

## Virginia Code § 15.2-2303.4: Guidance on the New Proffer Legislation

Virginia Code § 15.2-2303.4 became effective July 1, 2016 and it changes the way in which localities must approach proffers in addressing the impacts from a rezoning. The County's Proffer Policy was repealed by the Board of Supervisors on

1. *Virginia Code § 15.2-2303.4 applies only to residential rezonings.* Virginia Code § 15.2-2303.4 applies only to rezonings for new residential development or a new residential use, including the residential portion of a mixed-use development.
2. *Virginia Code § 15.2-2303.4 applies only to applications filed on or after July 1, 2016.* Virginia Code § 15.2-2303.4 applies only to rezoning applications filed on or after July 1, 2016, and only to applications to amend existing proffers (referred to as *proffer condition amendments* in the statute) where the application for the original rezoning was filed on or after July 1, 2016 (collectively referred to in this guidance as a "rezoning").
3. *Impacts that may be addressed by proffers are now limited to four issues.* Virginia Code § 15.2-2303.4 limits the scope of impacts that may be addressed by proffers to transportation, schools, public safety, and parks. Proffers pertaining to affordable housing, phasing development, stormwater management, and other issues are no longer allowed.
4. *Be careful about what you say to the applicant about proffers.* Virginia Code § 15.2-2303.4 prohibits a *locality* from *requesting* an *unreasonable proffer* (see section 6, below) in conjunction with a rezoning application. An applicant (the landowner) challenging the denial of its rezoning application may claim that the denial was based on the County's mere *suggestion* that the applicant submit an unreasonable proffer which the applicant refused to do. If that claim is made by the applicant in a court challenge, the evidentiary burden and presumptions favor the applicant.
  - A. A *request* or *suggestion* may be made by any representative of the County such as a staff member, a member of the board of supervisors, the planning commission, or a citizen advisory committee, regardless of whether the request or suggestion is made to the applicant in a public meeting or in another situation.
  - B. The terms *request* and *suggest* are not defined, so assume that any verbal or written statement to an applicant about a proffer may qualify as such.
5. *It is appropriate to talk about specific proffers only after the impact studies are completed and analyzed.* County representatives should discuss specific proffers with an applicant only after the impact studies are complete and the extent of the impacts are identified. Also, County representatives should require the applicant to first demonstrate how it will address the impacts from the rezoning through its proposed proffers, and then react to the applicant's proposed proffers in a measured response.
6. *Understand the criteria that make a proffer reasonable or unreasonable.* Virginia Code § 15.2-2303.4 provides that a proffer is *unreasonable unless* it is *specifically attributable* to an impact and, for proffers addressing impacts to off-site public facilities, including cash proffers, the rezoning 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 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."
  - A. The phrase *specifically attributable* is not defined and requires a level of certitude that may not be achievable in studies. Proffers in which the applicant proffers to do or provide any more, even 1% more, than necessary to address the impact from the rezoning may jeopardize the validity of the proffer. Put another way, the validity of any proffer that may provide *any* benefit to the public that lives outside of the development is jeopardized.
  - B. The phrase *in excess of existing public facility capacity* prohibits the County from addressing the incremental impacts of development if there is any existing capacity. For example, if the impact studies show that a rezoning will generate 100 elementary school-age children, and the elementary school that would serve the development has capacity for 99 children, the applicant need only address the impact from that 100<sup>th</sup> child. Existing capacity in

schools may be the easiest to quantify of the four areas for which proffers may be accepted (the others being transportation, public safety, and parks). This phrase may also expose the County to applications to amend proffers as capacity changes over time, such as when schools are redistricted.

- C. The phrase *direct and material benefit* is not defined and, like the phrase *strictly attributable*, requires a level of certitude that may not be achievable in practical application. This requirement also fails to acknowledge the lag time between the payment of a cash proffer and when the public facility for which the cash was contributed is constructed, thereby exposing the County to a challenge to the validity of the proffer if, at some point in time after the development begins to be occupied, that occupant is not receiving a direct and material benefit.
7. *Virginia Code § 15.2-2303.4 is new for everyone, complex, and not every question can be answered now.* Every applicant for a rezoning and every locality that accepts proffers will be dealing with the new law and, over time, the development community and the localities will find a reasonable approach that allows rezonings to continue to be approved with assurances that the impacts from those rezonings will be reasonably addressed to the extent allowed under the law. Virginia Code § 15.2-2303.4 is also complex. We anticipate that Virginia Code § 15.2-2303.4 will generate some lawsuits that will clarify some of the provisions of the law. The examples provided in Section 6 above may appear to be worst-case scenarios to some, but they also are real possibilities under the language in Virginia Code § 15.2-2303.4.
8. *Virginia Code § 15.2-2303.4 was not universally supported or reviled.* Understand that Virginia Code § 15.2-2303.4 was not supported by every member of the development community, and was not opposed by every Virginia locality.
9. *Final points.* This guidance may be subject to revision as County representatives, the development community, and the public gain experience applying the requirements of Virginia Code § 15.2-2303.4. For now, this guidance takes a conservative approach. County representatives should be restrained in their discussions with rezoning applicants and should refrain from discussing proffers with applicants until after the impact studies are completed and analyzed, the extent of those impacts are identified, and the applicant has made its first offer to address the impacts.