

COUNTY OF ALBEMARLE



MEMORANDUM

TO: Albemarle County Board of Supervisors

FROM: Greg Kamptner, Deputy County Attorney

DATE: May 26, 2016

RE: *Senate Bill 549: the new proffer legislation*

This memorandum outlines the key provisions of Senate Bill 549, which will become effective on July 1, 2016 and be codified as Virginia Code § 15.2-2303.4. This memorandum also identifies the key issues facing the County and the development community as a result of this new law, the actions that are being taken by County staff to adjust to the new law, actions that should be considered as the new law changes the landscape for zoning map amendments (“rezonings”), and other issues.

1. Key Provisions of Virginia Code § 15.2-2303.4

A. Subsection A **defines terms**, including:

1. *Offsite proffer*: A proffer “addressing an impact outside the boundaries of the property to be developed and shall include all cash proffers.”
2. *Onsite proffer*: A proffer “addressing an impact within the boundaries of the property to be developed and shall not include any cash proffers.”
3. *Public facility improvement*: A proffer may pertain only to a public facility improvement, which is an “offsite transportation improvement, a public safety facility improvement, a public school facility improvement, or an improvement to or construction of a public park.” The term includes capital improvements that expand the capacity of existing facilities, and excludes operational expenses.

B. Subsection B **prohibits** the County from **requesting or accepting** an unreasonable proffer, or denying an application where the denial is based in whole or in part on the applicant’s failure or refusal to submit an unreasonable proffer or an amendment to a proffer previously accepted.

C. Subsection C describes **what constitutes an unreasonable proffer**:

1. *Onsite proffers*: An onsite proffer is unreasonable “unless it addresses an impact that is ***specifically attributable*** to a proposed new residential development or other new residential use applied for.”
2. *Offsite proffers*: An off-site proffer is unreasonable: (i) “unless it addresses an impact that is ***specifically attributable*** to a proposed new residential development or other new residential use applied for”; and (ii) “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. The “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.”

D. Subsection D establishes the rules and **remedies** if the Board’s decision is challenged:

1. The action must be brought under Virginia Code § 15.2-2285(F) **within 30 days after the decision** (the same section that applies to other challenges to zoning decisions).
2. In an action challenging the denial of a rezoning application or an amendment to an existing proffer, if the **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 [County], 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 action, if the applicant is successful in challenging the Board’s decision under Virginia Code § 15.2-2303.4, 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.**”

2. Issues

A. The requirement that all proffers address impacts that are ***specifically attributable*** to the development:

1. ***Specifically attributable* is not defined** and significantly changes the meaning of what is a reasonable proffer.
2. **Virginia Code § 15.2-2303.4 establishes a new standard for evaluating whether proffers are *reasonable*.** All proffers must address impacts that are *specifically attributable* to the development. This standard replaces the longstanding standard of reasonableness that requires an *essential nexus* and *rough proportionality* between an impact and the proffer.
3. The new standard ***requires a level of certitude that may not be achievable***, thereby exposing any future approved rezoning or denied rezoning to challenge.
4. The word *specifically*, as used in the context of Virginia Code § 15.2-2303.4, likely means **“with exactness and precision.”** *Webster’s Third New International Dictionary*.
5. The level of certitude required may be impractical and **jeopardize the validity of proffers that may provide any benefit to the public that lives outside of the residential development for which the proffer was made.** For example, the County would be prohibited from accepting a proffer to dedicate land for a school within a proposed residential development if the school would serve any children from outside of the new residential development. This result would not advance the public interest.
6. Following is an example as to how the requirement of an impact being *specifically attributable* to a rezoning could be applied:

A developer proffers to dedicate 20 acres for an elementary school site within the development. The rezoning is approved. The maximum density from the residential development would produce 440 elementary school students. Two years after the rezoning is approved, the school division determines that a 440-student elementary school is not feasible from either an operational or an educational standpoint, and the school division has planned for a 550-student school for the site. Three years after the

rezoning is approved, the developer changes its mind and applies to amend the proffers to eliminate the proffer to dedicate the school site and the locality denies application. The developer challenges the denial. The locality loses because the school site was not *specifically attributable* to the original rezoning because it was more than what was required to address the impacts from that development. As a result, that proffer is required to be eliminated in its entirety.

B. The requirement that offsite proffers only address impacts **in excess of existing capacity**:

1. Virginia Code § 15.2-2303.4 requires that any offsite proffers, including all cash proffers, address only the “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.” In other words, as long as there is existing capacity, incremental impacts caused by a development cannot be addressed.
2. The County may base its assessment of public facility capacity on the projected impacts specifically attributable to the new residential development or new residential use.
3. **Existing capacity can change over time**, and that may result in applications to amend proffers as capacity becomes available. For example:

A proffer to address impacts on schools at the time of the original rezoning because a school did not have any capacity at that time may become an unreasonable proffer and would have to be deleted or amended upon an application to amend the proffer if, after the original rezoning was approved, the school division went through redistricting and the school had available capacity at the time of the proffer amendment.

C. The requirement that offsite proffers provide a **direct and material benefit** to the development.

1. *Direct and material benefit* is **not defined** and there is no guidance as to how that benefit is to be measured.
2. There is often **lag time between the payment of a cash proffer and when the public facility for which the cash was contributed is constructed**. Without a clear definition, at any time before the public facility is constructed, a developer could challenge the validity of the proffer that it made by claiming that the development is not receiving a “direct and material benefit.” This would create untenable uncertainty as to whether public facilities proffered to address impacts will be actually provided.
3. Following is an example as to how this required could be applied:

A developer proffers \$500 per dwelling unit for parks. The rezoning is approved and the residential development is built. Five years after the approval, the developer applies to amend the proffers for the houses still to be built because it has conducted a study of the residents now living in the development and the survey shows that none of the residents have visited a park located on the other side of the locality. Because that park receives 25% of the County’s parks budget, the developer applies to amend the cash proffer to reduce its amount 25% from \$500 to \$375 per dwelling unit. The locality denies the amendment and the developer challenges the denial. Because the residents currently living in the development have not used that park, the locality may have difficulty countering any evidence by the developer that the residents of the development are not receiving a *direct and material benefit* from the portion of the cash proffer supporting the park in issue. If the locality loses the case, the entire proffer must be deleted.

4. **Small, and less direct, impacts may escape being addressed.** For example, the fire rescue station closest to the proposed development may still have capacity (*i.e.*, it still would meet acceptable response times) at the time of the rezoning and, therefore, no proffer to address impacts on fire rescue service may be accepted. However, secondary fire rescue stations may be impacted by the increased number of calls.
- D. Virginia Code § 15.2-2303.4 will **prohibit** the County from accepting proffers to provide **affordable housing**.
- E. The effective date applies to rezoning applications filed after July 1, 2016, but **conversations between county officials and the applicant before July 1, 2016, may be subject to Virginia Code § 15.2-2303.4.**
- F. Virginia Code § 15.2-2303.4 will apply **to applications to amend proffers to previously approved rezonings, provided that the original rezoning application was filed after July 1, 2016;** it does not apply to applications to amend proffers filed after July 1, 2016, if the original rezoning was filed before July 1, 2016.
- G. Virginia Code § 15.2-2303.4 **eliminates the County's ability to rely on reasonable averages** developed for per unit cash proffers and requires a case-by-case analysis of every impact in order to ensure that the new standards are satisfied.

3. Actions Being Taken

- A. **Repealing the current cash proffer policy** adopted in 2007. The planning commission has held a public hearing and has recommended that the policy be repealed.
- B. **Study of new proffer policy** that is consistent with Virginia Code § 15.2-2303.4. A resolution of intent adopted.
- C. Developing **guidelines for County officials and staff for interacting with applicants** and evaluating impacts under the new law; *e.g.*, avoiding making requests, suggestions, or accepting *unreasonable* proffers.
- D. **Revising the standard proffer form** which currently states that the proffers are being **voluntarily offered** and that they are **reasonable**. The revised form will add that the **proffers address impacts that are specifically attributable** to the proposed development and, for offsite proffers and cash proffers, that the proffer addresses an impact to an offsite public facility and the **new development creates a need, or an identifiable portion of a need**, for public facility improvements in excess of existing public facility capacity, and that the new development will receive a **direct and material benefit** from the offsite public facility.

4. Actions to Consider

- A. Amend the comprehensive plan to **establish objective criteria and thresholds requiring adequate public facilities**.
- B. Establish **new form-based zoning district(s)** to which the County could initiate the rezoning of lands in target areas, beginning with those lands within master plan or small area plan areas. If the County initiates the rezoning, no proffers would be accepted and no application plan would be required.
- C. Establish **new zoning district(s) that satisfy the prerequisites of Virginia Code § 15.2-2303.4(E), *i.e.*,** lands within a master plan's area, designated as revitalization area, encompasses mass transit, be a mixed-use development, and have a minimum floor area ratio of 3.0. A district that meets these standards is not subject to the other requirements of Virginia Code § 15.2-2303.4.
- D. Develop a **new model to evaluate impacts** on transportation, public safety, schools, and parks on a case-by-case basis that is consistent with Virginia Code § 15.2-2303.4.

- E. **Track capacities** of all transportation, public safety, schools, and parks facilities, and identify those capacities at the time of the rezoning; include as part of the analysis the capacity theoretically consumed by projects already approved.
- F. Expand ordinances approving rezonings to further **explain how the proffers satisfy Virginia Code § 15.2-2303.4** and expand resolutions denying rezonings to further justify the decision and to address the issue of unreasonable proffers; when appropriate, recommend that the board of supervisors act on the ordinance or resolution at a subsequent meeting.
- G. **Require applicants to demonstrate how impacts are addressed** in compliance with Virginia Code § 15.2-2303.4, and **explain how each proffer is specifically attributable** to an impact and, for offsite proffers, **explain how the proffer provides a direct and material benefit** to the proposed development even if the new or expanded public facility is not available when the first residents live in the development.
- H. Re-evaluate **application fees** for rezoning applications to address the **increased costs resulting from heightened analyses of impacts** in order to ensure compliance with Virginia Code § 15.2-2303.4.
- I. Establish new forms of **incentive zoning** to promote affordable housing and address impacts that may no longer be addressed by proffers such as offers to dedicate open space, or to provide enhanced erosion and sediment control or stormwater management measures.
- J. Consider whether the costs of impacts resulting from new residential development should be **shared by the community as a whole** to a greater extent than it currently is, or in its entirety, in all cases or for those developments that will meet design or performance standards.

5. Other Issues

- A. Whether citizen advisory committees are part of the County for purposes of communications made to the applicant while an application is under review. If so, citizen advisory committees need training and guidelines. Community meetings, which are part of the rezoning process and are sometimes held at citizen advisory committee meetings, may need to be held in a different setting.
- B. The extent to which citizen comments may affect the legislative record in determining whether the denial of a rezoning will be presumed to be based on the applicant's failure or refusal to submit an unreasonable proffer.
- C. Evaluate whether service districts, transportation impact fees, or any other revenue-generating tools are available to ensure that impacts from a residential development are addressed.