

Chapter 11

Conditional Zoning: Proffers

11-100 Introduction

A *proffer* is an offer by a landowner during the rezoning process to perform an act or donate money, a product, or services to justify the propriety of a proposed rezoning. *Robin, Zoning & Subdivision Law in Virginia, a Handbook*, 71-72 (2nd ed.). Rezoning land where the governing body accepts proffers by the owner is referred to in Virginia Code § 15.2-2296 as *conditional zoning*. *Conditional zoning* means the allowing of reasonable conditions (proffers) governing the use of property, where the conditions are in addition to, or the modification of, the regulations provided for in a particular zoning district. *Virginia Code § 15.2-2201*. Given the purposes of conditional zoning discussed in the following paragraph, the “modification” clause in the definition of the term in Virginia Code § 15.2-2201 is not interpreted to mean that proffers may relax otherwise applicable zoning standards. When proffers are accepted by the locality’s governing body, they become part of the zoning ordinance. *Jefferson Green Unit Owners Association, Inc. v. Gwinn*, 262 Va. 449, 551 S.E.2d 339 (2001).

Ten Essential Features of Proffers

- In a proffer, the owner promises to perform an act or donate money, land, services or products designed to address an impact arising from the rezoning.
- Proffers impose additional requirements and restrictions, not alternative or lesser requirements or restrictions.
- Proffers must be voluntary, which means that after the locality identifies the impacts arising from the rezoning, it is up to the owner to decide whether it wants to address the impacts through proffers or risk having the rezoning denied by the governing body because impacts were not addressed; it is improper for a locality to deny a rezoning simply because the owner did not proffer something requested by the locality.
- Proffers must be reasonably related to the rezoning, either as a requirement of the applicable enabling authority or under constitutional principles (*see section 11-200*).
- Proffers must be consistent with the comprehensive plan.
- Once accepted by the governing body, proffers become part of the zoning regulations applicable to the land and they run with the land until it is rezoned (there are exceptions).
- Proffers must be in writing.
- Proffers must be submitted prior to the public hearing by the governing body and may not be materially amended once the public hearing begins without holding another public hearing, provided that the governing body may waive the requirement for a public hearing if the amendment does not affect conditions of use or density.
- Proffers must be signed by the owner(s) of the land being rezoned.
- Proffers to dedicate substantial land, make substantial cash payments, to construct substantial improvements, or which specify the permitted use or density, may create vested rights in the zoning of the land.

Conditional zoning was enabled to address the inadequacy of traditional zoning methods and procedures when competing and incompatible land uses conflict. *Virginia Code § 15.2-2296*. At least in theory, conditional zoning allows land to be rezoned that might not otherwise be rezoned because the proffers protect the community in which the land is located by imposing additional regulations or conditions on the land being rezoned to address impacts. *Virginia Code § 15.2-2296*; *Riverview Farm Associates v. Board of Supervisors of Charles City County*, 259 Va. 419, 528 S.E.2d 99 (2000); *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999). The Attorney General has stated that conditional zoning addresses the effects of changing land use patterns within communities, and that it permits differing land uses within those communities while protecting the community as a whole. *1997 Va. Op. Atty. Gen. 66*. In short, proffers allow the impacts resulting from a rezoning to be better addressed.

11-200 The enabling legislation

There are three sources of enabling authority for conditional zoning:

- *Old or original conditional zoning*: Virginia Code § 15.2-2303 is the enabling authority for conditional zoning in Fairfax County, those localities surrounding it, those counties east of the Chesapeake Bay, and those high growth localities otherwise subject to Virginia Code § 15.2-2298 opting to instead act under the enabling authority of Virginia Code § 15.2-2303. Proffers under this enabling legislation may include cash contributions. Albemarle County is a high growth locality, otherwise enabled under Virginia Code § 15.2-2298, that has opted to act under Virginia Code § 15.2-2303.
- *New conditional zoning (1978)*: Virginia Code § 15.2-2297 became the enabling authority for conditional zoning in those localities not enabled under Virginia Code § 15.2-2303. Section 15.2-2297's most notable characteristics are that cash contributions and off-site improvements are prohibited.
- *New conditional zoning for high growth localities (1989)*: Virginia Code § 15.2-2298 is the newest enabling authority, and it applies to those localities otherwise subject to Virginia Code § 15.2-2297 whose population grew by at least 5% since the next-to-latest to latest decennial census year. Section 15.2-2298 allows both cash contributions and off-site improvements.

Each of these laws has its own requirements and conditions that must be satisfied in order for a proffer to be lawfully made and accepted. The following table shows the differences among the enabling authority:

Comparison of Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303			
Principle	Virginia Code § 15.2-2297	Virginia Code § 15.2-2298	Virginia Code § 15.2-2303
General Qualities			
Proffers must be voluntary (see section 11-310, below)	§ 15.2-2297(A)	§ 15.2-2298(A)	Not required by statute but required to be voluntary under <i>Rinker v. City of Fairfax</i> , 238 Va. 24, 381 S.E.2d 215 (1989).
Proffers must be reasonable conditions that are in addition to the applicable zoning regulations (see section 6-440)	§ 15.2-2297(A)	§ 15.2-2298(A)	§ 15.2-2303(A)
The rezoning itself must give rise to the need for the proffers (see section 6-440)	§ 15.2-2297(A)	§ 15.2-2298(A)	Not required by statute, though as noted above, proffers must be reasonable
Proffers must have a reasonable relation to the rezoning (see section 6-440)	§ 15.2-2297(A)	§ 15.2-2298(A)	Not required by statute, though as noted above, proffers must be reasonable
Proffers must be consistent with the comprehensive plan	§ 15.2-2297(A)	§ 15.2-2298(A)	Not required by statute. Because it is not required, localities may have more flexibility to address a novel situation that may be inconsistent with the comprehensive plan but provides a better solution.
Proffers run with the land until the property is rezoned; proffers continue if the subsequent rezoning is part of the comprehensive implementation of a new or substantially revised zoning ordinance	§ 15.2-2297(A)	§ 15.2-2298(A)	§ 15.2-2303(A)

Comparison of Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303

Principle	Virginia Code § 15.2-2297	Virginia Code § 15.2-2298	Virginia Code § 15.2-2303
Proffers may not be accepted unless the locality has adopted a capital improvements program	Not addressed.	§ 15.2-2298(A)	Not addressed. There is no requirement that improvements be included in the capital improvements program.
Procedural Issues			
Proffers must be in writing and signed by all owners (see section 11-330, below)	§ 15.2-2297(A)	§ 15.2-2298(A)	§ 15.2-2303(A)
Proffers must be submitted before the public hearing before the governing body on the rezoning to which the proffers pertain	§ 15.2-2297(A)	§ 15.2-2298(A)	§ 15.2-2303(A)
Amended proffers may be accepted once the public hearing has begun if they do not materially affect the overall proposal (note that material changes may increase or reduce the requirements) (see section 11-350, below)	§ 15.2-2297(A)	§ 15.2-2298(A)	§ 15.2-2303(A)
Specific grants and limitations			
Proffers may not require the owner to create a property owners' association that requires its members to pay an assessment to maintain public facilities owned by a public entity not otherwise provided for in Virginia Code § 15.2-2241 (the enabling authority for mandatory subdivision ordinance provisions). Facilities that are not subject to this prohibition include sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Virginia Department of Transportation.	§ 15.2-2297(A)	§ 15.2-2298(A)	§ 15.2-2303(A)
Proffers may provide for the timing or phasing of dedications, payments, or improvements (see section 11-340, below)	§ 15.2-2297 (last paragraph)	§ 15.2-2298 (last paragraph)	§ 15.2-2303(E)
Reasonable conditions pertaining to the payment of cash for off-site road or off-site transportation improvements must be included in the comprehensive plan and incorporated into the capital improvements program (see section 11-400, below pertaining to cash proffers)	§ 15.2-2297(A) (limited only to those expressly permitted under Virginia Code § 15.2-2241)	§ 15.2-2298(A)	§ 15.2-2303(A) (within the broad scope of "reasonable conditions")
If proffers include the dedication of land or the payment of cash, the land may not transfer and the payment of cash may not be made until the facilities for which the land is dedicated or the cash is tendered are included in the capital improvements program (see section 11-400, below pertaining to cash proffers)	Not addressed	§ 15.2-2298(A); note however, that this limitation does not prevent high growth localities from accepting proffers related to projects that are not normally included in a capital improvements program.	Not required. Because it is not required, localities would have more flexibility in the timing of land dedications and cash contributions.

Comparison of Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303			
Principle	Virginia Code § 15.2-2297	Virginia Code § 15.2-2298	Virginia Code § 15.2-2303
If proffers include the dedication of land or the payment of cash, the proffers shall provide for the disposition of the land or the cash if it is not used for the purpose for which it was proffered (see section 11-400, below pertaining to cash proffers)	Not addressed	§ 15.2-2298(A)	Not required. Because it is not required, localities would have more flexibility in how cash received for proffers is used if it cannot be used for the stated purpose. However, the spending, tracking, alternative use, and accounting requirements now imposed by Virginia Code § 15.2-2303.2 have reduced the practical distinctions between sections 15.2-2298 and 15.2-2303 on this issue.
If proffers include the dedication of land of substantial value or substantial cash payments for, or construction of substantial public improvements, certain vested rights may attach. <i>See chapter 19.</i>	§ 15.2-2297(B) (not pertaining to substantial cash payments)	§ 15.2-2298(B)	§ 15.2-2303

There are some other general principles that apply to proffers:

- *Proffers must be valid and consistent with state law and local ordinances:* When the governing body accepts proffers, and their terms become the terms of the rezoning, they must be valid and consistent with state law and local ordinances. *Sterrett v. Board of Supervisors of Loudoun County*, 26 Va. Cir. 83 (1991). A proffer that creates a violation of a zoning ordinance is *per se* unreasonable. *Clark v. Town of Middleburg*, 26 Va. Cir. 472 (1990).
- *Proffers may not require the locality to assume any obligations:* Proffers may not require the locality to undertake any affirmative obligations it is not otherwise required to do because they may be found to be impermissible contract zoning. *For an explanation of contract zoning, see section 10-730.*
- *Proffers may not include a promise not to contest their enforceability:* A promise contained in proffers not to contest their enforceability is itself unenforceable. *1989 Va. Op. Atty. Gen. 96.*

A proffer that is invalid because it is beyond the permissible scope of the enabling authority may invalidate the rezoning, depending on the facts of the particular case and whether the rezoning is otherwise reasonable under the fairly debatable test. *Sterrett v. Board of Supervisors of Loudoun County*, 23 Va. Cir. 153 (1991).

11-300 A closer look at selected issues

This section examines several selected issues regarding proffers.

11-310 Proffers must be voluntary

Proffers must be voluntary. *Virginia Code §§ 15.2-2297(A), 15.2-2298(A); Rinker v. City of Fairfax*, 238 Va. 24, 381 S.E.2d 215 (1989). Thus, a governing body is not empowered to require a specific proffer as a condition precedent to a rezoning. *Board of Supervisors of Powhatan County v. Reed's Landing Corp.*, 250 Va. 397, 463 S.E.2d 668 (1995).

The requirement that proffers be voluntary does not mean that a locality is powerless to engage the applicant and its representatives in a meaningful dialogue to ensure that the applicant either addresses the identified adverse impacts through proffers or makes a conscious decision not to address those impacts through proffers.

The two cases below illustrate the nuances in dealing with the concept of voluntariness.

11-311 *Reed's Landing*

In *Board of Supervisors of Powhatan County v. Reed's Landing Corp.*, 250 Va. 397, 463 S.E.2d 668 (1995), the developer sought to rezone approximately 233 acres from the Agricultural (A-1) district to the Residential (R-1) district. The county's planning staff and planning commission recommended approval of the rezoning. A week after the planning commission's consideration of the rezoning, the board of supervisors adopted proffer guidelines which established a "recommended proffer" of \$2,439 per residential lot "to help defray costs of capital facilities."

When the rezoning was first considered by the board, the applicant proffered a cash payment under protest but the board deferred action for a month. When the rezoning returned to the board for a public hearing, no member of the public spoke in opposition, but "[i]t was apparent, however, that the Board would not approve the rezoning request unless the Developer agreed to pay \$2,439 per lot." The applicant refused to contribute the county's "recommended" cash proffer.

At the trial, the county's director of planning and community development testified that the per lot cash proffer amount was "expected," and that since the board had adopted its proffer guidelines, virtually no R-1 rezonings had been approved without the cash proffer. The trial court ruled that the board unlawfully conditioned approval of the rezoning upon the proffering of the cash payment.

The Virginia Supreme Court affirmed, holding that the county's recommended cash proffer was not voluntary and that the Powhatan board of supervisors imposed an unlawful condition precedent on the developer. In sum, the Virginia Supreme Court saw that Powhatan County required the cash proffer in order for it to approve a rezoning. This *quid pro quo* for a zoning approval violated the requirement that proffers be voluntary.

11-312 *Gregory*

Proffer guidelines adopted by a locality do not make proffers involuntary *per se*, however, and *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999) provides a good example as to why that is so.

In *Gregory*, Chesterfield County had a written policy concerning cash proffers. The policy established a methodology for calculating the cost to the county of providing public facilities for each new residence in a proposed subdivision, including schools, roads, parks, libraries, and fire stations. In 1995, the policy provided that "residential rezoning applicants are being asked to proffer \$5,083 per lot."

The applicant applied to rezone a 30-acre parcel from "Agricultural A" to "Single-Family Residential R-12" which, if approved, would allow for a proposed 81-lot development that would result in approximately 227 new residents. The county's planning staff estimated that this development would add approximately 47 school-age children and would generate approximately 850 vehicle trips per day, primarily on Newbys Bridge Road. The staff concluded that some of the resulting traffic impacts would increase traffic volumes on certain nearby subdivision streets beyond acceptable levels. The staff estimated that the per-lot fiscal impact from the project would be \$5,156 per lot. The applicant originally proffered \$5,043 per lot, but its amended application proffered \$1,500 per lot. The rezoning was otherwise consistent with the comprehensive plan.

The planning commission recommended denial of the rezoning "citing concerns regarding the impact that the rezoning would have on traffic, drainage, schools, and fire and rescue service." At the board public hearing, the planning staff recommended that the board approve the rezoning "only if the Board determined that the County's 'capital needs' would be met." Sixteen citizens spoke in opposition to the rezoning, raising concerns about the road infrastructure and the development's impact on schools. The board denied the rezoning and the applicant and the owners sued.

At trial, the county's planning director testified that a rezoning applicant could proffer, in lieu of cash, the construction of road or sidewalk improvements, or other ways to address the impacts of the proposed development

on public facilities and infrastructure. There also was evidence that, since Chesterfield County adopted its voluntary proffer policy, about 5,500 new lots had been created through rezoning approvals, and that about 51% of those lots were either approved with no cash proffer or cash proffers of less than the recommended amount.

Despite evidence that the absence of maximum cash proffers played a key factor in the board's decision to deny the rezoning, and that cash proffers were expected, the trial court found that the evidence of the development's unaddressed impacts on health, safety and welfare made the reasonableness of the board's decision fairly debatable and not arbitrary or capricious.

The Virginia Supreme Court affirmed, finding that the rezoning request was not denied solely because of the owner's failure to submit cash proffers in a particular amount. The Court found that there was evidence that the rezoning was also denied because the proposed development would adversely impact public health, safety, and welfare in the area of the proposed development – adverse impacts from the proposed rezoning that were not being addressed.

11-313 What *Reed's Landing* and *Gregory* tell us

Board of Supervisors of Powhatan County v. Reed's Landing Corp., 250 Va. 397, 463 S.E.2d 668 (1995) and *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999) instruct that rather than making a particular proffer or set of proffers the *quid pro quo* for obtaining a rezoning (*Reed's Landing*), a locality needs to identify all of the impacts resulting from the proposed rezoning and identify what needs to be done to address those impacts through proffers. *These impacts need to be substantiated and documented in the record before the planning commission and the governing body.* It is then up to the owner to decide whether it wants to provide proffers to address some or all of those impacts. *The owner may elect not to address all of the impacts*, and instead try to persuade the governing body that the impacts need not be addressed or that the proposed project has other public benefits that would justify approving the rezoning, even if some or all of the impacts go unaddressed (*Gregory*).

What Does It Mean That Proffers Must Be “Voluntary”?

- The locality must identify all of the impacts that could result from the rezoning so that the owner may decide which impacts it will address through proffers.
- It is up to the owner to decide whether to address the impacts that could result from the rezoning through proffers.
- If the locality denies the rezoning and the owner did not volunteer proffers to address all of the identified impacts, the decision must be based on sound zoning principles (including unmitigated impacts), and not simply on the fact that the owner did not proffer something.
- It does not mean that the locality is powerless to engage the applicant and its representatives in a meaningful dialogue to ensure that the applicant either addresses the identified adverse impacts through proffers or makes a conscious decision to not address those impacts through proffers.

If the proffers fail to address those impacts and the governing body denies the rezoning, *the governing body's decision must be based on the impacts of the rezoning and the fact that some or all of those impacts are not being sufficiently addressed*, and any other legitimate reasons to deny a rezoning, such as the rezoning's inconsistency with the comprehensive plan. The decision may not properly be based on the mere failure of the applicant to proffer any particular land or money.

The decision to deny a rezoning application because the owner failed to proffer to contribute the cash proffer amount recommended in a locality's cash proffer policy, even if unlawful under state law, “does not necessarily yield an Equal Protection violation.” *Sowers v. Powhatan County*, 2009 WL 3359204 (4th Cir. 2009) (unpublished) (board of supervisors could differentiate this application from others where there also was significant citizen opposition, unique traffic concerns, and the applicant was a “tough negotiator” who elected to “skirt typical procedures”).

See section 9-920 for a discussion of using the comprehensive plan to establish proffer policies to assure that impacts to public facilities are addressed.

11-320 Proffers must be *reasonable conditions*

Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303 require that proffers be *reasonable conditions*, and sections 15.2-2297 and 15.2-2298 also expressly require that the *rezoning give rise to the need for the conditions*, and that the proffers have a *reasonable relation* to the rezoning. Beyond *Board of Supervisors of Powhatan County v. Reed's Landing Corp.*, 250 Va. 397, 463 S.E.2d 668 (1995) and *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530, 514 S.E.2d 350 (1999), which deal with the issue of whether the proffers in those cases were voluntary, there is little Virginia case law shedding light on what each of these provisions means. However, these provisions have parallels in the body of Takings Clause jurisprudence pertaining to *exactions* which requires that conditions imposed in conjunction with land use approvals: (1) have an *essential nexus* that is related to the impact of the proposed development; and (2) be *roughly proportional* to the extent of the impact. *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987) (essential nexus); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994) (rough proportionality).

The table below shows the relationship between the statutory requirements for proffers in Virginia Code §§ 15.2-2297, 15.2-2298 and 15.2-2303 and the Takings Clause principles related to exactions.

The Relationship Between State Law Requirements for Proffers and the Takings Clause Principles Related to Exactions	
State Law	Parallel Constitutional Principle
Proffers must be <i>reasonable conditions</i> that are in addition to the applicable zoning regulations	Proffers must be <i>constitutional conditions</i> which, in the context of proffers, means that they cannot condition approval of the rezoning in the absence of an essential nexus and rough proportionality to the impacts they seek to address
The rezoning itself must <i>give rise to the need for the proffers</i>	A proffer must have an <i>essential nexus</i> to the impact it seeks to address
Proffers must have a <i>reasonable relation</i> to the rezoning	A proffer must have <i>rough proportionality</i> to the impact it seeks to address

Although the essential nexus and rough proportionality tests provide a helpful guide for evaluating whether any proffer satisfies State law requirements, whether a proffer is an unconstitutional exaction is primarily limited to proffers that require the applicant to dedicate real property or pay money. *Koontz v. St. Johns River Water Management District*, 570 U.S. ___, 133 S. Ct. 2586 (2013) (extending the principles of *Nollan* and *Dolan* to apply to conditions requiring money payments). There are many other classes of proffers that, but for the condition being imposed in conjunction with a condition of a land use approval, would not otherwise be a taking of property, *e.g.*, proffers in which the applicant offers to phase the development of its project in conjunction with the timing of planned improvements, or proffers in which the applicant offers to satisfy development standards that exceed what is otherwise required by local ordinance, such as enhanced sediment removal from stormwater.

This issue is discussed in depth in section 6-440.

11-330 The owners of the land being rezoned must sign the proffer statement

Only the owner of the property that is the subject of the rezoning may proffer conditions. *Virginia Code* §§ 15.2-2297(A), 15.2-2298(A), 15.2-2303(A). If the proffers are not submitted by all of the owners of the land, then the governing body cannot accept them. *Miller and Smith Land, Inc. v. Board of Supervisors of Loudoun County*, 1989 WL 646301 (Loudoun County Cir. Ct. 1989). In the most general sense, the term *owner* includes any person or entity with an interest in the land. However, as applied to proffers, the term *owner* means “one who owns the fee and who has the right to dispose of the property” and includes “one having a possessory right to land.” *Miller and Smith Land, Inc., supra*. Thus, for example, a holder of a fee interest or a life estate is an owner for purposes of Virginia Code § 15.2-2298, a secured creditor is not.

Of course, an owner must have the authority to submit proffers. Covenants, restrictions imposed by creditors, and other limitations may restrict or eliminate the authority of an owner to submit proffers. Thus, a proffer statement should contain a representation that the owner has the authority to make the proffers.

Proffers do not need to be signed when they are submitted, so the governing body can hold its public hearing even though it does not have signed proffers before it. However, it cannot accept the proffers until they are signed.

11-340 The timing or phasing of proffers; a statutory delay

Proffers may provide for the timing or phasing of dedications, payments, or improvements. However, any proffer related to new residential or commercial development valid and outstanding as of January 1, 2011 that requires the owner or developer to incur significant expenses upon an event related to a stage or level of development (*e.g.*, upon the issuance of the building permit for the 100th dwelling unit) is extended until July 1, 2017 or later as agreed to by the locality. *Virginia Code* § 15.2-2209.1(C). This extension does not apply: (1) to proffered land or right-of-way dedications; (2) if the completion of the event related to the stage or level of development has occurred; or (3) to events required to occur on a specified date certain or within a specified time period.

11-350 When proffers may be amended at the public hearing without holding another public hearing

Proffers must be submitted prior to the public hearing before the governing body on the rezoning to which the proffers pertain. *Virginia Code* §§ 15.2-2297(A), 15.2-2298(A), 15.2-2303(A).

Localities may accept amended proffers once a public hearing has begun only if the amended proffers do not materially affect the overall proposal. *Virginia Code* §§ 15.2-2297(A), 15.2-2298(A), 15.2-2303(A). If the proposed amendment would materially affect the proposal, either because the amendment would remove or reduce proffered restrictions or commitments or *impose additional restrictions or commitments*, the amended rezoning application must be properly readvertised under Virginia Code §§ 15.2-2204 and 15.2-2285 and an additional public hearing must be held. If an amendment is not material, another public hearing is not required because Virginia Code § 15.2-2285(C) enables localities to consider comments that citizens or property owners articulate during public hearings and to exercise legislative prerogatives to respond to those comments by amending proposed proffers. *See Arogas, Inc. v. Frederick County Board of Zoning Appeals*, 280 Va. 221, 698 S.E.2d 908 (2010) (applying pre-July 1, 2006 law and county ordinance).

However, the governing body may waive the requirement for a public hearing if the amendment does not affect conditions of use or density. *Virginia Code* § 15.2-2302 (not applicable to localities subject to Virginia Code § 15.2-2297).

11-360 The governing body is not required to accept all proffers if it rezones the property

The governing body is not required to accept every submitted proffer when it rezones land. Because valid proffers only impose additional zoning requirements on the land, it is within the governing body's legislative prerogative to determine that the rezoning not be subject to them.

However, the rejection of certain proffers, particularly those pertaining to the intensity of the use, such as density restrictions or use prohibitions, may require that the rezoning be re-advertised under Virginia Code §§ 15.2-2204 and 15.2-2285 because the result is an intensification of the proposed use. An additional public hearing also would have to be held. *Virginia Code* § 15.2-2285(C).

11-370 Administering and enforcing proffers

The zoning administrator is vested with all necessary authority to administer and enforce proffers. *Virginia Code* § 15.2-2299. This authority includes issuing written orders and initiating legal actions to require compliance, and requiring a guarantee to assure that all proffered physical improvements are constructed. *Virginia Code* § 15.2-2299. It also includes interpreting proffers to assure that they are being properly implemented.

If enforcement is necessary, the violation of a proffer is equivalent to the violation of a zoning ordinance, and is enforced as such. *Barton v. Town of Middleburg*, 27 Va. Cir. 20 (1992). The zoning administrator may bring actions in

injunction, abatement or other appropriate actions (such as actions for civil penalties). *Virginia Code § 15.2-2299*. Perhaps the most effective and efficient enforcement tool is found in the last sentence of Virginia Code § 15.2-2299, which provides that the failure to comply with all proffers is cause to deny the issuance of any required use, occupancy or building permits, as may be appropriate.

Any person aggrieved by a decision of the zoning administrator made under Virginia Code § 15.2-2299 may petition the governing body – *not the board of zoning appeals* – to review the zoning administrator’s decision. *Virginia Code § 15.2-2301*. The petition must be filed with the zoning administrator and the clerk of the governing body within 30 days from the date of the zoning administrator’s decision. *Virginia Code § 15.2-2301*. The petition must specify the grounds upon which the petitioner is aggrieved. *Virginia Code § 15.2-2301*. The governing body’s decision may be appealed to the circuit court. *Virginia Code § 15.2-2301*.

If the governing body, rather than the zoning administrator, determines that an approved final subdivision plat or site plan is in compliance with the applicable proffers, the recorded final subdivision plat or the approved final site plan controls, even if the plat or plan actually conflicts with the proffers. *Virginia Code § 15.2-2261.1*. To the extent that such a determination by the governing body effectively amends the proffers, Virginia Code § 15.2-2261.1 provides that the notice requirements for a zoning map amendment under Virginia Code § 15.2-2204 are deemed to have been satisfied.

11-380 Tracking proffers

Virginia Code § 15.2-2300 requires that proffered rezonings be identified on a locality’s zoning map by an appropriate symbol. It also requires that the zoning administrator maintain for public inspection a conditional zoning index that provides the ordinance creating the proffers and the regulations provided for in the particular zoning district or zone. The index also must provide ready access to all proffered cash payments and expenditures disclosure reports prepared under Virginia Code § 15.2-2303.2. The index must be updated each year, no later than November 30. *Virginia Code § 15.2-2300*.

11-390 Subsequent amendments to proffers

In *Town of Leesburg v. Long Lane Associates*, 284 Va. 127, 726 S.E.2d 27 (2012), the Virginia Supreme Court held that a locality does not need to obtain the consent of a neighboring property owner to rezone a parcel that was originally part of an undivided property that was previously rezoned and subject to a single set of proffers. The Court concluded that the owner of the neighboring property has no vested right in its expectation that the neighboring property would continue to develop in accordance with the prior proffered zoning, which existed at the time the landowner purchased its property and developed it in accordance with the prior proffers. The Court also concluded that Virginia Code § 15.2-2303(A) does not require that all successors in title agree or consent to any portion of the subdivided land being thereafter rezoned.

Related to the issue before the Virginia Supreme Court in *Long Lane Associates*, Virginia Code § 15.2-2302(A) allows a landowner subject to proffered conditions to apply to amend the proffers after providing written notice of the application to the owners of other parcels subject to the same existing proffers. The notice must be provided within 10 days after receipt of the application as provided in Virginia Code § 15.2-2204(H). *Virginia Code § 15.2-2302(A)*. If the proposed proffer amendment does not affect conditions of use or density, the governing body may waive any otherwise applicable requirement for a public hearing. *Virginia Code § 15.2-2302(B)*. Under Virginia Code § 15.2-2302(E), the governing body may waive the written notice requirement in order to reduce, suspend, or eliminate outstanding cash proffer payments for residential construction calculated on a per-dwelling-unit or per-home basis that have been agreed to, but unpaid, by any landowner.

11-400 Rules pertaining to cash proffers

There are several rules pertaining to cash proffers. The reader should be aware that this area of the law is evolving and annual amendments by the General Assembly can be expected, particularly in the area of reporting and spending.

11-410 Timely expenditure of cash payments

Virginia Code § 15.2-2303.2(A) requires that each locality accepting a cash proffer on or after July 1, 2005, pursuant to § 15.2-2298, 15.2-2303, or 15.2-2303.1 must, within 12 years after receiving full payment, begin construction or other improvements for which the cash payment was proffered. A locality that does not begin construction of the improvements for which the cash payment was proffered within 12 years after receipt of the proffered cash payment, or make other authorized alternative improvements, must pay the amount of that proffered cash payment to the Commonwealth Transportation Board for allocation to the appropriate construction program.

Localities may award contracts to entities willing to construct a more extensive improvement using the cash proffers of others as well as other available funds, upon a written determination by the governing body stating the basis for awarding one construction contract to extend the limits of the road improvement. *Virginia Code § 15.2-2303.2.*

A locality must include proffered cash payments in its capital improvements program, and include in its annual capital budget the amount of proffered cash payments projected to be used for expenditures or appropriated for capital improvements in the ensuing year. *Virginia Code § 15.2-2303.2.*

11-420 Timing of demand for cash payment

Virginia Code § 15.2-2303.3 prohibits localities from requiring a payment of a cash proffer prior to issuance of a building permit; however, a landowner may voluntarily agree to an earlier payment. Also, no locality may either request or accept a cash proffer whose amount is scheduled to increase annually, from the time of the proffer was accepted until tender of payment, by a percentage greater than the annual rate of inflation, as calculated by referring to the Consumer Price Index published by the United States Department of Labor, Bureau of Labor Statistics or the Marshall and Swift Building Cost Index.

Virginia Code § 15.2-2303.1:1(A) delays the collection of cash proffers for residential construction that are on a per dwelling unit or per home basis until completion of the final inspection and prior to the issuance of a certificate of occupancy for the subject property. For various reasons, collecting cash proffers at that point in the development process can create a number of problems for the locality, the home builder, and the home buyer. It is suggested that the home builder be put on notice of the cash proffer when the building permit is issued. In addition, localities must be certain that the cash proffers are collected “prior to the time of the issuance of any certificate of occupancy” because after that point, the locality arguably no longer is authorized by section 15.2-2303.1:1 to collect the cash proffer. *Board of Supervisors of James City County v. Windmill Meadows, LLC*, 752 S.E.2d 837 (2014) (in ruling that Virginia Code § 15.2-2303.1:1 applied retroactively, the Virginia Supreme Court also concluded that section 15.2-2303.1:1 was plain and unambiguous and that it was bound by the plain meaning of that statute).

Virginia Code § 15.2-2303.1:1(A) applies to proffers accepted before and after July 1, 2010, when the statute became effective. *Windmill Meadows, supra*. To encourage localities to adhere to the Attorney General’s opinion, Virginia Code § 15.2-2303.1:1(B) provides that a developer’s assertion of a right to delayed payment of cash proffers is not cause for an enforcement action under Virginia Code § 15.2-2299. Virginia Code § 15.2-2303.1:1(B) also allows the court to award reasonable attorneys’ fees, expenses, and court costs to any party successfully challenging a locality’s implementation of the statute. Virginia Code § 15.2-2303.3 prohibits a locality from requesting or accepting a proffer in which the profferor purports to waive future legal rights against the locality, and voids any such proffer accepted on or after January 1, 2012 without affecting the validity of the rezoning or any other proffers.

11-430 Applying cash payments for capital improvements for purposes other than the purpose proffered

Virginia Code § 15.2-2303.2 provides some flexibility to localities in applying cash payments received for capital improvements.

If cash payments were received for road or transportation improvements that are incorporated into the locality's capital improvements program, Virginia Code § 15.2-2303.2(C)¶1 allows the locality to use the cash payments as its matching contribution under Virginia Code § 33.2-357. For the purposes of this statute, *road improvement* includes the construction of new roads or the improvement or expansion of existing roads to meet increased demand attributable to new development. A *transportation improvement* means any real or personal property acquired, constructed, improved, or used for constructing, improving, or operating any: (1) public mass transit system; or (2) highway, or portion or interchange thereof, including parking facilities located within a district created under Title 15.2 of the Virginia Code. The improvements include, but are not limited to, public mass transit systems, public highways, and all buildings, structures, approaches, and facilities thereof and appurtenances thereto, rights-of-way, bridges, tunnels, stations, terminals, and all related equipment and fixtures.

If cash payments were received for capital improvements, Virginia Code § 15.2-2303.2(C)¶2 allows the locality to use the cash payments for "alternative improvements of the same category" within the locality "in the vicinity of the improvements for which the cash payments were originally made." This authority applies to proffers accepted under Virginia Code §§ 15.2-2298 or 15.2-2303, regardless of the date of the rezoning. Before using the cash payments for alternative improvements, the locality's governing body must give 30 days' notice to the party that made the cash payment or the owner, hold a public hearing, and then make the following findings: (1) the improvements for which the cash payments were proffered cannot occur in a timely manner or the functional purpose for which the cash payment was made no longer exists; (2) the alternative improvements are within the vicinity of the proposed improvements for which the cash payments were proffered; and (3) the alternative improvements are in the public interest.

There are two exceptions to how cash payments for capital improvements may be applied. First, Virginia Code § 15.2-2303.2(C)¶¶ 1 and 2 provide that these provisions do not apply if the proffer statement expressly prohibits the cash payment from being used for any other purpose. Merely designating the purpose for which the cash payment is to be applied does not prohibit it from being applied to other purposes in compliance with Virginia Code § 15.2-2303.2(C)¶¶ 1 and 2. Second, Virginia Code § 15.2-2303.2(D) provides that a cash payment may be used for a capital improvement to an existing facility, such as a renovation or a technology upgrade, only if it expands the capacity of the facility, and the cash payment may not be used for any operating expense of any existing facility such as ordinary maintenance or repair.

11-500 Assisting an owner with drafting proffers

Proffers are typically drafted, at least initially, by the owner. As a result, the initial style and content of proposed proffers may vary widely. A locality's planning staff and attorney must review and comment on the proffers and suggest revisions. Following are some suggestions for assisting in writing, reviewing and revising proposed proffers.

11-510 Develop the language as though it was a zoning regulation

Because proffers have the force and effect of zoning regulations, it is vital that they be written in clear language that is easily understood:

- *State each proffer clearly:* Each proffer should be a declaratory statement, using clear and concise language as to what must be performed, when it must be performed, when it must be completed, and, if applicable, how it must be performed.
- *Write each proffer with the dignity of a zoning regulation:* A proffer becomes part of the zoning regulations applicable to the property. Therefore, it should be written with the dignity of a zoning regulation, using terminology found in the zoning ordinance.
- *Select words carefully:* The words in a proffer must be carefully selected. Insist that the word "shall" be used when something is mandatory, rather than "should" or "may." If, for example, a proffer requires that the owner cannot proceed until the county engineer approves a plan, the proffer needs to state that "the owner shall

obtain approval of the plan from the county engineer before . . .,” rather than stating that the owner “shall submit a plan.” Never use “etc.” in a proffer.

- *Consistently use the same word to refer to the same person, place or thing:* A person, place or thing always should be described or identified by the same word.
- *Use complete sentences:* Proffers should be written in complete sentences.
- *Ensure that each proffer is comprehensive:* A proffer should be written in comprehensive language that addresses the reasonably foreseeable issues that may arise from the proffer.
- *Ensure that each proffer imposes standards that are enforceable:* Every proffer must be reviewed by the zoning administrator’s office to ensure that the proffer imposes standards that are enforceable. Part of the issue of enforceability pertains to the clarity of the language used, but the other part pertains to whether the language actually imposes a standard that can be enforced. Because the zoning administrator will have the task of enforcing the proffers, be certain that she has the opportunity to provide comments as to not only the language, but the subject matter (*e.g.*, a proffer that restricts a restaurant use to between the hours of 5:00 a.m. and 1:00 a.m. may require a zoning inspector to be in the field between 1:00 a.m. and 5:00 a.m. if the hours of operation become an enforcement issue).
- *Be careful not to make the proffer too specific:* In providing clarity, proffers can become too specific so that they become overly restrictive. Examples of being too specific include referring to the owner by name (because proffers run with the land and referring to a specific owner may create confusion to some), providing a specific measurement for height, distance, or something similar in an absolute when you intend to establish a minimum or a maximum.
- *Use similar language for similar situations:* Language that is similar to language previously approved for a similar type of proffer should be used, if possible.
- *Be certain that the time of performance is clearly stated:* Be certain that the language clearly states when the owner must do the promised or required acts.
- *Ensure that the proffers are well-organized:* Ensure that the proffers are well-organized by having proffers that are related to one another located next to one another.
- *Be certain that referenced documents are properly identified:* References to plats or plans should identify the title, last revision, and the entity preparing the plat or plan. References to ordinances should be identified by section number and include language such as “as the section was in effect on [date of special use permit].” References to letters, memos, staff reports, and similar documents should clearly identify the recipient, the author, and the date.
- *Attach copies of referenced regulations:* If an owner desires to restrict the uses allowed to only some of those allowed in the zoning district, or to otherwise refer to a specific zoning regulation, the referenced regulation should be attached so that there is no question about the content of the referenced regulation.

11-520 Ensure that unique proffer-related issues are addressed or avoided

Proffers raise some unique issues since they are proposed and submitted by the owner, and are often written by the owner as well:

- *Identify the owners of the property:* Identify all of the owners of the property who will be required to sign the proffers, any peculiar ownership status (*e.g.*, will be signing as a trustee), and obtain required documentation that the person signing on behalf of the owner is authorized to do so (*e.g.*, by one person on behalf of another, or on

behalf of a corporation, partnership or other entity). Consider including a statement that the owner has the authority to make the proffers.

- *Encourage owners to either delete or separate from their proffers those statements that do not impose additional regulations or conditions:* Owners may seek to include preambles, statements of intent and desire, restatements of what is already required by existing regulations, and other matters that are not proffers. Encourage owners to either delete this unnecessary text or to at least separate it from the proffers themselves. Statements that explain why a particular proffer is being submitted (*i.e.*, to satisfy a provision of the comprehensive plan) may be retained.
- *Ensure that the proffers do not impose, or would not be perceived to impose, an obligation on the locality, VDOT, or any other public entity:* Proffers address impacts resulting from a rezoning and they should be drafted so as not to impose, or be perceived to impose, an obligation on the locality, VDOT, or any other public entity to do something. This problem often arises in the context of establishing the timing for performance. For example, a proffer stating that the “final site plan shall be approved by the site plan agent prior to commencing the use” could be read to mean that the director must approve the site plan. Alternative wording to address this issue would be, for example, “The applicant is required to obtain approval of the final site plan by the site plan agent prior to commencing the use.”
- *Consider requiring that proffers be satisfied before the application for a needed approval is submitted:* When an owner requires additional approvals in the process, such as a site plan, there may be some proffers where it is best to require that a proffer be satisfied before the owner even applies for the site plan rather than some later point in the process, such as prior to issuance of a certificate of occupancy. This suggestion does not apply to proffers requiring the payment of cash tied on a per unit (residential) basis. *See Virginia Code § 15.2-2303.1:1.*
- *Avoid conditional proffers:* Try to avoid proffers that arise only under certain circumstances and are speculative in nature (*i.e.*, *if/then* scenarios, such as “if the state widens Jackson Boulevard to 8 lanes within the next 5 years, the owner will pay for the installation of a signal at the intersection of . . .”). In some cases, *if/then* scenarios (particularly those pertaining to matters internal to the proposed project) may be an indication that there are important issues that remain unresolved at the rezoning stage – in the example above, the proffered signal may be required as a result of the rezoning, regardless of whether the boulevard is first widened. Unless all of the possible scenarios have been completely evaluated, the governing body may be faced with considering a rezoning application that is a moving target. This issue is different from the proffer that requires the owner to do something when a specific, foreseeable event occurs (*e.g.*, “The owner shall construct Pocket Park No. 2 as shown on the Plan before requesting the city to issue the 100th building permit for a dwelling unit within the Project.”).
- *Use proffer forms or an acceptable alternative:* Proffers should be submitted on a standard proffer form that states the legal prerequisites for granting and accepting proffers. The proffer form need not be used if the proposed proffers include the information contained on the proffer form.

11-530 Make certain the language makes sense

Once a proffer has been put to writing, the locality’s planning staff and attorney must make certain that it is actually understandable, unambiguous, and enforceable:

- *Review draft proffers with a critical eye:* The locality’s planning staff must ignore its insider’s understanding of the application and put itself in the position of a reader who knows nothing about the project and: (1) ask whether the proposed proffers are clear, concise, and comprehensive in a way that a future reader will easily understand; (2) drop all assumptions and preconceived notions and be critical; (3) identify the ambiguities and eliminate them; (4) identify all superfluous text and eliminate it; and (5) ask whether each proffer would make sense to somebody ten years from now.

- *Have a peer review the proffers:* The planning staff should ask others not directly involved with the application to review the proffers. It is important to have someone without an insider's knowledge of the application to see if he or she can understand the proffers and identify ambiguities.
- *All appropriate departments review the proffers:* The planning staff must ensure that all departments that will have an interest in the proffers as well as the locality's attorney, review and comment on the proffers. For example, if land for a public park, library, or school is proffered to be dedicated, ensure that the locality's parks and recreation, library, and schools officials have an opportunity to review and comment on the proffers.