought the property with such an intention. Likewise, the ordinance potentially prohibits domestic partners, or divorced or separated spouses, who wish to alternate usage of a jointly owned home at different times of year for whatever personal reasons—none of which is the concern of the City. Under the plain language of the ordinance, it appears that all of these scenarios would

be prohibited. But the City has urged that the Proposed Ordinance “does not inadvertently capture non-time share uses such as the purchase of an entire property between family and friends and/or the bequeathing of a property by a family member.” Thus it is entirely unclear what is or is not prohibited. *See Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 555 (9th Cir. 2004) (finding regulation unconstitutionally vague because it required patients be treated with “consideration,” “respect,” “dignity,” and “individuality”—words that were subject to “widely variable” meanings, and therefore were “too vague and subjective for providers to know how they should behave in order to comply, as well as too vague to limit arbitrary enforcement”); *Zubarau v. City of Palmdale*, 192 Cal. App. 4th 289, 310 (2011) (holding city zoning ordinance permitting a 75-foot vertical antennae, but limiting the “active element” of antenna arrays to a height of 30 feet without defining the term “active element of the antenna array” or reconciling the differing 75-foot and 30-foot height limitations, to be unconstitutionally vague).

The City acknowledged this ambiguity and resulting confusion. The May 2023 Report summarized the Planning Commission’s recommendation, which specifically pointed out the need to “clarify” whether time share definitions excluded “shared vacation homes by family or friends”:

On April 20, 2023, the Planning Commission held a public hearing to discuss draft Zoning Code and LCP amendments. Seven people spoke (six in favor and one against). The Planning Commission recommended approving the amendments and suggested two additional changes for the City Council’s consideration: 1) prohibit advertising time shares for sale, and 2) ***clarify time share definitions to exclude shared vacation homes by family or friends so that it is clear what is not intended.***

(May 2023 Report at 3 (emphasis added).) However, neither the May 2023 Report, nor the definitions in the Proposed Ordinance, clarify this issue. Instead, the May 2023 Report merely states that, despite the confusion around whether shared vacation homes with family or friends would be prohibited under the Proposed Ordinance, the City would not change the proposed definition of a time share plan to clarify this:

With respect to an exception to the definition of time share plan, Staff is recommending that the definition remain as proposed because the definition treats everyone equally and avoids creating a loophole that could be used to avoid regulation. Specifically, the definition of time share plan set forth in the proposed ordinances requires several conditions be met to trigger regulation and ***does not inadvertently***



***capture non-time share uses such as the purchase of an entire property between family and friends and/or the bequeathing of a property by a family member.*** These conditions include: (i) the use of an accommodation; (ii) pursuant to a plan; (iii) whereby a purchaser, in exchange for consideration; and (iv) receives the right to exclusively use the accommodation for less than one year during a given year, on a recurring basis for more than one year. . . .

(*Id.* at 4 (emphasis added).) But the proposed definition does just that. The definition of a “time share plan,” sweeps in all co-ownership structures—no matter whether they are owned by strangers or family members, either via direct purchase or inheritance. It is thus entirely unclear how to interpret the Proposed Ordinance and proposed definition of a “time share plan” with regard to co-owners who have made arrangements or devised a plan to determine when or how each co-owner uses the property. Residents are left to guess how to comport their conduct to comply with the ordinance. On one hand, the City states that “the purchase of an entire family and friends” is necessarily a “non-time share use,” but in direct odds with this statement, the City urges that that the definition “treats everyone equally.” (*Id.* at 4.)

The Proposed Ordinance is also unconstitutionally vague with respect to its purported prohibition on “person[s]” who “[a]dvertise or cause to be printed, published, or disseminated in any way and through any medium, the availability for sale, in its entirety or a fraction thereof: (a) any property or unit in the City that is used for a time share use or as a time share unit; or (b) any entity where the ownership thereof, in whole or in part, entitles the owner thereof to use a property or unit in the City for a time share use.” (May 2023 Report Ex. H, Proposed Code Text Changes (Redlined), at 3.) The ordinance fails to clarify or define what constitutes “advertis[ing],” or whether this prohibition extends to someone reposting a time share listing on their social media page or merely sending a link of the listing via email to another friend. This prohibition potentially implicates brokers, agents, printing companies, and even individuals reposting listings on social media or via private email exchanges.

Likewise, the ordinance fails to clarify, define, or set any bounds on who qualifies as “caus[ing] to be printed, published, or disseminated in any way and through any medium” the availability for sale of a time share. (*Id.*) The lack of clarity leaves citizens guessing as to what kind of speech is impermissible. For example, this phrase potentially extends to and implicates individuals merely conversing with a friend about a time share use or listing in the City, a printing company publishing an opinion piece about time share uses in the City, individuals reposting a time share

listing on Facebook, or an individual sending a link of a time share listing to another friend via private email, among potentially many others.

The cloud of threatened criminal prosecution and massive fines for violations of the Proposed Ordinance makes this draconian ordinance even more troubling, since the vague ordinance may trap innocent and honest brokers, agents, printing companies, and ordinary citizens who merely repost, print or even discuss time share uses or listings in the City, by not providing fair warning.

Because the ordinance is vague, ambiguous, and confusing, both on its face and as applied to Pacaso, and threatens ordinary, law-abiding citizens with enormous penalties for an ambiguous spectrum of conduct, it should not be passed.

## **2. The Proposed Ordinance is Unconstitutionally Overbroad**

The Proposed Ordinance violates the First Amendment because it is unconstitutionally overbroad on its face as it extends to a substantial number of impermissible applications. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 565 (1980).

The ordinance provides that “**no person** including, but not limited to, an owner of a time share unit, an agent, or a broker shall . . .”:

3. Advertise or cause to be printed, published, or disseminated in any way and through any medium, the availability for sale, in its entirety or a fraction thereof: (a) any property or unit in the City that is used for a time share use or as a time share unit; or (b) any entity where the ownership thereof, in whole or in part, entitles the owner thereof to use a property or unit in the City for a time share use . . .

(May 2023 Report Ex. H, Proposed Code Text Changes (Redlined), at 3 (emphasis added).)

“Any violation of these requirements is subject to the penalties,” including fines, misdemeanors or imprisonment. *See* NBMC, § 1.04.010(C).

By prohibiting a person from “disseminat[ing] in any way and through any medium” the use of a time share in the City, the ordinance broadly prohibits *all* speech on time share use in the City *without exception*—including non-commercial and political speech. The ordinance also applies to *all* “person[s]” who, *without exception*, disseminate information about a property being used as a time share use in the City or

an entity that is merely “entitle[d]” to use—*i.e.*, potentially not even presently using—a property or unit for a time share use.

This prohibits many different forms of protected speech—including an individual’s forwarding of an online advertisement to another along with his or her commentary about Pacaso (to the extent it is the City’s position that Pacaso is entitled to use a property as a time share use)—and also extends to any and every individual who “causes” or “disseminates” such speech. As another example, social communications among friends, co-workers, family members or spouses merely relaying news, gossip, or information about time share uses or listings in the City are prohibited under this ordinance. The ordinance also extends to Tweets or Facebook posts expressing an opinion about or providing information about a known time share use in the City. Indeed, a public comment or email to the City pointing out an improper time share use would be a literal violation of this ordinance. These are just a handful of examples of the overbroad nature of the ordinance and chilling effect the ordinance will have on free speech.

This overbroad prohibition on protected speech (both commercial and non-commercial) regarding time share uses in Newport Beach renders the ordinance unconstitutionally overbroad and void on its face as it violates the First Amendment.

### **3. The Proposed Ordinance Exceeds The Scope Of Permissible Zoning Authority**

Cities may regulate land use by zoning under the police power of the state. Cal. Const., art. XI, § 7. However, this power is not unlimited. An ordinance must be “reasonable in object and not arbitrary in operation” to constitute a “justifiable exercise of police power.” *Roman Catholic Welfare Corp. v. City of Piedmont*, 45 Cal. 2d 325, 326 (1955). A land use ordinance exceeds municipal authority under the police power where it has no substantial relation to the public health, safety, morals or general welfare. *Id.*

Any attempt to apply the Proposed Ordinance to Pacaso is outside the scope of the City’s authority to regulate permissible zoning subject matters. The Proposed Ordinance seeks to impermissibly regulate *who* the owners are, in contrast to the *use* of land as between residential and other purposes (which is permissible). The City has already acknowledged the limits on its power in this regard. As Community Development Director Seimone Jurjis conceded during the City’s November 16, 2021 City Council Meeting, the City cannot regulate **ownership**: “From a city standpoint the only thing we can regulate is the use of the property. ***We can’t regulate the ownership of the property.*** We don’t regulate LLCs. We don’t regulate the trusts, or

the S Corps, or tenants in common, or joint tenancy. We don't regulate that. The only thing we *can* regulate that is given to us as authority from the state is how do you use the property.” (City of Newport Beach, Newport Beach City Council Meeting: November 16, 2021, YouTube, at 43:40–44:13 (Nov. 17, 2021) (emphasis added), <https://youtu.be/nk1QT25nAUQ?t=2620>.)

Permissible zoning regulations must focus on the *use of land*. Zoning regulations that do not focus on the use of land, but rather target *certain individuals*, exceed the scope of permissible zoning regulations. The City may not adopt a zoning regulation based on the identity of a tenant or where a particular resident permanently resides. *See Friends of Davis v. City of Davis*, 83 Cal. App. 4th 1004, 1013 (2000).

But the City's Proposed Ordinance does just that. Instead of focusing on the “use” of land, the Proposed Ordinance, by its terms, and the City, in their application against Pacaso and its homeowners—but not families or friends—regulates and targets individuals based on who the owners are, not how they use their property. As the City even concedes, whether the homeowners are “family and friends” is determinative of whether the use is a time share or non-time share use. (*See* May 2023 Report at 4 (stating that the Proposed Ordinance “does not inadvertently capture non-time share uses such as the purchase of an entire property between family and friends and/or the bequeathing of a property by a family member”).) Thus, the application of the Proposed Ordinance and impact on property ownership improperly turns on the *identities* of owners, which is plainly impermissible.

As a result, the Proposed Ordinance requires the City to peer within co-owned homes into the relationships and manner of use of such co-owners. The Proposed Ordinance regulates how people come together to own and enjoy property, requiring the City to assess and make determinations about intimately private engagements and arrangements, including those among friends, family members, co-workers, spouses, and separated or divorced spouses. The ordinance also invades, interferes with, and restricts individuals' ability to make intimate personal decisions about their living arrangements, including who they want to co-own property with, how they want to allocate the time spent within that home, and how they can use and share a home together. This is not within the City's power or scope to regulate.

#### **4. The Proposed Ordinance Violates Homeowners' Right to Privacy**

The Proposed Ordinance, and its enforcement against Pacaso homeowners and other co-owners, violates their state constitutional rights of due process and equal protection by infringing upon their fundamental right of privacy under Article I,

Section 1, of the California Constitution. These privacy rights, which are enshrined in the California Constitution, are extraordinarily broad.

There is a recognized autonomy privacy interest in choosing the persons with whom a person will reside, and in excluding others from one's private residence. *See Tom v. City & County of San Francisco*, 120 Cal. App. 4th 674 (2004). Pacaso homeowners have a privacy interest in coming together with co-owners to own and use a home together. Likewise, Pacaso homeowners have a privacy interest in choosing with whom to live, in excluding others from their home, and in their private living arrangements. Like all other homeowners, Pacaso homeowners have a reasonable expectation of privacy in their own home, including in their living arrangements, in how they can come together to own and enjoy property, in choosing with whom to live, and in excluding others from their home.

The Proposed Ordinance violates these privacy rights. It regulates and invades how Pacaso homeowners can come together to own and enjoy property together, and restricts homeowners from being able to exclude others from their home. The ordinance intrudes into, interferes with, and restricts individuals' ability to make intimate personal decisions about their living arrangements, including who they want to co-own property with, how they want to allocate the time spent within that home, how they can share a home with others, and their ability to exclude others from the home.

The Proposed Ordinance also regulates and invades intimate and private engagements and living arrangements, including assessing the identity of co-owners, relationships of co-owners, and manner of use of co-owners. The City even concedes that the *identity* of homeowners is relevant to the City's analysis as to whether the ordinance applies—stating that it “*does not inadvertently capture non-time share uses such as the purchase of an entire property between family and friends and/or the bequeathing of a property by a family member.*” (May 2023 Report at 4 (emphasis added).) In doing so, the City impermissibly intrudes upon living arrangements.

The City's intrusion on the Pacaso homeowners' privacy interest is not justified by any goals or interests underlying the Proposed Ordinance. For example, the City states that its amendment efforts were a “result of community concerns received regarding the commercialization of residential neighborhoods that fractional ownership uses create, including increases in traffic, parking, noise and trash” and their attempt to find the “best approach to address potential impacts.” (May 2023 Report, at 2.) Similarly, the Proposed Ordinance states that fractionally owned homes “result[] in an increase in traffic and noise in residential neighborhoods, as well a [sic]

change to the fabric of the community due to the short-term nature of the stays,” and that “public testimony included concerns about increases in traffic, noise, and trash.” (May 2023 Report Ex. A, Ordinance No. 2023-4, at 2, 4.)<sup>1</sup> However, prohibiting Pacaso does not further these goals. In fact, Pacaso homeowners—by virtue of the policies they adopt when becoming a Pacaso homeowner—cause less traffic, parking, noise or trash than other Newport Beach residents. For example, Pacaso co-owners agree not to have large events or parties; co-owners adhere to a 9:00 p.m. to 7:00 a.m. quiet hour policy; co-owners agree not to rent the home to third parties; and Pacaso encourages homeowners to avoid parking on the street unless absolutely necessary.

In any event, Pacaso homes are subject to all of the same noise, nuisance and parking ordinances that currently apply to other single-family residences in Newport Beach. Finally, Pacaso is a purely residential co-homeownership structure that lacks any resemblance to such “commercial” uses or “short-term lodgings.” Rather, Pacaso homeowners are strictly prohibited from any short-term rentals of their homes.

Pacaso homeowners are true homeowners who make a significant financial investment in their home—and they are in it for the long haul. They are directly invested in the home and its surrounding neighborhood and community, and they own for their personal use and enjoyment, not for profit. Just like their neighbors, Pacaso homeowners make large financial investments in their homes and bring an owner mentality, not a “short-term” vacation mentality, to their use of the property. Council Member (and now sitting Mayor) Blom acknowledged this point and undercut the City’s statements that Pacaso homeowners are “chang[ing] the fabric of the community” (May 2023 Report Ex. A, Ordinance No. 2023-4, at 2), when he rightly expressed: “I don’t see four or eight owners of a single house really destroying our city. I feel like those people have actually put in \$500,000 or a decent amount of money. . . . We would love it if it was a single-family owner for every house; that’s the old way. . . . A lot of people that are maybe trying to create this life for themselves—maybe this is the best way to get to do it. I don’t think they are here to destroy our community. I think they’re here to enjoy it.” (City of Newport Beach, Newport Beach City Council Meeting: November 16, 2021, YouTube, at 54:22–58 (Nov. 17, 2021), <https://youtu.be/nk1QT25nAUQ?t=3260>.)

In any event, the City lacks all visibility and control into how much time *any* homeowner intends to spend in his or her home; so, preventing Pacaso and its co-

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<sup>1</sup> Further, the Proposed Ordinance states that “fractionally owned homes are a time share and operate much like short-term lodgings,” and “these homes operate as short-term lodging with residents expressing displeasure with the impacts that these homes were causing including an increase in the noise and traffic in the residential neighborhood.” (*Id.* at 3, 4.)

owners from buying properties has no bearing on the likelihood that other prospective buyers are either buying the home as a second home, or anticipating the ability to use it for short-term lodging.

Nor does the Proposed Ordinance further the purported goal of ameliorating concerns about “impacts on the City’s housing supply and character of residential neighborhoods.” (May 2023 Report Ex. E, Planning Commission Resolution No. PC2023-018, at 2; May 2023 Report Ex. A, Ordinance No. 2023-4, at 2.)<sup>2</sup> Rather, Pacaso helps relieve competition for more affordable homes by giving second home buyers a better option. Instead of competing for a whole home valued at \$525,000, for example, Pacaso offers up to eight second home buyers an option to be co-owners of a \$4–5 million property for the same price. Just one Pacaso home can remove up to eight buyers from local competition. Further, second homes are notorious for sitting empty much of the year. In contrast, Pacaso-managed homes are fully utilized, which means that Pacaso homeowners engage in their community and support local businesses year-round.

Finally, targeting Pacaso in order to address “frequent turnover of the properties’ occupants and its commercial management” is a similarly specious rationale. (May 2023 Report Ex. A, Ordinance No. 2023-4, at 2.) The City lacks all visibility and control into how much time homeowners intend to spend in their homes, the frequency to which a homeowner invites over guests, how many overnight visitors the homeowner has, and how frequently they have people coming in and out of, or servicing, their home (including, *e.g.*, landscapers, professional cleaners, etc.). Preventing Pacaso from buying properties does nothing to prevent other prospective buyers from buying the home as a second home and using it the same manner as the Pacaso homeowners.

These major disconnects between the goals and findings underpinning the Proposed Ordinance and Pacaso’s model and the behavior of its homeowners underscores that the ordinance is nothing more than a pretext to deny homeownership to new owners. Instead, it is plain that many other preexisting regulations, ordinances, and policies address the supposed “concerns” the City had with certain residential properties that underly the purpose and intent of the Proposed Ordinance.

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<sup>2</sup> The Proposed Ordinance further states that “the fractional ownership of single-unit residences as a second home further exacerbates the housing supply in Newport Beach making it harder to meet housing demand.” (May 2023 Report Ex. A, Ordinance No. 2023-4, at 3.)



Because the City cannot show a narrowly tailored means to achieve its stated goals or purposes, the Proposed Ordinance should not pass.

## **5. The Proposed Ordinance Will Be Selectively And Arbitrarily Enforced**

In light of the City's largely homogenous community, the City's attempt to meddle in property co-ownership (especially among Pacaso's clientele) is deeply concerning. The City's enforcement agenda infringes on homeowners' constitutional and privacy rights to associate and cohabitate with persons of their choosing, effectuates an unnecessary barrier to entry for new homeownership opportunities, and directly stifles diverse individuals' access to owning real property in Newport Beach.

By enforcing the Proposed Ordinance against Pacaso, the time share ban targets specific individuals who seek to co-own a property with individuals of their own choosing, and hampers their right to cohabitate.

### **(a) The City's Enforcement Agenda Against Pacaso, But Not Other Co-Owned Residences, Is Suspect And Arbitrary**

The City's plan to enforce the Proposed Ordinance against Pacaso, without any similar measures taken against other co-owned residences (through LLCs, trusts, a tenancy in common, or otherwise), is selective and arbitrary enforcement with discriminatory, disparate impact implications.

Several joint or partial ownership scenarios appear to fall under the City's broad definition of a "time share plan" under the Proposed Ordinance, but will nevertheless still be permitted to operate undisturbed. For example, as described above, a single-family residence co-owned by multiple family members through an LLC would purportedly fall under the City's Proposed Ordinance. Or, as another example, a residence co-owned by a husband and wife through an LLC would purportedly fall within the time share ban. Yet the City has expressly indicated that they will not be attempting enforcement against such entities or individuals who are similarly situated or functionally the same as Pacaso's homeowners.

As the City's own council members pointed out, co-ownership of real property is common in Newport Beach and exists today in a variety of forms. As Community Development Director Seimone Jurjis noted during the City's November 16, 2021 City Council Meeting, co-ownership is "not a new concept" and people have long participated in fractional ownership of other real property such as larger buildings such as apartments or commercial properties. (City of Newport Beach, Newport Beach City

Council Meeting: November 16, 2021, YouTube, at 38:39–39:25 (Nov. 17, 2021), <https://youtu.be/nk1QT25nAUQ?t=2319>.)

Mr. Jurjis noted that 56% of all single-family homes in Newport Beach are owned in an LLC or trust. (*Id.* at 41:19–41:28.) Further, Mr. Jurjis noted that the City only has access to the name of the LLC or trust—the City “[does not] know anything about who owns the LLC, what [is] the partnership structure of the LLC, who are the trustees.” (*Id.* at 41:28–41:53.)

Mayor Blom highlighted this issue during the November 16, 2021 City Council Meeting:

The one thing that jumped out the most is that a lot of ownership in Newport Beach is held in LLCs and trusts, and there’s a portion of residents here that have multiple homes within the City and some of those might be held in different entities, and if we start getting into the definition of not allowing fractional ownership[,] it frightens me because all of a sudden we’re in an LLC and trust issue where that can be litigated in a way that might not be beneficial to a huge amount of our residents that are maybe giving ownership of that Balboa cottage to their four children, or something where maybe an operating agreement has the benefit of family in mind as well as the benefit of financial well-being.

(City of Newport Beach, Newport Beach City Council Meeting: November 16, 2021, YouTube, at 51:31–52:40 (Nov. 17, 2021), <https://youtu.be/nk1QT25nAUQ?t=3091>.) He further stated: “I have a hard time denying ***when 56% of the ownership of Newport Beach is in an LLC or trust how we can legally justify getting rid of fractional ownership in any way, shape or form*** because it would eventually roll back to all of those kinds of arguments.” (*Id.* at 55:40–55:57 (emphasis added).) As then-Mayor Pro Tem Kevin Muldoon noted, each member in a Pacaso co-ownership arrangement is essentially “a more stringent partner than a family-owned trust or an LLC”—an attempt at a distinction that has no legal or substantive significance. (*Id.* at 1:10:15–1:11:14.)

Thus, the fact that the City plans to enforce the ordinance against Pacaso, where other similarly situated properties with similar ownership structures will

expressly not be targeted, is clear evidence that the City plans to selectively enforce the ordinance and that the City is deliberately and wrongly singling out Pacaso.<sup>3</sup>

## 6. The Proposed Ordinance Conflicts with Coastal Act Policies

The Proposed Ordinance does not qualify as a *de minimis* Local Coastal Program (“LCP”) amendment because it would fundamentally alter an allowable use of real property. An LCP amendment may be considered *de minimis* only under extremely narrow circumstances and must “not propose . . . any change in the allowable use of property.” Coastal Act, § 30514(d)(1)(B). Here, the City’s Proposed Ordinance would treat co-ownership of residential units in the City as “time share uses” that are prohibited in all residential zones—including those in the Coastal Zone. Moreover, the Proposed Ordinance would apply a host of new regulations to any co-owned properties that are permitted. Because 56% of all single family homes in Newport Beach are owned as LLCs or in trust—structures that allow multiple owners of a property—the City’s Proposed Ordinance could alter the use of over half of the City’s single family homes. Such sweeping and broad reaching regulation falls well outside of what the Coastal Act considers to be *de minimis*.

More specifically, the NBMC currently defines “time share use” as a “right of occupancy . . . that is *not* coupled with an estate in the real property.” NBMC, § 21.70.020.V (emphasis added). Accordingly, homes with multiple owners, such as

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<sup>3</sup> Pacaso homes are not time shares; but, even for the sake of argument, if they were considered time shares, the Proposed Ordinance further fails for the independent reason that state law preempts the City from regulating time share programs locally. It is black letter law that “[i]f otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.” *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993) (citation omitted). “A conflict exists if the local legislation ‘duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.’” *Id.* (citation omitted). “Local legislation is ‘duplicative’ of general law when it is coextensive therewith.” *Id.* “Similarly, local legislation is ‘contradictory’ to general law when it is inimical thereto.” *Id.* at 898. Under California’s Vacation Ownership and Time-share Act of 2004 (“VOTA”), time share plans are not subject to local regulation: the regulation of time share plans and exchange programs is an “exclusive power and function of the state.” Cal. Bus. & Prof. Code § 11280(a) (2018). And, while the law states that “[n]o provision of this chapter invalidates or modifies any provision of any zoning, subdivision, or building code or other real estate use law, ordinance, or regulation,” *id.* § 11280(b), VOTA is clear that “[a] unit of local government may not regulate time share plans or exchange programs,” *id.* § 11280(a), which is exactly what the City seeks to do through the Proposed Ordinance. Thus, the City’s time share ordinance fits squarely within the scope of VOTA and “regulate[s] in the very field the state has reserved to itself.” *Id.* The comprehensive nature of VOTA in regulating time shares and certain registration or advertising requirements for time share plans is so thorough and detailed as to manifest the legislature’s intent to preclude local regulation of time shares and indicate that the issue is now exclusively a state concern.

in an LLC or trust, are not considered time shares because each owner holds an ownership interest in the home. The Proposed Ordinance, however, would broaden “time share uses” to include co-owned homes that are used separately by multiple owners “*regardless of whether* [the] rights of use are a result of a grant of ownership rights.” (See May 2023 Report Ex. H, Proposed Code Text Changes (Redlined), at 6 (emphasis added).) Under this broadened definition, existing co-owned homes in the City’s residential coastal zoning districts could be considered prohibited time shares—fundamentally changing the use of those properties. See NBMC, § 21.18 (not permitting time share uses in residential coastal zoning districts). Because the Proposed Ordinance would impose a novel restriction upon a previously “allowable use of property” in the Coastal Zone, the amendment cannot be considered *de minimis*. Coastal Act, § 30514(d)(1)(B).

In addition, the Proposed Ordinance conflicts with several Coastal Act Chapter 3 policies and therefore neither qualifies as *de minimis* nor meets the findings required for an LCP amendment. See Coastal Act, §§ 30514(d)(1)(B), 30514(b), 30512(c). As an initial matter, no LCP amendment can be considered *de minimis* if it is not “consistent with the policies of Chapter 3” of the Coastal Act. Co-ownership opportunities advance a number of Chapter 3 policies such that a prohibition of this use would create inconsistencies with Chapter 3. For example, co-ownership augments the stock of overnight accommodations in the Coastal Zone for individuals who are not fortunate enough to live in coastal cities on a full time basis. By providing an additional option for accommodations and property ownership in the Coastal Zone, co-ownership homes increase coastal access overall. See *id.*, § 30210; Cal. Coastal Commission, Staff Report for City of Malibu LCP Amendment No. LCP-4-MAL-20-0083-2, (July 21, 2022), p. 2 (recognizing that increased supply in any one coastal accommodation type can “augment the stock of [all] overnight accommodations” and thereby enhance public access overall).

Further, by providing homeownership opportunities for some individuals and families in the Coastal Zone, co-ownership units remove those same individuals and families from competing for properties in the vacation rental market, thereby increasing rental stock and lowering demand and costs for others. Accordingly, co-ownership facilitates increased coastal access and recreational opportunities for all visitors, including lower cost visitor serving uses. See Coastal Act, §§ 30210, 30213. Moreover, by providing ownership opportunities to multiple individuals and families in a single vacation property, co-ownership may help keep those seeking second homes in the Coastal Zone from purchasing lower-cost properties by themselves, thereby helping to maintain local housing stock for fulltime residents. Finally, co-homeownership increases property utilization and support for coastal businesses from multiple owners, unlike other second homes in the Coastal Zone that are more likely

to sit empty much of the time. Accordingly, co-ownership uses help support visitor and recreational uses in the Coastal Zone in furtherance of multiple Chapter 3 policies. *See id.*, § 30213.

For each of the reasons set forth above, the Proposed Ordinance's restrictions upon co-ownership, which if imposed may increase vacation rental demand and the acquisition of lower-cost homes in the Coastal Zone as second homes, and result in reduced support of visitor and recreational uses by fractional homeowners, are at odds with the Coastal Act's Chapter 3 policies. Accordingly, the Proposed Ordinance also fails to satisfy the Coastal Commission's finding requirements for an LCP amendment processed through the Commission's standard LCP amendment procedures. *See* Coastal Act, §§ 30514(b), 30512(c).

Because the Proposed Ordinance cannot satisfy the Coastal Act's requirements for an LCP amendment—much less a *de minimis* amendment—the Proposed Ordinance should not be adopted.

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The City's Proposed Ordinance violates the rights of Pacaso and Pacaso's homeowners for all of the reasons described above. Pacaso's co-ownership model presents a means to diversify the City's housing market, demographics, and broader community in a positive and meaningful way, including by providing homeownership to those who have traditionally been excluded from the second home market.

Pacaso has the potential to be an excellent partner of the City. Pacaso provides the City with the opportunity to foster inclusion and lift barriers to homeownership for people of diverse backgrounds. Pacaso's new homeowners are part and parcel of the underlying economic ecosystem. Unlike absentee second home owners, Pacaso owners occupy their home and support local businesses year-round, such as restaurants and retail shops. Additionally, not just homeowners in the City, Pacaso itself employs between 8–10 local businesses per property, including real estate agents, property managers, landscapers, pool cleaners, home cleaners, laundry services, handymen, local artists, and more.

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We are hopeful that the City will seize this opportunity to protect property rights and abandon its efforts to pass the Proposed Ordinance. Pacaso believes strongly in its mission to enrich lives by making second home ownership possible for more people and will pursue all necessary courses of action to defend the rights of the homeowners Pacaso serves. All rights are reserved.

Sincerely,



Lance A. Etcheverry

Cc: Grace K. Leung, City Manager  
Aaron C. Harp, City Attorney