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Dissecting the Proffer Reform Bill

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1. Background

Virginia Code § 15.2-2303.4, the Proffer Reform Bill, went into effect on July 1, 2016. The bill was an effort by the Virginia General Assembly to overhaul localities? proffer programs. Proffers originated as voluntary offers by developers to abide by certain conditions, including capital contributions to localities (?cash proffers?). Exactions, in contrast, are requirements *imposed* on developers as conditions to approval. The purported purpose of these conditions or contributions is to offset the impacts of development. Proffers arose in reaction to legislative and judicial restrictions on exactions.

In Virginia, this occurred far earlier than it did nationally. In 1975, the Supreme Court of Virginia ruled that it was a violation of the equal protection clause for a local government to condition development upon providing a public improvement when that public improvement is unrelated to the proposed development. *James City County v. Rowe*, 216 Va. 128 (1975). Nationally, it was not until 2013 that the Supreme Court imposed similar restrictions on localities? imposition of exactions. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2610 (2013). As a result, the proffer program has a robust history in Virginia, for, even after exactions were restricted, localities still wanted to impose conditions on development, and developers still wanted to develop. And so, developers ?voluntarily? imposed such conditions: *quid pro quo* in all but name.

Only recently have proffer programs declined in scope. In 2001, Virginia Code § 15.2-2303.2 directed the Commission on Local Government to collect data annually concerning local government revenues and expenditures resulting from the acceptance of cash proffers. The results of the survey for the 2003 Fiscal Year revealed that the aggregate amount collected and expended was $37,384,315. In 2014, that number almost tripled to nearly $100 million. In addition, these collections were concentrated in several specific localities. In these locations, the collection of cash proffers accelerated exponentially. In 2013, the expected cash proffer amount *per each new detached single family home* was: Frederick County, $19,583; Chesterfield County, $18,966; Albemarle County, $20,460; Loudoun County, $45,930; Spotsylvania County, $33,285; Stafford County, $50,943. As a result, in 2013, the Virginia General Assembly attempted to restrict localities? use of proffers. Virginia Code § 15.2-2303.2 prohibited the use of cash proffers for capital improvements to existing facilities that did not *expand the capacity* of such facilities. The legislature was attempting to connect cash proffers by developers to the impacts of their developments. However, cash proffers continued to increase, albeit at a slower pace. In reaction to this continued growth and lack of systemic change, the General Assembly enacted the Proffer Reform Bill.

2. Dissecting § 15.2-2303.4

The Proffer Reform Bill prohibits localities from **requesting or accepting** any **unreasonable** proffer in connection with a rezoning or a proffer condition amendment. The statute only applies to: 1) projects filed after July 1, 2016, 2) projects involving conditional rezonings with proffers or a proffer amendment, and 3) proffers containing a residential component. There are also exemptions for projects within Metrorail areas or projects within small area comprehensive plans that are designated as revitalization areas encompassing mass transit, that include mixed development, and that allow a density of at least 3.0 floor area ratio in a portion thereof. These exemptions mostly apply to Northern Virginia localities. For instance, most of Fairfax County already meets the above criteria, except those areas that do not have an FAR of at least 3.0. Thus, Fairfax County is in the process of amending its comprehensive plan to allow up to 3.0 FAR in those areas that are not exempt already.

The statute defines an *unreasonable* proffer according to the type of proffer being offered - either an onsite or an offsite proffer. An onsite proffer addresses impacts within the boundaries of the property to be developed. In contrast, an offsite proffer addresses impacts outside of the property to be developed (and includes cash proffers). Offsite proffers and cash proffers are likely to have a more tenuous connection to the impacts of the development and, thus, are more restricted by the new law. If the proffer is onsite, it must be **specifically attributable** to the proposed development, or it will be considered unreasonable. If the proffer is offsite, not only must it be specifically attributable to the proposed development, but, also, the proffer can only address impacts to transportation, public safety, schools or parks (i.e. public facility improvements). Moreover, such proffers will still be deemed unreasonable unless the project creates a need or an identifiable portion of a need for that public facility improvement *in excess of existing capacity*. Even further, such proffers will still be deemed unreasonable unless the development receives a **direct and material benefit** from the proffers. This definition of an unreasonable proffer (especially for offsite and cash proffers) imposes a substantially more stringent standard than what was used previously. However, it is still unclear how exactly the terms ?specifically attributable? and ?direct and material benefit? will be interpreted. Neither term is defined in the statute or the case law. Moreover, no case has yet been brought applying these new standards.

Perhaps some guidance can be gleaned from an Illinois State Supreme Court case wherein, before several U.S. Supreme Court cases overhauled standards for exactions (i.e. *Kootnz* (cited above), *Nollan v. California Coastal Comm?n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (commonly known as the *Nollan* and *Dolan* cases)), the Illinois State Supreme Court used a ?specific and uniquely attributable? test to determine the validity of conditions imposed on developers by localities, i.e., exactions. It is not controlling law in Virginia since it is not a Virginia case, nor does it relate to proffers, which are *voluntary* development conditions. However, it is a legal interpretation by a state Supreme Court of ?specifically attributable? as it relates to land use and development. In *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill.2d 375 (1961), the Illinois State Supreme Court determined that the need for recreational and education facilities (satisfied through the requirement of dedicating 6.7 acres of land to the public for an elementary school and secondary school playground) was *not* specifically and uniquely attributable to the development of a 250 residential unit subdivision. The Court reasoned that the need for these recreational and education facilities stemmed from the *total* activity of the community, not just the subdivision, and thus the need was not *specifically* attributable. The Court further clarified its standard by stating, ?The municipality may require the developer to provide the streets which are required by the activity within the subdivision but cannot require him to provide a major thoroughfare.? If the ?specifically attributable? standard in the Proffer Reform Bill were to be applied in the same way as the similar standard in the Illinois case, it would require a major overhaul of many localities? proffer programs. Whether localities could ever achieve such a level of certainty that would be required for compliance with the Proffer Reform Bill under such an interpretation remains to be seen.

3. Localities? Reactions to the Proffer Reform Bill

The first reaction of many localities to the enactment of the Proffer Reform Bill was to require developers to execute documentation certifying that the proffers they submitted were not unreasonable. This is clearly prohibited if executed as part of the proffer agreement. Virginia Code § 15.2-2303.3(C) prohibits a locality from accepting any proffer that waives future legal rights against the locality (see also, 1989 Va. Op. Atty. Gen. 96, stating that a promise contained in proffers not to contest their enforceability is itself unenforceable). A written waiver that is executed separately from a proffer also will not carry much weight, as the new Proffer Reform Bill prohibits *localities* from accepting an unreasonable proffer, as defined by the code, rather than prohibiting the *applicant* from submitting an unreasonable proffer. This is a key difference between prior law and the current bill. Previously, §15.2-2297(A) controlled the question of whether a proffer was reasonable, and in many localities developers were required to state in the proffer statement that the proffer was reasonable and voluntary if they had any hope of obtaining approval of their rezoning request, such that the burden was on the applicant to state that the proffer was reasonable. The burden of demonstrating that a proffer is not unreasonable has now shifted onto the locality; the new statute specifically prohibits localities? *acceptance* of an unreasonable proffer.

In view of the foregoing developments, many localities have halted, or effectively halted, acceptance of any applicable rezoning applications until further guidance is provided. In fact, Spotsylvania County, Stafford County, Leesburg and Albemarle County, to name a few, have all repealed their proffer policies or programs. The Town of Leesburg officially enacted an interim policy which provides that no new proffers will be accepted until the Town Council has adopted legislative changes. The ensuing review is expected to take at least six months. In June, Albemarle County repealed its proffer policy, and, in October, it approved a charter for a new Residential Development Impact Work Group. The group is tasked with understanding the new state law and recommending next steps to the county. However, as of the date of writing this article in late December, Albemarle County had yet to actually appoint members to the Work Group. Once such members are appointed, it likely will take the Work Group at least 6 to 12 months to provide a recommendation. Portsmouth is proceeding in a similar fashion?to avoid getting sued while it works out a more formal policy, Portsmouth?s planners simply will not suggest or entertain any proffers, reasonable or otherwise. The Planning Director of Portsmouth, Robert Baldwin, was quoted in the *Virginian-Pilot* as stating, ?If you want to submit proffers, we?re not discussing it.?

Other localities either have chosen to proactively reduce the scope of their proffer programs or have required developers to provide more comprehensive data on the impacts of their proposed developments. Chesterfield County was one of the localities that reduced the scope of its proffer program. It reduced the county?s cash proffer maximum from $18,966 to $9,400 per dwelling unit (whether attached or detached), its first reduction in 25 years. These payments were also restricted to transportation improvements only. The Chesterfield Chamber of Commerce applauded the move, stating, ?The Chesterfield Chamber believes this new policy positions the County to be transparent and pragmatic in establishing proffers that are tied to the actual impacts of development.? Directly linking cash proffers to specific impacts was a key goal of the Proffer Reform Bill. Many parts of Loudoun County are exempt or will be exempt once the County enacts proposed small area plans around current or future Metro stations. However, for areas not exempt, the County has eliminated *cash* or *offsite* proffers. The Assistant Director of Planning and Zoning for Loudoun County, John Merithew, was quoted in *Loudoun Now* stating, ?Where the new legislation applies, we will in fact not accept cash or offsite proffers, completely eliminating the discussion or the potential risk of the county accepting the unreasonable or wrong types of proffers.?

Hanover County has both reduced its proffer program and required more impact studies by developers. It had already abolished its proffer policy for all areas except transportation four years ago. The County further revised its proffer program by requiring subdivisions with 40 or more lots to conduct traffic impact studies and eliminated a minimum payment of $2,306 per lot for these smaller subdivisions. As demonstrated by the above examples, for several municipalities, the new Proffer Reform Bill has resulted in either reduction of proffers or complete stagnation.

Yet, at the Local Government Attorneys Fall Conference in October, several panelists addressed this exact issue to a large number of Virginia local government attorneys. The title of one panelist?s written materials was, ?Keep Calm and Carry On.? Several other panelists questioned whether the Proffer Reform Bill actually changed the legal landscape, arguing that Virginia Code §§ 15.2-2297 and 15.2-2298 already dictated that any rezoning giving rise to the need for conditions must have a reasonable relation to the rezoning. Additionally, *Nollan* and *Dolan* (pertinent U.S. Supreme Court case law in this area) already required an ?essential nexus? and ?rough proportionality? between the condition imposed and the proposed development. Thus, they posed the question, ?Are these old standards different than the ?specifically attributable? standard of the new law?? I believe they are. As stated above, specifically attributable is not defined in either the statute or the case law; however, one interpretation, cited by Albemarle County Attorney Greg Kamptner, stated that it likely means ?with exactness and precision? as per *Webster?s Third New International Dictionary*. This is certainly a higher standard than *Dolan*?s *rough* proportionality test. Moreover, the terms differ not just in their common application but also as they have been applied legally. In fact, it was in the *Dolan* case that the U.S. Supreme Court explicitly stated that the test of ?specific and uniquely attributable? required by certain state courts (as noted earlier) is a much more ?exacting scrutiny? than the ?rough proportionality? test that it decided to employ. Also, according to *Miller v. Highland County*, 274 Va. 355, courts must assume that the General Assembly chose, with deliberation and care, the words it used in a statute. Thus, courts must assume that the General Assembly chose to enact a standard different from the one previously used.

4. Conclusion

The new Proffer Reform Bill has set up a strong basis for challenging the denial of rezoning applications with a residential component. The bill has increased both the chances of, and the eventual benefits of, a win in court. The bill prohibits localities from requesting or accepting unreasonable proffers. Also, localities may not deny an application if the denial is wholly or partly based on an applicant?s refusal to submit an unreasonable proffer. As stated earlier, this shifts the burden onto the locality, for the new statute specifically prohibits acceptance by the locality (not the proffering by the applicant) of an impermissible proffered condition. Moreover, when an application has been denied, an applicant need only prove by a preponderance of the evidence that it refused to submit an unreasonable proffer (i.e. just a 51% likelihood). The statute then directs the court to presume that such refusal or failure was the controlling basis for the denial unless the locality can provide clear and convincing evidence to the contrary. The standard of preponderance of the evidence imposed on the applicant is much lower than the localities? standard of clear and convincing evidence. The remedies provided by the new statute also are very favorable. Localities would be required to pay applicants? attorney?s fees and costs resulting from denial, and courts may order localities to approve projects as applied for without the unreasonable proffer within 90 days and enjoin those localities from interfering with development of the project if they fail to do so.

In sum, the Proffer Reform Bill has set a new standard for reviewing the reasonableness of proffers that has yet to be interpreted or defined, and the burden has now shifted onto localities to determine what exactly the General Assembly intended. It is not yet clear how this new standard will be applied, and each locality has reacted differently. Reactions have ranged from eliminating or reducing proffer programs to halting acceptance of any proffers at all. Developers and other landowners planning residential rezonings should be engaged in any new policy discussions about cash proffers in their communities as such programs evolve.

While much uncertainty remains regarding interpretation of the standards imposed by the Proffer Reform Bill, as stated above, common usage and legal interpretations in other jurisdictions suggest a much more stringent standard than what was used previously. Perhaps the Proffer Reform Bill requires changes to localities? regulations that are so dramatic that localities are not ready or willing to accept them, especially since proffers were an important part of the budgetary makeup of these localities. Yet, the Proffer Reform Bill has demanded change. An alternative budgetary source to proffers could be a fraction of an increase in taxes across the entire municipality. This slight increase would likely more than make up whatever the locality would lose from no longer accepting cash proffers, and politicians would have the political cover of the Proffer Reform Bill to justify such an increase. This may be exactly what the Proffer Reform Bill was intended to do: spread the costs of increasing, yet necessary community facilities across the entire community.

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