Virginia Housing Commission

Proffer/Impact Fee Workgroup

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Background

- **2016 General Assembly Session:**
  - SB 549 (the "2016 Proffer Law") enacted in growing sentiment among the housing industry in some regions that Virginia's Proffer System have evolved from a system of reasonable and voluntary mitigation to one of forced exactions with varying degrees of disconnect from the development's actual impact on public facilities
- **Response/implementation of the 2016 Proffer Law was varied:**
  - Some localities continued to process and approve residential rezoning applications
  - Prohibited any discussion between applicants and local governments
  - Crippled ability to adequately address the impact of new residential development on local infrastructure

Local Government Response/Implementation

- **Chesterfield County - 2016**
  - 2016: Transitioned to “Roads Only” Proffer System
- **Goochland County - 2018**
  - County and consultant prepared a Capital Impacts Study and developed a Capital Impacts Model to assist the Board in evaluating the potential impacts of growth.
  - The Study and Model identify the current capacities and levels of service for the county’s capital facilities and then determine the anticipated impacts from proposed developments.
  - These tools allow staff to identify the specifically attributable impacts on the county’s public facilities for the Board to consider in evaluating the reasonableness of proffers being offered in residential rezoning requests.
  - An applicant may then choose to prepare and submit its own Development Impact Statement, or it may rely on the data and information from the Capital Impacts Study and Model, provided it independently analyzes the data, methodology, and calculations, and finds them to be reasonable
  - Richmond Times Dispatch: *“The largest development in Goochland County approved: 520 homes on 207 acres in West Creek”* (March 16th, 2018)

BOARD OF SUPERVISORS/PLANNING COMMISSION -- RESIDENTIAL REZONINGS

Applies to new residential development applications filed after July 1, 2016

Communications with Applicants:

DO NOT	Suggest, request or require any proffer
DO NOT	Ask an applicant to change any proffer
DO NOT	Say that an applicant's cash proffer is smaller than it used to be
DO NOT	Ask an applicant to increase its cash proffer
DO	Say that the development will have an impact on County facilities
DO	Say that the development will have an impact on the road network
DO	Say that the development (does/does not) comply with the Comprehensive Plan
DO	Say the development (does/does not) comply with the County's land use planning
DO	Say the development (is/is not) in the best interests of the health, safety and welfare of County citizens
DO	Say that the application (does/does not) fully address its impact on capital facilities.

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Reasonable proffer test:
Proposed new development must **create a need, or an identifiable portion of a need** for the public facility improvement **in excess of existing public facility capacity** at the time of the rezoning.

Impact must be **specifically attributable** to a proposed new development.

Proposed new development will receive a **direct and material benefit** from the public facility improvement that the proffer is addressing.

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Public Facilities eligible for Cash Proffers:

Transportation -- construction of new roads or improvement/expansion of existing roads and related appurtenances.
Public Safety – construction of new or expansion of existing law enforcement, fire, emergency medical and rescue facilities, including all buildings, structures, parking, and other costs directly related thereto.
Schools – construction of new or expansion of existing primary and secondary schools, to include all buildings, structures, parking, and other costs directly related thereto.
Parks – improvement to or construction of a public park, including playgrounds and other recreational facilities.

PUBLIC HEARINGS

Certification – Each applicant shall state the following prior to any public hearing:
"The proffers in this case are being voluntarily offered to address impacts specifically attributable to the proposed development. The proffers are reasonable under state law."

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Factors to be considered:

Does the proposed development comply with the Comprehensive Plan?
o Do the use and density comply? o Does it promote balanced development and preservation of rural character? o Does it guide development to village areas and designated growth areas? o Does it anticipate and prepare for population growth? o Does it ensure that new development does not exceed the County's ability to provide the needed services and infrastructure? o Does it protect natural, scenic, and historic resources?
Does the proposed development comply with the County ordinances and good land use planning policies and goals?
o Sufficient lot size to meet setbacks? o Adequate buffers being provided in open space and with sufficient plantings? o Adequately provide for pedestrian movement? o Does it address its impacts on adjacent parcels? Or the character of the area? o Does the application represent sound, reasonable planning principles?
How does the proposed development impact the county's road network?
o Does it offer left and right turn lanes with appropriate stacking at each entrance? o Does it provide adequate stub roads and connectivity consistent with the Access Management Plan? o How will it impact the traffic volume and safety of nearby roads? Level of Service standards? o How will it impact the traffic volume and safety of nearby intersections? Level of Service standards? o Does it provide safe and reliable emergency access to the proposed homes?
Are there impacts on the County's public facilities specifically attributable to the proposed development that are not adequately addressed?

Local Government Response/Implementation

- **Prince William County (2016):**
  - Repealed the Policy Guide for Monetary Contributions (i.e., the 2014 “Proffer Guidelines”), which historically provided zoning applicants suggested monetary proffer amounts for residential rezonings (e.g., $44,930 per single-family unit; $39,837 per townhouse unit; and $26,778 per multifamily unit)
  - Directed County staff to prepare policy proposals “related to mitigating the impacts of proposed residential rezonings and proffer amendments for the Board’s consideration” and to initiate a Comprehensive Plan amendment to review all level of service standards including the capacity of County infrastructure; and
  - Required applicants (for cases filed after July 1, 2016) to: (i) identify the proposed impacts of a rezoning or proffer amendment proposal, (ii) propose mitigation strategies addressing the impacts, and (iii) demonstrate how the proposed mitigation is sufficient and consistent with state law.

Local Government Response/Implementation

- **Fairfax County:**
  - Governing body has adopted small area plans that correspond to the "activity centers" identified in the Comprehensive Plan – which is primarily the transit station areas (e.g. Reston and Tysons and Springfield and Merrifield), revitalization areas and suburban centers (e.g. Fairfax Center and the Dulles Suburban Center). There have been minor expansions of such areas that the County believes meet the criteria identified in the proffer bill but will not consider wholesale expansion of the exempt areas that not consistent with the criteria in the bill.
  - Prior to all community meetings involving potential proffer bill areas, the County has standard disclaimer language that is read that says nothing in the meeting is construed to be requesting a proffer and specific proffer requests cannot be discussed.
  - As a policy matter, the County will not consider Comprehensive Plan amendments outside the exempt areas because they are concerned about adopting Comprehensive Plan language that might be able to implemented because of the proffer bill.
  - Private sector initially hesitant to file applications, but small number of cases are being processed through the system as both the County and private sector have opened the lines of communication.

Local Government Response/Implementation

- **Loudoun County (2016):**
  - Board of Supervisors approved a Comprehensive Plan Amendment, Zoning Ordinance Amendment, and revised proffer policies and guidelines to exempt the County's suburban policy area under one of the 2016 legislation's exemption for residential rezonings located "…in an approved small area comprehensive plan that encompasses an existing or planned Metrorail station, or is adjacent to a Metrorail station located in a neighboring locality, and allows additional density within the vicinity of such existing or planned station."

Local Government Response/Implementation

- **James City County – 2016**
  - Board of Supervisors passed resolution stating that they County will no longer accept proffers associated with residential rezonings
  - “When Chapter 322 becomes effective on July 1, 2016, the liabilities associated with accepting voluntary proffers for residential development now outweigh the benefits.”
  - County has received three residential rezonings – one was approved, one was denied, and one is pending.
- **Spotsylvania County – 2016**
  - Board of Supervisors repealed County’s “Proffer Guidelines”
  - “Reasonable proffers will be determined on a case-by-case basis based on impacts specifically attributable to residential development associated with rezoning applications submitted on July 1, 2016 or after.”
  - County has received 7 cases – 2 have been approved and 5 are pending
- **City of Norfolk – 2016**
  - City Council passed Zoning Text Amendment stating that “No proffer shall be submitted or accepted for any use or development on any property that is proposed, as part of a rezoning application, to be zoned for either single-family or multi-family housing.”
  - Applicant can choose to strike proffers and proceed with rezoning without any conditions – if they don’t the application is deemed incomplete.
  - “All residential rezonings will now be analyzed solely on the proposed applications compliance with plaNorfolk 2030.”

Local Government Response/Implementation

- **City of Suffolk:**
  - City does not have an adopted policy but accepts proffers when applicable and submitted voluntarily (September, 2016- https://pilotonline.com/news/government/local/article_f96285fa-607d-5d5d-a878-601ab5b1e977.html)
- **Virginia Beach:**
  - "Virginia Beach uses proffers and has not recently changed its policy, a spokesman said." (September, 2016- https://pilotonline.com/news/government/local/article_f96285fa-607d-5d5d-a878-601ab5b1e977.html)
- **Isle of Wight:**
  - Board of Supervisors rescinded the County's cash proffer policy and asked Planning Commission to amend the zoning ordinance to ensure that:
    - Applicants submit an independent proffer analysis
    - County Attorney be present at meetings between County staff and applicant
    - Applicant submit affirmation that proffers contained are consistent with state code.

Local Government Response/Implementation

- **City of Chesapeake:**
  - Applicants required to sign a statement acknowledging that they understand the new law prior to pre-application meetings.
  - Residential Rezoning Certificate signed and submitted with the residential rezoning application.

Residential Rezonings from July 1, 2016 - January 11, 2018

Date Filed	Application Number	Project Name	Location	Proposal	Planning Commission	City Council
9/12/16	REZ-16-025	Dozier Rezoning	Lindale/Campostella	Rezone from B-1 to R-8	A 11/9/16	A 12/20/16
9/12/16	REZ-16-027	Washington Drive Rezoning	Washington Drive	30 lot subdivision	Pending	
9/12/16	REZ-16-029	VLP Associates	Johnstown Road	22 Lot subdivision R10s	Ap 11/9/16	Ap 3/21/17
11/7/16	REZ-16-031	Creeks Edge North	1620 Rokeby Avenue	1 ac B1-RMF1	A 11/8/17	Ap 12/19/17
12/5/16	REZ-16-032	Silverwood Forest	N. Radcliffe Lane	20 sf townhomes	Ap 6/14/17	Ap 7/18/17
1/3/17	REZ-17-001	Royal Crossings	4135 Airline Blvd	B1 to RMF-1	Pending	
1/3/17	REZ-17-002	Riddick Property Rezoning	4924 Lake Shore Drive	A1 to R-15s	A 3/8/2017	A 4/18/17
2/27/17	REZ-17-004	Whitesell Rezoning	1001 Old Vintage Road	1 lot to R-15	As 5/10/2017	Ap 6/20/17
4/3/17	REZ-17-013	The Parklands	5541 Bainbridge Blvd	M1 to RMF-1 & R15s	Pending	
4/3/17	REZ-17-015	Russell Prop/Sr. Housing Fac.	Chesapeake Square Ring Road	160 Unit Sr. Housing fac.	Pending	
4/3/17	REZ-17-016	Drum Creek Farms	2814 Taylor Road	Increase lots to 20 lots	Ap 6/14/17	W 8/25/17
5/1/17	REZ-17-019	1014 Washington Drive Rezoning	1014 Washington Drive	A-1 to R-15s 1 sfr	Pending	
5/1/17	REZ-17-020	Hartwood Terrace	408 Kempsville Road	R-15-to RMF-1	Pending	
6/5/17	REZ-17-022	Cobblestone Cay	1924 Elbow Road	Rezone to R-10s	Pending	
6/5/17	REZ-17-023	Gilmerton Terrace	Gilmerton Road	Rezone 5 B1 lots to 3 R8 lots	A 10/11/17	Ap 11/21/17
6/6/17	REZ-17-024	Ida Gardens Lots 7 & 8	809 Bells Mill Road	Remove M-1 Boundary for lots 7 & 8	Ap 8/9/2017	Ap 9/19/17
7/5/17	REZ-17-026	Stratford Terrace	405 Berndale Drive	R15s	Pending	
7/25/17	REZ-17-027	Cinnamon Cove	901 Pine Wood Run	O&I to RMF-1	Pending	
7/25/17	REZ-17-028	Everton Estates	Terminus of Ian's Way	28 Lot Subdivision		W 10/10/17
9/1/17	REZ-17-030	Dillon Property	1824 Elbow Road	Rezone 24.11 Ac. To R-8	Pending	
10/3/17	REZ-17-032	2333 Cedar Road Rezoning	2333 Cedar Road	AC to R15	W 2/14/18	
10/3/17	REZ-17-033	Coleman Farms Proffers	Miller Avenue	Proffer Reconsideration	Ap 12/13/17	P 2/20/18
12/4/2017	REZ-17-037	Hillwell Cottages	1044 Hillwell Road	R-15 to RMF-1	Pending	

2019 Proffer Legislation

- April, 2018 – January, 2019:
  - Solicited input/feedback from local governments, building industry, and other stakeholders

- SB 1373 (Favola) / HB 2342 (Thomas)
  - Signed by Governor Northam; effective July 1, 2019
  - Endorsed by Virginia REALTORS ®, Virginia Association for Commercial Real Estate, Northern Virginia Chamber of Commerce, Prince William Chamber of Commerce, Loudoun County Chamber of Commerce, and the Northern Virginia Chamber Partnership which includes the Dulles Regional Chamber of Commerce, the Greater McLean Chamber of Commerce, the Greater Reston Chamber of Commerce, and the Tysons Regional Chamber of Commerce.

2019 Proffer Legislation

- Goals:
  - Find common-ground between industry and local governments on amendments to the 2016 Proffer Legislation
  - Open lines of communication before and during the development review process
  - Expand flexibility for applicants and local governments to discuss and agree upon different types of onsite and offsite proffers
  - Preserve the long-standing legal principle that proffers are “voluntary”

Substantive Provisions of the 2019 Proffer Legislation

Facilitating Communication Between Applicants and Local Governments

1. Removal of “request or accept”, “suggested”, and “required” language; replaced with “require”:
   - Notwithstanding any other provision of law, general or special, no ~~locality~~ *local governing body* shall (i) ~~request or accept~~ *require* any unreasonable proffer, as described in subsection C, in connection with a rezoning or a proffer condition amendment as a condition of approval of a new residential development or new residential use or (ii) deny any rezoning application or proffer condition amendment for a new residential development or new residential use where such denial is based in whole or in part on an applicant's failure or refusal to submit an unreasonable proffer or proffer condition amendment.
   - In any action in which a ~~locality~~ *local governing body* has denied a rezoning or an amendment to an existing proffer and the aggrieved applicant proves by a preponderance of the evidence that it refused or failed to submit an unreasonable proffer or proffer condition amendment that ~~it has proven~~ was ~~suggested,~~ requested ~~, or required~~ *in writing* by the ~~locality~~ *local governing body in violation of this section*, the court shall presume, absent clear and convincing evidence to the contrary, that such refusal or failure was the controlling basis for the denial.

Facilitating Communication Between Applicants and Local Governments

2. Inserted language to explicitly allow for communications between applicant and local government:
   - *Notwithstanding any provision in this section to the contrary, nothing contained herein shall be deemed or interpreted to prohibit or to require communications between an applicant or owner and the locality. The applicant, owner, and locality may engage in pre-filing and post-filing discussions regarding the potential impacts of a proposed new residential development or new residential use on public facilities as defined in subsection A and on other public facilities of the locality, and potential voluntary onsite or offsite proffers, permitted under subsections C and D, that might address those impacts. Such verbal discussions shall not be used as the basis that an unreasonable proffer or proffer condition amendment was required by the locality. Furthermore, notwithstanding any provision in this section to the contrary, nothing contained herein shall be deemed or interpreted to prohibit or to require presentation, analysis, or discussion of the potential impacts of new residential development or new residential use on the locality's public facilities.*

Flexibility for Applicants and Local Governments

2. Re-instated ability for local governments and applicants to discuss and agree upon different types of off-site and on-site proffers:

C. Notwithstanding any other provision of law, general or special, ~~(i)~~ as used in this chapter, a proffer, or proffer condition amendment, whether onsite or offsite, offered voluntarily pursuant to § **15.2-2297**, **15.2-2298**, **15.2-2303**, or **15.2-2303.1**, shall be deemed unreasonable unless ~~it~~*:*

1. It addresses an impact that is specifically attributable to a proposed new residential development or other new residential use applied for*;* and ~~(ii) an offsite proffer shall be deemed unreasonable pursuant to subdivision (i) unless~~

2. If an offsite proffer, it addresses an impact to an offsite public facility, such that ~~(a)~~ *(i)* the new residential development or new residential use creates a need, or an identifiable portion of a need, for one or more public facility improvements in excess of existing public facility capacity at the time of the rezoning or proffer condition amendment and ~~(b)~~ *(ii)* each such 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. ~~For the purposes of this section, a~~ *A* locality may base its assessment of public facility capacity on the projected impacts specifically attributable to the new residential development or new residential use.

Flexibility for Applicants and Local Governments

D. *Notwithstanding the provisions of subsection C*:

1. An applicant or owner may, at the time of filing an application pursuant to this section or during the development review process, submit any onsite or offsite proffer that the owner and applicant deem reasonable and appropriate, as conclusively evidenced by the signed proffers.

2. Failure to submit proffers as set forth in subdivision 1 shall not be a basis for the denial of any rezoning or proffer condition amendment application.

Additional Provisions of 2019 Proffer Legislation

- Notification Requirement:
  - Actions brought to contest the action of a ~~locality~~ *local governing body* in violation of this section shall be brought only by the aggrieved applicant or the owner of the property subject to a rezoning or proffer condition amendment pursuant to subsection F of § **15.2-2285**, *provided that the applicant objected in writing to the governing body regarding a proposed condition prior to the governing body's grant or denial of the rezoning application*.

Additional Provisions of 2019 Proffer Legislation

- "Mediation" of an unreasonable proffer:
  - In any successful action brought pursuant to this section contesting an action of a ~~locality~~ *local governing body* in violation of this section, the applicant may be entitled to an award of reasonable attorney fees and costs and to an order remanding the matter to the governing body with a direction to approve the rezoning or proffer condition amendment without the inclusion of any unreasonable proffer *or to amend the proffer to bring it into compliance with this section*. If the ~~locality~~ *local governing body* fails or refuses to approve the rezoning or proffer condition amendment*, or fails or refuses to amend the proffer to bring it into compliance with this section,* within a reasonable time not to exceed 90 days from the date of the court's order to do so, the court shall enjoin the ~~locality~~ *local governing body* from interfering with the use of the property as applied for without the unreasonable proffer. Upon remand to the local governing body pursuant to this subsection, the requirements of § **15.2-2204** shall not apply.

Virginia: Proffers vs. Impact Fees

- Broad group of stakeholders:
  - Local governments
  - Residential development and construction industry
  - Commercial development and construction industry
  - Landowners
  - Agriculture industry
- No clear consensus among stakeholders on several important issues:
  - Who ultimately bears the burden of paying?
    - Landowner, developer, builder
    - Homebuyer
  - Impact on housing production/affordability and economic development
  - Application and structure of impact fee enabling legislation
  - Are impact fees the right tool for Virginia?

Impact Fee: Policy Considerations

- Definitions and Applicability:
  - Scope of public facilities for which impact fees are assessed
  - Impact Fees for residential, commercial, or both?
- Minimum Standards for Impact Fee Ordinances:
  - Impact fees based on proportionate share of the cost of system improvements, actual system improvement costs, or reasonable estimates of such costs
  - Timing of collection of impact fees: commencement of construction, issuance of building permit, certificate of occupancy, case-by-case basis
  - Required exemptions or reduction in Impact Fees for affordable housing, senior housing, veteran housing, and other types of population-specific housing.
  - Methodology by which costs per service unit are calculated
  - Schedule of development impact fees for various land uses per unit of development
  - Description of acceptable levels of service for system improvements
  - Should make a determination as to whether one service area or more than one service area is necessary to establish a correlation between impact fees and benefits

Impact Fee: Policy Considerations

- Impact Fee Advisory and Oversight Committees:
  - State + regional/local committees responsible for implementation/oversight
  - Increases predictability/mitigates liability for both private sector and local governments
  - Local Committees:
    - Monitor/evaluate implementation of Capital Improvement Plans
    - Review local impact fee calculations
- Calculation of impact fees:
  - State framework with local/regional input?
  - State framework – consistency across the Commonwealth.
- Accounting/Expenditure of Impact Fees:
  - Timeframe for the expenditure of collected impact fees
  - Accountability and transparency in how/where collected impact fees are spent

Impact Fee: Policy Considerations

- Refunds:
  - System to refund the collected impact fees if the local government does not appropriate and expend the collected development impact fees in the specified timeframe
- Credits:
  - System to provide credits for projects that include affordable housing, senior housing, veteran housing, and other population-specific housing types
  - Statewide system of credits vs. patchwork of local credits
- Cash Proffers vs. Impact Fees:
  - Local decision to pick one or the other?
  - Statewide policy choice between cash proffers or impact fees?

Moving Forward…

- 2019 Proffer Legislation became effective July 1, 2019
  - Progress: Dialogue between local government and industry regarding implementation and local policy changes.
- Two significant changes to proffer statutes over the last several years – industry and local governments need time to implement 2019 proffer legislation
- Next Steps: Continue to monitor and evaluate the implementation of the 2019 Proffer Legislation