



Date of Council Work Session: June 27, 2016

**TOWN OF LEESBURG  
TOWN COUNCIL WORK SESSION**

**SUBJECT:** Initiating Resolution to Comply with New Proffer Statute (Code of Virginia §15.2-2303.4)

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

**Council Action Requested:** Pass an Initiating Resolution to begin work to comply with the new proffer statute, Code of Virginia, §15.2-2303.4.

**Staff Recommendation:** Staff recommends Council pass the Initiating Resolution.

**Commission Recommendation:** None.

**Fiscal Impact:** It is anticipated that the hiring of a consultant will be necessary to assist the Town in evaluating “proffer packages” which will include “impact studies” submitted by landowners desiring to rezone properties to a zoning category with a residential component. In order to offset the cost of this consultant, Town staff recommends increasing submittal fees for rezoning applications. The goal is to have a neutral fiscal impact to the Town when implementing the new law. That is, the cost of analyzing the “impact studies” will be passed on to the applicant through the revised fee schedule. As a part of the work effort on complying with the new proffer statute, staff will be getting estimates for consultant costs to review “impact studies” and factoring these costs into proposed increases to the fee schedule. Staff will provide this information when the revised fee schedule is presented to Council for review and action.

**Work Plan Impact:** The impact on the work of Town staff (Department of Planning and Zoning and Town Attorney’s Office) to understand the new proffer statute and formulate strategies to implement the new statute has been significant. It is anticipated that significant additional work will be necessary to amend the Zoning Ordinance and Comprehensive Plan in order to implement the new statute.

**Executive Summary:** As a result of the new proffer statute (Code of Virginia § 15.2-2303.4), several administrative tasks must occur before Council can accept proffers:

- 1) The Zoning Ordinance must be amended to include a new process for accepting and evaluating proffers and for the repeal of applicant-initiated Town Plan Amendments;
- 2) Proffer guidelines contained in Resolution No. 2015-105 (School Proffers) and Appendix B of the Town Plan (Off-Site Transportation Cost Data) must be repealed;

- 3) Residential rezoning application fees (and mixed use rezonings with a residential component) should be increased to offset the cost of hiring a consultant to evaluate proffer packages which will include impact studies; and
- 4) An Interim Policy should be adopted by Council prohibiting the submittal and acceptance of proffers with residential rezonings until actions nos. 1-3 have occurred; and
- 5) Council should initiate amendments to the Town Plan; however, work on amending the Town Plan will take an extended period of time and need not delay the lifting of the Interim Policy so that the Town may begin to accept proffer packages while work on the Town Plan continues.

**Background:** New Virginia Code § 15.2-2303.4 changes the definition of “reasonableness” for proffers offered with residential zonings, changes the way the Town can accept, evaluate and discuss proffers and also changes the way courts determine whether proffers are reasonable and voluntary under the law. Explanation and implications of the new proffer law were previously given to Council in an Informational Memo dated March 28, 2016, and an Agenda Memo dated May 23, 2016, both of which are attached.

Town staff anticipates that there will continue to be residential rezoning applications submitted after July 1, 2016. Until such time as the Zoning Ordinance has been amended, current proffer guidelines have been repealed, and residential rezoning application fees have been increased, Town staff recommends that Council adopt an Interim Policy that prohibits the acceptance of proffers with residential rezonings until the aforementioned tasks have been accomplished. Amendments to the Town’s Comprehensive Plan should be ongoing both during the Interim Policy period and afterwards. Once the Zoning Ordinance has been amended, fees have increased and proffer guidelines have been repealed to comply with the new statute, the Interim Policy can be lifted and proffers can be accepted under new guidelines and procedures.

Staff envisions the following changes to the Zoning Ordinance:

1. All questions and comments about proffers, whether made by Town staff, members of the Planning Commission, members of the Town Council, or the applicant, must be submitted in writing to the Project Manager for the Town who will evaluate and answer the questions after training and consultation with legal counsel, if necessary;
2. Proffers submitted by an applicant wishing to rezone to a district with a residential component must include sworn certifications that the proffers are submitted voluntarily and that no Town staff member or official has suggested or demanded a proffer that is unreasonable under the law;
3. All proffer packages will be submitted in writing and include “impact studies” that address the mitigation of impacts as a result of the rezonings (both onsite and offsite) and all proffer packages must be submitted with a similar certification in No. 2 above, that the applicant certifies that the proffers are reasonable under the confines of the new law;

During the Interim Policy Period, no proffers will be accepted with residential rezoning applications. All residential rezoning applications will be decided upon the factors set forth in Va. Code §15.2-2284: *“the existing use and character of the property, the comprehensive plan, the suitability of the property for various uses, the trends of growth or change, the current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies, the transportation requirements of the community, the requirements for airports, housing schools, parks, playgrounds, recreation areas and other public services, the conservation of natural resources, the preservation of floodplains, the protection of life and property from impounding structure failures, the preservation of agricultural and forestall land, the conservation of properties and their values and the encouragement of the most appropriate use of the land throughout the locality.”*

Attachments: Va. Code §15.2-2303.4

Informational Memo dated March 28, 2016

Agenda Memo dated May 23, 2016



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 25<sup>th</sup> 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



**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.

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

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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

PRESENTED June 28, 2016

RESOLUTION NO. 2016-\_\_\_\_\_

ADOPTED \_\_\_\_\_

A RESOLUTION: INITIATING AMENDMENTS TO THE ZONING ORDINANCE AND THE COMPREHENSIVE PLAN TO COMPLY WITH NEW CODE OF VIRGINIA § 15.2-2303.4 AND ENDING APPLICANT-INITIATED TOWN PLAN AMENDMENTS; INITIATING THE REPEAL OF ALL CURRENT PROFFER GUIDELINES; INITIATING INCREASED REZONING APPLICATION FEES TO OFFSET THE COSTS NECESSARY TO IMPLEMENT THE NEW PROFFER LAW; AND IMPLEMENTING AN INTERIM POLICY TO PROHIBIT THE ACCEPTANCE OF PROFFERS FOR REZONINGS WITH A RESIDENTIAL COMPONENT UNTIL AMENDMENTS TO THE ZONING ORDINANCE HAVE BEEN ENACTED AND APPLICATION FEES HAVE INCREASED

WHEREAS, the 2016 Virginia General Assembly enacted *new* Code of Virginia Section 15.2-2303.4 which changes the legal definition of “reasonable” proffers offered with residential rezonings; changes how proffers can legally be evaluated by the Town when offered with residential rezonings; and increases the liability of the Town when dealing with proffers offered with residential rezonings; and

WHEREAS, to comply with the new statute, amendments to the Zoning Ordinance are necessary including, but not limited to, Section 3.3 Zoning Map Amendments (Rezonings); and

WHEREAS, to comply with the new statute, repeal of all current proffer guidelines must occur; and

WHEREAS, to assist in the implementation of the new statute, amendments to the Town’s Comprehensive Plan must occur; and

WHEREAS, to continue to accept proffers from landowners applying to rezone property with a residential component, “proffer packages” must contain “impact studies” which expressly demonstrate and certify that the proffers are legal under the new statute; and

WHEREAS, increased rezoning application fees will be necessary in order to offset the

A RESOLUTION: INITIATING AMENDMENTS TO THE ZONING ORDINANCE AND THE COMPREHENSIVE PLAN TO COMPLY WITH NEW CODE OF VIRGINIA § 15.2-2303.4 AND ENDING APPLICANT-INITIATED TOWN PLAN AMENDMENTS; INITIATING THE REPEAL OF ALL CURRENT PROFFER GUIDELINES; INITIATING INCREASED REZONING APPLICATION FEES TO OFFSET THE COSTS NECESSARY TO IMPLEMENT THE NEW PROFFER LAW; AND IMPLEMENTING AN INTERIM POLICY TO PROHIBIT THE ACCEPTANCE OF PROFFERS FOR REZONINGS WITH A RESIDENTIAL COMPONENT UNTIL AMENDMENTS TO THE ZONING ORDINANCE HAVE BEEN ENACTED AND APPLICATION FEES HAVE INCREASED

cost of evaluating these proffer packages; and

WHEREAS, to allow time for the Town Council to enact ordinances and resolutions amending the Zoning Ordinance, increasing rezoning application fees and repealing proffer guidelines currently in place, an Interim Policy prohibiting the submission and acceptance of proffers with residential rezonings should be adopted; and

WHEREAS, as the Town Plan dictates the public infrastructure needs of the Town, no applicant-initiated Town Plan amendment applications should be accepted after July 1, 2016.

NOW THEREFORE, the Town Council of the Town of Leesburg, Virginia hereby resolves:

1. To initiate amendments to the Zoning Ordinance to comply with *new* Code of Virginia Section 15.2-2303.4; and
2. To initiate the repeal of all current proffer guidelines; and
3. To initiate an ordinance increasing rezoning application fees to offset the cost of the evaluation of proffer packages; and
4. To adopt an Interim Policy prohibiting the acceptance of proffers with rezoning applications that include a residential component until such time as amendments to the

A RESOLUTION: INITIATING AMENDMENTS TO THE ZONING ORDINANCE AND THE COMPREHENSIVE PLAN TO COMPLY WITH NEW CODE OF VIRGINIA § 15.2-2303.4 AND ENDING APPLICANT-INITIATED TOWN PLAN AMENDMENTS; INITIATING THE REPEAL OF ALL CURRENT PROFFER GUIDELINES; INITIATING INCREASED REZONING APPLICATION FEES TO OFFSET THE COSTS NECESSARY TO IMPLEMENT THE NEW PROFFER LAW; AND IMPLEMENTING AN INTERIM POLICY TO PROHIBIT THE ACCEPTANCE OF PROFFERS FOR REZONINGS WITH A RESIDENTIAL COMPONENT UNTIL AMENDMENTS TO THE ZONING ORDINANCE HAVE BEEN ENACTED AND APPLICATION FEES HAVE INCREASED

zoning Ordinance, repeal of proffer guidelines, and the increase of rezoning application fees have occurred; and

5. To prohibit applicant-initiated Town Plan amendment applications as of July 1, 2016; and
6. To initiate amendments to the Town's Comprehensive Plan.

PASSED this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

\_\_\_\_\_  
David S. Butler, Mayor  
Town of Leesburg

ATTEST:

\_\_\_\_\_  
Clerk of Council