



**2016 CHANGES TO PROFFER AUTHORITY;
New Va. Code Section 15.2-2303.4
(Effective July 1, 2016)**

Where we are headed today

1. Brief Review of Current Proffer Authority

2. New Va. Code § 15.2-2303.4:

- A. Bottom Line – *What does this new statute do?*
- B. Applicability and Exceptions to New Rules
- C. Residential Development Proffers -- New Definitions and Restrictions
- D. New Legal and Attorney's Fees Provisions

Current Proffer Authority (Conditional Zoning)



Current Proffer Authority -- Va. Code § 15.2-2303:

“A zoning ordinance may include reasonable regulations and provisions for conditional zoning . . . and for the adoption . . . as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body . . . by the owner of the property which is the subject of the proposed zoning map amendment.”

NOTE: Accepted proffers of public improvements that are not generated solely by the rezoning itself get a special protection against future modification of these proffers.

Conclusion: Essentially recognizes that proffers need not be directly necessitated by the rezoning.

Summary of Current Rule:

- ☐ Proffers must be:
 - offered by the owner (or owner's agent);
 - in writing; and
 - "reasonable."
- ☐ In Fairfax County, proffers do not have to be related to the impacts of the rezoning.
- ☐ Reasonable proffers may be for any purpose (dedication of property, cash contributions, construction of public facilities, etc.).
- ☐ All types of rezonings can have proffers (residential, commercial, etc.)
- ☐ There are a couple limited exceptions but the authority is generally broad.

Refresher on Some Additional Statutory Regulations on Proffers:

-- Cash proffer made on a per-unit basis for residential construction cannot be paid until after final inspection and before RUP is issued.
(Va. Code § 15.2-2303.1:1)

-- Public project must begin within 12 years of acceptance of a cash proffer contribution towards the project.
(Va. Code § 15.2-2303.2)

-- Cannot (a) require cash proffer be paid before payment of fee for issuance of a building permit;
(b) schedule annual increase in cash proffer faster than the CPI until payment; or
(c) require applicant to waive future rights against the County.
(Va. Code § 15.2-2303.3)

New Law: Va. Code § 15.2-2303.4

-- Bottom Line and Applicability --



Bottom Line for § 15.2-2303.4:

1. All proffers for new residential development must address a proposed development's impacts that are "specifically attributable" to the development;
2. "Off-site" proffers must address need to expand existing capacity of 4 categories of public facilities:
 - a. transportation (including transit);
 - b. public safety;
 - c. public school; and
 - d. parks (including playgrounds and other recreational facilities); AND
3. "Off-site" proffers must provide a "direct and material benefit" to the proposed residential development.

§ 15.2-2303.4: Applicability

General Rule = § 15.2-2303.4 applies **only** to:

A. New residential development *or* use

AND

B. Rezoning or PCA application filed *on or after July 1, 2016*.

NOTES:

- ❖ Supersedes all other inconsistent rules.
- ❖ *3 exceptions to this general rule*

Next, some definitions . . .

§ 15.2-2303.4 Applies to “New Residential Development”

Definition: “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.”

§ 15.2-2303.4 Applies to “New Residential Use”

Definition: “any use of residentially zoned property that requires a rezoning or that requires a proffer condition amendment to allow for new residential development.”

§ 15.2-2303.4 Applies to “Residentially Zoned Property”

Definition: “property zoned or proposed to be zoned for either single-family or multifamily housing.”

❖ *NOTE: May include all residential uses.*

Considerations for General Applicability:

1. Applies to rezonings and PCAs where application was filed *on or after July 1, 2016*.
2. Affects proffers related to residential component of a proposed mixed-use development.
3. Does not affect proffers related to commercial or other non-residential components of mixed-use.



More on Applicability
-- Areas Exempt from § 15.2-2303.4 --

3 Exceptions to Applicability: § 15.2-2303.4(E):

Overview:

- Exceptions #1 and #2 apply to “small area comprehensive plans” (need this definition to understand the exemptions).
- Exception #3 applies to a certain type of tax service district.

3 Exceptions to Applicability: § 15.2-2303.4(E):

Definition: “Small area comprehensive plan:”

“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.”

Note: *Small area comprehensive plans must be approved by the locality as part of the comprehensive plan.*

3 Exceptions to Applicability (*continued*):

Exception #1: The new restrictions do not apply to an approved small area comprehensive plan that:

1. is designated as a revitalization area,
2. encompasses mass transit (includes busses),
3. includes mixed-use development, AND
4. allows a density of at least 3.0 floor area ratio in a portion thereof.

Notes:

- A. Must have all four elements to meet this exception.
- B. Need only a portion of the area to allow 3.0 FAR or higher.
- C. Examples of exempted areas: Richmond Highway Corridor and CBCs such as Annandale, Baileys, and Seven Corners.

3 Exceptions to Applicability (*continued*):

Exception #2: The new restrictions do not apply to an approved small area comprehensive plan that:

1. (a) encompasses an existing or planned Metrorail station, or (b) is adjacent to a Metrorail station located in a neighboring locality, AND
2. allows additional density within the vicinity of such existing or planned station.

Notes: *Effectively exempts all Metrorail areas: Tysons, Reston, Merrifield, Franconia-Springfield, Dulles Suburban Center, Fairfax Center, and TSAs encompassing Metrorail such as Innovation Center, Huntington, Vienna, Van Dorn, and West Falls Church.*

3 Exceptions to Applicability (*continued*):

Exception #3: The new restrictions do not apply to an approved service district created pursuant to § 15.2-2400 that encompasses an existing or planned Metrorail station.

Note: *Currently, only Tysons is subject to such a tax district. All other transportation tax districts were created under other legal authority.*

Some Identified Areas Where the New Rules Apply

1. Centreville Suburban Center
2. Flint Hill Suburban Center
3. Lorton-South Route 1 Suburban Center
4. McLean CBC
5. Kingstowne CBC

Key

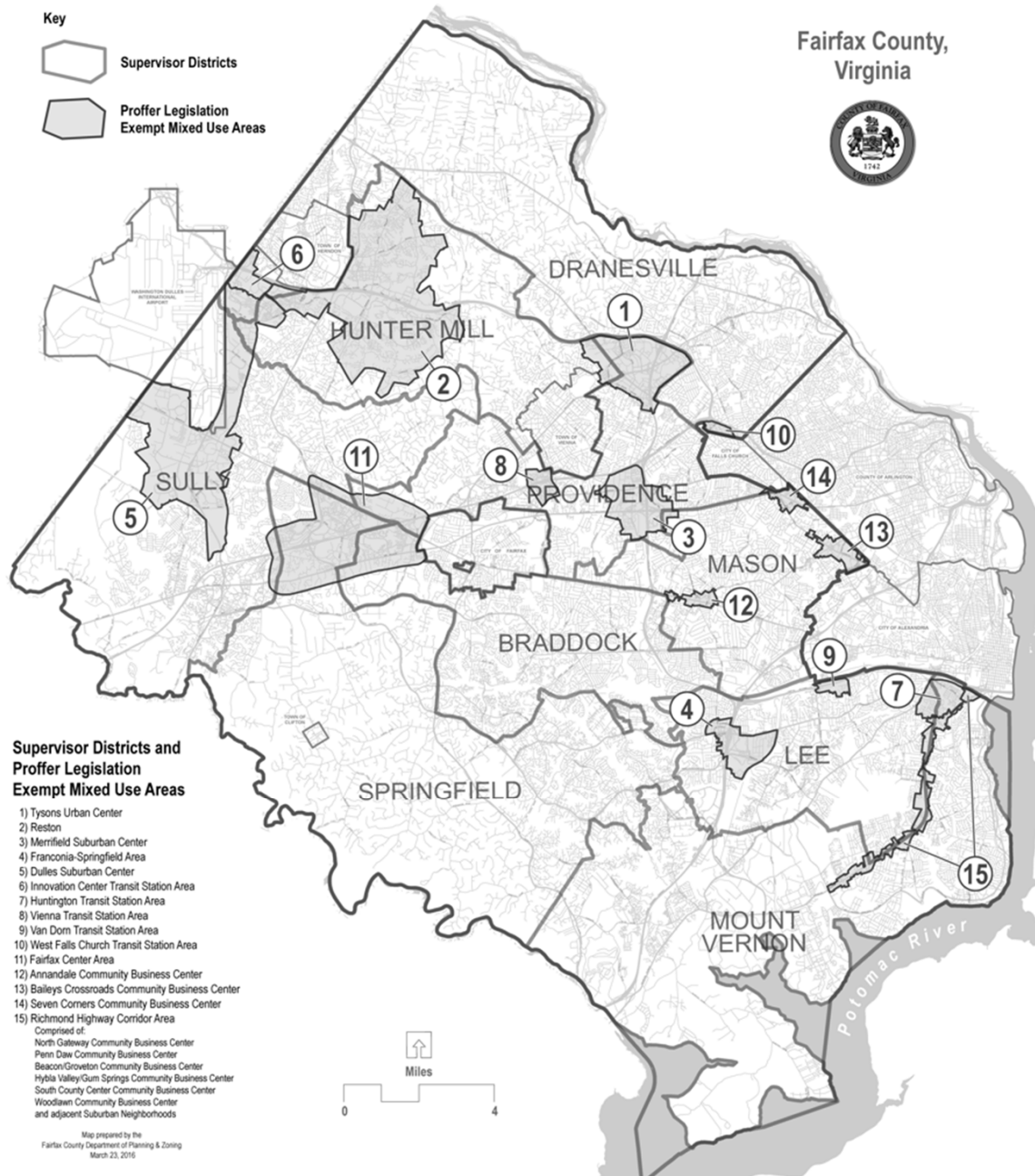


Supervisor Districts



Proffer Legislation
Exempt Mixed Use Areas

Fairfax County,
Virginia



**Supervisor Districts and
Proffer Legislation
Exempt Mixed Use Areas**

- 1) Tysons Urban Center
 - 2) Reston
 - 3) Merrifield Suburban Center
 - 4) Franconia-Springfield Area
 - 5) Dulles Suburban Center
 - 6) Innovation Center Transit Station Area
 - 7) Huntington Transit Station Area
 - 8) Vienna Transit Station Area
 - 9) Van Dorn Transit Station Area
 - 10) West Falls Church Transit Station Area
 - 11) Fairfax Center Area
 - 12) Annandale Community Business Center
 - 13) Baileys Crossroads Community Business Center
 - 14) Seven Corners Community Business Center
 - 15) Richmond Highway Corridor Area
- Comprised of:
- North Gateway Community Business Center
 - Penn Daw Community Business Center
 - Beacon/Groveton Community Business Center
 - Hybla Valley/Gum Springs Community Business Center
 - South County Center Community Business Center
 - Woodlawn Community Business Center
 - and adjacent Suburban Neighborhoods

Map prepared by the
Fairfax County Department of Planning & Zoning
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More Detail for New Rules in Residential Rezoning and PCAs -- § 15.2-2303.4 --



Restrictions on Proffers for New Residential Development or Uses (§ 15.2-2303.4(B)):

“Notwithstanding any other provision of law, general or special, no locality shall (i) request or accept 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.”

Take away: *Cannot (i) request or accept unreasonable proffer
or
(ii) deny an application based on lack of an
unreasonable proffer.*

Defining an “*unreasonable proffer*” -- § 15.2-2303.4(C)

1. Define “onsite” and “offsite” proffers.
2. Discuss new rule for *all* proffers
(Meaning both “onsite” and “offsite”).
3. Discuss additional rules that apply *only* to
“offsite” proffers.

New Distinction Between “Onsite” and “Offsite” Proffers for New Residential Development

- “Onsite” proffers address impacts ***inside*** of the boundaries of the subject property and ***do not include*** cash proffers.
- “Offsite” proffers address impacts ***outside*** of the boundaries of the subject property and ***do include*** cash proffers.

***New Requirement for both
Onsite and Offsite Proffers:***

All proffers for new residential use must address an impact that is “specifically attributable” to the residential use/component.

Hypothetical Example Proposed Development: New multi-family building

<i>Hypothetical examples of impacts “specifically attributable “ to the proposed development:</i>	<i>Hypothetical proffer conditions that may be among options to address each impact:</i>
Adjacent property’s view is negatively affected	Onsite landscaping that adequately screens the proposed development as approved by the Urban Forest Management Division
Need additional parking for residents of the development	Onsite parking garage

New Restrictions in § 15.2-2303.4(C)

-- Offsite Proffers --



***“Offsite” Proffers = “specifically attributable”
+ 3 additional elements***

Element #1: “Offsite” proffers must address an impact to an offsite ***“public facility.”***

❖ *Notes: (i) Offsite proffers must address impacts to public (not private) facilities.*

(ii) “Public facility” has a specific definition, which will be covered after these 3 elements.

***“Offsite” Proffers = “specifically attributable”
+ 3 additional elements***

Element #2: The impact to the public facility must create a need (or identifiable portion of a need) for improvements ***in excess of existing capacity*** at the time of the rezoning or PCA.

Element #3: The development must receive a ***“direct and material benefit”*** from the proffer.

Identified “Public Facilities” for Offsite Proffers

Includes four categories :

1. Public safety facilities,
2. Public school facilities,
3. Public transportation facilities, and
4. Public parks including “playgrounds and other recreational facilities.”

Offsite “Public Facilities” – Defined

“Public safety” and ***“public school”*** facilities include new construction or expansion of existing “buildings, structures, parking and other costs directly related thereto.”

Offsite “Public Facilities” – Defined

“Public Transportation facilities” include

- 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.

Offsite “Public Facility Improvement” Defined

- **Includes improvements to any of the four public facilities listed in the previous slides *except*:**
 - a. operating expense of an existing public facility (such as ordinary maintenance or repair), or
 - b. any capital improvement to an existing public facility that does not expand the capacity of such facility (such as renovation or technology upgrade).

New Rules for Judicial Review -- Va. Code § 15.2-2303.4(D) --



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What does § 15.2-2303.4(D) do?

- Only aggrieved applicants and owners of rezonings and PCAs are allowed to sue for a violation of this new Code section.
(Must file within 30 days of the date of the decision.)
- If the application (new rezoning or PCA) was denied, then applicant can prove that the denial was a violation of this section by showing:
 - i. The County “**suggested, requested, or required**” an unreasonable proffer, **AND**
 - ii. The applicant refused or simply did not submit it.
- The County’s rebuttal evidence has to be “**clear and convincing**” (the highest standard of proof in civil cases).

What does § 15.2-2303.4(D) do? (continued)

- Provides new potential remedies to an applicant who wins including:
 - A. attorney's fees and costs AND
 - B. A court order to Board of Supervisors to approve the application *without* any unreasonable proffer.
- If the County does not approve the application within 90 days of the court order, then the court ***must*** enjoin the County “from interfering with the use of the property as applied for without the unreasonable proffer”
 - ❖ *Note: The requirements of § 15.2-2204 and Zoning Ordinance § 18-205 (relating to public notice for land use hearings) do not apply to the Board's decision after the Court remands the matter.*



Questions