

INDIAN WELLS CITY COUNCIL

September 5, 2024



To: City Council
From: City Attorney
Prepared by: Todd Leishman, Best, Best, & Krieger LLP
Subject: **Ordinance Amending Chapter 21.32 Relating to Time-Share Provisions of the Municipal Code**

RECOMMENDED ACTIONS:

Council **INTRODUCES** and **DISCUSSES** an ordinance adding Chapter 21.32 "Time-Share Uses" and deleting Section 21.04.090 from Title 21 of the Indian Wells Municipal Code reinforcing the City's prohibition against time-share uses within the City; and

APPROVES the ordinance to be brought back for second reading and adoption; and

FINDS the action to be exempt from the provisions of the California Environmental Quality Act ("CEQA") under state CEQA Guidelines sections 15060(c)(2), 15060(c)(3), and 15061(b)(3).

BACKGROUND:

In recent years, there has been discussion in California cities regarding time-share projects. One source of these discussions arise due to a company, now known as Pacaso, that began marketing homes in various cities in a manner that functions like a time-share project. Based on Pacaso's marketing materials, cities have concluded that the properties being marketed by Pacaso were not just fractional- or partial-ownership structures, but also constitute time-share uses with all the transitory-occupancy impacts. The City of St. Helena recently concluded litigation with Pacaso, the outcome of which was favorable to St. Helena. That litigation encourages a new look at the City's current regulation of time-share uses.

Currently, Section 21.04.090 of the City's Zoning Code prohibits the creation of a new time-share project in any zone within the City (the "Time Share Ordinance"). When reviewing the Time Share Ordinance in this context, the City Attorney's office found that the substance of the Time Share Ordinance applies to and prohibits "fractional-ownership" and fractional-use operations like Pacaso's — but the Time Share Ordinance has not been updated since its adoption in 1996 and could do more to put companies like Pacaso and their potential buyers on notice of the City's time-share restrictions. The City Attorney's office concluded that the Time Share Ordinance would benefit from an update

to refine the definitions to more directly address the impacts of time-share uses, to clarify the means used by the City to enforce the restrictions on time-share uses, and to clarify how time-share uses are treated (Attachment 1).

The City's Planning Commission reviewed the Time Share Ordinance at a public hearing on August 29, 2024, and unanimously recommended approval to the City Council under PC Resolution No 2024-06 (Attachment 2).

ANALYSIS

The Analysis section of the Staff Report is organized as follows: First, the section provides a brief explanation for the City's conclusion that the homes that have been marketed by Pacaso constitute time-share projects. While the City's conclusion does not directly affect the changes to the Zoning Code set forth in the proposed ordinance, it is helpful to understand that the Time Share Ordinance, both in its original form and as proposed to be amended, is intended to protect against the impacts that these homes and similar uses could have on the City's housing supply and the character of the City's residential districts. Second, this section discusses the legal basis for the City's Time Share Ordinance, the reasons why the City prohibited time share uses in residential properties, and why those reasons continue to apply today. Third, this section outlines the changes made in the proposed ordinance and the reasons for the proposed changes.

A. Current Time Share Ordinance and Application to Pacaso Homes

Section 21.04.090 of the Zoning Code prohibits the creation of a time-share project in any zone within the City. A time-share project is defined in section 21.08.462 as: a project "in which a person or entity receives the right or entitlement in perpetuity, for life or for a term of years or other extended term of the recurrent, exclusive use, right to use or occupancy of a lot, parcel, unit room(s), hotel or portion thereof, or segment of real property annually or on some other seasonal or periodic basis, for a period of time that has been or will be allotted from the use or occupancy periods into which the time share program which is involved has been divided. The right or entitlement to occupancy may attach in advance to a specific lot, parcel, unit, room(s), or portion of a hotel or segment of real property, or may involve designation or selection of the same at a future time or times. The interest obtained or owned by the occupant may be pursuant to a fee, lease, contractual right of exclusive occupancy, vacation license, prepaid hotel, reservation, club membership, limited partnership, vacation bond or otherwise." (Section 3.12.020 has a similar definition of "time share program" for purposes of transient-occupancy tax.) Together, the definition in section 21.08.462 and the prohibition in section 21.04.090 govern time-share uses of all kinds, including the fractional-ownership and fractional-use model promoted by Pacaso.

Pacaso provides a significant amount of information on its website regarding the manner in which its homes are used by the purchasers of a Pacaso home. According to Pacaso's website, the single family residences marketed by Pacaso are held by a property-specific

limited liability company (“LLC”), and each co-owner purchases a 1/8 share in the LLC. (Pacaso.com/learn) Each 1/8 share entitles the co-owner to 44 stay nights within any 365 day window. Stays can be from 2 to 14 nights in duration for each 1/8 share. Back-to-back stays are not permitted. (Pacaso.com/faq/scheduling) Stays are booked on an app, with specific rules governing the number of “special dates” that each co-owner can book, and the number of stays that each owner can book during “peak seasons.” (Ibid.) Each owner can book the residence to use themselves, or may allow guests to use the residence, whether or not the co-owner is present. (Ibid.) Between each stay, Pacaso conducts a thorough inspection and cleaning. (“5 reasons Pacaso is better than a timeshare.” Pacaso.com/blog/better-than-resort-timeshare.)

To summarize, the Pacaso model grants each 1/8 owner the right to use the property for a specific period of time (44 days in a year) in increments of 2 to 14 days. The use, occupancy, and possession of the property circulates among the co-owners according to a floating time schedule that gives each co-owner exclusive rights to the property for a specific period of time each year. The use is inherently one of transitory occupancy. This use structure fits squarely in the City’s definition of a time-share program, and the properties operated by Pacaso in this manner are therefore time share projects under the existing Time Share Ordinance.

B. Reasons for the Existing Time Share Ordinance

1. The City’s General Plan

The City of Indian Wells has long been defined by its small-scale, residential-resort quality. In commencing with the Indian Wells General Plan Update 2040, the City noted that one of the focuses of the General Plan will be to maintain adequate sites to accommodate the City’s Regional Housing Needs Allocation (“RHNA”) while retaining the residential-resort lifestyle.

2. Use of Zoning to Preserve Residential Areas

The use of zoning to preserve the character of the residential districts of a City has been common for over a century. In the seminal case of *Euclid v. Ambler* the United State Supreme Court upheld the validity of comprehensive zoning that would set aside residential districts “from which business and trade of every sort, including hotels and apartment houses, are excluded.” (*Euclid v. Ambler Co.* 272 U.S. 365, 390.) The U.S. Supreme Court upheld the Village of Euclid’s zoning ordinance in that instance, noting that the inclusion of non-residential uses in residential districts may have an increasingly deleterious impact on the residential area “until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.” (*Id.* at 394.)

The California Court of Appeals followed *Euclid* and subsequent cases in upholding the City of Carmel-by-the-Sea’s zoning restriction on short-term rentals. (*Ewing v. City of Carmel-By-The-Sea* (1991) 234 Cal.App.3d 1579.) In that case, the Court noted that the

City's chief purpose in adopting the short-term rental restriction was "to provide an appropriately zoned land area within the City for permanently single-family residential uses and structures and to enhance and maintain the residential character of the City." (Id. at 1579.) In upholding Carmel's short-term rental restriction, the Court found that short-term rentals "undoubtedly affect the essential character of a neighborhood and the stability of a community. Short-term tenants have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow — without engaging in the sort of activities that weld and strengthen a community." (Id. at 1591.)

3. Impacts of Time Share Uses on Residential Districts

Like Carmel, the City strives to maintain the character of its resort-residential areas in the face of intense demand for accommodations to serve visitors to the City. The Time Share Ordinance is one of the means that the City has in place to ensure that it is able to maintain its existing and limited housing stock for use in long-term residency, and to maintain the character of its residential zoning districts.

i. Housing Shortages and Impacts of Time-Share Uses on Existing Housing Stock

In adopting the current Time Share Ordinance, the City Council implicitly prioritized long-term occupancies and accessible housing. That continues to be the case, and is undoubtedly worse than was the case at the time the Time Share Ordinance was originally adopted.

The City has made and continues to make efforts to address the need for affordable housing in the City. The City has also ensured that new non-residential development will assist the City in providing adequate affordable housing. These efforts, however, have highlighted the challenges of providing housing at all income levels, with the most significant challenge being a limited supply of existing housing stock in the City, and a limited supply of available land for new housing. Given the housing shortage already in existence, losing additional housing stock will only make this problem worse.

The conversion of homes to time-share projects has always threatened to eliminate residential dwelling units that would otherwise be available for long-term residential use. This continues to be true, as a home that is used for time-share purposes will no longer be available for households to use as their long-term residence. This threat to the City's existing housing stock is not insignificant. The publicity regarding Pacaso's rise as a company speaks to a pent up demand for homes that could be converted to time-share use, reducing available housing stock for long-term use. Pacaso's co-founder has indicated that "[t]here are tens of millions of families that aspire to own second homes but are unable to, due to reasons of cost." ("Just Five Months Old, Zillow Co-founder's Pacaso Claims It's Already A Unicorn" Noah Kirsch (March 24, 2021)

(<https://www.forbes.com/sites/noahkirsch/2021/03/24/just-five-months-old-zillow-cofounders-pacaso-claims-its-already-a-unicorn/>.) In discussing Pacaso's model, Dan Wenhold of the venture capital firm Fifth Wall said "[t]hey were taking a previously illiquid asset, which was a timeshare, and making it affordable for the masses, also making it attainable for folks who wanted to own a second home but previously weren't able to." ("Pacaso, the Proptech Startup Founds by Zillow Alums, Raises \$125M Series C" Sophia Kunthara (September 14, 2021) (news.crunchbase.com/news/proptech-startup-pacaso-raises-125m-series-c/)) Creating a new market for these prospective buyers who otherwise would not buy second homes unquestionably increases demand for these homes by creating an incentive for time-share companies to buy up residences to meet this market demand. Creating more demand, and reducing supply, will further ratchet up housing costs, exacerbating the already significant housing shortage in the City.

ii. Impacts to Character of the City's Residential Districts

Time-share projects have the same characteristics and impacts as commercial hotels, motels, and other transient occupancy uses due to their transient nature and to the multiple short-term occupancies by those participating in time-sharing projects. The current Time Share Ordinance effectively concludes that this commercial or quasi-commercial-like use is inappropriate in residential areas. This makes sense due to the increased traffic generation and multiple occupancies disturbing the peace and quiet of residential neighborhoods. This continues to be the case, as the nature of time-share uses of residential property is different than the typical long-term residential uses for which the residential districts of the City are intended.

The intensity of this use is a significant reason that these uses can change the character of a residential neighborhood. Long-term residents, whether owners or renters, will occasionally have guests, and will occasionally have parties, but these time-share homes are used exclusively by people who are coming to the City on a short-term basis for vacation or leisure. People in that situation will typically stay out and stay up later, entertain more and gather in larger numbers while on vacation. That is the reason that these transitory lodgings are more appropriate in non-residential areas that are intended to cater to the City's visitors and tourists. Time-share uses can change the character of a residential neighborhood by having it serve not only as a residential area but also a visitor-lodging area, and subjecting the neighborhood to the impacts that come with that more intense land use.

In its marketing materials, Pacaso cites this intensity of use as a benefit, indicating that having these units filled with visitors seven days a week will benefit the local economy, since these visitors will patronize local businesses. (pacaso.com/communities) However, as noted above, the City strives through its General Plan to achieve a balance between benefits to the local economy and maintaining the character of the City. Bringing more visitors into residential neighborhoods to improve the local economy does not help to achieve that balance. Instead, it tips the scales in favor of the local tourism economy, at the expense of the residential character of these neighborhoods.

The nature of the time-share use itself can impact the residential character of the City's residential districts because it will ensure that the time-share users can only use their property for a limited amount of time each year. In the case of Pacaso owners, each stay is limited to 2 to 14 days. As discussed above, in the *Ewing v. City of Carmel-by-the-Sea* case, the California Court of Appeal found that short-term rentals would affect the essential character of a neighborhood and the stability of a community. The Court noted that "[s]hort term rent[ers] have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a Scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally they are here today and gone tomorrow—without engaging in the sort of activities that weld and strengthen a community." The same problem is present with time-share uses.

C. Proposed Amendments to the Time Share Ordinance

The proposed ordinance would make certain changes to the City's existing Time Share Ordinance, as described below.

1. Findings and Establishment of New Chapter

The proposed ordinance includes detailed recitals and findings describing the policy bases for the City's regulation of time-share uses. The findings are consistent with the findings made as part of the original Time Share Ordinance, but more detail has been added. The policy bases for the proposed ordinance are discussed in the sections above, and further discussion is not necessary here.

The proposed ordinance also relocates the restrictions on time-share uses to its own chapter at Chapter 21.32. The Time Share Ordinance is currently located in Section 21.04.090. City staff believes that with the added level of detail in the proposed ordinance, these provisions merit being located in a separate chapter, and recommends the new location of the Time Share Ordinance accordingly.

2. Definitions

The proposed ordinance expands beyond section 21.04.090 to create definitions that are used to define time-share uses. The new definitions are modeled on the definitions utilized by the state to regulate time-shares in the Vacation Ownership and Time-Share Act of 2004 (Bus. & Prof. Code §§11210–11288), but are modified somewhat to better apply in the land use regulation context.

The new ordinance includes a number of definitions that work in concert to define a time-share use. The ordinance defines a "time-share use" as the use of one or more accommodations, or any part thereof, as part of a time-share property pursuant to a time-share plan. An "accommodation" is defined in this Chapter to include a range of residential units that could potentially be used for time-share purposes. The types of

residential units that can be accommodations are listed at the beginning of Section 21.32.020 in the proposed ordinance. A "time-share plan" is defined in the ordinance, and generally includes any arrangement, plan, scheme or similar device whereby a purchase receives the right to exclusive use of the accommodation, 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. A "time-share property", in turn is defined as one or more accommodations that are subject to the same time-share plan together with any property rights that are appurtenant to the accommodations. A "time-share instrument", is the document or documents that create or govern the operation of the time-share plan. Therefore a time-share use is the use of a residential property that fits within the definition of an "accommodation" under the ordinance, pursuant to a "time-share plan," which grants each owner of the time-share property exclusive use of the property for a certain period of time each year, but not the full year.

The focus here is not on ownership, but use.

It is important to note that not all properties with multiple owners or owned by business entities (such as LLCs) would constitute a time-share use under these definitions. The definitions focus on the manner in which the accommodation is used, not how it is owned. A time-share use allows each owner exclusive use of the property for a specific period of time. This manner of use prevents the property from being used for long-term residency, and leads to the continual cycling of visitors through the property and the more intense, constant vacation-oriented use that the ordinance seeks to limit in residential districts of the City.

A property that is owned by a group of friends or extended family members, whether through a separate business entity or otherwise, will not necessarily mandate that only one owner will be able to use the property at a time. The more formal arrangement found in time-share uses increases the intensity of use, in that each individual time-share owner cycles through the property, whereas families or friends are more likely to use the property together or in groups leading to less transition in the residential neighborhood. The more formal relationship, use of professional property managers and rights to exclusive use found in time-share uses contributes to the commercial character of the property, with added traffic due to the more frequent turnover of visitors and more frequent cleaning and inspection between each user, which is common for a commercial vacation property, but not for a home owned by family or friends.

3. Enforcement

The new ordinance additionally adopts a new enforcement structure for the City time-share restrictions. The ordinance prohibits both the use of accommodations for time-share use, and the advertisement of accommodations for time-share uses. This will better allow the City to prevent time-share uses in residential neighborhoods before they occur. The proposed ordinance also outlines the process that will be used to enforce this new

Chapter, again based on the City's existing regulations. This approach has proved to be effective in enforcing the City's other regulations, and will help the City to take a more preventative approach to enforcing its time-share regulations as well. The proposed ordinance does include a different administrative-fine amount, to effectively deter violations.

FISCAL IMPACT:

The proposed ordinance will not result in any new cost to the City.

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA):

This action has been reviewed in accordance with the authority and criteria contained in the California Environmental Quality Act (CEQA), the State and local CEQA Guidelines, and the environmental regulations of the City. The City, acting as Lead Agency, has determined this action is not subject to CEQA because the adoption of this ordinance is not a "project" pursuant to Sections 15060(c)(2) and 15060(c)(3) of Title 14 of the California Code of Regulations. Specifically, this ordinance only affirms and clarifies existing regulations regarding time-share uses within the City and merely authorizes administrative and implementation activities which will not result in a direct or reasonably foreseeable indirect physical change to the environment.

Moreover, under Section 15061(b)(3) of the State CEQA Guidelines, this ordinance is exempt from the requirements of CEQA because it can be seen with certainty that the provisions contained herein would not have the potential for causing a significant effect on the environment.

ATTACHMENTS:

1. Ordinance
2. PC Resolution