

**Received**  
**Planning Division**  
 07/21/2021

**LAW OFFICES OF JAMES D. ZUPANCIC, PC**

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July 21, 2021

Beaverton Planning Commission  
 Chair Terry Lawler, Commissioner  
 Vice-Chair Scott Winter, Commissioner  
 Kim Overhage, Commissioner  
 Jennifer Nye, Commissioner  
 Victor Saldanha, Commissioner  
 Kevin Teater, Commissioner  
 Chelsea McCann, Commissioner

DELIVERED BY EMAIL

Re: August 4, 2021, Hearing; 6:30 PM

Applicant: West Hills Development Company (“**West Hills**”)

Pending: CU2021- 0006/LD2021-0004 (“**Major Adjustment**”)

Previous: CU2019- 0012/LD2019- 0032

CU 2017- 0010/LD 2017-0009; LD 2017-0017

Dear Commissioners:

This law firm represents the following City of Beaverton homeowners:

- A. Ronald Anderson and Jennifer Anderson who reside at 19237 SW Tile Flat Road, Tax Lot 400 (approx. 1.5 acres) and
- B. Doug Evans who resides at 19161 SW Tile Flat Road, Tax Lot 500 (approx. 1.0 acres).

West Hills (the “**Applicant**”) and others reportedly own a 132.15-acre vacant parcel located in Beaverton (the “**Large Parcel**”) near the intersection of SW Scholls Ferry and SW Tile Flat Road. With the assistance of Taylor Morrison, the Applicant is developing the Large Parcel commonly known as Scholls Heights pursuant to the land use permits referenced above (the “**Land Use Permits**”).

Our clients’ combined properties, totaling 2.5 acres (collectively the “**Subject Properties**”) are adjacent to the Large Parcel, as shown on Exhibit A (attached to this letter). When viewed on Exhibit A, those Subject Properties appear as a “birds’ tooth” notch in the Large Parcel.

The first purpose of this letter is to provide new information to the Commissioners relating to the pending application before this Commission and to demonstrate the adverse impact that the Land Use Permits, as currently being (mis)interpreted by the Applicant, will have on the community and on the Subject Properties. The second purpose of this letter is to demonstrate how the application fails to meet all the criteria as set forth in the Beaverton Development Code (“**BDC**”) 40.10.15.2.c relating to Major Adjustments of land use decisions. Specifically, the Applicant is not in compliance with the Condition

of Approval that requires Applicant to dedicate land and widen SW Tile Flat Road from the northern boundary of the Scholls Heights property to the SW Scholls Ferry Road intersection: this is because Applicant has misinterpreted this Condition to mandate only partial dedication and construction of only a portion of the required road-widening improvements. As shown below, this misinterpretation has broad and deep implications that damage our clients and place the public in danger.

Based on the foregoing, the Commission should (and has authority to) clarify and/or modify the previously granted Land Use Permits and/or impose conditions on approval of the pending application (BDC 40.10.15.2.E). This letter outlines some of the major issues for the Commission to consider when making such clarifications or modifications.

**Recommended Action: Approve a clarification to the Land Use Permits, consistent with Orders 2571 and 2572, requiring the Applicant to improve and dedicate land on SW Tile Flat Road from the northern boundary of the Scholls Heights property to the SW Scholls Ferry Road intersection.**

**1. The Applicant Must Comply with the Land Use Permit Condition Requiring Applicant to Widen (and Dedicate) the Entire Designated Section of SW Tile Flat Road.**

In connection with West Hills' development, Kittleson & Associates issued a Traffic Impact Analysis dated May 22, 2017 (the "TIA") In the TIA at Page 2, Kittleson recommended as follows:

**"West Hills should widen SW Tile Flat Road to provide a 3-lane cross-section from the northern boundary of the Scholls Heights property to the SW Scholls Ferry Road intersection."** (emphasis added)

At Page 18 of the TIA, West Hills apparently conceded to this Kittleson recommendation. The relevant section of the TIA states:

"In addition to the signal at SW Strobel Road, West Hills proposes to make the following additional improvements as part of the Scholls Heights development:

**Widening of SW Tile Flat Road to provide a 3-lane cross-section from the northern boundary of the Scholls Heights property to the SW Scholls Ferry Road intersection."** (emphasis added)

As this Commission is aware, on November 15, 2017, it voted unanimously to adopt the Staff Recommended Conditions of Approval as contained in Exhibit J to that Staff Report dated November 8, 2017 (the "**Staff Report**"). Those Conditions of Approval included the following precondition before the preliminary plat would be approved and before the final plat would be recorded:

“Submit plans that show 30 feet of right-of-way dedication and construction of half-street improvements along SW Tile Flat Road to accommodate the following modified 3-Lane Arterial Street cross section; existing rural drainage and shoulder on the west side, a 12 foot south bound travel lane, a 14-foot left-turn lane, 2 12-foot west bound travel lanes, a 7-foot buffered bike lane, a 7.5 foot planter strip measured from the face of the curb, and a 14-foot multi-use path (Transportation/KR & Wash Co/NV).” (the “**Condition**”) See Page 3, No. 6 and Page 14, No 5 Staff Report.

The language of LD2017-009 (Order 2571) and LD 2017-0017 (Order 2572) essentially restate the above Condition. Contrary to the clear language of this Condition, the Applicant is planning to dedicate land and widen only 78.5% of the applicable section of Tile Flat Road, leaving the responsibility to dedicate and widen the remaining 21.5% of Tile Flat Road to our clients. This plan is noncompliant with the Condition, and the Applicant is attempting to rewrite the Condition to EXCEPT the property on Tile Flat Road fronting the Subject Properties.

The language of the Condition cited above is unequivocal and does not include an exception for the improvements or dedications along frontage abutting the Subject Properties. In fact, in the Applicant’s Preliminary Plat Submittal, in Sheets P2.5, P3.5, P4.5 and P5.5, it shows Tile Flat Road dedicated and widened in front of the Subject Properties. Only on Sheet P6.5 is there a vague implication that the road will not be widened in front of the Subject Properties. But the Commission’s intent is clear: there is no express exception in the Condition that the Applicant be excused from improving Tile Flat Road adjacent to the Subject Properties. Instead, the Applicant must make the dedication and improvements “**from the northern boundary of the Scholls Heights property to the SW Scholls Ferry Road intersection.**”

If, in fact, the Applicant is permitted to “except” the portion of Tile Flat Road abutting the Subject Properties from the widening condition, then the Applicant will have failed to have meet the Condition as written. More importantly, the Applicant and this Commission will have thereby shifted the burden of completing the widening and dedication squarely upon the owners of the Subject Properties, creating a widely disproportionate effect on those owners. For example, a “shadow plat” of the Subject Properties was created coincidental with the approved development plat: that shadow plat showed 892 single family housing units on the Large Parcel and 23 single family housing units on the Subject Properties (for a total of 915 housing units). Yet, the total half-street improvements and related land dedication charged to the Subject Properties would be nearly **TEN TIMES** the impact as measured in land area or housing units: this is because the total linear footage of SW Tile Flat Road to be improved under the Condition is about 2,735.1 feet, while the Subject Properties’ frontage on SW Tile Flat Road is about 588.5 feet. In other words, the Subject Properties (by itself) would account for only 1.8% (2.5/134.65) of the land area and 2.5% (23/915) of the increased traffic load but would end up being saddled with 21.5% of the cost of the related Tile Flat Road dedications and improvements. This disproportionality will equate to substantial costs to our clients that *would not have been necessary but for the Applicant’s development.*

The solution to the problem above is for this Commission to clarify and to enforce its findings that the Applicant must comply with **all of** the Conditions associated with the Land Use Permits, including without limitation the widening of the entire length of SW Tile Flat Road “from the northern boundary of the Scholls Heights property to the SW Scholls Ferry Road intersection.” If the Applicant cannot meet this Condition due to third party ownership of the Subject Properties, then the City and/or the Applicant must take steps to rectify the situation. For example, the Applicant or Taylor Morrison could purchase the Subject Properties from my clients and thereafter dedicate and widen the relevant section of road; if that effort fails, my clients are willing to enter into good faith negotiations with the City for the Subject Properties, Under either scenario, the City and this Commission must enforce the plain and express language of the approved Land Use Permits, and for that matter, follow the Kittleson & Associates’ recommendation under the TIA.

**2. The Potential Partial Widening of Tile Flat Road Creates Unreasonably Dangerous Road Conditions.**

As supported by the attached Testimony from Ron Anderson, attached as Exhibit “B”, the potential partial widening of Tile Flat Road would create numerous dangerous conditions. The narrowing of the road in front of the Subject Properties is problematic because:

1. Emergency vehicles will find it difficult to pass through the narrow neck in the roadway when cars are pulled off to the side of the road to allow them to pass;
2. Nighttime motorists will find it difficult to see the abrupt narrowing in the road, causing accidents and possible fatalities;
3. Cyclists will be placed at greater risk for injuries because motorists will not properly adjust for the narrowing in the road and may collide with cyclists on the edge of the road;
4. Less experienced drivers, possibly some from Mountainside High School, will be unable to navigate the unpredictable abrupt change in the road width; and
5. The volume of traffic along Tile Flat will increase exponentially and it is likely that drug or alcohol impaired drivers will not notice the narrowing of the road, causing their cars to careen into the Subject Properties causing substantial property damage and personal injury.

**3. If the Commission Accepts the Applicant’s Misinterpretation of the Condition, by Non-Action, the Land Use Permits Do Not Satisfy the Oregon Transportation Planning Rule or Comply with the Beaverton Active Transportation Plan (“BATP”).**

OAR 660-012-0045(2) requires adoption of subdivision regulations, including access control measures, to protect transportation facilities and corridors. Furthermore, OAR 660-012-0045(3) to (6) mandate that subdivision regulations include pedestrian-, bicycle-, and transit-friendly requirements. These state mandates require pedestrian ways or bikeways connecting subdivisions to each other or to commercial areas.

BATP at P. 43 provides: “SW Tile Flat Road adjacent to the Community Plan area should retain a rural design, particularly on the west side adjacent to land designated as Rural Reserve. All expansions requiring additional right-of-way should be to the east (urban) side. Safe bicycle and pedestrian movements shall be accommodated by a shared-use pathway adjacent to the road on the east side, with trees and other landscaping to provide a visual buffer to adjacent rural lands.

Under the Applicant’s misinterpretation of the Condition, a segment of Tile Flat Road will clearly not comply with the Transportation Planning Rule and the BATP. A dangerous condition will be created by the narrowing of the road and the total right of way expansion on the east side of the road will not be complete. This result is inconsistent with the purpose of the Transportation Planning Rule and the BATP.

**4. The Exaction of Dedicated Land and Required Road Improvements Imposed on the Subject Properties Constitute an Inverse Condemnation Taking Because of a Lack of Nexus.**

The condemnation of property occurs either through a direct taking or through the adverse impact of government actions that result in a diminution in the value of land caused by the government action. The latter is called inverse condemnation and that doctrine applies in this case.

In *Nollan v. California Coastal Comm’n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987), the United States Supreme Court developed the “essential nexus” test in connection with inverse condemnation. The Nollans owned beachfront property in Ventura County, California located between two public beach areas. As part of their option to purchase the property, the Nollans were required to demolish the existing bungalow on the lot and replace it with another dwelling, which necessitated the Nollans’ application to the California Coastal Commission for a coastal development permit. Over the Nollans’ objection, and with the aim of developing public access between the two public beach areas north and south of the Nollans’ property, the Commission granted the permit with the condition that the Nollans record a deed restriction granting an easement to the public allowing the public to pass across a portion of their property between the high tide line and the seawall. *Nollan*, 483 US at 827–28. The Supreme Court stated that “[h]ad California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.” *Nollan*, 483 US at 831. The Court then held that there must be an essential nexus between the condition imposed and the “end advanced as the justification for the prohibition.” *Nollan*, 483 US at 837. The Commission proffered the interest of visual access to the beach as the purpose for imposing the condition; however, the Court held that “visual access” to the beach would not be served by requiring a beachfront easement allowing pedestrian

access west of the Nollan dwelling; therefore, the condition that the Nollans grant an easement was unconstitutional. *Nollan*, 483 US at 838–39.

Unless the Recommended Action is adopted, the consequence of the Land Use Permits results in an extraordinary exaction of land and required road improvements imposed on the Subject Properties, a burden that would not arise but for the Applicant’s development. This burden is not directly related to the future development of the Subject Properties, but only stems from the Applicant’s misinterpretation of the Condition. Because of this lack of “nexus”, a taking of the Subject Properties occurs by inverse condemnation. The solution is to (1) adopt the above Recommended Action or (2) expressly remove this exaction and improvement requirement burdening the Subject Properties. The problem the latter option is that it creates a dangerous condition as described above.

**5. Unless the Recommended Action is Adopted, the Exaction of Dedicated Land and Required Road Improvements Imposed on the Subject Properties Constitutes an Inverse Condemnation Taking Because of the Absence of Rough Proportionality**

Even if there exists an essential nexus between the condition imposed and the end advanced as the justification for the prohibition as required by Nolan, there must be rough proportionality between the required dedication and the impact of the proposed development.

In *Dolan*, 512 US 374, the United States Supreme Court applied the *Nollan* essential-nexus test of whether there is an essential nexus between the legitimate state interest and the permit condition, and developed the “rough proportionality” test. As a condition of a permit to redevelop her property, the City of Tigard required that Dolan dedicate some of her property to further the city’s land use plan including flood control purposes and traffic improvements. The Court held that if a nexus between the legitimate state interest and the permit condition existed, then the exactions (e.g., dedication of property) imposed on the applicant must be roughly proportionate to the applicant’s proposed development. This does not mean that a mathematical calculation is required but that “an individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” *Dolan*, 512 US at 391.

The resulting damage emanating from the misinterpretation of the Land Use Permits is so severe on the Subject Properties that the exaction clearly does not pass the “Dolan Test.” For example, the total acreage (assuming inclusion of the Subject Properties) included on the shadow plat is 134.65 acres. The Subject Properties totaling 2.5 acres is 1.85% of this total acreage. Likewise, the total unit count of the development (including the shadow plat lots) is 915 units. There are 23 units shown on the shadow plat for the Subject Properties. The Subject Properties unit count is only 2.5% of the total number of units.

Yet, the total half-street improvements and related land dedication charged to the Subject Properties is nearly **TEN TIMES** the impact as measured in land area or units. To illustrate, the total linear footage of SW Tile Flat Road to be improved under the Condition is about 2,735.1 feet. The Subject Properties' frontage on SW Tile Flat Road is about 588.5 feet. The Subject Properties' frontage constitutes 21.5% of the total linear footage, therefore the Subject Properties are burdened with 21.5% of the cost of the dedications and improvements, even though the impact caused by the Subject Properties is only 1/10 of that amount.

In 2013, the United States Supreme Court in *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 133 S Ct 2586, 186 L Ed 2d 697 (2013), held that the *Nollan* and *Dolan* tests apply to denials of permits and to monetary exactions as well as to the imposition of a specific burden on a property interest such as the imposition of a dedication requirement in a land use approval. Prior to *Koontz*, the prevailing view in Oregon was that the *Nollan* and *Dolan* tests applied only to exactions requiring the dedication of land—the Oregon Supreme Court had opined that neither monetary exactions nor the requirement that the developer construct off-site improvements were subject to the *Dolan* rough-proportionality test. *W. Linn Corp. Park, L.L.C. v. City of W. Linn*, 349 Or 58, 240 P3d 29 (2010). However, under *Koontz* those Oregon decisions would no longer withstand Constitutional scrutiny, and land use permits must now be evaluated in the context of the specific burdens placed on the property in question.

## **6. The Application Fails Because it Fails to Comply with BDC 40.15.4.C.3.**

If the Commission rejects the Recommendation Action, careful examination should be made to determine if the Applicant has complied with all the policies of the Comprehensive Plan, as required by BDC 40.15.4.C.3.

BDC 40.15.4.C.3 provides in pertinent part as follows:

Approval Criteria. In order to approve a Major Modification of a Conditional Use application, the decision making authority shall make findings of fact based on evidence provided by the applicant demonstrating that all the following criteria are satisfied:

The proposal complies with the applicable policies of the Comprehensive Plan.

For the reasons cited above, the undersigned asserts that the following Transportation Element (Chapter 6) policies contained in the Comprehensive Plan cannot and will not be met if the Commission accepts and adopts the misinterpretation of the Condition as promoted by the Applicant.

6.2.1. Maintain the livability of Beaverton through proper location and design of transportation facilities. This policy is not met.

6.2.2 Recognize that streets are important to community identity and provide a needed service. Implement Beaverton’s public street standards that recognize the multipurpose nature of the street right-of-way for a combination of utility, pedestrian, bicycle, transit, truck, auto uses, and railroad crossings. This policy is not met.

6.2.3. a) Improve traffic safety through a comprehensive program of education, enforcement, and engineering. b) Design streets to serve anticipated function and intended uses as determined by the Comprehensive Plan. This policy is not met.

6.2.6 c) Maintain traffic flow and mobility on arterial and collector roadways. This policy is not met.

## **7. Conclusion**

For the reasons cited above and on the attached, and those that will be raised at the hearing, my clients respectfully request that the Recommended Action be adopted by the Commission.

Sincerely,

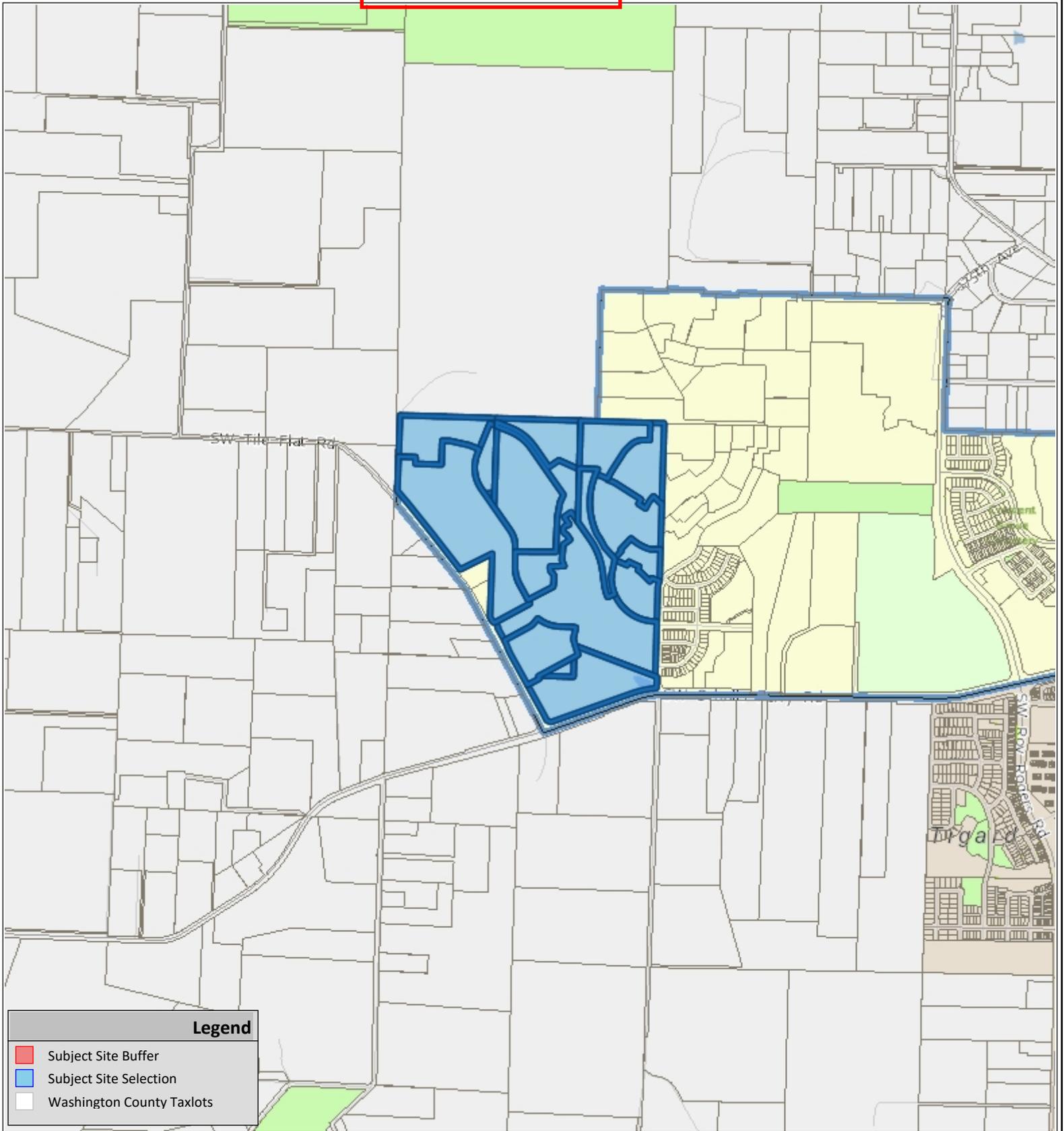
*James D. Zupancic*

James D. Zupancic, Esq., CRE

attachments

Received  
Planning Division  
07/21/2021

# VICINITY MAP



SCHOLLS HEIGHTS PUD NORTHEAST PHASE MODIFICATIONS  
CU2021-0006/LD2021-0004

COMMUNITY DEVELOPMENT DEPARTMENT  
Planning Division

The information supplied in this application represents the best data available at the time of publication. City of Beaverton GIS makes no claims, representations, or warranties as to its accuracy or completeness.

06/22/2021

Taxlot No:

2S2010003200  
2S2010003300  
2S2010003301  
2S2010003400



Application #  
See Notice

1  
2 **IN THE PLANNING COMMISSION**  
3 **FOR THE CITY OF BEAVERTON**

4 IN RE:

5 MAJOR ADJUSTMENT TO  
6 CONDITIONAL USE PERMIT

7 CU 2021-0006; LD 2021-0004

8 APPLICANT: WEST HILLS LAND  
9 DEVELOPMENT

**TESTIMONY OF RON ANDERSON  
REGARDING DANGEROUS ROAD  
CONDITIONS ON SW TILE FLAT  
ROAD**

**Hearing Date: August 4, 2021  
Time: 6:30 p.m.**

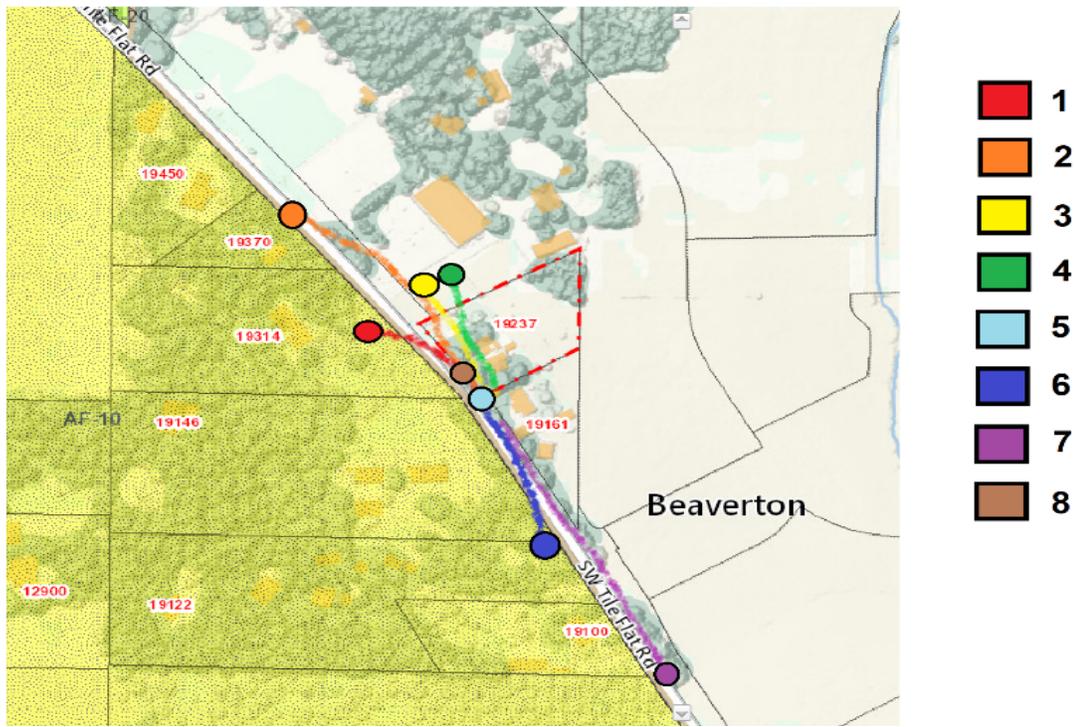
10  
11  
12 I, RON ANDERSON, respectfully request that the following written testimony be entered  
13 into the record at the above referenced hearing. I will be available at the hearing to answer  
14 questions.

15 1. I am married to Jennifer Anderson, and we have resided at 19237 SW Tile Flat Road,  
16 Beaverton, OR since 5/28/1996.

17 2. The existing SW Tile Flat Road is only an 18 ft. wide paved road (9 ft. lanes in either  
18 direction) with minimal shoulders measuring only 6 – 8 inches in width, then falling off in many  
19 segments at very steep slopes resembling more of a ditch. The narrow nature of the road along  
20 with the miniscule shoulders contribute to making Tile Flat Road a very dangerous road. After  
21 the Scholls Heights development is constructed, thousands of additional monthly vehicle trips  
22 will be made on this road, making Tile Flat Road an even more dangerous road unless the entire  
23 impacted road is widened as recommended by Kittleson & Associates.

1  
2 **Accidents observed in front of 19237 SW Tile Flat Road**

3 The sudden and subtle simultaneous changes in elevation and direction may be contributing factors



15 3. I am familiar with each of the accidents depicted on the above map. In each case, the  
16 narrowness of the road was a contributing factor. Widening the road only in some areas, and then  
17 creating a bottle neck in front of our home, will only make this situation worse. Runners and  
18 cyclists will be competing with more vehicles for the same 9 feet of lane width in front of our  
19 home.

20 4. I have been rear-ended twice resulting in permanent injuries. I am very concerned  
21 that I, members of my family, and other community members, will be severely injured or killed  
22 if the road is constructed in the partial manner as proposed by the Scholls Heights developer. I  
23 am concerned about emergency vehicle access, and the more challenging driving path for  
24 inexperienced drivers, impaired drivers and those with decreased night vision that will not  
25 anticipate the narrowed roadway.

