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SENATE BILL NO. 1373

Offered January 9, 2019

Prefiled January 8, 2019

A BILL to amend and reenact § 15.2-2303.4 of the Code of Virginia, relating to conditional rezoning proffers.

Patrons—Favola, Black and Marsden

Referred to Committee on Local Government

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

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59 § 15.2-2297, 15.2-2298, 15.2-2303, or 15.2-2303.1, shall be deemed unreasonable unless it addresses an  
60 impact that is specifically attributable to a proposed new residential development or other new  
61 residential use applied for and (ii) an offsite proffer shall be deemed unreasonable pursuant to  
62 subdivision (i) unless it addresses an impact to an offsite public facility, such that (a) the new residential  
63 development or new residential use creates a need, or an identifiable portion of a need, for one or more  
64 public facility improvements in excess of existing public facility capacity at the time of the rezoning or  
65 proffer condition amendment and (b) each such new residential development or new residential use  
66 applied for receives a direct and material benefit from a proffer made with respect to any such public  
67 facility improvements. For the purposes of this section, a locality may base its assessment of public  
68 facility capacity on the projected impacts specifically attributable to the new residential development or  
69 new residential use.

70 D. *In addition to and notwithstanding the provisions of subsection C, an applicant or owner may, at*  
71 *the time of filing an application pursuant to this section or during the development review process,*  
72 *submit any proffer as the applicant or owner deems reasonable and appropriate, as conclusively*  
73 *evidenced by the signed proffers. Failure to submit proffers as set forth in this subsection shall not be*  
74 *the basis for the denial of any rezoning or proffer condition amendment application.*

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

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

81 2. In any action in which a ~~locality~~ *local governing body* has denied a rezoning or an amendment to  
82 an existing proffer and the aggrieved applicant proves by a preponderance of the evidence that it refused  
83 ~~or failed~~ to submit an unreasonable proffer or proffer condition amendment that ~~it has proven~~  
84 ~~suggested, requested, or required~~ by the ~~locality~~ *local governing body in violation of this section*, the  
85 court shall presume, absent clear and convincing evidence to the contrary, that such refusal or failure  
86 was the controlling basis for the denial.

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

97 E. F. The provisions of this section shall not apply to *communications regarding or consideration of*  
98 *any new residential development or new residential use occurring proposed or approved* within any of  
99 the following areas: (i) an approved small area comprehensive plan in which the delineated area is  
100 ~~designated as a revitalization area~~, encompasses mass transit as defined in § 33.2-100, and includes  
101 mixed use development, and allows a density of at least 3.0 floor area ratio in a portion thereof; (ii) an  
102 approved small area comprehensive plan that encompasses an existing or planned Metrorail station, or is  
103 adjacent to a Metrorail station located in a neighboring locality, and allows additional density within the  
104 vicinity of such existing or planned station; or (iii) an approved service district created pursuant to  
105 § 15.2-2400 that encompasses an existing or planned Metrorail station.

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

111 H. *Notwithstanding any provision in this section to the contrary, nothing contained herein shall be*  
112 *deemed or interpreted to prohibit or to require communications between an applicant or owner and the*  
113 *locality. The applicant, owner, and locality may engage in pre- and post-filing discussions regarding the*  
114 *potential impacts of a proposed new residential development or new residential use on public facilities*  
115 *as defined in subsection A and on other public facilities of the locality, and potential voluntary onsite or*  
116 *offsite proffers, permitted under subsection C and subsection D, that might address those impacts. Such*  
117 *verbal discussions shall not be used as the basis that an unreasonable proffer or proffer condition*  
118 *amendment was required by the locality. Furthermore, notwithstanding any provision in this section to*  
119 *the contrary, nothing contained herein shall be deemed or interpreted to prohibit or require*  
120 *presentation, analysis, or discussion of the potential impacts of new residential development or new*

121 *residential use on the locality's public facilities.*

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

125 **3. That an applicant with a pending application for a rezoning or proffer condition amendment**  
126 **that was filed prior to July 1, 2016, may elect to proceed under the law as it existed prior to that**  
127 **date, and an applicant with a pending rezoning or proffer condition amendment application filed**  
128 **after July 1, 2016, but before July 1, 2019, may elect to proceed under the law as it existed during**  
129 **that period.**

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