Overview of Proffer Legislation
2019 General Assembly (GA)

HB 2342 (Thomas)/SB 1373 (Favola)

These bills were introduced at the request of the Home Builders Association of Virginia (HBAV), and contain numerous amendments resulting from negotiations between HBAV and local governments (including Fairfax County) throughout the state. **SB 1373** was reported from the Senate Local Government Committee (11-2) on January 15, 2019. **HB 2342** was reported from a House Counties, Cities and Towns subcommittee (6-1) on January 16, 2019.

Summary of HB 2342/SB 1373

(The summary includes all amendments made to both bills to date.)

- **HB 2342/SB 1373** substantially amend the proffer law enacted by the 2016 GA.
- The 2016 law prevents localities from suggesting, requesting or accepting an unreasonable proffer. **HB 2342/SB 1373** instead prevent a local governing body from requiring in writing an unreasonable proffer.
- The 2016 law imposed new restrictions on proffers generally, but especially offsite proffers, which are limited to four categories of public facilities: transportation, public safety, public schools, and parks. Conversely, **HB 2342/SB 1373** allow an applicant to submit any onsite or offsite proffer that the applicant deems reasonable and appropriate. This election can be made at the time of the filing of the application or during the development review process — the applicant's signed proffers provide conclusive evidence that the proffers are reasonable. Failure to submit signed proffers cannot be the basis for the denial of any application.
- Under the 2016 law, an applicant whose application was approved can still sue to challenge any proffer as unreasonable. If challenging the denial of an application, the applicant need only prove by a preponderance of the evidence the locality suggested or requested an unreasonable proffer that the applicant failed or refused to submit; the court must presume that the denial was based on the absence of the unreasonable proffer, unless the locality proves otherwise by clear and convincing evidence. **HB 2342/SB 1373** maintain that requirement, but they also require the applicant to prove that the local governing body requested the unreasonable proffer in writing.

- Additionally, under **HB 2342/SB 1373** an applicant can contest the approval or denial of an application under the statute, but only if the applicant objected in writing before the local governing body took action on the application.
- **HB 2342/SB 1373** state that "verbal discussions" during the application process cannot be used as the basis for determining that an unreasonable proffer or proffer condition amendment was required by the locality.
- The 2016 law requires that, if an applicant is successful in court, the court would then direct the locality to approve the application without the unreasonable proffer. **HB 2342/SB 1373** give the court the additional option of amending an unreasonable proffer to bring it into compliance.
- The provisions of the bills are effective on any rezoning application filed on or after July 1, 2019; to any application for a proffer condition amendment amending such a rezoning; or to any then-pending rezoning application that the applicant amends and elects to have processed under the new law. Otherwise, applications filed before July 1, 2016, proceed under the law as it existed prior to that date, and applications filed on or after July 1, 2016, but before July 1, 2019, proceed under the law as it existed during that period.
- **HB 2342/SB 1373** do not alter any of the exemptions in the 2016 law – the County has several areas that are exempt from the 2016 law, including Tysons, Merrifield, and portions of Reston and Richmond Highway.

Additional Proffer Bills

Several additional proffer bills were introduced in the 2019 GA, including **SB 1143** (Peake), **SB 1524** (Black), **HB 2276** (Murphy), and **HB 1801** (Ware). The only one that remains under consideration is **HB 1801** (Ware). **HB 1801** was a request by Goochland County, and it incorporates all of the changes included **HB 2342** and **SB 1373**, but makes one additional change – **HB 1801** eliminates the requirement that a public facility improvement be in excess of existing public facility at the time of the rezoning or proffer condition amendment.

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SENATE BILL NO. 1373

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Local Government on January 15, 2019)

(Patrons Prior to Substitute—Senators Favola and Black [SB 1524])

A BILL to amend and reenact § 15.2-2303.4 of the Code of Virginia and to repeal the third enactment of Chapter 322 of the Acts of Assembly of 2016, relating to conditional rezoning proffers.

Be it enacted by the General Assembly of Virginia:

1. That § 15.2-2303.4 of the Code of Virginia is amended and reenacted as follows:

§ 15.2-2303.4. Provisions applicable to certain conditional rezoning proffers.

A. For purposes of this section, unless the context requires a different meaning:

"New residential development" means any construction or building expansion on residentially zoned property, including a residential component of a mixed-use development, that results in either one or more additional residential dwelling units or, otherwise, fewer residential dwelling units, beyond what may be permitted by right under the then-existing zoning of the property, when such new residential development requires a rezoning or proffer condition amendment.

"New residential use" means any use of residentially zoned property that requires a rezoning or that requires a proffer condition amendment to allow for new residential development.

"Offsite proffer" means a proffer addressing an impact outside the boundaries of the property to be developed and shall include all cash proffers.

"Onsite proffer" means a proffer addressing an impact within the boundaries of the property to be developed and shall not include any cash proffers.

"Proffer condition amendment" means an amendment to an existing proffer statement applicable to a property or properties.

"Public facilities" means public transportation facilities, public safety facilities, public school facilities, or public parks.

"Public facility improvement" means an offsite public transportation facility improvement, a public safety facility improvement, a public school facility improvement, or an improvement to or construction of a public park. No public facility improvement shall include any operating expense of an existing public facility, such as ordinary maintenance or repair, or any capital improvement to an existing public facility, such as a renovation or technology upgrade, that does not expand the capacity of such facility. For purposes of this section, the term "public park" shall include playgrounds and other recreational facilities.

"Public safety facility improvement" means construction of new law-enforcement, fire, emergency medical, and rescue facilities or expansion of existing public safety facilities, to include all buildings, structures, parking, and other costs directly related thereto.

"Public school facility improvement" means construction of new primary and secondary public schools or expansion of existing primary and secondary public schools, to include all buildings, structures, parking, and other costs directly related thereto.

"Public transportation facility improvement" means (i) construction of new roads; (ii) improvement or expansion of existing roads and related appurtenances as required by applicable standards of the Virginia Department of Transportation, or the applicable standards of a locality; and (iii) construction, improvement, or expansion of buildings, structures, parking, and other facilities directly related to transit.

"Residentially zoned property" means property zoned or proposed to be zoned for either single-family or multifamily housing.

"Small area comprehensive plan" means that portion of a comprehensive plan adopted pursuant to § 15.2-2223 that is specifically applicable to a delineated area within a locality rather than the locality as a whole.

B. 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.

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.

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.

E. Notwithstanding any other provision of law, general or special:

1. 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.*

2. 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.

3. 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.

~~E.~~ *F.* The provisions of this section shall not apply to any new residential development or new residential use occurring within any of the following areas: (i) an approved small area comprehensive plan in which the delineated area is designated as a revitalization area, encompasses mass transit as defined in § 33.2-100, includes mixed use development, and allows a density of at least 3.0 floor area ratio in a portion thereof; (ii) 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; or (iii) an approved service district created pursuant to § 15.2-2400 that encompasses an existing or planned Metrorail station.

~~F.~~ *G.* This section shall be construed as supplementary to any existing provisions limiting or curtailing proffers or proffer condition amendments for new residential development or new residential use that are consistent with its terms and shall be construed to supersede any existing statutory provision with respect to proffers or proffer condition amendments for new residential development or new residential use that are inconsistent with its terms.

H. 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.

2. That the third enactment of Chapter 322 of the Acts of Assembly of 2016 is repealed.

3. That this act shall be effective as to any application for a rezoning filed on or after July 1, 2019, or for a proffer condition amendment amending a rezoning that was filed on or after July 1, 2019, or to any then-pending rezoning application in which the applicant elects to proceed hereunder, by amendment of that pending application.

4. That an applicant with a pending application for a rezoning or proffer condition amendment that was filed prior to July 1, 2016, may continue to proceed under the law as it existed prior to that date, and an applicant with a pending rezoning application filed on or after July 1, 2016, but before July 1, 2019, or proffer condition amendment application amending a rezoning for which the application was filed on or after July 1, 2016, but before July 1, 2019, may continue to proceed under the law as it existed during that period.