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VIRGINIA'S PROFFER SYSTEM AND THE PROFFER REFORM ACT OF 2016

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ABSTRACT

Virginia’s conditional zoning law allows a landowner to voluntarily agree to limit the use of property in certain ways or otherwise to perform certain acts, including in some cases the provision of cash or other services, as conditions in support of certain land use permits or authorizations. While established with laudable purpose, that system of conditional zoning (commonly known as the “proffer system” referencing the promises “proffered” to localities) has, in certain instances, been used by localities in a manner that more closely resembles forced exactions than voluntary conditions. In 2016, the Virginia General Assembly enacted legislation reforming these arrangements in an effort to return efficiency and fairness to the process. This Article summarizes the history of proffers in Virginia, describes certain judicial interpretations and modifications of proffer laws and practices, and analyzes the 2016 reforms enacted by the General Assembly – concluding that, once implemented, the 2016 law will improve conditions for landowners and homeowners in Virginia.

INTRODUCTION

On July 1, 2016, legislation enacted during the 2016 Session of the Virginia General Assembly representing a fundamental restructuring of Virginia’s system of conditional zoning became applicable to the Commonwealth’s localities. Pursuant to that system, localities may accept voluntary offers by applicants to limit or qualify how a subject property will be used or developed or otherwise to perform certain acts or provide cash or other services (“proffers”) as conditions on a property in exchange for the approval of a rezoning application.¹ In spite of a laudable original intent and the early support of the development community, the proffer system has been the subject of regular criticism and legislative modification in recent years as certain localities across the Commonwealth have become more and more reliant on the system as a salve for impacts arguably not directly (or even indirectly) caused by the relevant development.²

The 2016 legislation, enacted as Chapter 322 of the 2016 Acts of Assembly (the “Proffer Reform Act” or the “Act”) and codified as § 15.2-2303.4 of

¹ Commission on Local Government Commonwealth of Virginia, Report on Proffered Cash Payments and Expenditures by Virginia’s Counties, Cities and Towns 2015-2016 (2016).

² Antonio Olivio, *Va. Bills Seek to Weaken Land-use Tool Behind New Roads, Parks, and Schools*, Wash. Post (Feb. 7, 2016), https://www.washingtonpost.com/local/dc-politics/va-bills-seek-to-weaken-land-use-tool-behind-new-roads-parks-and-schools/2016/02/07/f50fe23c-cb88-11e5-ae11-57b6aeab993f_story.html?utm_term=.66ee03de7d3d.

the Code of Virginia (the “Statute”), was promoted by the building industry as a means of restoring a modicum of reason and fairness to a process that had, in the eyes of its proponents, morphed in some localities from a system of voluntary mitigation to one of forced exaction.³ At its core, the Act substantially limits the permissible breadth of certain proffers and provides applicants with a remedy to address infractions by the government.

Following a brief discussion regarding Virginia’s proffer system, including its origins and certain recent revisions occasioned by perceived liberties taken by localities, this article provides a detailed analysis of the 2016 Proffer Reform Act and its expected impact on Virginia’s system of conditional zoning.

I. VIRGINIA’S PROFFER SYSTEM

A. In Concept

In many respects, the purpose of the Proffer Reform Act was to return Virginia’s concept of conditional zoning and the proffer process back in the direction of its roots.

By black letter law, Virginia defines “conditional zoning” as meaning, “as part of classifying land within a locality into areas and districts by legislative action, the allowing of reasonable conditions governing the use of such property, *such conditions being in addition to, or modification of the regulations provided for a particular zoning district or zone by the overall zoning ordinance.*”⁴ The statutory purpose of conditional zoning is to establish “a more flexible and adaptable zoning method to cope with situations found in such zones [...] whereby a zoning reclassification may be allowed *subject to certain conditions proffered by the [...] applicant for the protection of the community that are not generally applicable to land similarly zoned.*”⁵

With these two policy pronouncements, the Code of Virginia supplies helpful insight into the original intent and purpose underlying Virginia’s proffer system – to provide a legally binding (legislative) method by which an applicant may add to the requirements of, or modify her rights under, an existing zoning classification in a manner not generally applicable to land in the zone both to provide for the protection of the community and as means for gaining government approval for a rezoning.

³ *See id.*

⁴ Va. Code Ann. § 15.2-2201 (2016) (emphasis added).

⁵ *Id.* at § 15.2-2296 (emphasis added).

It is noteworthy both that the definition contemplates conditions as additions to, or modifications of, *the regulations* of a particular zone and that the purpose statement contemplates the conditions as applicable *to land*. Noticeably absent from this concept, of course, is any allusion to the conditions as satisfaction of local expectations for cash (or anything else) to be used for the more general benefit of the local citizenry as an alternative to taxes. While such expectations have become common practice in recent years (as discussed *infra*, “rough proportionality” can be quite rough in practice), the concepts set forth in §§ 15.2-2201 and 15.2-2296 of the Code reflect both the early days of the proffer system as well as the conceptual baseline toward which the Statute hopes to return the modern system.

B. Early History⁶

Under its early conceptualization, the proffer system was the codification of an applicant practice that had originated in Fairfax County of including “development conditions,” either in a development plan (required pursuant to certain early “Planned Development” zoning categories) or as part of a plan of development in a rezoning application, as a means of overcoming concerns with the development raised by neighbors, county staff, planning commissioners, or members of the Board of Supervisors.⁷ These early conditions often included height restrictions, setback increases, the creation of a buffer in commercial settings, or limits on density or the provision of a school in the residential setting.⁸ The difficulty with this early practice was that it was not legally binding on the developer or its successors and, as such, was not as effective at assuaging local concerns as it could be and was subject to challenge as contracting away legislative authority.⁹

In 1973, apparently driven by these concerns, the General Assembly passed a bill:

[To allow] for the adoption, in [Fairfax County] as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by ordinance, when such conditions shall have been proffered in writing [...] by the owner of the property which is the subject of the proposed

⁶ The authors wish to thank principals of the land use bar and development community during this period including William G. Thomas, Grayson P. Hanes, John T. “Til” Hazel, and Douglas R. Fahl for invaluable background regarding the early history of the Virginia proffer system. Certain historical observations were supported by the unpublished work of Doug Fahl. See, Douglas R. Fahl, Proffer Reform (Sb 549) – Why It Is Necessary 1 (2016), http://www.hbav.com/site/publisher/files/Proffer%20Reform%20Why%20Needed%205August2016_pdf%20Doug%20Fahl%202016.pdf.

⁷ See Fahl, *supra* note 6.

⁸ *Id.* at 2.

⁹ *Id.*

zoning map amendment.¹⁰

This initial Virginia proffer statute solved an immediate problem for Fairfax County and its development community by allowing a developer to enter a legally binding agreement with the locality to limit a landowner's rights or provide relief from an impact caused by proposed development in order to assuage the concerns of interested parties. And as originally contemplated, the system was reasonably unobjectionable. The difficulty for certain members of the development community came with what followed.

The original proffer statute (what has become § 15.2-2303) applied initially to Fairfax County, with its Urban County Executive form of government, and later to adjacent jurisdictions including Prince William and Loudoun Counties and two counties east of the Chesapeake Bay. Throughout the later 1970's and 80's, the General Assembly enacted a multitude of additional provisions expanding upon (and in some cases restricting) the power of localities to accept proffers.¹¹

In 1978, the General Assembly expanded proffer authority to all Virginia localities (and, perhaps sensing the possibility of abuse, also added the statement of purpose now set forth in § 15.2-2296).¹² In what is now § 15.2-2297 of the Code, the General Assembly authorized localities to accept a *voluntary* proffer by a landowner of conditions as part of a rezoning provided: (i) the rezoning itself must give rise for the need for the conditions; (ii) the conditions must have a reasonable relation to the rezoning; (iii) the conditions do not include a cash contribution to the locality; (iv) the conditions do not include mandatory dedication of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided in § 15.2-2241; (v) the conditions do not include payment for or construction of off-site improvements except as provided for in § 15.2-2241; (vi) a condition may not be proffered that is not related to the physical development or physical condition of the property; and (vii) all conditions must be in conformity with the comprehensive plan.¹³ While quite restrictive in theory, the word "voluntary" – included no doubt to provide a theoretical distinction from a forced exaction – provides a roadmap for circumvention that,

¹⁰ 1973 Va. Acts 379.

¹¹ Virginia adheres to Dillon Rule principles whereby a unit of local government has only those powers granted by the General Assembly and those necessarily implied from such a grant. *See Bd. of Zoning Appeals of Fairfax Cty. v. Bd. of Supervisors of Fairfax Cty.*, 666 S.E.2d. 315, 317 (2008). Under such principles, unless the General Assembly grants power to a unit of local government, the locality does not have the ability to exercise such authority.

¹² 1978 Va. Acts 320.

¹³ Va. Code. Ann. § 15.2-2297 (2016).

by anecdote, has been frequently exploited over time.¹⁴

It is helpful to see, however, that in this first real expansion of proffering authority, the General Assembly was sufficiently concerned with potential abuse that it disallowed both cash contributions and other benefits that are not specifically tied to the impacts of the development (*e.g.*, dedication of open space and parks or construction of certain off-site improvements) and specifically prohibited any condition that is not related to the physical development or physical condition of the property.

While the early concept was a relatively conservative one, it became liberalized with time. In 1989, the General Assembly further expanded the breadth of conditional zoning authority when what is now § 15.2-2298 of the Code was enacted for high-growth localities.¹⁵ The expanded proffer authority provided for voluntary proffering of reasonable conditions so long as: “(i) the rezoning itself gives rise to the need for the conditions; (ii) the conditions have a reasonable relation to the rezoning; and (iii) all conditions are in conformity with the comprehensive plan.”¹⁶ These revisions expanded authority for high growth localities to accept significantly more flexible proffers – including cash.

C. Modern Uses (and Abuses) and the Futility of Legal Challenge

As land development activity increased, localities have increasingly sought to offset general impacts upon government facilities such as schools, parks, roads and utilities by increased demands for payment of cash proffers. Whereas in early stages of land use case law, local governments and rezoning applicants often cooperatively worked out conditions that were reasonably-related to the impact of a particular project, as development activity increased (and the political will to enact broad-based revenue measures decreased), the conceptually “reasonable relationship” of conditions to the rezoning project often, in the give and take of negotiation, became a locality’s wish list opportunity to ask for conditions (bordering on exactions) that could have been

¹⁴ According to land use practitioners, localities often seek and obtain a wide variety of proffers that might appear to conflict with statutory requirements because proffers are made “voluntarily” by an applicant at the time of the legislative body’s public hearing. Once the rezoning is approved, the rezoning applicant may be estopped from challenging a proffer because it was “voluntarily” offered. *See* A. Barton Hinkle, *Are Proffers Built on Shaky Ground?*, Richmond Times Dispatch (Sept. 7, 2014), http://www.richmond.com/are-proffers-built-on-shaky-ground/article_e04c6be8-7b39-5292-99cb-f35e97c25de3.html.

¹⁵ 1989 Va. Acts 697 (current version at Va. Code Ann. § 15.2-2298 (2017)).

¹⁶ Va. Code Ann. § 15.2-2298 (2017). These modern concepts roughly reflect constitutional mandates of reasonable relationships and rough proportionality between conditions and disturbance. However, some localities have found ample room for expansive reading within the statutory and constitutional mandates over time. *See infra* p. 7.

characterized in some circumstances as “an out-and-out plan of extortion.”¹⁷

With time, these “wish lists” have grown long. During modern Virginia rezoning review, it has become common practice for some localities to recommend denial of a rezoning application unless the applicant proffers obligations such as cash payments for the unmet housing needs of the locality, county-wide open space easement requirements, design details of units, affordable housing fees unrelated to project density, regional water quality improvements unrelated to a particular project, regional transit fees, and regional road fees, among others.

Such expansive proffering is perhaps most apparent in the area of cash – where localities have, for years, published “schedules” noting per lot “expectations” for cash proffers. Specifically, and notwithstanding constitutional hash marks concerning exaction obligations,¹⁸ rezoning applicants have been expected to “voluntarily” pay regularly-increasing fees set by localities to address what might be considered locality-wide public facility needs (*contra* simply those specifically created by the proposed development). Examples of cash proffers expected to be paid before the Act became effective include the following recommended cash fees for a single family detached home: Loudoun County (\$45,923), Prince William County (\$44,930), Spotsylvania County (\$33,285); Chesterfield County (\$18,966), etc.

Importantly, these proffer schedules were uniform across their respective localities – and were completely unrelated to the actual impact of a specific development on public facilities. If existing facilities had capacity, for example, the actual impact could be quite low and, thus, a high proffer payment would be in excess of compensating for the impact. “Roughly proportional,” perhaps, but not necessarily consistent with the original concept of the system.¹⁹ Often, the costs of these proffer payments were passed on to new home buyers, thereby increasing the cost of new housing for which a rezoning was required in a manner not shared by buyers of existing homes or by-right development.

While there have been challenges to such “expected” proffers, they are few (it may be politically difficult for a developer to sue a locality) and face substantial hurdles under current case law. A good description of an expected cash proffer may be found in *Board of Supervisors of Powhatan County v. Reed's Landing Corp.*, 250 Va. 397 (1995). In this case the Powhatan County Board of Supervisors would not approve a rezoning application for the sole

¹⁷ See *Nollan v. Cal. Coastal Comm'n.*, 483 U.S. 825, 837 (1987).

¹⁸ See *Nollan*, 483 U.S. at 838; *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

¹⁹ Note that the inverse could also be true – where the actual impact of a development could exceed the uniform cash proffer amount.

reason that the developer refused to pay a \$2,439.00 per lot proffer. The Supreme Court concluded that, under Dillon Rule principles, local governing bodies have only the powers the General Assembly expressly or by necessary implication confers upon them that did not include imposition of an impact fee.²⁰ Evaluating proffer legislative authority the Supreme Court determined a unit of local government “is not empowered to require a specified proffer as a condition precedent to a rezoning.”²¹

The sort of “expected” cash proffer determined in *Reed’s Landing* to have been an *ultra vires* request, has nevertheless been distinguished by the Virginia Supreme Court in factual patterns such as is stated in *Gregory v. Board of Supervisors of Chesterfield County*.²² In *Gregory*, the Board of Supervisors denied a rezoning application where the record established “[p]ersuasive evidence exists that full cash proffers or lack thereof played a key factor in the Board[’s] determination.”²³ In *Gregory* the Supreme Court distinguished *Reed’s Landing*, noting while there was evidence from which to conclude that the County “expected” cash proffers, “the evidence is not as ‘definitive’ as the evidence presented in [Reed’s Landing.]”²⁴ The distinguishing factor in *Gregory*, unlike *Reed’s Landing*, was the record the county established to demonstrate that where there are two reasonable zoning classifications for the property, the Board was free to choose between the two classifications.

The fairly debatable standard set forth in *Gregory* is routinely utilized by localities to deny a requested rezoning, even if the record shows “persuasive evidence” that the absence of an offer to pay maximum cash proffers “played a key factor” and that cash proffers were “expected,” as they were in *Reed’s Landing*.²⁵

D. Recent Legislative Reactions

In response to consistently increasing liberties taken with the confines of the proffer statutes, the General Assembly has sought, in recent years, to reign in certain symptoms of abuse. For example, the General Assembly has addressed issues concerning when cash proffers may be collected or accepted (§ 15.2-2303.1:1), the timing of expenditures and use of cash payments (§ 15.2-2303.2), and the timing of payment of a cash proffer prior to issuance of a building permit (§ 15.2-2303.3), among many other issues. Indeed, most sessions of the General Assembly since 2000 have included some iteration of

²⁰ Bd. of Supervisors of Powhatan Cty. v. Reed’s Landing Corp., 463 S.E.2d 668 (Va. 1995).

²¹ *Id.* at 670.

²² Gregory v. Bd. of Supervisors of Chesterfield Cty., 514 S.E.2d 350 (Va. 1999).

²³ *Id.* at 353.

²⁴ *Id.*

²⁵ *Id.*

“proffer reform.”²⁶

The General Assembly’s interest in reform has, at times, been spurred by developments in federal law. In the summer of 2013, the U.S. Supreme Court made an important ruling related to the *Nollan/Dolan* constitutional standard in *Koontz vs. St. John’s River Water Mgmt. Dist.* (“*Koontz*”).²⁷ Importantly, while *Nollan* and *Dolan* dealt with the dedication of interests in real property (e.g., easements), the Court in *Koontz* found that “the government’s demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.”²⁸

Thus, in *Koontz*, the Court plowed new ground in two key respects: (1) a proposed permit condition may be found to be an unconstitutional condition not simply “when the government approves a development permit conditioned on the owner’s conveyance of a property interest (*i.e.*, imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (*i.e.*, imposes a condition precedent);”²⁹ and (2) the *Nollan/Dolan* requirements apply to monetary exactions (e.g., cash proffers) in addition to other types of non-cash exactions. On the latter point, the 5-4 majority found that if the *Nollan/Dolan* standard was not applicable to monetary exactions, it would be “very easy for land-use permitting officials to evade” the rule through use of “so-called ‘in lieu of’ fees” – fees that the majority found to be “functionally equivalent to other types of land use exactions.”³⁰ For that reason, the Court held, “‘monetary exactions’ must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.”³¹

Importantly, the applicant in *Koontz* was able to seek relief in the Florida state courts under a state statute authorizing damages and attorney fees for victims of unconstitutional exactions and, at the time, Virginia did not have a similar statute. Thus, a Virginia applicant in a similar circumstance may not have had the same avenue of opportunity to enjoy the protections afforded by *Nollan/Dolan* and *Koontz*.

To provide a clear avenue for Virginia landowners to seek relief in Virginia state court under *Nollan/Dolan/Koontz*, the 2014 General Assembly

²⁶ See, e.g., 2008 Va. Acts 733; 2006 Va. Acts 450; 2001 Va. Acts 703.

²⁷ See generally *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013) (requiring land use exactions and permit conditions to be both closely related and proportional to the impact of the proposed land use, lest the exaction/condition be considered a “taking” for which the applicant may be owed compensation).

²⁸ *Id.* at 2603 (Kagan, E., dissenting).

²⁹ *Id.*

³⁰ *Id.* at 2599 (majority opinion).

³¹ *Id.*

passed a new provision of the Code to afford a state law remedy to Virginia applicants aggrieved by the imposition of unconstitutional conditions.³² While the clear goal of the legislation was not only to provide applicants a clear state court remedy, but more broadly to encourage localities to stay within the parameters of *Nollan/Dolan* when considering local land use decisions, it was limited in its ability to effect real change in the proffer system. Specifically, because the *Koontz* legislation defaulted to the constitutional standards of rough proportionality and rational nexus, it could stem only the most egregious abuses by local governments (presuming an applicant was willing to enforce her rights) and left ample room for local excesses within the confines of the constitutional mandates.

To the sponsors of the Proffer Reform Act, additional reform was required.

II. THE PROFFER REFORM ACT OF 2016

The Proffer Reform Act was promoted by the building industry to push the modern proffer process back toward its original conceptions, *inter alia*, by requiring that proffers be tied closer to the actual impact of the development than might be required by existing statutes or constitutional baselines and to give renewed meaning to the concept of the “voluntary” proffer (*contra* “the required exaction”).³³

As signed by the Governor, the Act accomplishes three fundamental objectives: (1) it provides a new standard for adjudging the permissibility of a particular type of condition (proffers) that may be accepted by a locality in the context of a certain subset of residential rezoning or proffer condition amendment (“PCA”) applications;³⁴ (2) it prohibits localities from either requesting or accepting an impermissible (or “unreasonable” as used in the Act) proffer in conjunction with a rezoning or PCA or otherwise from denying a rezoning or PCA application on the basis of the applicant’s refusal or failure to submit such an unreasonable proffer;³⁵ (3) it provides a legal remedy whereby certain aggrieved parties may enjoy relief for violations of the Act and, thereby, enforce rights protected therein.³⁶

Although it is too early to judge the full implication of the Act, a brief analysis of its key provisions may provide insight regarding its expected impact on Virginia’s proffer system in the future.

³² See 2014 Va. Acts 1140; 2014 Va. Acts 1255.

³³ Va. Code Ann. § 15.2-2303.4(C) (2016).

³⁴ *Id.* at § 15.2-2303.4(B).

³⁵ *Id.*

³⁶ *Id.* at § 15.2-2303.4(D).

A. Definitions

Subsection A of the Act provides definitions for various terms used in the section and, thereby, provides substantive limitations on the Act's reach.

While the definitions should be reviewed carefully in their entirety, key limitations found in subsection A limit the scope of the Act to residential development and use (including residential components of mixed use development), distinguish between onsite and offsite proffers (offsite proffers including, by definition, all cash proffers), and define public facility improvement (effectively public transportation/road improvements, public safety improvements, public school improvements, and public parks) for purposes of later limitations on offsite proffers.³⁷

B. Prohibitions

Subsection B of the Act contains the Act's two key prohibitions on localities. As noted above, this section prohibits localities from (i) requesting or accepting an "unreasonable" (as defined in subsection C) proffer in the context of a residential rezoning or PCA; or (ii) denying a rezoning or PCA application where such denial is based (in whole or in part) upon an applicant's failure or refusal to submit an unreasonable proffer in connection with the application.³⁸

In the first part, a locality is specifically precluded not only from requesting (or encouraging, etc.) an applicant to submit an unreasonable proffer but, importantly, from *accepting* an unreasonable proffer submitted "voluntarily" by the applicant. The concept of prohibiting acceptance of an impermissible proffer mirrors, *inter alia*, Va. Code § 15.2-2303.1:1 (a statute that limits when certain cash proffers may be accepted by a locality) and is designed to forestall subtle coaxing by the locality that might otherwise attend "voluntary" proffers. As the onus for the prohibition is on the locality (*contra* the profferor), it is the locality that violates the statute for the acceptance of an impermissible proffer.³⁹

In the second part, a locality is precluded from denying a relevant application on the basis of the applicant's refusal to submit an unreasonable proffer. This provision raises obvious questions of proof and is drafted to work closely in tandem with subdivision D(2) which provides a presumption re-

³⁷ *Id.* at § 15.2-2303.4(A).

³⁸ Va. Code Ann. § 15.2-2303.4(B) (2016).

³⁹ *Id.*

lated to the denial of a rezoning or PCA application on an impermissible basis.

C. “Unreasonable” Proffers

Subsection C of the Act defines what it means to be an “unreasonable” proffer for purposes of the Act’s prohibitions and remedies. Importantly, this definition varies depending on whether the proffer in question is an “onsite” or an “offsite” proffer – with greater latitude being given to the former than the latter.⁴⁰

1. Onsite and Offsite Proffers ~ “Specifically Attributable” Impacts

Under subdivision C(i), both “onsite” proffers (*i.e.*, those addressing an impact within the boundaries of the property to be developed) and “offsite” proffers (*i.e.*, those addressing an impact outside of the property, inclusive of any cash proffer) are to be deemed unreasonable unless they address an impact that is “specifically attributable” to the proposed development or use.⁴¹

The term “specifically attributable” is a shortened version of a term of art used in the introduced bill “specifically and uniquely attributable.”⁴² The latter phrase is borrowed from exaction case law in the courts of other states as well as the federal courts and has been understood to connote a higher standard than the “rough proportionality” standard as it has been developed in exaction case law.⁴³

In contrast to competing standards for evaluating exactions (such as the “judicial deference” and “rational nexus” standards), the “specifically and uniquely attributable” test applies strict scrutiny when evaluating land use regulations.⁴⁴ This test requires that the imposed exaction be in *direct* proportion to a *specifically created* need and thereby limits required exactions to those specifically and uniquely attributable to the impact of the development.⁴⁵

Historically, the phrase “specifically and uniquely attributable” has been championed by the Illinois Supreme Court in the context of exaction law and other state courts have adopted it. In *Pioneer Trust & Savings Bank v. Village*

⁴⁰ *Id.* at § 15.2-2303.4(C).

⁴¹ *Id.* at § 15.2-2303.4(C)(i).

⁴² See S.B. 549, 2016 Gen. Assemb., Reg. Sess. (Va. 2016). *But see*, Va. Code Ann. § 15.2-2303.4(C) (2016).

⁴³ *Dolan*, 512 U.S. at 389–91.

⁴⁴ Daniel W. Russo, Note, *Protecting Property Rights with Strict Scrutiny: An Argument for the Specifically and Uniquely Attributable Standard*, 25 *Fordham Urb. L.J.* 575, 587 (1998).

⁴⁵ *Id.*

of *Mount Prospect*, the Illinois Supreme Court explained that requiring developers to dedicate land for public use is permissible only if the need for such land “is specifically and uniquely attributable to [the developer’s] activity.”⁴⁶ Otherwise, such a requirement “is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power.”⁴⁷

The Court continued, “[u]nder this standard, if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, ‘the exaction becomes a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations.’”⁴⁸

In *Northern Illinois Homebuilders Assn. v. County of DuPage*, Illinois applied the “specifically and uniquely attributable” standard to the imposition of “transportation impact fees.”⁴⁹ There, the court approved of a statute that incorporated the following definition:

“Specifically and uniquely attributable” means that a new development creates the need, or an identifiable portion of the need, for additional capacity to be provided by a road improvement. Each new development paying impact fees used to fund a road improvement must receive a direct and material benefit from the road improvement constructed with the impact fees paid. The need for road improvements funded by impact fees shall be based upon generally accepted traffic engineering practices as assignable to the new development paying the fees.⁵⁰

The Illinois Supreme Court approved of this language, observing that it “comports with the [requirement]...that an exaction which required a developer to provide for improvements ‘which are required by [his] activity,’ would be permissible, but one which required him to provide for improvements made necessary by ‘the total activity of the community,’ would be forbidden.”⁵¹

Several states have followed Illinois’s lead in adopting the “specifically and uniquely attributable” standard. For example, in adopting the “specifically and uniquely attributable” standard in 1975, the New Jersey Supreme Court observed “that there has been a disregard of the fundamental principle prohibiting discrimination in cost apportionment in requiring [a developer]

⁴⁶ 176 N.E.2d 799, 802 (Ill. 1961).

⁴⁷ *Id.*

⁴⁸ N. Ill. Home Builders Ass’n, Inc. v. Cty. of Du Page, 649 N.E.2d 384, 389 (Ill. 1995) (quoting *Dolan*, 512 U.S. at 389-90).

⁴⁹ *Id.*

⁵⁰ *Id.* at 389–90 (quoting 605 ILCS 5/5–903 (West 1992)).

⁵¹ *Id.* at 390 (citing *Pioneer Trust*, 176 N.E.2d at 799).

to pay \$20,000 and allocating no part of the cost to the other properties allegedly specially benefited by improvement, which was constructed as a general improvement.”⁵²

Although the modified phrase “specifically attributable” used in subsection C of the Act has not been particularly discussed in case law, its import and impact is likely similar to the source phrase – namely that, to be reasonable, a proffer subject to the Act must address a need that was created, at least in part, by the rezoning or PCA (although the rezoning or PCA need not be the sole cause of the need, as it may have been under the original language).

2. Offsite Proffers ~ Additional Limitations

As noted *supra*, the roots of the proffer system dealt effectively with *onsite* issues such as setbacks, buffers, and limitations on density. In many respects, it has been the marked expansion in the use of *offsite* proffers (including cash proffers) that has generated (over) reliance on proffers by localities to supplement resources generated by the general population and encouraged abuse of the system. As such, the Act establishes additional protections specific to offsite proffers in subdivision C(ii).⁵³

Under subdivision C(ii), an *offsite* proffer is to be deemed unreasonable pursuant to the first subdivision (*i.e.*, deemed not to be “specifically attributable”) unless it addresses an impact to an offsite public facility such that (a) the new development or use creates the need, or a portion of the need, for a public facility improvement in excess of existing capacity and (b) each new development or use receives a direct and material benefit from the public facility improvement resulting from the proffer.⁵⁴ As noted previously, public facility improvements are defined in subdivision A to consist of offsite public transportation improvements, public safety facility improvements, public school facility improvements, and public parks.⁵⁵

Thus, under subdivision C(ii), the Act makes clear that offsite proffers (inclusive of cash) must go to a limited universe of public facility improvements the need for which is created by the development or use and that each such improvement must enjoy a benefit therefrom in order to satisfy the “specifically attributable” requirement in subdivision C(i). Importantly, the “test” for satisfying C(ii) directly replicates the “specifically and uniquely attributable” test used by the Illinois Supreme Court in *Pioneer Trust and Savings Bank*

⁵² *Divan Builders, Inc. v. Planning Bd. of Twp. of Wayne*, 334 A.2d 30, 41 (N.J. 1975).

⁵³ Va. Code Ann. § 15.2-2303.4(C)(ii) (2012).

⁵⁴ *Id.*

⁵⁵ *Id.* at § 15.2-2303.4(A).

such that offsite proffers must arguably meet that standard and case law interpreting that standard will likely be relevant to Virginia courts interpreting the meaning of subdivision C(ii).

The last sentence of subsection C provides that in calculating public facility "capacity" for purposes of subdivision C(ii), the locality utilize "projected impacts" specifically attributable to the new development or use. Thus, the locality is not limited to the immediate impact but may project the impact into the future.

D. Enforcement Provisions

Subsection D consists of various provisions designed to allow an applicant or landowner of a subject property to enforce the provisions of the Act and enjoy a remedy in the case of violation by a locality.⁵⁶

Subdivision D(1) limits the universe of contestants in a cause of action to enforce the provisions of the Act to either an aggrieved applicant or the owner of the relevant property (in the event those are different parties) and requires that any such action be brought within thirty days of the offensive locality action (*e.g.*, either adopting or failing to adopt a rezoning or PCA in violation of the Act).⁵⁷

Subdivision D(2) provides a presumption available to certain aggrieved/applicant landowners in the case of a denial of a rezoning or PCA in violation of subdivision B(ii) of the Act (*contra* the impermissible request/acceptance of an unreasonable proffer pursuant to B(i)).⁵⁸ Specifically, the subdivision provides that in the case of a denial (the B(ii) situation) where an applicant/owner is able to prove by a preponderance of the evidence that it either refused or failed to submit an unreasonable proffer or PCA that was suggested, requested, or required by the locality, the court is to "presume, absent clear and convincing evidence to the contrary, that such refusal or failure was the controlling basis for the denial."⁵⁹

Pursuant to its plain terms, subdivision D(2) seeks to avoid the situation in which (i) the locality does, in fact, suggest/request/etc. an unreasonable proffer, (ii) the applicant declines to offer the requested unreasonable proffer, (iii) the locality denies the rezoning, but (iv) attributes the denial to some other factor (*e.g.*, health, safety, welfare).⁶⁰ In such a situation, if the applicant/land-

⁵⁶ *Id.* at § 15.2-2303.4(D).

⁵⁷ Va. Code Ann. §§ 15.2-2285(F), 15.2-2303.4(D)(1) (2016).

⁵⁸ *Id.* at § 15.2-2303.4(D)(2).

⁵⁹ *Id.*

⁶⁰ *See, e.g.*, Gregory v. Bd. of Supervisors of Chesterfield Cty., 257 Va. 530 (1999).

owner is able to make the threshold showing, she is entitled to a strong presumption that her refusal to submit the unreasonable proffer was the proximate cause for the denial. Such a presumption is likely to be critical to the successful prosecution of a case pursuant to the Act.

Subdivision D(3) is a fee shifting provision that provides an applicant/owner who is successful in contesting the actions of a locality in violation of the Act with attorney fees and costs along with an order remanding the rezoning or PCA to the local governing body with a direction to approve the rezoning or PCA without the offensive proffer. This provision should function as a significant deterrent to violations of the Act by localities.

E. Certain Exemptions

Subdivision E provides exemptions from the statute for certain high growth, high density areas (mostly in Northern Virginia).⁶¹ For areas meeting the descriptions, proffers for new development or use that would otherwise be governed by the Act are subject only to existing limitations.

F. Second Enactment Clause: Impact on Existing Provisions

The Second Enactment Clause is intended to provide guidance to courts analyzing the interplay between the Act and existing statutes governing proffers. Specifically, the clause makes clear that the Act is supplemental to all existing statutory provisions governing proffers that are consistent with its terms but trumps any existing statute that conflicts with its terms as to the subset of proffers (*i.e.*, proffers offered in the context of residential rezonings/PCA's) impacted by the Act.⁶²

While it is likely that a court would have reached this conclusion based on fundamental rules of statutory construction, the clause is designed to eliminate any doubt in that regard.

G. Third Enactment Clause: Prospective Application

The Third Enactment Clause makes clear that the Act only impacts rezoning applications filed on or after July 1, 2016, (the effective date of the Act) and PCA applications filed after that date amending proffers on a rezoning filed after that date. The apparent purpose of this provision is to give localities and applicants the time to adjust to the new regime and to make clear that the new Act may not be used to undo proffers agreed to prior to its

⁶¹ Va. Code Ann. § 15.2-2303.4(E) (2016).

⁶² 2016 Va. Acts 322.

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effective date.⁶³

CONCLUSION

Virginia's system of conditional zoning was predicated on a desire to allow developers and local governments to enter voluntary yet legally binding agreements regarding conditions to be placed on land in addition to, or as modification of, the regulations provided for in a particular zoning district in order to placate any concerns of the community in order to smooth the way for a rezoning approval. Over its history, the system has run fairly far afield – with developers routinely proffering (voluntarily in name only) to provide cash, services, and other things of value to the locality the connection of which to the actual impact of the project is tenuous at best. While the Proffer Reform Act will not (and cannot) address all questionable circumstances, its provisions should provide new rights to applicants while allowing them to pay a fair share for the impacts of a development and, thereby, pull the proffer system back in the direction of its roots.

⁶³ *Id.*

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