

Memorandum to the Alameda Golf Commission
Prepared by Robert T. Sullwold¹
June 12, 2009

**ANALYSIS OF RON COWAN'S PURPORTED RIGHT
TO BUILD ADDITIONAL HOUSING ON HARBOR BAY ISLE**

Background

After the Alameda City Council voted to close the Mif Albright par-3 course in November 2008, rumors began to circulate that the reason for the Council's action was that the City was negotiating a deal with Ron Cowan, the principal in Harbor Bay Isle Associates ("HBIA"), to swap undeveloped land owned by HBIA in the Harbor Bay Business Park for the Mif. HBIA would then demolish the existing Harbor Bay Club, build a new Harbor Bay Club on the Mif property, and construct luxury homes on the former Harbor Bay Club site.

These rumors appeared have some basis in fact, since the agenda for a closed session meeting of the City Council on February 17 contained an item referring to a "conference with real property negotiators" involving the undeveloped Business Park parcel (which HBIA designated "Village VI") and the Mif. Apparently, this item was pulled from the agenda due to the absence of two Councilmembers. At the subsequent public session, Golf Commission chair Jane Sullwold raised the issue of the alleged deal in her remarks. Mayor Johnson attempted to dismiss the matter as a mere rumor, but Vice Mayor deHaan admitted that the issue had indeed been scheduled for discussion during the closed session.

Three months later, after a concerted lobbying effort by Alameda citizens, the City Council voted to re-open the Mif on an "interim" basis for six months. But it made no commitment regarding the future of the Mif property thereafter. And we are reliably informed that the City is continuing to negotiate with HBIA regarding further development options. Those negotiations, of course, are secret, and we do not know what proposals have been made. Nevertheless, it is likely that the proposed swap involving the Mif is one of the issues on the table.

It has been publicly reported² that HBIA claims to have leverage over the City in these negotiations because it has a legal right to build additional housing on Harbor Bay Isle and that, accordingly, the City is obligated to find a way for HBIA to exercise this right. The proposed swap, it is argued, may be the solution. The purpose of this memorandum is to assess the validity of the premise behind this argument. It is based solely on public documents filed with the City Clerk and the Alameda County Superior Court. I am not relying on, and, indeed, have no knowledge of, extrinsic evidence of negotiations between the parties.

¹ The opinions expressed herein are those of the author as an Alameda resident with a law degree. The firm of Sullwold & Hughes has not been engaged by any party to render legal advice on the issues discussed in this memorandum.

² E.g., by John Knox White in his blog entitled "Stop Drop and Roll," posted on March 9, 2009.

Issue Presented

Does HBIA have the legal right to construct additional housing units on Harbor Bay Isle?

Short Answer

HBIA has no unconditional legal right to construct additional housing units on Harbor Bay Isle. It does have the right to apply to re-zone property it owns from commercial to residential use. But neither the Planning Board nor the City is legally obligated to approve such an application. Rather, they are required to evaluate it using the criteria generally applicable to re-zoning applications, including benefit to the community and environmental impact. HBIA already has exercised its right to apply for re-zoning – but the Planning Board unanimously denied the application, and HBIA took no appeal.

Statement of Facts

A. The Harbor Bay Isle Development

In September 1973, HBIA proposed a master plan for Harbor Bay Isle that provided for a maximum of 4,950 housing units arranged in five “villages” and approximately 350 acres for commercial use. Thereafter, various issues arose, including the impact of noise associated with aircraft operations at the Oakland Airport and the amount of land that would be dedicated for public uses (e.g., schools and parks). HBIA sued, and, in 1977, HBIA and the City entered into a settlement agreement that allowed the development of the first four “villages” to proceed. They agreed on a master plan authorizing up to 3,200 housing units within the area zoned for residential use and reserving 325 acres adjacent to the Oakland Airport for commercial use. In 1980, HBIA and the Port of Oakland entered into an agreement allowing the development of the fifth “village” and the business park to proceed subject to agreed-upon conditions for noise mitigation.

Disputes again arose between HBIA and the City in 1987 and 1988 over the development plans for Villages IV and V and the business park. HBIA again sued, and again HBIA and the City entered into a settlement agreement purporting to resolve what dedications and exactions the City could require for completion of the Harbor Bay Isle development. The settlement agreement provided that HBIA and the City would negotiate a comprehensive Development Agreement that would set forth their respective rights and obligations.

B. The Development Agreement

HBIA and the City entered into the Development Agreement effective April 4, 1989. In section 1.5, the Agreement recited that HBIA “had obtained approvals” from the City to build “up to a total of 3,200 units” in Villages I through V, which were zoned for residential use, and HBIA had covenanted not to build more than 3,200 units in those five villages. Construction in Villages I through IV was complete or near complete. HBIA had obtained approval to build 839 housing units in the remaining parcel zoned for residential use, Village V, but section 1.6 of the Agreement recited that HBIA had proposed a revised development plan calling for building only 630 units in Village V and not more than 3,000 units in all five villages.

Sections 4.1, 4.2 and 4.3 of the Agreement addressed HBIA's development rights. Section 4.1 provided that HBIA had the right to develop and use its property for the uses set forth in the "Existing and Proposed Approvals" described in Exhibit D and "such other uses that may be mutually agreed upon by the parties hereto in accordance with the applicable provisions of the Government Code." Exhibit D in turn showed that Villages IV and V were approved for residential use and the business park was approved for commercial use.³ Sections 4.2 and 4.3 provided that HBIA had the right to develop its property "to the density or level of intensity" and the "maximum size and height," respectively, indicated in the Existing or Proposed Approvals.

Section 4.1 also contained two sentences that became the focus of subsequent litigation. After stating that HBIA had the right to develop and use its property for the uses set forth in the Existing and Proposed Approvals, that section then stated,

City acknowledges that, from time-to-time, the Property Owners may seek to obtain, in accordance with the applicable provisions of state and local law, minor amendments to the Existing and Proposed Approvals without the need for an amendment to this Agreement. So long as an amendment to a development approval does not increase the overall density or intensity of use, an amendment shall be deemed a "minor amendment."

C. The Re-zoning Application

After the Development Agreement was executed, construction of Village V apparently went forward as planned, and, ultimately, the residential development totaled 2,973 houses in the five villages. Then, in August 2004, HBIA applied to re-zone 12.2 acres of the business park from commercial to residential in order to build 104 new homes on that parcel (which HBIA designated Village VI). This new construction would bring the total number of homes constructed on Harbor Bay Isle to 3,077. HBIA argued that, since this total was lower than the "up to 3,200" density specified in the Development Agreement, the re-zoning application was a "minor amendment" that did not trigger the procedures required by the Development Agreement Statute – i.e., a minimum of two public hearings, a finding of consistency with all applicable general and specific plans, and adoption of an ordinance challengeable by referendum.

The City of Alameda disagreed. It took the position that the re-zoning application required either an amendment to the Development Agreement or a new development agreement, either of which would trigger the statutory procedures. More significantly, it also stated that, to obtain the City's consent to re-zoning, HBIA would have to comply with the Inclusionary Housing Ordinance (which would require that Village VI include low-income housing or a payment in lieu thereof) and to pay additional development fees.

Not surprisingly, HBIA found these conditions unacceptable. It insisted that the City expedite processing of the re-zoning application. The City then had a Draft Environmental Impact Report ("EIR") prepared. When that report adopted the City's position regarding the necessity of an amended or new development agreement, HBIA once again sued in June 2007. Its petition sought a writ of mandate ordering the City, among other things, to process the re-zoning application without requiring an amended or new development agreement and to "confirm the right of HBIA to develop up

³ Exhibit D does not mention Villages I through III, presumably because the buildout of these villages already had been completed.

to 3,200 residential units in Harbor Bay Isle upon compliance with the applicable provisions of the Development Agreement.”

D. The Settlement Agreement

The litigation did not last long. The City never filed an answer to the petition but instead entered into settlement negotiations. (It would later be claimed – and denied by the City – that the suit was a “friendly” one whose outcome was predetermined). Those negotiations produced a Settlement Agreement, which was approved by City Council in a closed session on October 9, 2007. (The publicly available documents do not record the vote).

In the Settlement Agreement, the City renounced its contentions that the re-zoning application required an amended or new development agreement and that it could apply the Inclusionary Housing Ordinance to, or impose additional fees on, the proposed Village VI. Rather, City accepted HBIA’s position that the re-zoning application was only a “minor amendment” that did not trigger the statutory procedures and that Village VI was subject only to the ordinances and fees in effect when the Development Agreement was entered into in 1989 (which did not include the Inclusionary Housing Ordinance). In exchange for these concessions, HBIA agreed to make a “voluntary contribution” of up to \$1 million to the City’s low- and moderate-income housing fund and a “one-time voluntary payment” of \$500,000 for road maintenance.

The Settlement Agreement addressed both HBIA’s rights and the City’s obligations under the Development Agreement. Section 2.1 stated that the Existing Development Agreement⁴ “grants to HBIA the vested right to develop and to complete the build-out of Harbor Bay Isle” in accordance with its terms. Section 2.2 then described what the City agreed those terms to be:

City acknowledges and confirms that, pursuant to Section 1.5 of the Original Development Agreement, HBIA has the right to develop up to 3,200 residential units within Harbor Bay Isle, subject to the terms, covenants, and conditions of the Development Agreement and that the residential units of Village Six, as proposed by HBIA pursuant to the Rezoning Application, would fall within this 3,200 residential unit development entitlement.

Section 2.5 of the Settlement Agreement required the City to “process as expeditiously as possible” the review of the re-zoning application and related authorizations, including the EIR. But it went on to state that such authorizations “shall be subject to State statutorily and City Municipal Code required notice and hearing provisions and procedures.” Later, section 2.12 made clear that HBIA “acknowledges that this Agreement does not take away the City’s police power and authority to make its decisions on the Rezoning Application. . . .” Read together, these sections require the City to *process* the re-zoning application – but they do not require the City to *approve* it. This distinction would become significant in subsequent litigation.

E. The Peet’s Coffee Suit

After HBIA filed its suit against the City, Peet’s Coffee and the Citizens League for Airport Safety (“CLASS”) moved to intervene in the case to oppose the relief sought by HBIA. It appears from their motion that Peet’s was concerned about the impact of a new residential

⁴ The Development Agreement had been amended twice since 1989 in respects not material to the analysis.

development on the existing and planned operations of its roasting plant and distribution center located in the Harbor Bay Business Park. CLASS was concerned that the new residential development would undermine its efforts to address noise impacts from the airport.

Before the motion to intervene could be heard, HBIA and the City settled the case, rendering the motion moot. (In subsequent pleadings, Peet's and CLASS allege they were sandbagged by the City Attorney). Peet's and CLASS then filed their own suit against HBIA and the City. The suit alleged that the Settlement Agreement between HBIA and the City was illegal on a number of grounds and sought a writ of mandate ordering the City to rescind it.

F. The Judge's Decision

Peet's/CLASS, HBIA, and the City all filed briefs in support of their respective positions. No trial was held, but Judge Frank Roesch of the Alameda Superior Court heard oral argument on February 7, 2008. Two months later, the Judge issued his decision rejecting the claim that the Settlement Agreement was illegal and denying the petition for mandamus.

Judge Roesch was not asked to, was not required to, and did not rule on the issue of whether HBIA had the legal right to build additional homes on Harbor Bay Isle. Rather, the issue before him was whether the Settlement Agreement was illegal because, among other reasons, the City allegedly had amended the Development Agreement without following the statutory procedures and allegedly had "contracted away" its police powers. Nevertheless, the Judge's decision on those issues required him to construe the Settlement Agreement, and his interpretation of that Agreement is instructive as to what rights and obligations it recognized or imposed.

The primary contention by Peet's/CLASS was that the Settlement Agreement constituted an amendment to the Development Agreement that required public hearings and adoption of an ordinance. Judge Roesch rejected this attack for three reasons. First, he agreed with defendants that, rather than "amending" the Development Agreement, the Settlement Agreement merely "resolved the interpretation and clarification" of the Development Agreement. Second, he agreed with defendants that a "minor" amendment to a development agreement did not trigger the statutory procedures and that the re-zoning application in fact was a "minor" amendment as defined in section 4.1 of the Development Agreement. Finally, and most significantly, the Judge found that the Settlement Agreement did not actually "modify" the Development Agreement at all, since it neither re-zoned any property itself nor committed the City to approving the re-zoning application. He said:

The Court finds that the Settlement Agreement does not re-zone the site, does not amend the General Plan, does not authorize HBIA to proceed with Village Six. It confirms HBIA's rights under the City's controlling land use regulations, subject to the City's actions in regard to the Application, including public hearings and the City's exercise of its discretion in reaching any decision on the Application.

Later in the opinion, in rejecting the contention that the City had "contracted away" its police powers, Judge Roesch emphasized that, under the Settlement Agreement, the City retained discretion to review, and, if it so chose, to *deny* the re-zoning application:

[T]he Settlement Agreement here imposes no constraint on the City's exercise of its police power in the future, and does not mandate any action. . . . The Settlement Agreement contemplates that land use applications for a General Plan amendment and re-zoning will be presented to two decision-making bodies of the City, which will

exercise their judgment as they see fit. . . . The City Council maintains its discretion to weigh and evaluate the Application and make a decision as to whether to approve or deny it.

G. The Planning Board Decision

In the meantime, HBIA went forward with its application to re-zone the 12.2 acre parcel in the business park from commercial to residential, and the City completed the final EIR. The application was placed on the Planning Board agenda for May 12, 2008.

The Planning Board staff recommended that the re-zoning application be denied. Staff cited four reasons: (1) the noise environment on the site is not suitable for residential development; (2) the City should maintain an “adequate buffer” between Alameda neighborhoods and the Oakland Airport; (3) the City should preserve the business park for commercial, job-creating uses, and (4) the proposal did not provide significant housing, transportation or fiscal benefits.

At its May 12, 2008 meeting, the Planning Board held a public hearing on the application. HBIA presented its case. Home and business owners spoke in opposition. The Board then voted unanimously to deny the application.

HBIA had the right to appeal the Planning Board’s decision to the City Council. As far as I have been able to determine, no appeal was taken.

Legal Analysis⁵

HBIA’s legal rights, and the City’s legal obligations, are determined by the Development Agreement entered into between HBIA and the City in 1989 and the Settlement Agreement entered into between them in 2007. In my view, neither agreement grants HBIA an unconditional legal right to construct additional housing units on Harbor Bay Isle.

A. The Development Agreement

The most straightforward reading of the Development Agreement is that it confers on HBIA the right to build up to 3,200 housing units on the property zoned for residential uses – Villages I through V – and to develop the property zoned for commercial uses as a business park. Section 1.5 of the Development Agreement recites that HBIA “has obtained approvals” to build up to 3,200 housing units in Villages I through V. Section 4.1 then ties HBIA’s development rights specifically to the “Existing and Proposed Approvals, described on Exhibit D.” Taken together, these sections would seem to mean that HBIA has the “right” to build the housing units already approved (or for which approvals were pending): i.e., up to 3,200 units in Villages I through V. (An even more restrictive reading is also possible by virtue of section 1.6: HBIA voluntarily agreed to *reduce* the number of housing units it had the right to build to not more than 3,000 units).

The Development Agreement contains no provision entitling HBIA to build any houses anywhere on Harbor Bay Isle other than Villages I through V. Nor does it say that, if HBIA chooses not to build the maximum number of approved housing units – whether 3,200 or 3,000 – in Villages I

⁵ The following analysis is based on general principles of contract interpretation under California law. I have no expertise in either municipal government or land use law.

through V, it can “bank” the difference and build them at the business park. And it certainly does not impose any obligation upon the City to approve any subsequent application by HBIA to build additional housing units beyond those already approved (or for which approval was pending). Presumably, if the parties had intended to give HBIA the right to build additional housing elsewhere on Harbor Bay Isle, or to obligate the City to approve its application do so, they would have included language in the Development Agreement to that effect. But they did not. To me, the Development Agreement reflects the parties’ agreement that, after years of dispute and litigation, residential development on Harbor Bay Isle would comprise 3,200 – or 3,000 – units constructed within the confines of the five villages.

I have no way of knowing why, five years after signing the Development Agreement, HBIA decided it wanted to build another 104 homes. But the argument that the Development Agreement gave it the right to do so (or obligated the City to approve its request to do so) is unpersuasive. This argument is based on the last two sentences of section 4.1, in which the City acknowledges that HBIA “may seek to obtain, in accordance with the applicable provisions of state and local law, minor amendments to the Existing and Proposed Approvals” without amending the Development Agreement and that, as long as any proposed change to an existing or proposed approval “does not increase the overall density or intensity of use,” it shall be deemed “minor.”

At the time the Development Agreement was signed, HBIA’s revised development plan for the last of the residential villages, Village V, was still pending. It would seem entirely reasonable for HBIA to want to be able to change that proposal in some “minor” way without having to go through the process of formally amending the Development Agreement. The quoted language preserves that ability.

The construction placed by HBIA on these two sentences in subsequent litigation is, however, far broader. According to HBIA, the Development Agreement gave HBIA the “right” to build 3,200 housing units on Harbor Bay Isle. True, the Development Agreement identified Villages I through V as the site for residential development. But, according to HBIA, the last two sentences in section 4.1 preserved HBIA’s “right” to build additional houses elsewhere within the project. All HBIA had to do was to apply to re-zone property from commercial to residential (or to increase the density on property already zoned for residential use). As long as the proposal would not result in breaching the 3,200-unit cap, HBIA had the “right” to get property re-zoned to permit additional residential development.

In my view, this argument, while creative, is not a reasonable interpretation of the Development Agreement. The Development Agreement did not give HBIA the “right” to build 3,200 housing units anywhere on Harbor Bay Isle. To the contrary, it was quite specific about what uses were permitted on which parcels: up to 3,200 housing units, arguably reduced by agreement to 3,000 units, in the five “villages” approved for residential uses. But even if the Development Agreement can be construed to contemplate the possibility of future housing development on Harbor Bay Isle, it does not give HBIA an unconditional “right” to build additional homes. Rather, like any property owner, HBIA would be entitled to apply to re-zone property from commercial to residential – i.e., in the language of section 4.1, HBIA “may seek to obtain” such a change. But, if HBIA made such an application, it would, like every other property owner, be subject to the usual review and approval process – i.e., in the language of section.4.1, to “applicable state and local law.”

The last two sentences of section 4.1 do not create an exception for HBIA to these requirements. At most, they purport to reflect the parties’ agreement that, if HBIA proposed a change

in use that did not increase “overall” density, it would not be required to go through the *additional* procedures required by state law for amending a development agreement. An ordinary property owner who desires to re-zone his property does not have to jump through the hoops mandated by the Development Agreement Statute. Neither, the parties agreed, should HBIA have to do so, as long as its proposed change did not expand the previously established scope of residential development. Under this interpretation, the last two sentences of section 4.1 represent a reasonable concession by the City to HBIA. But they by no means create an unconditional “right” for HBIA to construct, or impose a binding “obligation” on the City to approve construction of, additional housing units on Harbor Bay Isle.

B. The Settlement Agreement

HBIA’s petition for a writ of mandate sought a court order requiring the City to “confirm the right of HBIA to develop up to 3,200 residential units in Harbor Bay Isle upon compliance with the applicable provisions of the Development Agreement.” In section 2.1 of the Settlement Agreement, HBIA appears to have gotten the City to give it – without a court order – what it asked for. In that section, the City “acknowledges and confirms” that, “pursuant to Section 1.5 of the Original Development Agreement,” HBIA “has the right to develop up to 3,200 residential units within Harbor Bay Isle, subject to the terms, covenants, and conditions of the Development Agreement. . . .” And, lest anyone miss the point, it continues, “the residential units of Village Six, as proposed by HBIA pursuant to the Rezoning Application, would fall within this 3,200 residential unit development entitlement.” Thus, the City appears to concede that HBIA does indeed have the legal right to build additional housing units in the business park. And, by including the reference to section 1.5 of the Development Agreement, the parties seek to characterize this concession as simply acknowledging a right that the Development Agreement conferred in the first place.

Section 2.1, however, must be read in the context of the rest of the Settlement Agreement. Although section 2.5 requires the City to process the re-zoning application as expeditiously as possible, it recognizes that the process “shall be subject to State statutorily and City Municipal Code required notice and hearing procedures and provisions.” Nowhere does the Settlement Agreement dictate the outcome of this process by obligating the City to *approve* the re-zoning application. Indeed, section 2.12 expressly recognizes the possibility that the City may *not* approve the application. In the same section, HBIA acknowledges that the Agreement “does not take away City’s police power and authority to make its decisions” on the re-zoning application. To the extent that section 2.1 of the Settlement Agreement can be read as giving HBIA the legal right to build additional housing on Harbor Bay Isle, section 2.12 makes clear that such a “right” is not unconditional. Rather, it is subject to the exercise by the City of its discretion to review the re-zoning application -- which includes the discretion to deny it. In the end, the “right” conferred upon HBIA by the Settlement Agreement thus amounts to little more than the right to apply to have the property re-zoned. *The right to build additional housing arises only if and when, having considered the criteria generally applicable to similar requests, the City approves the re-zoning application.*

Judge Roesch’s opinion supports this conclusion. That opinion emphasizes what the Settlement Agreement does not do: It “does not re-zone the site, does not amend the General Plan, does not authorize HBIA to proceed with Village Six.” Nor does it “mandate any action” by the City to approve the re-zoning application. Rather, HBIA’s “rights” are “subject to the City’s actions in regard to the Application, including public hearings and the City’s exercise of its discretion in reaching any decision on the Application.” Indeed, the City Council “maintains its discretion to weigh and evaluate the Application and make a decision as to whether to approve or deny it.”

By interpreting the Settlement Agreement in this way, Judge Roesch saved it from the two main attacks launched by Peet's and Class: that the Settlement Agreement "amended" the Development Agreement without following the required statutory procedures and that it unlawfully "contracted away" the City's police powers. Had the judge interpreted the Settlement Agreement to give HBIA the unconditional right to build additional housing on the business park, it would have been vulnerable to both of these attacks. But by emphasizing that any rights conferred on HBIA by the Settlement Agreement were conditioned upon successful completion of the review and approval process, Judge Roesch was able to conclude that the City acted lawfully by entering into that Agreement. The plain implication of his reasoning is that, if the review process resulted in *denial* of the re-zoning application, HBIA would have no basis for complaining that its "rights" had been violated. And that, of course, is just what happened.

Conclusion

The fate of the Mif Albright course may hang upon whether the City Council decides to enter into a deal with Ron Cowan and HBIA to swap the Mif for other property owned by HBIA. I express no opinion on whether such a deal would be beneficial economically to the City. Nor do I express an opinion on whether such a swap would comply with City ordinances regarding sales or exchanges of property designated for recreational issues. I do, however, believe that the sword apparently being held over the City's head – i.e., that Cowan and HBIA have the legal right to build additional housing units on Harbor Bay Isle – is not supported as a matter of law. If I am correct, the Golf Commission should not be persuaded by any argument that a swap of the Mif is necessary to satisfy the City's legal obligations to Cowan/HBIA.

RTS

cc: Interim City Manager Ann Marie Gallant