

At a special meeting on April 13, City Council voted to "explore" developer Ron Cowan's proposal "whose existence had been kept secret, and even denied, for two years" to swap commercial real estate he owns in Harbor Bay Isle for the Mif Albright par-three course located on parkland owned by the City.

The advantages and disadvantages of Cowan's proposal for the City, youth sports in general, and golf in particular, will be ripe for debate once Cowan reveals exactly what he proposes as a substitute for the Mif.

But there is one argument that should be rejected out of hand: that the City somehow "owes" Cowan City-owned land on which to complete the residential portion of the Harbor Bay Isle development.

This is an argument that has been floating around City Hall for several years. It recently reemerged when Cowan publicly disclosed his plan. For example, in his April 8, 2011 letter to the City, the COO of Harbor Bay Isle Associates, C. Timothy Hoppen, contended that a court had "acknowledged and confirmed" the City's "obligation" to allow Cowan to build an additional 227 homes "in the area benefited by the Development Agreement."

In fact, a review of the relevant legal documents shows that the City has no obligation whatsoever to enter into a land swap that would allow Cowan to build additional homes on the Mif Albright site.

Here are the facts:

Cowan's rights to develop the land he owns on Bay Farm Island are governed by a Development Agreement between him and the City signed in April 1989. That Agreement simply gave Cowan the right to build up to 3,200 homes on the property he owned that was zoned residential and designated as "Villages I through V."

For whatever reason, Cowan built only 2,973 homes on this property. In 2004, he applied to re-zone commercial land he owned in the Harbor Bay Business Park to allow him to build an additional 104 homes there. The City sought to impose conditions he found unacceptable, so he sued.

The suit settled. Under the settlement agreement, the City agreed to abandon the conditions it had demanded and to "process as expeditiously as possible" the re-zoning application. In exchange, Cowan agreed to make a "voluntary" contribution to the City's low- and-moderate income housing fund and a "voluntary" payment for road maintenance.

Peet's Coffee and a citizen's group then sued challenging the settlement agreement. Judge Frank Roesch of the Alameda Superior Court rejected the challenge. But the judge did not rule that Cowan had the legal right to build an additional 104 homes at the Business Park — only the legal right to apply to re-zone the property for that purpose. And the City had no legal obligation to approve the application, rather it retained discretion to review — and to deny — it.

Which is what happened: Cowan applied for re-zoning — and the Planning Board unanimously denied his request.

A fair reading of this history shows that the Cowan does not have a legal right to force the City to allow him to build additional homes on commercial property he already owns. He has to play by the usual rules. And there is absolutely no basis, in the Development Agreement, the settlement agreement, or Judge Roesch's opinion, for the proposition that the City has an obligation to convey City-owned park land to Cowan so that he can build on such land the homes he was denied the right to build at the Business Park.

Simply put, the argument that the City "owes" Cowan the Mif is a myth.

City Council directed staff to scrutinize Cowan's proposal carefully. As part of that scrutiny, the Acting City Attorney should furnish her legal opinion about whether the City has the obligation Cowan claims it does. And the Council can then evaluate whether his claim has any legal merit or is just another bargaining gambit.

By Robert T. Sullwold
(published in the Alameda Journal on April 28, 2011)