



## MEMORANDUM

TO: Planning Commission

FROM: Jana Fox, Current Planning Manager

DATE: August 20, 2021

SUBJECT: Scholls Heights PUD Northeast Phase Modifications (CU2021-0006 / LD2021-0004)

---

This memo is to provide the Planning Commission with the staff analysis of the testimony received during the open public comment and rebuttal periods. The public comment and applicant's final written argument were provided to the Commission under a separate memorandum dated August 18, 2021.

### Procedure

At the August 4, 2021, Planning Commission hearing the Commission took public testimony and received a request from Mr. Zupancic to hold the record open for 10 days. Pursuant to state law (ORS 197.763) the Commission is required to keep the written record open for a minimum of 7 days if requested at the first evidentiary hearing. The August 4, 2021, meeting was the first evidentiary hearing for the Scholls Heights PUD Northeast Phase Modifications applications. The applicant and staff proposed to the Commission a continuance of the open record period as follows: open written public testimony period ending at 5pm on August 11, 2021, an applicant only written argument period that ended on August 18, 2021, with seven (7) additional days for staff to provide final comments and analysis to the Commission for their deliberations on August 25, 2021. The August 25, 2021, meeting will not involve additional public testimony as the record has been closed. Staff will give a brief presentation and be available to answer any questions from the commission prior to beginning deliberations.

### Staff Analysis

The City received four pieces of public testimony during the seven day open record period ending on August 11th, including one piece of testimony from the applicant's attorney Michael Robinson. Staff received one piece of rebuttal testimony from Mr. Robinson on August 16th during the applicant rebuttal period. The assertions made in the public testimony are summarized and consolidated below and responded to by staff.

The public testimony raised 6 main assertions, they are summarized as follows:

- 1) Tile Flat improvements/issues are not outside the scope of this application.

- 2) The Commission must address Tile Flat Road Safety as part of the Major Adjustment application.
- 3) Applicant's assertions that the Andersons and Mr. Evans acquiesced to the current Tile Flat condition being left in place are inaccurate.
- 4) Applicant did not provide community support of their stance while opponents did.
- 5) The language in condition of approval 6 requires dedication of the outparcels.
- 6) Opponents deserve clarification of the 2017 Scholls Heights PUD Conditions and for the Commission to address inequities created by the conditions.

In response to Assertion 1) made by Mr. Zupancic that the Tile Flat improvements are within the scope of Planning Commission consideration for the Scholls Heights PUD Northeast Phase Modifications application staff provides the following analysis. There is a lack of a connection between Mr. Zupancic's concerns regarding improvements to SW Tile Flat Road and the applicant's proposed modifications to the Scholls Heights PUD. The applicant's proposal is limited in scope to splitting the northeast phase of the PUD into two phases. The minor changes to lots and grading within the northeast phase do not change the total number of lots or types of dwelling units proposed, neither does the request to reduce rear yard setbacks for decks greater than 30 inches for specific lots within the greater PUD. In addition, none of the proposed modifications to the previously approved PUD involve changes to proposed transportation infrastructure, transportation conditions of approval, or change the anticipated traffic demand, which would allow consideration of previously conditioned transportation improvements.

The Scholls Heights PUD is a final land use decision which was approved in 2017 and was not appealed by any party. Mr. Zupancic (Exhibit 2.11) notes that the applicant provided a memo from Kittleson and Associates with their application which did discuss modifications to conditions of approval. However, the applicant withdrew that request prior to being deemed complete. Mr. Robinson notes in his letter (Exhibit 3.10) that the notice of application, staff report, and applicant's materials all do not address any modification to the conditions of approval related to Tile Flat Road as none are proposed. Staff concurs that no modifications to transportation related conditions of approval are sought by the applicant with these applications.

The Modification of a Decision process, as outlined in Section 50.95.2 of the Beaverton Development Code (BDC), limits the scope of review of a modification application to those items proposed to be modified. The applicant has not requested any modifications to the PUD that impact transportation improvements, including those transportation improvements to SW Tile Flat Road. Given the lack of connection between the applicant's requested modifications to the Scholls Heights PUD and the improvements to SW Tile Flat Road, staff finds that the issues raised relating to SW Tile Flat Road are not relevant to the proposed modifications.

In response to 2) above Mr. Zupancic refers to a Major Adjustment application. Staff notes that no Major Adjustment application has been filed. However, staff assumes Mr. Zupancic is referring to the modification of decision applications which are under consideration at this time. In the arguments under this assertion Mr. Zupancic again points to the Kittleson memo provided by the applicant as to why transportation impacts should be considered. This memo is discussed under assertion 1 above. As staff noted in response to assertion 1, there is no request to modify conditions of approval 6, 7, and 8 of LD2017-0009 nor any proposed modifications which impact the transportation system and would require review of these conditions. Staff finds that issues related to SW Tile Flat Road are outside the scope of the modification of a decision request and are therefore not applicable to the request before the Commission.

In response to 3) above addressing the accuracy of testimony given by the applicant, Mr. Grimberg, regarding conversations he had with Mr. Anderson and Mr. Evans and the content of those conversations, staff notes that conversations between private parties are not applicable to the requested modification of a decision. The Planning Commission may only make a decision based upon the applicable approval criterion and the content of any past conversations between the applicant and the outparcel property owners are irrelevant to this decision making process and should not be considered.

In response to 4) above that the applicant has provided no evidence of public support of their position while the opposition has provided letters in support of their opposition staff finds the following. The Planning Commission decision must be based on the relevant applicable approval criteria for the application before them. The testimony provided by Mr. Zupancic and others opposed to the project does not address the relevant approval criteria to the modification of decision applications before the Planning Commission or provide evidence of how any criteria are not met. The volume of public testimony provided on a topic is not an approval criterion which can be considered by the Planning Commission.

In 5) above Mr. Zupancic asserts on page 3 of Exhibit 2.11 that condition of approval (COA) 6 of LD2017-0009 requires the dedication of the Anderson and Evans properties, that the Evans and Andersons relied upon this language, and that the City should have provided additional notice to the Andersons and Mr. Evans.

In his letter Mr. Zupancic asserts that COA 6 requires dedication and construction of right of way improvements to SW Tile Flat Road in front of his clients' properties based on his reading of the condition of approval. As Mr. Robinson points out in Exhibit 3.09, the staff report for the 2017 Scholls Heights PUD makes clear that the outparcels are not a part of the proposed development and are not subject to the conditions of that approval. Page 6 of Exhibit 3.09 lists many places that the staff report makes clear the outparcels are not included in the proposal and excludes them from proposed improvements. The staff report is the supporting document for the conditions of approval, and it provides the associated findings and clarification for the conditions of approval. A reading of the staff report demonstrates that the outparcels are not a

part of the development proposal and are not subject to improvements required of the development. If the outparcels would have been required to dedicate or improve right of way as part of the Scholls Heights PUD, property owner consent would have been required from Mr. Evans and the Andersons. If this had been the case Mr. Evans and the Andersons would have been listed as property owners in the staff report, which they were not. The applicant's plan sets from the 2017 decision are consistent with the staff report and show the tapering of SW Tile Flat Road in front of the outparcels. It is clear from the language of the staff report (provided as an attachment to Exhibit 3.09) that the outparcels are not part of the site frontage and not required to dedicate or improve the right of way in front of said properties.

To address the question of sufficient notice, Mr. Robinson has entered into the record as an attachment to Exhibit 3.09 the affidavit of mailing for the public notice of the 2017 Scholls Heights PUD; the associated mailing list shows clearly that Mr. Evans and the Andersons were provided mailed notice. Mr. Anderson provided written public testimony into the record, which was provided to the Planning Commission. Mr. Anderson's testimony specifically states that he reviewed the plans provided by the applicant (this testimony is attached to Exhibit 3.09). As Mr. Anderson provided public testimony, and was therefore a party of record to the decision, he was also provided with the notice of decision and information on how to appeal the Planning Commission's decision. As has been previously noted, the 2017 Scholls Heights PUD decision is a final land use decision; it was not appealed. If there were questions about the language or intent of conditions of approval in that decision the time to raise those questions and objections was when that decision was made. Staff finds that Mr. Evans and the Andersons were given the appropriate legal notice of the 2017 Scholls Heights PUD application.

In regards to 6) above wherein Mr. Zupancic asserts that conditions 6, 7, and 8 of LD2017-0009 create dangerous conditions and inequities for his clients, staff provides the following response. First, this application does not implicate or modify any of these conditions; therefore, these 2017 conditions are not relevant to the current decision. Second, no substantial evidence to support the claims that the conditions of approval create a dangerous situation has been entered into the record to show that the 2017 approved road design would create a safety hazard. Examples of such documentation would be a memo from a licensed transportation engineer who is qualified to provide a professional opinion on such matters. The information provided is anecdotal in nature and based on the current road conditions on SW Tile Flat Road.

The second point of Mr. Zupancic's argument is that in not requiring the developer to make improvements to his client's property the City created an inequitable result for the Andersons and Mr. Evans because it disincentivizes the developer of the adjacent property from purchasing their properties. As noted in the staff report there was no taking or requirement placed upon Mr. Zupancic's clients, as a result of the 2017 Scholls Heights PUD decision. Should Mr. Zupancic's clients choose to develop their property, frontage improvements will be assessed at that time in proportion to the proposed development.

Mr. Zupancic further suggests that the City and/or Washington County should enter into negotiations to acquire his clients' properties. Staff finds that private property transactions are outside the scope of Planning Commission consideration. The Commission has no authority to enter into negotiations, or direct staff to enter into negotiations, to purchase property. Similarly, the Planning Commission cannot compel developers to purchase private property or compel private property owners to sell property.

In summary, staff finds that the issues raised in the public testimony provided during the open record period do not address the approval criteria for the modification of decision applications before the Planning Commission. The 2017 Scholls Heights PUD decision is a final land use decision which can only be modified based on the scope of what is requested by the applicant. Transportation impacts and/or conditions are not proposed to be modified by the current proposal and are therefore outside the scope of consideration for the Planning Commission in regard to the Scholls Heights PUD Northeast Phase Modification application. Staff's recommendation in the staff report dated July 29, 2021, remains the same, approve the applications subject to the conditions of approval in Exhibit D of that report.