



**Date of Council Work Session: May 23, 2016**

**TOWN OF LEESBURG  
TOWN COUNCIL WORK SESSION**

**Subject:** New Proffer Legislation: Next Steps for Council and Staff

**Staff Contact:** Susan Berry Hill, Director of Planning and Zoning  
Barbara Notar, Town Attorney

**Council Action Requested:** Work Session discussion.

**Staff Recommendation:** Staff recommends another work session be held in June to discuss the following recommendations:

1. The Zoning Ordinance must be reviewed to comply with the new law;
2. The Comprehensive Plan must be reviewed to evaluate whether amendments are necessary as the Comprehensive Plan will dictate the public infrastructure and facilities necessary for new residential developments **and** was passed with the expectations of proffers under the 15.202303 regime;
3. Proffer guidelines must be evaluated and possibly abolished so as not to assist an applicant who argues that an unreasonable proffer was “suggested, requested or accepted”;
4. If proffers are submitted by an applicant to Town staff, Planning Commission or Town Council members, the proffers must be in writing;
5. Likewise, any and all suggestions by Town staff, Planning Commission and Town Council members to alter the proffers submitted by an applicant must be in writing;
6. All written proffers must be reviewed by the Town Attorney;
7. If proffers are submitted by an applicant, proffers must include detailed analysis or “impact studies” that demonstrate that the proffer address the impacts of the rezoning and that they are reasonable under the law;
8. Application fees should be increased to hire a consultant to assist the Town in verifying applicants’ impact studies as well as determining impacts to public facilities for each individual residential rezoning application. Reimbursement by applicants may be possible for the Town’s analysis of applicants’ impact studies.

Town staff also recommends the following additional steps should be taken to comply with the new law:

9. Applicant-initiated Town Plan Amendments should be no longer be accepted by the Town;

10. Town staff should begin the procurement process to hire a consultant who will review applicants' impact studies and assist the Town in determining the impacts to public facilities for individual rezoning applications; and
11. Contact County staff to discuss their assistance in establishing updated school capital intensity factors to be used by the Town under the new law.

**Commission Recommendation:** None. Council may wish to seek input from the Planning Commission at a future date.

**Fiscal Impact:** The fiscal impact of the new proffer legislation has not yet been determined. However, staff will be proposing additional fees for rezoning applications that contain a residential component. The proposed additional fees will offset the cost of the increased analysis needed by the Town to verify applicants' analysis of development impacts and/or proposed proffers as well as to update current proffer guidelines and individual impact studies.

**Work Plan Impact:** The impact on the Town's Work Plan is anticipated to be significant in that increased staff time will be necessary to prepare for implementation of the new bill including preparation of new land development submission checklist requirements and other zoning ordinance amendments, updating fee schedules, review of the Town's Comprehensive Plan, and training of staff, Planning Commission and Town Council members on the processes and protocols under the new law. Additionally, increased staff time will be necessary to analyze proffers submitted under the new law as well as the analysis necessary to propose impacts that may arise upon rezoning submissions.

**Executive Summary:** On March 7, 2016, Senate Bill 549 was signed into law. The bill adds a new state code section (15.2-2303.4) which places strict limits on what localities can accept in proffer agreements. Town staff has met internally and with County staff to discuss a new process for rezoning and special exception applications that are submitted on and after July 1, 2016. County and Town staff agree that training on the new law for staff, Town Council and Planning Commission Members must occur regarding discussions in both private and public meetings with applicants to avoid "suggesting, requesting, accepting or requiring" an unreasonable proffer under the law.

**Background:** Town and County staff have met to discuss a coordinated effort to comply with the new proffer regulation. However, residential developments in the County may fall into several exceptions to the new law and County staff is considering asking the Board of Supervisors to amend its Comprehensive Plan to form several "small area comprehensive plan[s]" which need not comply with the new law so long as these areas contain certain existing or proposed public amenities. Va. Code § 15.2-2303.4 (E) sets forth the conditions which must be met to fall within the exceptions to the new law:

*E. The provisions of this section shall not apply to any new residential development or new residential use occurring within any of the following areas: (i) an approved small*

*area comprehensive plan in which the delineated area is designated as a revitalization area, encompasses mass transit as defined in § 33.2-100, includes mixed use development, and allows a density of at least 3.0 floor area ratio in a portion thereof; (ii) an approved small area comprehensive plan that encompasses an existing or planned Metrorail station, or is adjacent to a Metrorail station located in a neighboring locality, and allows additional density within the vicinity of such existing or planned station; or (iii) an approved service district created pursuant to § 15.2-2400 that encompasses an existing or planned Metro rail station.*

Staff believes that as the Town has no planned Metro rail station, and it does not fit into the first exception, the Town cannot benefit from exceptions to the new law.

Major components of the legislation include:

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. However, there is a split of opinion whether applicants, after July 1, 2016, may apply to amend previously approved proffers to comply with the new law.
2. Definitions of Unreasonable Proffers: 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. Onsite proffers may not include cash proffers.
  - 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. Cash proffers may only be related to offsite proffers.

Under current law, proffers must be reasonable and need not be directly necessitated by the rezoning. Reasonable proffers may be for any public purpose.

3. Legal Presumptions and Remedies Changed: In the new law, a presumption now exists that a failure or refusal to submit an unreasonable proffer is the controlling basis for a rezoning denial if the applicant proves that a locality “suggested, requested, or required” an unreasonable proffer. The Town’s rebuttal evidence must be “clear and convincing” which is the highest standard in civil cases. This may impact the Town’s “fairly debatable

standard”. The new law allows applicants to assert the unreasonableness of a proffer even when they are submitted to the Town voluntarily and a court can strike an unreasonable proffer and order the Town to approve the rezoning without the proffer, not just the unreasonable portion of the proffer. A successful applicant may be entitled to attorneys’ fees and costs.

Attachments: 1. Virginia Code Section 15.2-2303.4

# VIRGINIA ACTS OF ASSEMBLY -- 2016 SESSION

## CHAPTER 322

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

[S 549]

Approved March 8, 2016

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Notwithstanding any other provision of law, general or special, (i) as used in this chapter, a proffer, or proffer condition amendment, whether onsite or offsite, offered voluntarily pursuant to § 15.2-2297, 15.2-2298, 15.2-2303, or 15.2-2303.1, shall be deemed unreasonable unless it addresses an impact that is specifically attributable to a proposed new residential development or other new residential use applied for and (ii) an offsite proffer shall be deemed unreasonable pursuant to

subdivision (i) 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 or proffer condition amendment and (b) each such new residential development or new residential use applied for receives a direct and material benefit from a proffer made with respect to any such public facility improvements. For the purposes of this section, a locality may base its assessment of public facility capacity on the projected impacts specifically attributable to the new residential development or new residential use.

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

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

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

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

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

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

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