



Date of Council Work Session: March 28, 2016

**TOWN OF LEESBURG
TOWN COUNCIL WORK SESSION**

Information Memo

Subject: Legislative Update - New Proffer Legislation

Staff Contact: Barbara Notar, Town Attorney

Council Action Requested: None. Information only.

Staff Recommendation: Not applicable.

Commission Recommendation: Not applicable.

Fiscal Impact: The fiscal impact of the new proffer legislation has not yet been determined. The Town may need to consider hiring a consultant to assist in formulating a proffer policy that comports with the new state law.

Work Plan Impact: The impact has not yet been determined but, it is anticipated that increased staff time will be necessary to analyze proffers under the new law as well as working with a consultant to address the impacts and implications of the new law.

Executive Summary: On March 7, 2016, Senate Bill 549 was signed into law by Governor McAuliffe. The bill adds a state code section (15.2-2303.4) which puts new limits on what localities can accept in proffer agreements. Proposed by the Homebuilders Association of Virginia, the intent of the legislation is to protect developers against local governments who may abuse the rezoning process to get more proffers than are justified by a residential rezoning. The claim is that lower proffer contributions will lead to lower home prices. The bill was opposed by most jurisdictions in Northern Virginia including Loudoun County and the Town of Leesburg. **The law goes into effect on July 1, 2016.**

At the Local Government Attorney's Conference in mid-April, a special session has been scheduled to discuss the new law. This session will discuss the impact it will have upon residential rezoning applications, and options localities may have to mitigate impacts. **A further update on this legislation will occur at the April 25th Work Session when the Final Legislative Update is presented.**

Background: Below is a breakdown of the major components of the legislation:

1. **Applicability:** The legislation by its terms is applicable to *residential* developments that are the subject of a rezoning application as well as a *mixed use development which has a residential component*. It has no application to purely nonresidential

rezonings, rezoning applications currently pending, or rezonings which have already been approved—meaning applicants cannot apply to amend proffers already accepted by the Council.

2. Definitions of Unreasonable Proffers: The law seeks to protect developers from “unreasonable proffers” required or accepted by a locality as part of a residential rezoning. The definition of an “unreasonable proffer” is divided into 2 types of unreasonable proffers-- “onsite” and “offsite”.
 - An onsite proffer is unreasonable unless it addresses an impact that is *specifically attributable* to a proposed new residential development.
 - An offsite proffer is unreasonable unless it addresses an impact to an offsite public facility such that (a) the new residential development or new residential use *creates a need, or an identifiable portion of a need*, for one or more public facility improvements *in excess of existing public facility capacity at the time of the rezoning*; and (b) each such new residential development *receives a direct and material benefit* from a proffer made with respect to any such public facility improvements.
3. Impact and Concerns: Major concerns regarding the bill were summed up in a letter sent by the Town to Governor McAuliffe before the bill was signed into law. This letter was based upon a template sent out by the Loudoun County Attorney’s Office to all affected jurisdictions. That letter stated, in pertinent part:

Specifically, it [the bill] prohibits a constructive and collaborative development process for rezonings; eliminates the ability of localities and developers to adequately mitigate the impacts of development; shifts the costs of necessary public facilities from new developments to existing taxpayers; and reverses the longstanding presumption of reasonableness that otherwise attaches to local legislation, by creating and imposing a new presumption of unreasonableness with respect to a local governing body’s rezoning decisions. In effect, SB 549 usurps local government authority’s ability to assure orderly, planned growth of vibrant neighborhoods and communities, fundamentally alters the law by transforming a locality’s rezoning decision from a legislative act to a ministerial act, and ultimately creates a genuine issue of separation of powers by allowing the courts to direct that rezonings be approved despite the existence of valid reasons for the denial, effectively allowing courts to substitute their judgment for that of the democratically elected legislative bodies.

Additionally, the law contains several new phrases and terms that are open to interpretation with no case law or Attorney General’s opinions to rely upon. For example, when determining the reasonableness of an offsite proffer, the new law states that the residential development must receive “a direct and material benefit” from the

proposed proffer, and “the new development creates a need, or an identifiable portion of a need, for one or more public facility improvements in excess of existing public facility capacity at the time of the rezoning”. One of the concerns is that this language will have a chilling effect on the Town’s ability to negotiate legitimate proffers to address the public infrastructure impacts of new residential development. Rather than risk an accusation that the Town has “suggested, requested, or required” (the language in the new law) something that may later be determined by a court to be an “unreasonable proffer”, the Town will be unable to collaborate as effectively with developers as in the past. The result will likely be a reduction in proffered public infrastructure, particularly offsite, and thereby increase the cost to taxpayers to construct needed public infrastructure because localities will be fearful of potential lawsuits and the burden associated with them under this new law.

Equally concerning is that the new law appears to require mathematical precision for determining whether a proffer is “specifically attributable to the proposed development” or whether the development “creates a need or an identifiable portion of a need”. It remains to be determined what “specifically attributable” means, but it seems to require a measure of mathematical precision localities have not previously been required to demonstrate. The new language appears to invalidate routine proffers providing for the dedication of right-of-way and construction of through roads, turning lanes and road widening, because these improvements will at some point serve some traffic other than that generated by the specific development under consideration and/or an existing road near a development must have an identifiable portion of a need caused by the development in order for a proffer to expand the road to be reasonable. For example, the Town’s Appendix B of the Town Plan—the offsite transportation contributions, the School Proffer Policy and any future Capital Intensity Factors, must be reevaluated and analyzed for each new residential development to ensure that these cash proffers are the mathematically correct amount that can be attributed to the development under review. Moreover, for each offsite public facility, analysis by staff must occur to determine whether the public facility is at capacity and if not, exactly how much more capacity is needed from the proposed development at the time of the rezoning.

4. Legal Presumption and Burden of Proof Changed: Under current law, the decision of a local governing body approving or denying an application for rezoning is a legislative act that is presumed to be reasonable. Even if an applicant presents evidence that the locality’s decision was unreasonable, the local legislative action will be upheld if the locality offers *some* evidence of its reasonableness, thereby making the question “fairly debatable”.

The new proffer bill shifts the presumption to one of *unreasonableness* and requires the locality to overcome this presumption with clear and convincing evidence – the highest burden of proof in civil cases. This change in the burden of proof and legal presumption effectively eliminates the “fairly debatable” standard that has applied in rezoning cases for decades and which afforded local government decisions a presumption of reasonableness. (Under the new bill, applicants who bring suit also have a higher burden

of proof—they must prove by a preponderance of the evidence or, in other words, that it is more likely than not, that the Town acted unreasonably. Under current law, the applicant must produce probative evidence or some evidence that the Town acted unreasonably.)

5. Remedies: If a locality loses a legal action, the applicant may be entitled to reasonable attorney fees and costs. Also, the locality *may* be ordered by the court to approve the rezoning without the inclusion of the unreasonable proffer. This portion of the bill appears to be in violation of the concept of separation of powers long recognized in zoning cases—rather than remanding a case back to the governing body to take legislative action under the law as set forth by the appellate court, it instead mandates that the governing body make the specific legislative decision.

Attachments: 1. Virginia Code Section 15.2-2303.4

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 An Act to amend the Code of Virginia by adding a section numbered 15.2-2303.4, relating to
3 conditional zoning.

4 [S 549]
5 Approved

6 **Be it enacted by the General Assembly of Virginia:**

7 **1. That the Code of Virginia is amended by adding a section numbered 15.2-2303.4 as follows:**

8 **§ 15.2-2303.4. Provisions applicable to certain conditional rezoning proffers.**

9 A. For purposes of this section, unless the context requires a different meaning:

10 "New residential development" means any construction or building expansion on residentially zoned
11 property, including a residential component of a mixed-use development, that results in either one or
12 more additional residential dwelling units or, otherwise, fewer residential dwelling units, beyond what
13 may be permitted by right under the then-existing zoning of the property, when such new residential
14 development requires a rezoning or proffer condition amendment.

15 "New residential use" means any use of residentially zoned property that requires a rezoning or that
16 requires a proffer condition amendment to allow for new residential development.

17 "Offsite proffer" means a proffer addressing an impact outside the boundaries of the property to be
18 developed and shall include all cash proffers.

19 "Onsite proffer" means a proffer addressing an impact within the boundaries of the property to be
20 developed and shall not include any cash proffers.

21 "Proffer condition amendment" means an amendment to an existing proffer statement applicable to a
22 property or properties.

23 "Public facilities" means public transportation facilities, public safety facilities, public school
24 facilities, or public parks.

25 "Public facility improvement" means an offsite public transportation facility improvement, a public
26 safety facility improvement, a public school facility improvement, or an improvement to or construction
27 of a public park. No public facility improvement shall include any operating expense of an existing
28 public facility, such as ordinary maintenance or repair, or any capital improvement to an existing public
29 facility, such as a renovation or technology upgrade, that does not expand the capacity of such facility.
30 For purposes of this section, the term "public park" shall include playgrounds and other recreational
31 facilities.

32 "Public safety facility improvement" means construction of new law-enforcement, fire, emergency
33 medical, and rescue facilities or expansion of existing public safety facilities, to include all buildings,
34 structures, parking, and other costs directly related thereto.

35 "Public school facility improvement" means construction of new primary and secondary public
36 schools or expansion of existing primary and secondary public schools, to include all buildings,
37 structures, parking, and other costs directly related thereto.

38 "Public transportation facility improvement" means (i) construction of new roads; (ii) improvement
39 or expansion of existing roads and related appurtenances as required by applicable standards of the
40 Virginia Department of Transportation, or the applicable standards of a locality; and (iii) construction,
41 improvement, or expansion of buildings, structures, parking, and other facilities directly related to
42 transit.

43 "Residentially zoned property" means property zoned or proposed to be zoned for either single-family
44 or multifamily housing.

45 "Small area comprehensive plan" means that portion of a comprehensive plan adopted pursuant to
46 § 15.2-2223 that is specifically applicable to a delineated area within a locality rather than the locality
47 as a whole.

48 B. Notwithstanding any other provision of law, general or special, no locality shall (i) request or
49 accept any unreasonable proffer, as described in subsection C, in connection with a rezoning or a
50 proffer condition amendment as a condition of approval of a new residential development or new
51 residential use or (ii) deny any rezoning application or proffer condition amendment for a new
52 residential development or new residential use where such denial is based in whole or in part on an
53 applicant's failure or refusal to submit an unreasonable proffer or proffer condition amendment.

54 C. Notwithstanding any other provision of law, general or special, (i) as used in this chapter, a
55 proffer, or proffer condition amendment, whether onsite or offsite, offered voluntarily pursuant to
56 § 15.2-2297, 15.2-2298, 15.2-2303, or 15.2-2303.1, shall be deemed unreasonable unless it addresses an

57 *impact that is specifically attributable to a proposed new residential development or other new*
58 *residential use applied for and (ii) an offsite proffer shall be deemed unreasonable pursuant to*
59 *subdivision (i) unless it addresses an impact to an offsite public facility, such that (a) the new*
60 *residential development or new residential use creates a need, or an identifiable portion of a need, for*
61 *one or more public facility improvements in excess of existing public facility capacity at the time of the*
62 *rezoning or proffer condition amendment and (b) each such new residential development or new*
63 *residential use applied for receives a direct and material benefit from a proffer made with respect to*
64 *any such public facility improvements. For the purposes of this section, a locality may base its*
65 *assessment of public facility capacity on the projected impacts specifically attributable to the new*
66 *residential development or new residential use.*

67 *D. Notwithstanding any other provision of law, general or special:*

68 *1. Actions brought to contest the action of a locality in violation of this section shall be brought only*
69 *by the aggrieved applicant or the owner of the property subject to a rezoning or proffer condition*
70 *amendment pursuant to subsection F of § 15.2-2285.*

71 *2. In any action in which a locality has denied a rezoning or an amendment to an existing proffer*
72 *and the aggrieved applicant proves by a preponderance of the evidence that it refused or failed to*
73 *submit an unreasonable proffer or proffer condition amendment that it has proven was suggested,*
74 *requested, or required by the locality, the court shall presume, absent clear and convincing evidence to*
75 *the contrary, that such refusal or failure was the controlling basis for the denial.*

76 *3. In any successful action brought pursuant to this section contesting an action of a locality in*
77 *violation of this section, the applicant may be entitled to an award of reasonable attorney fees and costs*
78 *and to an order remanding the matter to the governing body with a direction to approve the rezoning or*
79 *proffer condition amendment without the inclusion of any unreasonable proffer. If the locality fails or*
80 *refuses to approve the rezoning or proffer condition amendment within a reasonable time not to exceed*
81 *90 days from the date of the court's order to do so, the court shall enjoin the locality from interfering*
82 *with the use of the property as applied for without the unreasonable proffer. Upon remand to the local*
83 *governing body pursuant to this subsection, the requirements of § 15.2-2204 shall not apply.*

84 *E. The provisions of this section shall not apply to any new residential development or new*
85 *residential use occurring within any of the following areas: (i) an approved small area comprehensive*
86 *plan in which the delineated area is designated as a revitalization area, encompasses mass transit as*
87 *defined in § 33.2-100, includes mixed use development, and allows a density of at least 3.0 floor area*
88 *ratio in a portion thereof; (ii) an approved small area comprehensive plan that encompasses an existing*
89 *or planned Metrorail station, or is adjacent to a Metrorail station located in a neighboring locality, and*
90 *allows additional density within the vicinity of such existing or planned station; or (iii) an approved*
91 *service district created pursuant to § 15.2-2400 that encompasses an existing or planned Metrorail*
92 *station.*

93 **2. That this act shall be construed as supplementary to any existing provisions limiting or**
94 **curtailing proffers or proffer condition amendments for new residential development or new**
95 **residential use that are consistent with its terms and shall be construed to supersede any existing**
96 **statutory provision with respect to proffers or proffer condition amendments for new residential**
97 **development or new residential use that are inconsistent with its terms.**

98 **3. That this act is prospective only and shall not be construed to apply to any application for**
99 **rezoning filed prior to July 1, 2016, or to any application for a proffer condition amendment**
100 **amending a rezoning for which the application was filed prior to that date.**