

CALIFORNIA COASTAL COMMISSION

SOUTH COAST DISTRICT OFFICE
301 E. OCEAN BLVD., SUITE 300
LONG BEACH, CA 90802
(562) 590-5071



Th14a

LCP-5-NPB-23-0020-2

(FRACTIONAL OWNERSHIP & TIME SHARE)

AUGUST 10, 2023

CORRESPONDENCE 2



August 4, 2023

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

Re: Response to Pacaso Briefing Material – Agenda Item Th14a (LCP-5-NPB-23-0020-2)

Dear Mr. Sy:

The City of Newport Beach (City) hereby submits the following responses to the briefing material submitted by Pacaso related to the City's amendment request.

The City objects to McCabe and Company (Susan McCabe), a former City Consultant, from representing Pacaso as confidential information obtained through its representation of the City is now being used against the City: First and foremost, the City registers its objection to Pacaso retaining Susan McCabe to represent Pacaso before the Coastal Commission on Agenda Item Th14a. McCabe and Company entered into a professional services agreement (PSA) with the City wherein Susan McCabe advised the City on applications and code amendments for Coastal Commission consideration. Susan McCabe worked extensively with the City and obtained attorney-client privileged information related to short-term lodging as well as the time share code amendment that Coastal Commission is considering in Agenda Item Th14a. Section 18 (Confidentiality) of the PSA requires Susan McCabe to maintain confidentiality on City-related consultant matters and Section 8 (Standard of Care) requires McCabe to perform services "in a manner commensurate with community professional standards and with the ordinance degree of skill and care that would be used by other reasonably competent practitioners..." Needless to say, Susan McCabe's work for the City on matters that the Coastal Commission will consider and then turning around using that same information against the City violates not only the terms of the PSA but the basic tenets of trust and professional standards.

Pacaso's Fractional Ownership or "Co-Ownership" Model is a Time Share: The terms "fractional ownership" or "co-ownership" are branding labels coined by commercial entities to conceal the fact that they are selling "time share" interests in residential properties. As described in the briefing material, Pacaso clearly describes an ownership model that fits within the traditional sense of a time share. In fact, a Pacaso representative has stated in correspondence to the California Department of Real Estate (Attachment 1) that Pacaso homes

are sold as time share interests as defined in Business and Profession Code Section 11212(z). No amount of clever labeling can conceal what Pacaso or others like it are actually selling: time share interests in residential properties.

Fractional ownership Housing Does Impact Affordable Housing Stock: The conversion of residential dwelling units into time shares removes the dwelling unit from the housing market, thus making them no longer available for occupancy of full-time residences. As fewer dwelling units become available for rent or sale, housing prices increase. These price increases ultimately reduce the opportunities available to provide affordable housing to extremely low-, very low-, low-, and moderate-income households. The decrease in number of dwellings for long-term occupancy also negatively impacts the City's ability to comply with the State's Regional Housing Needs Allocation (RHNA) assigned to the City. Therefore, proposed amendment would prevent conversion of dwelling units into a visitor serving accommodation, thus preserving the number of units in the City's housing stock, which would help minimize increases to housing costs.

Fractional Ownership Housing is Regulated under the Coastal Act: Fractional ownership housing is considered a time share. Time shares have historically been regulated as a form of visitor accommodation under the Coastal Act and the City's Local Coastal Program. The proposed amendment serves to clarify that Pacaso's fractional ownership model is defined as a time share use within the City. The permitted locations and development standards that apply to time shares would not be changed.

The Amendment Will Not Inadvertently Affect Other Ownership Arrangements: While it may be true that 56% of single-family residences in Newport beach are owned in some form of an LLC or trust, the proposed amendment does not automatically define these common ownership arrangements as a time share. As explained in detail in the Coastal Commission staff report for the amendment, in order for an arrangement to be defined as a time share, the proposed amendment requires several conditions to be met to trigger the regulation and does not inadvertently capture non-time share uses. The following are the critical definitions, with key language underlined where applicable:

"Time share use" means the use of one or more accommodations or any part thereof, as a time share property.

"Time share property" means one or more accommodations subject to the same time share instrument, together with any other property or rights to property appurtenant to those accommodations.

"Time share instrument" 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 accommodations to the time share plan.

"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, 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. 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.

Therefore, the proposed time share-related definitions have been carefully crafted such that collectively, these definitions make clear that the LCP prohibits (i) the use of real property, (ii) pursuant to an arrangement, plan, scheme or similar device (including a written agreement), (iii) where a purchaser, (iv) in exchange for value, (v) receives the right to exclusive use of real property, (vi) for a period of time less than a full year during a given year, on a recurring basis for more than one year.

Family or friends who jointly acquire a property do not pay for the right (i.e. purchaser in exchange for value) to exclusively use a property for a period of less than a year, but on a recurring basis for more than one year. Family or friends who buy a property together acquire unlimited rights to use and enjoy the property for the entire year and can co-occupy the property as a matter of right. In contrast, owners of a fractional ownership interest in a home pay for exclusive rights to use a property for less than a year, and this arrangement is typically memorialized in a written instrument that all fractional interest holders agree to when they purchase their ownership interest.

Given the foregoing, the City believes it will be easy to distinguish between a home bought by family or friends from a commercial “fractional ownership home,” which is simply a different name for a “time share” and includes all of the same commercial features of a time share (i.e. payment for exclusive rights to use a property for less than a year, on a recurring basis for more than a year).

The Amendment is Not Arbitrary or Discriminatory: Due to the evolution of this new fractional owner ownership model and the City’s outdated time share related definitions, clarification to the City’s existing time share regulations is needed to clarify that these fractional ownership models are considered time shares and subject to the City’s existing time share regulations. Time shares are currently prohibited in residential zoning districts, but are currently allowed in other areas where visitor-serving uses are currently permitted. This includes the CM, CV, MU-H, and MU-W Coastal Land Use Designations, which are identified in CLUP Table 2.1.1-1 to provide visitor-serving uses.

The City Provides Extensive Coastal Access and Lower-Coast Visitor Facilities: While short-term rental of dwelling units does provide a means of providing lower-cost overnight visitor accommodations, on October 13, 2021, the Coastal Commission approved an LCP amendment capping the maximum number of short-term rentals to 1,550 permits to prevent adverse impacts to residential areas and preserve housing stock within the coastal zone. Unlike short term rentals, time share use of coastal residential properties is a high-cost option to visit the coast on a limited basis, but have similar negative impacts to housing supply and

neighborhood disturbances that short term rentals create. Therefore, it is appropriate to prohibit this type of visitor-serving commercial use in residential neighborhoods. Furthermore, the proposed amendment will not impact the City's ability to support the wide variety of visitor accommodations that are currently provided, including 4,086 hotel/motel rooms hotels and motels, a cap of 1,550 short term lodging units, and approximately 471 campground and RV sites.

No Need for A Continuance: The City disagrees with Pacaso's assertion that the proposed amendment raises significant issues about its fractional ownership model that warrants further study. The reality is that its fractional ownership model is clearly a time share and the City already has regulations in place regulating time shares. The intent of the proposed amendment is merely to clarify and remove any ambiguity that exists in the City's outdated definitions.

Thank you for the opportunity to respond. If you need any additional information regarding this LCP Amendment request, please contact me at (949) 644-3209 or by email at jmurillo@newportbeachca.gov.

Sincerely,



Jaime Murillo, AICP
Planning Manager

Attachments

1. Correspondence from Pacaso to CA Department of Real Estate

Attachment A

From: Andy Sirkin <dasirkin@gmail.com>

Sent: Saturday, July 24, 2021 10:19 AM

To: Aiu, Joseph@DRE <Joseph.Aiu@dre.ca.gov>

Cc: Bruce, David@DRE <David.Bruce@dre.ca.gov>; Neri, Chris@DRE <Chris.Neri@dre.ca.gov>;

Patrick Abell <patrick@pacaso.com>; David J. Willbrand <david@pacaso.com>

Subject: Re: Pacaso (DRE No. 121-0701-006)

CAUTION: THIS EMAIL ORIGINATED OUTSIDE THE DEPARTMENT OF REAL ESTATE!
DO NOT: click links or open attachments unless you know the content is safe.
NEVER: provide credentials on websites via a clicked link in an Email.

Dear Mr. Aiu,

Yes, I confirm that Pacaso Homes are within that exemption. We sincerely appreciate your prompt response and attention.

All the best,

Andy Sirkin

SirkinLaw APC

+1-415-462-5925 (US)

On Jul 24, 2021, at 5:37 PM, Aiu, Joseph@DRE <Joseph.Aiu@dre.ca.gov> wrote:

Dear Mr. Sirkin,

Thank you for your email response and explanation dated 7/21/21. Based on your response and explanation, we understand that your clients, Pacaso Inc. and Pacaso Homes, are selling time-share interests as defined in B&P Code section 11212(z), but are exempt from needing to file for a time-share public report since they fall below the reporting threshold of 11 or more units. Please confirm. Thank you.

Sincerely,

Joseph Aiu

Investigations & Compliance

From: Andy Sirkin <dasirkin@gmail.com>

Sent: Wednesday, July 21, 2021 2:28 AM

To: Aiu, Joseph@DRE <Joseph.Aiu@dre.ca.gov>

Cc: Bruce, David@DRE <David.Bruce@dre.ca.gov>; Neri, Chris@DRE

<Chris.Neri@dre.ca.gov>; Patrick Abell <patrick@pacaso.com>; David J. Willbrand
<david@pacaso.com>

Subject: Re: Pacaso (DRE No. 121-0701-006)

CAUTION: THIS EMAIL ORIGINATED OUTSIDE THE DEPARTMENT OF REAL ESTATE!
DO NOT: click links or open attachments unless you know the content is safe.
NEVER: provide credentials on websites via a clicked link in an Email.

Dear Mr. Aiu,

I received an email late yesterday from David Bruce saying that, since an investigation has been initiated by the Department, all correspondence should be routed to you. He also mentioned that I was welcome to “cc” him on that correspondence, so I will continue to do so.

Although you may already have a basic understanding of Pacaso’s business, I will begin with a brief explanation of the key elements. Pacaso only organizes group purchases of single-family residences. Each owner gets a 1/8th share along with the right to use the home for 1/8th of each year indefinitely. During each owner’s usage period, that owner has exclusive use of the entire house. All rentals are prohibited; only owners and their guests are permitted to use the house. Each owner pays regular assessments to fund the operating costs of the home and maintenance reserves. Once all eight ownership slots are filled, the eight owners own and control the house; Pacaso retains no ownership interest.

B&P Code Section 11212(z) defines “Time-Share Plan” as any “arrangement . . . whereby a purchaser, in exchange for consideration, receives ownership rights in or the right to use accommodations for a period of time less than a full year during any given year, on a recurring basis for more than one year.” This description matches exactly the arrangement among owners of a Pacaso home. Specifically, each purchaser gets the right to use the home for 1/8th of each year on a recurring basis every year for as long as he/she is an owner. However, since each Pacaso offering involves only eight interests, each home is below the threshold for needing a Time-Share public report under Section 11211.5(b)(1).

B&P Code Section 11004.5(g) provides that “time-share plans . . . are not “subdivisions” or “subdivided lands” subject to this chapter.” Based on this language, I had always assumed that Time-Share offerings, regardless of size, did not require a subdivision public report under B&P Code Section 11000 et seq.; rather, large Time-Share offerings (more than 10 interests) require a Time-Share public report, and small Time-Share offerings (10 or fewer interests) require no public report.

Your communications suggest that Time-Share offerings too small to require a Time-Share public report instead need a subdivision public report. I am having difficulty understanding the logic of this position. As you may know, prior to 2004, California law required a Time-Share public report only for projects involving more than 12 interests. When the legislature enacted the Vacation Ownership and Time-Share Act Of 2004, it reduced the threshold from 12 to 10. This change shows that the legislature specifically considered the appropriate threshold for when a Time-Share offering needs a public report. The legislature did not choose nine, or eight, or six for the threshold; it specifically chose 10.

The idea that Time-Share offerings too small to require a Time-Share public report instead need a subdivision public report seems contrary to this legislative intent. What meaning could the 10-share threshold in Section 11211.5(b)(1) have if an offering below the threshold still had to obtain a subdivision public report?

Moreover, when the legislature enacted the Vacation Ownership and Time-Share Act Of 2004, the legislature could have said that Time-Share offerings require a subdivision public report under B&P Code Section 11000 et seq., and that the application for a Time-Share public report should be the same as the application for a subdivision public report. Instead, the legislature carefully specified the types of information it deemed appropriate for DRE to obtain and consider when “vetting” a proposed Time-Share offering. The application submittal for a Time-Share public report makes sense in the context of what a Time-Share offering is and what the purchasers buy.

If, as you suggest, Time-Share offerings too small to require a Time-Share public report instead need a subdivision public report, it would mean that the public report application for a small Time-Share offering would ignore the carefully-crafted specifics of the Time-Share law (which make perfect sense in the context of a Time-Share offering), and instead comply with the public report application requirements for a subdivision (which make no sense in the context of a Time-Share offering).

To illustrate this point with just one of many examples, consider B&P Code Section 11234(c), under which a Time-Share public report requires “a description of the type of interest and usage rights the purchaser will receive” and “a representation about the percentage of useable time authorized for sale, and if that percentage is 100 percent, then a statement describing how adequate periods of time for maintenance and repair will be provided.” This requirement is perfectly logical for a Time-Share public report, since the fairness and adequacy of the usage assignment structure is absolutely critical from a consumer protection standpoint. So, why would the subdivision public report you suggest is needed for a small Time-Share offering not require this critical information? Is this information suddenly less important if the offering involves 10 or fewer Time-Share interests?

For all of these reasons, I respectfully suggest that Pacaso offerings do not require a Public Report. My assertion is based specifically on B&P Code Sections 11211.5(b)(1) and 11004.5(g), and on the legislative history and context of the Vacation Ownership and Time-Share Act Of 2004. To simplify your job when responding, you can ignore the other arguments made in my client’s letter of July 9.

Cordially,

Andy Sirkin

SirkinLaw APC

+1-415-462-5925 (US)

On Jul 17, 2021, at 1:28 AM, Aiu, Joseph@DRE

<Joseph.Aiu@dre.ca.gov> wrote:

Dear Mr. Sirkin,

Your request for an extension to the deadline imposed in my “Notice to show cause was taken under consideration and you are granted an extension until **July 23, 2021**. Please note the following. *The Department of Real Estate (DRE), investigates violations of the Real Estate Law (Licensees), the Subdivided Lands Act (Subdividers), the Vacation Ownership and Time Share Act (Developers), and endeavors to safeguard the public interests in real estate matters.*

In your initial response, your letter alluded to 11001.[a](b)(2), 11004.5(g), 11212.5(b)(1), and Pacaso Homes purchases are resales. Please be aware that your marketing concept is also under consideration.

Sincerely,

Joseph Aiu

Investigations and Compliance

From: Andy Sirkin <dasirkin@gmail.com>

Sent: Friday, July 16, 2021 3:04 PM

To: Aiu, Joseph@DRE <Joseph.Aiu@dre.ca.gov>

Cc: Bruce, David@DRE <David.Bruce@dre.ca.gov>; Neri, Chris@DRE <Chris.Neri@dre.ca.gov>; Patrick Abell <patrick@pacaso.com>; David J.

Willbrand <david@pacaso.com>

Subject: Pacaso (DRE No. 121-0701-006)

CAUTION: THIS EMAIL ORIGINATED OUTSIDE THE DEPARTMENT OF REAL ESTATE!
DO NOT: click links or open attachments unless you know the content is safe.
NEVER: provide credentials on websites via a clicked link in an Email.

Mr. Aiu,

Our office has been engaged by Pacaso in connection with your inquiry. Over the past four days, I have been corresponding with David Bruce about my analysis of the situation and potential options to move forward in a manner that would be satisfactory to DRE. I had hoped to provide a formal response to your email by this afternoon in accordance with your deadline. However, I have not yet received David's response to my most recent email (sent late yesterday), and I would very much like to get that before responding to you. Might I ask your indulgence in getting a short extension so that I might complete my interchange with David? I will commit to keeping you advised on the progress of that exchange.

Please be assured that resolving this matter to the satisfaction of DRE is Pacaso's highest priority. We are in no way interested in delaying a resolution; however, we want to make sure to proceed in the manner most likely to lead to a mutually acceptable outcome. Thank you in advance for your consideration.

All the best,

Andy Sirkin

SirkinLaw APC

+1-415-462-5925 (o)

+1-415-350-6296 (m)

----- Forwarded message -----

From: **Aiu, Joseph@DRE** <Joseph.Aiu@dre.ca.gov>

Date: Fri, Jul 9, 2021 at 11:42 AM

Subject: RE: Pacaso response to DRE notice letter (DRE No. 121-0701-006)

To: Patrick Abell <patrick@pacaso.com>

Cc: David Willbrand <david@pacaso.com>, Charlie Tanner <charlie@brokerzoo.com>, Aiu, Joseph@DRE <Joseph.Aiu@dre.ca.gov>

Dear Mr. Abell,

Thank you for your letter explaining the position of Paseo Homes as to its sales of "1/8th undivided interests in a residential homes." The key phrase in our letter is the sale of *undivided interest*. Please refer to Section 11000.1 of the Code. Further, your letter appear to allude to the "Exemption" pursuant to Subsection 11000.1(b)(2), which requires satisfactory evidence presented to DRE – this has not been done. Hence, Section 11010 is applicable.

Please respond by **July 16, 2021** as to whether Pacaso Homes and its affiliates will comply with applying for a Public Report, since advertising the sales must have a Preliminary Public Report.

Sincerely,

Joseph Aiu

Statewide Subdivisions

Investigations & Compliance

(213) 576-6927 Direct

(213) 576-6942 Fax

Department of Real Estate

320 W. 4th Street, Suite 350

Los Angeles, CA 90013

joseph.aiu@dre.ca.gov

<image001.png>

FW: Public Comment on August 2023 Agenda Item Thursday 14a - City of Newport Beach LCP Amendment No. LCP-5-NPB-23-0020-2 (Fractional Ownership).

SouthCoast@Coastal <SouthCoast@coastal.ca.gov>

Thu 8/3/2023 4:18 PM

To:Sy, Fernie@Coastal <Fernie.Sy@coastal.ca.gov>

Cc:Hernandez, Jose@Coastal <jose.hernandez@coastal.ca.gov>

From: Gary Cruz <gdcruz1949@outlook.com>

Sent: Thursday, August 3, 2023 4:00 PM

To: SouthCoast@Coastal <SouthCoast@coastal.ca.gov>

Subject: Public Comment on August 2023 Agenda Item Thursday 14a - City of Newport Beach LCP Amendment No. LCP-5-NPB-23-0020-2 (Fractional Ownership).

Dear Commissioners,

I am writing in support of the proposed amendment to clarify characteristics of fractional ownership as time-shares in the City of Newport Beach. I'm confident that you have done due diligence on the topic and will make the appropriate ruling. Your time is valuable so I will not rehash what has already been provided. What I would like stress is that residents started pushing back on this business model three years ago and it that time the number has escalated from 3 or 4 fractionally owned homes to 12 or 13. The trend has been a worry to residents on the Newport Peninsula.

You can call fractional homes a lot of things but one thing they are not is a residence. They are a commercial business set up in a residential neighborhood and regardless of the quality of the shareholders they are not part of the community fabric. They represent another example of the "have's" getting something at the expense of the "have not's". They are taking away housing stock and driving up the cost of homes.

From one of my neighbors...

"We bought our home 35 years ago to enjoy living in a residential area of Newport Beach which includes single family and duplex properties. We chose not to live in commercial or summer/winter rental areas because we valued the quiet enjoyment of a family-oriented neighborhood."

Sincerely,

Gary Cruz
Newport Island



August 4th, 2023

California Coastal Commission
455 Market Street, Suite 300
San Francisco, CA 94105

SPON

PO Box 102
Balboa Island, CA 92662
949.864.6616
<http://SPON-NewportBeach.org>

Via email to: SouthCoast@Coastal.ca.gov

Subject: **Agenda Item TH14A 8/10/23**

President

Charles Klobe

Dear Coastal Commissioners and Staff,

Vice President

Susan Dvorak

SPON, founded in 1974, is a non-profit public education corporation dedicated to protecting and preserving the residential and environmental qualities of Newport Beach.

Treasurer

Dennis Baker

We support the application from the City of Newport Beach for this amendment to the LCP. Further, we support the Executive Director's determination that the proposed amendment is de minimus.

Secretary

Jeff Herdman

Thank you for your service,

Board Members

Andrea Lingle
Bobby Lovell
Bruce Bartram
Don Krotee
Jo-Carol Hunter
Marko Popovich
Max Johnson
Nancy Scarbrough
Nancy Skinner
Ron Rubino
Sharon Ray

Charles Klobe
President

Advisors

Nancy Alston
Portia Weiss

*To protect and preserve
the environmental and
residential qualities of
Newport Beach.*