



## Proffer Amendments Update

**03.02.2012**

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On May 19, 2011, Judge J. Howe Brown, sitting by designation for the Circuit Court of Loudoun County, Virginia, formally ruled on a case that has garnered a lot of attention in the development community and has resulted in appeals to the Virginia Supreme Court and proposed legislation in the Virginia General Assembly. In the case of Long Lane Associates Limited Partnership v. The Town of Leesburg (unreported), Judge Brown ruled that a property owner, in this case a church, may not amend the proffers applicable to its property without obtaining approval of all property owners that were subject to the original proffered conditions.

In this particular case, 38 acres were rezoned in 1988 in the Town of Leesburg, Virginia by High Point Associates and the Town Council accepted certain proffers. The property later was subdivided with a portion being owned in fee by Long Lane and the remainder by a local church, the Cornerstone Chapel of Leesburg. The church subsequently received approval from the Town of Leesburg to amend the proffers to permit its requested use (a church with a day care facility) and eliminate the obligation of the church to extend Tolbert Lane as required by the original proffers. Long Lane challenged the two ordinances (a rezoning and use permit to permit the church with a day care facility and amending the Town plan to remove the Tolbert Lane's extension through the church property) by appealing to the Loudoun County Circuit Court. Long Lane had constructed its portion of Tolbert Lane as required by the proffers and, as stated in its appeal, had relied on the continuation of Tolbert Lane as required by the proffers and on the unchanged use of the church property.

The issue before the trial court was whether Long Lane could essentially veto the Town plan amendment and rezoning request of its neighbor, Cornerstone Chapel, if the rezoning would effectively modify the conditions as they applied to Cornerstone's property. The trial court asked "...does the fact that the property has been subdivided give the town the right to alter the proffers in one divided parcel without the permission of the other[?]" Judge Brown determined that the Town did not in fact have authority to rezone Cornerstone's property or amend its zoning conditions without Long Lane's consent because Long Lane had a vested right in the 1988 proffers applicable to Cornerstone's property and, therefore, the development of Cornerstone's property. See Petition for Appeal to the Supreme Court of Virginia in *Town of Leesburg v. Long Lane Associates, LP*, filed on September 14, 2011 and docketed as Case Number 111658.

The Town of Leesburg filed an appeal to the Supreme Court of Virginia on September 14, 2011, and Long Lane filed its brief in opposition on October 6, 2011. The Supreme Court granted a certificate of appeal on January 11, 2012. The parties are in the process of briefing their arguments (the Town's brief was received by the Court on February 21, 2012) with oral argument yet to be scheduled.

This decision by Judge Brown has had a significant impact on numerous communities and development proposals throughout Virginia. Almost immediately, a few localities began following Judge Brown's interpretation and refusing to accept any proffer amendment applications without the consent of all property owners of parcels to which the original proffers applied. Some of those localities had already adopted the same interpretation of the Virginia Code prior to Judge Brown's ruling, but began using that ruling as further evidence for their position. Some of these applications were simple (amending a proffer on signage for one outparcel), and others slightly more complicated (owners of all but 3 lots of a 50 lot subdivision refusing to consent to a proffer amendment to permit more than 50 lots).

It is interesting to note that, contrary to Judge Brown's decision, which is not binding outside of Loudoun County, Virginia, some of the same jurisdictions that refused to accept proffer amendment applications did permit rezonings without any other owner's consent to change the proffer. It appears that Judge Brown would find that position inappropriate as it would have, in effect, revised the proffer, regardless of how such revision occurred.

The Virginia Municipal League, the Virginia Association of Counties, the Virginia Bar Association, the Home Builders Association of Virginia, the Hampton Roads Association for Commercial Real Estate, and many other interested groups began to notify their members of this new development. The issue of property owners having vested rights in another owner's property was troubling, and, some argued, unwarranted by existing law. The potentially far-reaching impact of this ruling becomes obvious in a mixed use community where one single lot or condominium unit owner could veto any change in the proffers for a commercial area on the other side of the development simply because the properties were zoned as part of the same case. Recent rezoning applications have included attempts to get around this issue by, for example, (a) dividing cases so that varying uses (single family residential, multi-family residential, office, and business) were filed under separate cases so that one user could not veto a future change, (b) proffers that permit future amendments without permission from any other lot owner, and (c) restrictive covenants granting a developer a power-of-attorney to grant permission to amend the proffers for any lot.

Many of these same associations and developers approached the Virginia General Assembly with a request to amend the applicable Virginia Code provisions to permit a proffer amendment without approval from any other lot owner as long as appropriate notice is provided. This amendment to Virginia Code Section 15.2-2302 can be found at <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+HB326S1>. House Bill 326 was passed by the Senate on February 24, 2012 (37-0-1) and by the House on February 28, 2012 (98-0) and now awaits the expected signature of the Governor.

Without digging into the merits of either side's position on this issue, numerous lessons can be learned from this case. Long Lane could have avoided this entire issue had it not relied on the Town of Leesburg to protect its rights. In such a situation, when purchasing land that is a part of a larger tract subject to proffered conditions, it is always a good idea to obligate the other property owners by using private agreements to enforce the obligations in the proffered conditions. A locality may, but is not obligated to, enforce the proffered conditions, and, as can be seen with the Town of Leesburg, those proffered conditions may change. If those obligations are critical to the success of your project, you need to control the enforcement of those obligations rather than relying on the locality to do so. It is also telling that a simple case, in a local circuit court, can have such an impact on the state of real estate development throughout the entire Commonwealth. On such occasions, it not only is important for the non-prevailing party to preserve its rights of appeal, but also for others to look to legislative change to respond accordingly.

*For more information about this topic, please contact Andrew M. Condlin at 804.420.6457 or any member of the firm's Financial Services & Real Estate team.*

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