FINDING COMMON GROUND ON PROFFER REFORM

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Since its controversial passage in 2016, Virginia's Proffer Reform Law[2] has continued to stir debate. Despite the rift between homebuilders and local governments over the law, efforts are underway to find common ground.[3] Initially, opponents of the law sought either outright repeal or additional exemptions to make the law inapplicable to certain parts of the Commonwealth.[4] However, recent efforts have instead focused on reforming the Proffer Reform law.[5] This article highlights some of the key concerns voiced by both opponents and supporters of the law, and evaluates what types of legislative changes may be appropriate in light of common law and constitutional limitations.

Creation of the Proffer System

The current clash between local governments and the development industry represents a tension between public interests and private property rights that has existed since zoning was found to be lawful by the U.S. Supreme Court in *Village of Euclid v. Ambler Realty Co*.[6] On the one hand, there is the local government's valid exercise of its "police power" to protect its citizens from the harmful

[1] The views expressed in this article are solely the views of the authors and do not represent the views of any other person, firm, institution or organization.

[2] Code of Virginia § 15.2-2303.4, also known as "The Proffer Reform Law," was passed by the Virginia General Assembly during the 2016 session and became effective July 1.

[3] For example, stakeholders convened last May for a discussion hosted by the George Mason University Center for Real Estate Entrepreneurship entitled *The Proffer Reform Law and Northern Virginia Residential Development - Where Do We Go From Here?*. The panel was organized to discuss the different responses from residential developers, builders, and local governments to the Proffer Reform Law.

[4] The law in its present form exempts certain areas. Va. Code § 2303.4(E). *See also* Renss Greene, *Loudoun Planning Commission Waves Through Proffer Workaround*, Loudoun Now (Sept. 30, 2016) (reporting that the proffer reform bill faced "strident and unanimous opposition" from local government organizations and that "[c]ounty leaders and representatives in Richmond admitted early on that they had little chance of defeating the bill, and focused instead on writing in exemptions.").

[5] The Virginia Municipal League reported that the Senate Committee on Local Government held a meeting in the spring to discuss proffers and determined that local governments and homebuilders should meet and "develop sensible changes to the proffer statute." https://www.vml.org/enews-april-19-2018/.

[6] 272 U.S. 365 (1926).

impacts of development.[7] On the other hand is the requirement to protect the rights of property owners as embodied in the U.S. and Virginia constitutions.[8]

Nearly fifty years ago, Virginia lawmakers, working with the public and private sectors, enacted a legislative solution that sought to balance these competing interests.[9] This legislation allowed conditional zoning[10] whereby developers could voluntarily offer to mitigate the impact of their developments, rather than losing approval for projects because of unmitigated impacts.[11] These voluntary offers of mitigation (known as "proffers") are made as written conditions applicable to the project, and upon acceptance, the proffers become part of the zoning ordinance applicable to that particular development.[12]

Since their inception, the use and breadth of proffers has expanded and now includes the ability of developers to offer construction of off-site improvements and/or cash to local jurisdictions.[13] That has led to renewed clashes as local governments in some parts of the state sought cash proffers approaching $60,000 per single family home, as predicted by Til Hazel, a proponent of the proffer system.[14], [15]

Pressures on the Proffer System

Certain economic and legal developments added fuel to the conflict. For example, several northern Virginia counties had become the fastest growing jurisdictions in the country,[16] putting enormous political pressure on local government officials to make developers pay for growth – with schools

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[7] *Id*. at 387 ("The [zoning] ordinance now under review . . . must find [its] justification in some aspect of the police power, asserted for the public welfare.").

[8] U.S. Const. amend. V; Va. Const. art. I, § 11.

[9] *See* Edward A. Mullen & Michael A. Banzhaf, *Virginia's Proffer System and the Proffer Reform Law of 2016*, 20 Rich. Pub. Int. L. Rev. 203 (2017) for a discussion of the history of proffers in Virginia.

[10] *See* Va. Code § 15.2-2303 (allowing in certain localities "the adoption . . . 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." (emphasis added)).

[11] *See* Mullen & Banzhaf, 20 Rich. Pub. Int. L. Rev. at 205 ("[T]he original intent and purpose underlying Virginia's proffer system [was] to provide a legally binding (legislative) method by which an applicant may add to the requirements of, or modify her rights under, an existing zoning classification in a manner not generally applicable to land in the zone both to provide for the protection of the community and as means for gaining government approval for a rezoning.").

[12] *See Jefferson Green Unit Owners Association, Inc. v. Gwinn*, 262 Va. 449, 551 S.E.2d 339 (2001) (". . . the [written] proffers become part of the zoning ordinance . . . they are legislative enactments . . . .).

[13] Initially, cash proffers were disallowed. *See* Mullen & Banzhaf at 207-08 (noting that when proffering authority was expanded to all localities in 1978, "the General Assembly was sufficiently concerned with potential abuse that it disallowed both cash contributions and other benefits that are not specifically tied to the impacts of the development . . . and specifically prohibited any condition that is not related to the physical development or physical condition of the property.").

[14] Some developers consider John T. (Til) Hazel, attorney and developer, to be the father of the proffer system. *See* Marcia McAllister, Proffers system helps Fairfax County ride boom, *Washington Post* (May 11, 1985).

[15] In 2016, the cash proffer in Loudoun County for example had risen to just under $60,000 for a single-family home. *See* https://www.cvilletomorrow.org/news/article/24155-new-virginia-proffer-law-creates-uncertainties/.

[16] In 2013, Loudoun County was the second fastest growing county in the country. Joel Kolin, *America's Fastest Growing Counties: The 'Burbs Are Back*, Forbes.com, September 26, 2013.

being at the epicenter of citizens' frustrations.[17] Because roads and schools were not being built at the same pace as development, some residents understandably became antagonistic toward growth, spurring a "no growth" or "not in my backyard" reaction to residential zoning cases.[18]

In response, several jurisdictions enacted proffer schedules that set out how much per dwelling unit a property owner/developer should pay for schools and other services. While these schedules were theoretically "suggestions" for *voluntary* proffers, in practice, developers simply paid the "suggested" sums, believing that if they did not, their rezoning application would be denied. Initially, the development community welcomed the schedules because they provided not only certainty as to how much would have to be paid, but also an argument that if those amounts *were* proffered, rezoning requests could not be denied because the impacts clearly had been mitigated by proffering the suggested amount.

However, the economic and political forces began shifting in ways that led to the current conflict. As rapid growth continued, citizens demanded that rezonings either be denied or that developers pay more. Zoning moratoriums, however, are illegal in Virginia,[19] so in response, localities increased their suggested proffer amounts.[20] Neighboring localities even competed with one another, increasing proffers deemed "too low" compared to other jurisdictions.[21]

Although they complained about proffers as "extortion," large developers willingly paid the increased amounts because doing so meant obtaining approval of the project – and definite sums provided certainty for project *pro forma* assumptions and projections. Developer acceptance of higher proffers, however, dimmed during the Great Recession as construction stalled nationwide.[22] Local governments faced pressures of their own (especially the fast growth jurisdictions), and in some cases, even if there was a legitimate basis for a reduction, the governing body did not, and perhaps politically could not, reduce the proffer amounts previously set.

Constitutional and Statutory Limitations on Proffers

The problem of excessive exactions in land use cases came to the attention of the courts in a series of statutes[23] and cases, including *Cupp v. Board of Supervisors of Fairfax County* and *Board of*

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[17] *See e.g.,* https://potomaclocal.com/2017/01/27/school-overcrowding-spooks-prince-william-leaders-rezoning-deferred/.

[18] For a discussion of "NIMBY-ism" in Loudoun County, Virginia, *see* Calandrillo, S. P., Deliganis, C. V., & Woods, A., When private property rights collide with growth management legislation, *Cornell Real Estate Review*, 13(1), 20-35 (2015); http://scholarship.sha.cornell.edu/crer/vol13/iss1/6.

[19] *Board of Supervisors v. Horne,* 216 Va. 113, 215 S.E.2d 453 (1975); *Matthews v. Board of Zoning Appeals,* 218 Va. 270, 237 S.E.2d 128 (1977).

[20] *See* Jill Palermo, *Prince William County will ask for more cash from developers*, InsideNova (June 21, 2014).

[21] *Id.* "School board members have long complained that Prince William's proffers, last revised in 2006, are too low compared to surrounding counties and fall far short of covering the costs of new schools."

[22] *See* https://www.pbs.org/newshour/economy/u-s-construction-rebound-great-recession (Aug. 30, 2016).

[23] Initially, these clashes were over how proffer monies were being collected and used. That resulted in limits on when proffers could be paid and the time period in which they must be used by the local government. *See* Va. Code §§ 15.2-2298(A); 15.2-2303.1:1; 15.2-2303.2(C); 15.2-2303.3.

Supervisors of James City County v. Rowe in Virginia[24] and *Nollan v. California Coastal Community* and *Dolan v. City of Tigard* in the U.S. Supreme Court.[25]

Addressing special exceptions in *Cupp*, the Virginia Supreme Court said that requiring a property owner to expand a road when his development contributed only a small part of the traffic on the road violated Article I, § 11 of the Virginia Constitution.[26] The U.S. Supreme Court cases *Nollan* and *Dolan* came to similar conclusions based on the Fifth Amendment to the U.S. Constitution.[27] In these state and federal cases, the common problem was that the government required more than was reasonably necessary to mitigate the developments' impacts, and therefore, the courts found that the government was effectively taking private property to benefit the public without just compensation in violation of the takings clause.[28]

Still, exactions were not totally prohibited by the courts. The U.S. Supreme Court laid out a two-part test for analyzing government exactions in land use cases. First, there must be a connection between what the government requires of the landowner and the impact of the proposed development; the court characterized this connection as an "essential nexus."[29] Second, there must be "rough proportionality," which refers to "the required *degree of connection* between the exactions and the projected impact of the proposed development."[30] Expounding on this concept, the U.S. Supreme Court said: "We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of *individualized determination* that the required dedication is related *both in nature and extent* to the impact of the proposed development."[31]

The Koontz Case

These constitutional constraints were brought into focus once again in the landmark U.S. Supreme Court decision, *Koontz v. St. Johns River Water Management District*.[32] *Koontz* arose from a case in Florida where a local government agency conditioned the issuance of a permit on Mr. Koontz's agreement to either not build anything on 13.9 of his 14.9 acres by granting the state a conservation easement, or pay the state for off-site wetlands mitigation located several miles from the development. Mr. Koontz objected, sued under the Fifth Amendment and sought damages under a Florida statute. *Nollan* and *Dolan* "involve a special application of th[e] [unconstitutional conditions] doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits."[33] The Court stated that land use cases are unique in that they subject applicants to the potentially coercive power of government:

> [L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has

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[24] *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984); *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975).

[25] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

[26] *Cupp* at 595-96.

[27] *Nollan* at 837; *Dolan* at 384-86.

[28] *See* nn. 25 & 26, *supra*.

[29] *See Nollan* at 837.

[30] *Dolan* at 386 (emphasis added).

[31] *Id.* at 391 (emphasis added).

[32] *Koontz v. St. Johns River Water Management District,* 570 U.S. 595, 133 S.Ct. 2586 (2013).

[33] *Id.* at 570 U.S. at 604.

> broad discretion to deny a permit that is worth far more than property it would like to take . . . the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.[34]

The Court went on to say that a violation could occur whether the permit was granted or denied,[35] and that taking money as well as property could violate the Fifth Amendment.[36] None of this was too surprising given the prior rulings of the Court. However, what happened next added a new level of complexity, especially applicable in the proffer context.

The Court said that because of the inherently coercive nature of the land permitting process, the mere act of making a demand for an excessive sum of money or property was itself a violation of a property owner's rights under the Fifth Amendment. Because a constitutional right was at stake, reasonableness or arbitrariness of the government's suggested mitigation did not come into play: "We are not here concerned with whether it would be 'arbitrary or unfair' for [Florida] to order a landowner to make improvements to public lands that are nearby . . . whatever the wisdom of such a policy, it would transfer an interest in property from the landowner to the government. For that reason, any such demand would amount to a *per se* taking similar to the taking of an easement or a lien."[37]

That ruling led to this excerpt from Justice Kagan's profound dissent: "If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed the government might desist altogether from communicating with applicants."[38] Justice Kagan noted that the "danger" of local governments simply denying applications outright rather than negotiating agreements that would work to both sides' advantage "would rise exponentially if something less than a clear condition—if each idea or proposal offered in the back-and-forth of reconciling diverse interests—triggered *Nollan–Dolan* scrutiny. At that point, no local government official with a decent lawyer would have a conversation with a developer."[39]

Those words seem especially prescient from the vantage point of post-Proffer Reform Law in Virginia. It is worth noting, however, that Justice Kagan's comments derive from the particular facts of the *Koontz* case.

As Justice Kagan explained in her dissent, "…the [water management] District never made any particular demand respecting an off-site project (or anything else)" and it had "made clear that it welcomed additional proposals from Koontz to mitigate his project's damage to wetlands."[40] She noted further that "[e]ven at the final hearing on his applications, the District asked Koontz if he would 'be willing to go back with the staff over the next month and renegotiate this thing and try to

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[34] *Id.* at 605.

[35] *Id.* at 606 ("The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so.").

[36] *Id.* at 619 ("We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.").

[37] *Id.* at 615.

[38] *Id.* at 631.

[39] *Id*.

[40] *Id*. at 632.

come up with' a solution."[41] "But Koontz refused, saying (through his lawyer) that the proposal he submitted was 'as good as it can get.'"[42] Thus, Justice Kagan's concern was that, in this case, the parties appeared to have been in the midst of negotiations; indeed, the government's last overture was an invitation for further dialogue, which arguably cannot be characterized as a "demand." The Court's holding merely confirmed the applicability of *Nollan* and *Dolan* as the appropriate constitutional doctrine in cases involving monetary exactions and a permit denial; importantly, "the Court expresse[d] no view on the merits of petitioner's claim that respondent's actions here failed to comply with the principles set forth in this opinion and those two cases [*Nollan* and *Dolan*]," and remanded the case for further proceedings not inconsistent with its opinion.[43] Perhaps due in part to the fact that the merits were not addressed (creating some uncertainty), the decision caused commentators to fear its "chilling" effect.[44], Indeed, some of the reactions to the Proffer Reform Law in Virginia give credence to the validity of Justice Kagan's concerns. That said, appropriate dialogue regarding impact mitigation *can* coexist with sound application of constitutional doctrine, and, under *Koontz*, it must.

Finally, the *Koontz* court considered the question of damages; however, because the damage claim arose under a Florida statute authorizing compensation for violations of constitutional rights, the court did not address the damages that could be assessed on a purely federal theory, but remanded the case to the Florida courts.[45] In response to the *Koontz* case, in 2014, the Virginia legislature enacted Va. Code § 15.2-2208.1; that section provides, in part, ". . . any applicant aggrieved by the grant or denial by a locality of approval or permit, however, described or delivered, . . . where such grant included or denial was based upon, an unconstitutional condition pursuant to the United States Constitution or the Constitution of Virginia, shall be entitled to an award of compensatory damages . . . ."

The enactment of § 15.2-2208.1 did not seem to affect proffer practices in Virginia, leading to growing frustration in the development community and culminating in 2016 with the Homebuilders Association of Virginia (HBAV) pushing for proffer reform. As a result, the Virginia legislature passed the Virginia Proffer Reform Law, which was codified as § 15.2-2303.4.

The Proffer Reform Law

Much has already been written about the law's specific language, and the reader is directed to the statute for the entirety of that language; in this article, we will summarize what we consider to be the key provisions.

The proffer reform law applies only to new residential developments and limits offsite proffers to those for transportation, public safety facilities, schools and parks.[46] It states that an offsite proffer is unreasonable unless it addresses an impact created by the new development in "excess of existing public facility capacity at the time of the rezoning" and the development receives a "direct and material benefit" from the proffer.[47] It provides that ". . . a locality may base its assessment of public

[41] *Id*.

[42] *Id*. at 632-33 (internal citations omitted).

[43] *Id.* at 619.

[44] *See e.g.,* Julie A. Tappendorf & Matthew T. DiCianni, *The Big Chill?—The Likely Impact of Koontz on the Local Government/Developer Relationship*, 30 TOURO L. REV. 455, 471–72 (2014).

[45] *Id.* at 618.

[46] Va. Code § 2303.4(A) (definition of "public facilities").

[47] Va. Code § 2303.4(C)(a) and (b).

facility capacity on the projected impacts specifically attributable to the new residential development or new residential use."[48]

The proffer reform law goes on to state that

> [i]n any action in which a locality 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 by the locality, the court shall presume, absent clear and convincing evidence to the contrary, that such refusal or failure was the controlling basis for the denial.[49]

Certain small area plans are exempt if they meet specific criteria related to mass transit.[50]

Responses to the Proffer Reform Law

The responses to the law have varied from jurisdiction to jurisdiction. For example, Chesterfield County limited its proffers to transportation and set a new maximum amount.[51] In contrast, the City of Norfolk elected to stop accepting residential proffers, meaning that residential rezoning applications would be forced to stand or fail without them.[52] The Prince William County Board of Supervisors repealed its proffer guidelines for monetary contributions; other jurisdictions also eliminated their proffer schedules.[53]

In addition to repealing its proffer guidelines, Prince William County amended its submission requirements to require developers to submit an SB549 narrative that "identifies all impacts of the proposed rezoning" and "propose[s] specific and detailed mitigation strategies and measures to address all of the impacts." Applicants also must "[s]pecifically address whether all of the mitigation strategies and measures are consistent with all applicable law, including, but not limited to, [the Proffer Reform Law]." The SB549 narrative must "[s]pecifically demonstrate the sufficiency and validity of those mitigation strategies using professional best accepted practices and criteria, including all data, records and information used by the applicant or its employees or agents in identifying any impacts and developing any proposed mitigation strategies and measures."[54] Despite

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[48] Va. Code § 2303.4(C).

[49] Va. Code § 2303.4(D)(2).

[50] Va. Code § 2303.4(E).

[51] The Chesterfield County Board of Supervisors has established $9,400 as the maximum per dwelling unit road cash proffer that it will accept in a zoning case to address the transportation impacts of a proposed new residential development on the County's transportation facilities. https://www.chesterfield.gov/DocumentCenter/View/382/Cash-Proffer-Policy-PDF?bidId=.

[52] *See* City of Norfolk Ordinance No. 46,487 (6/22/16) (if an application for residential rezoning is submitted with proffers, the "proffer shall be stricken and the applicant may elect to withdraw the application or else to proceed with the rezoning without any conditions.").

[53] In Prince William County, "[i]n response to SB549, the Board adopted a resolution on May 17, 2016, which [among other things] . . . [r]epealed the residential portion of the County's Policy Guide for Monetary Contributions," effective as of the effective date of the Proffer Reform law (July 1, 2016). http://www.pwcgov.org/government/dept/planning/Documents/Senate%20Bill%20549%20-%20New%20Proffer%20Legislation%20w%20Summary.pdf.

[54] Reference Manual for Rezoning, Special Use Permit and Proffer Amendment Applications (Revised July 1, 2017) at pp. 4-5.

this requirement, the chairman of the Board of County Supervisors subsequently announced publicly that all residential rezonings in Prince William County were "dead on arrival."[55]

The Fairfax County Board of Supervisors passed a resolution stating that "the sole method by which the Board will accept a proffer" for a new residential development "is that the proffer must be requested or suggested in writing *first* by the person(s) applying for approval . . . and not by any person(s) on behalf of, or on the apparent behalf of, the County . . . ."[56] In Loudoun County, existing policy documents regarding administration of proffers were qualified by adding "to the extent permitted by law."[57] Nevertheless, Loudoun seems to interpret the law to allow for "per-unit" proffer guidelines that are based on an appropriate methodology. The Loudoun County Board of Supervisors has also pointed to what it perceives are disadvantages of the proffer system, including its unreliability as a source of significant levels of capital funding, and inconsistent application, stating that it "must seek alternative methods of funding needed public improvements."[58]

These varying reactions have resulted in confusion and uncertainty on the part of all relevant stakeholders. Not knowing how to proceed in the absence of the proffer policies and being unable to talk to jurisdictions about impact mitigation proposals, many developers simply have stopped filing residential rezoning applications.[59] Over time, the situation has eased somewhat as Loudoun and Fairfax Counties used the "small area" plan exceptions to maintain their prior systems. Still, that approach is not a "silver bullet" – for reasons discussed below.

There must be an effort to find common ground for legislative changes to alleviate the current confusion and conflict.

ISSUES AND POTENTIAL SOLUTIONS

Proposals have been introduced in committees to study the law, repeal the law, carve out additional exemptions, enable the use of impact fees, and remove the language prohibiting a locality from *accepting* an unreasonable proffer (while retaining the prohibition on *requesting* an unreasonable proffer). As yet there have been no amendments to the statute;[60] nevertheless, there likely are legislative solutions to at least some of the localities' and homebuilders' specific concerns.

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[55] *See Dennis v. Board of County Supervisors of Prince William County*, Complaint for Declaratory Judgment (CL18003370-00, filed April 5, 2018), ¶¶ 19, 20.

[56] Board of Supervisors of Fairfax County, Virginia, Resolution Regarding Senate Bill 549 (adopted June 21, 2016) (emphasis added).

[57] "Where and to the extent permitted by law, the County will structure residential proffer guidelines on a per-unit basis, based upon the respective levels of public cost of capital facilities generated by the various types of dwelling units (i.e., single-family detached, single-family attached, or multi-family land development pattern)." Loudoun County Board of Supervisors, *Resolution to Administer New Proffer Legislation*, https://www.loudoun.gov/DocumentCenter/View/123444.

[58] *Id*.

[59] Max Smith, *Northern Va. Leaders: Home Building Grinds to Halt After State Law Change* (Sep. 7, 2017); https://wtop.com/virginia/2017/09/northern-va-leaders-home-building-grinds-to-halt-after-state-law-changes/.

[60] *See* SJ13 (conditional rezoning proffer reform bill; joint commission to study); HB 1446 (provision for public facility improvement); HB 89 (affordable dwelling units); SB469 (removes restrictions on types of proffers a locality may request or accept); SB957 (exempts certain localities from law); SB944 (cash proffers; impact fees); SB458 (public facility capacity, previously approved residential developments; removes prohibition on accepting unreasonable proffer).

1. The Law Prevents Local Jurisdictions from Speaking to Developers

Both sides of the debate agree that an unintended and undesirable consequence of the law is the stifling of appropriate communications between planning staff and applicants. Localities are correct in that they have potential liability in speaking to developers if, during the course of that communication, they seek mitigation measures that exceed the impact of the proposed development but developers need input from the localities on public facility capacity and other conditions affecting the impact analysis so that they can voluntarily proffer appropriate mitigation.

It is important to note that the Proffer Reform Law does not expressly preclude the negotiation of reasonable approaches to mitigating impacts specifically attributable to the project. Nevertheless, a risk jurisdictions face is statutory liability (including damages and attorneys' fees) for subjecting property owners to unconstitutional conditions in the grant or denial of land use approvals under Virginia Code § 15.2-2208.1, which is the direct offspring of *Koontz*. Additionally, it is true that under the Proffer Reform Law, a locality is at risk not just for requesting, but for merely *accepting* a proffer deemed unreasonable.

One possible approach to reforming the law would be to add language to the Proffer Reform Law expressly permitting such negotiations; Virginia Code § 15.2-2208.1 could be amended to exclude proffer *negotiations* (but not the resulting proffers) from creating liability under Virginia law. Proponents of reform on both sides of the debate have advocated for language that also would allow an applicant to submit *any* offsite proffer the applicant deems reasonable and appropriate. The rationale is that an applicant ought to be able to offer *voluntarily* anything it wants to give if such "gift" helps win approval for the project.

However, this is problematic for a variety of reasons. First, it is contrary to the essential purpose of the proffer system: a proffer is not something that is offered as compensation for the right to rezone; rather, it is something that is offered to *mitigate the particular impacts* of a proposed project. Recall that the proffer system was devised as a solution to the 1970s anti-growth period in Fairfax County, when rezoning requests faced near-certain denial. Proffered mitigation allowed the developer to gain approval because it meant that the developer had sufficiently mitigated the impacts that otherwise would have been a lawful basis for denial. It was never intended to be "zoning for dollars."[61]

Second, the proffer-enabling laws' provisions for "reasonable" conditions do not permit proffers that are wholly untethered to mitigation of the project's impacts.[62] The law's recognition of proffers that are "not generated *solely* by the rezoning itself," is not inconsistent with constitutional limitations.[63] Because factors *in addition to* the rezoning itself may generate a dedication by a developer does not mean that the dedication itself may be wholly unrelated to the development. Virginia law is consistent with the constitutionally mandated "essential nexus" and "rough proportionality" tests.[64]

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[61] Indeed, cash contributions were initially prohibited altogether. Va. Code § 15.2-2297(iii).

[62] *See* Va. Code §§ 15.2-2297 (". . . the rezoning itself must give rise for the need for the conditions; [] the conditions shall have a reasonable relation to the rezoning . . . ."; and providing a remedy against loss of development rights if developer makes substantial dedications not generated solely by the rezoning itself); 15.2-2298 (same in relevant part); 15.2-2303 (requires "reasonable conditions"; and providing same remedy for substantial dedications not generated *solely* by the rezoning itself; and clarifying that the governing body *may* accept proffered conditions which include provisions for timing or phasing of dedications, payments, or improvements; provisions for affordable housing; and provisions for "payment . . . of a pro rata share of the cost of reasonable and necessary road improvements, located outside the property limits of the land owned or controlled by him *but serving an area having related traffic needs to which his subdivision or development will contribute*." Citing Va. Code § 15.2-2246(5) (emphasis added)).

[63] Va. Code 15.2-2303 (emphasis added).

[64] *See* discussion of *Nollan* and *Dolan*, *supra*.

Application of those tests does not require a proffer to be *solely* generated by the development,[65] nor does the Proffer Reform Law, as "specifically attributable" does not mean "solely attributable."[66]

Finally, it simply is bad public policy to promulgate a system in which developers "pay to play." The power of local government to regulate land use derives from its police powers, *i.e.*, the power to regulate for the protection of the health, safety and welfare of its citizenry.[67] Requiring a developer to mitigate negative land use impacts is an appropriate exercise of such power and properly protects the public. However, if a developer can offer unlimited cash or improvements wholly unrelated to the project's land use impacts, the government's legitimacy is seriously undermined.[68] All developers are not on equal footing in their ability to offer "extra" contributions; thus, while larger developers might benefit from an unconstrained proffer system, smaller landowners would be at a disadvantage.

2. There are Impacts Other than Schools, Parks, Public Safety and Transportation

As an example, new developments may have an impact on libraries. The premise underlying proffers, embodied in the Virginia Proffer Reform Law, is that they are for capital costs and not operating costs which are paid from real estate taxes. Arguably, the developer ought to be able to proffer construction of a library or library improvements so long as there is the requisite nexus between the proposed project and the proffer is roughly proportional to the impact of the proposed development. A legislative compromise would be to permit developers to voluntarily offer proffers for certain capital projects that currently cannot be considered under the law as written but make it clear that the failure to do so would not be grounds for denial of the rezoning.

3. No One Can Tell What Constitutes a Reasonable Proffer or What Constitutes "Existing" Public Facility Capacity

The statute provides that an offsite proffer is unreasonable "unless 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" and requires that the residential use applied for "receives a direct and material benefit from [the offsite public facility] proffer."[69] Some efforts to reform the Proffer Reform Law have focused on this "capacity" provision.[70]

Local governments and developers alike have raised legitimate concerns over the proper interpretation of this provision, and it is undoubtedly one of the more complex issues arising out of the Proffer Reform Law. For example, an owner of undeveloped land who has contributed taxes with no demand for services, including schools, ought to be able to utilize existing capacity when developing her land. However, local governments are correct that a problem arises if multiple

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[65] Such an "exacting correspondence" was expressly rejected by the U.S. Supreme Court in *Dolan*. *Dolan* at 389; (rejecting the "specific and uniquely attributable test," stating that "[w]e do not think the Federal Constitution requires such exacting scrutiny . . . .").

[66] In fact, an earlier version of the bill that became the Proffer Reform Law required that the impact be "*specifically and uniquely attributable*" but the words "and uniquely" were stricken from the bill text. *See* SB549 (offered 1/13/16, 16103808D).

[67] *See Euclid*, *supra* at n. 5.

[68] As an example, if a project's impact is $5,000 and the developer proffers $500,000, this raises the specter of a developer "buying the rezoning," which erodes public trust in government. It is theoretically possible for a developer to make a "gift" or "dedication" of land or improvements without any nexus to a particular project and not for the purpose of mitigating impacts; this, however, does *not* constitute a "proffer" and would have to occur outside of the zoning approval process.

[69] Va. Code § 2303.4(C).

[70] *See e.g.,* SB458.

developers are permitted to claim the same capacity by disregarding previously approved rezonings that are in the pipeline but have not yet been completed.[71] That said, a potentially complicating factor is that previously approved projects in the applicable impact area may never be built or may have already proffered mitigation to address their impacts.

A secondary argument is that it is impossible to measure specific impacts and benefits. The data to support proffers exists in most jurisdictions on a case-by-case basis; one solution is to utilize a similar methodology to traffic impact analyses. In that methodology, projects that have been approved but are not yet built and that impact a particular road impact zone are considered together with their proffered mitigation. Impacts from the proposed project are then evaluated utilizing this data. If after the analysis, capacity remains, proffers are not required. If the project has an impact beyond available capacity, mitigation is required. This concept is not new or untested; individual traffic impact analysis has been the norm for many years. Jurisdictions similarly can require applicants to submit a detailed impact analysis to show how the proffer conditions mitigate the specific impacts.[72] Jurisdictions can freely criticize the methodology and assumptions in the analysis without asking for specific proffers.

Of course, a fundamental issue – whether in the context of traffic mitigation or other offsite proffers – is that the identified impact zone must be justified as having the constitutionally mandated "essential nexus" to the proposed development.[73] Whatever the appropriate constitutional line-drawing may be to define an impact zone with the requisite nexus to the development's impacts, the zone is likely to be found to be too broad if the proposed "mitigation" results in charging the property owner with fixing a pre-existing public problem not created by the development (except to the extent that the proposed development increases the problem).[74] In any event, a datacentric analysis appears to satisfy *Dolan's* requirement of an individualized determination of a project's impacts, and provides maximum flexibility in crafting mitigation strategies, as originally contemplated when the proffer system was created. [75]

4. Localities Cannot Respond to Citizen Concerns, Interfering with the Political Process

Despite the legal limitations involved, zoning is still a political process and rezoning is a legislative act. However, constitutional limitations balance the public good against the property rights of individual citizens. The process has typically played out in the public zoning hearing process and private negotiations; that process can continue. Local government bodies can still consider public

[71] SB 458 proposes that a locality be permitted to base its assessment of public facility capacity not only the projected impacts specifically attributable to the proposed project, but also on impacts attributable to "previously approved residential developments, or portions thereof, that have not yet been completed."

[72] *See* n. 53, *supra* (referencing Prince William County's requirement for an SB549 Narrative).

[73] Local governments are likely to advocate for a broader impact zone (such as an entire school district), while developers will want a narrowly defined impact zone (only the schools serving the particular development). Neither the U.S. Supreme Court nor the Virginia Supreme Court has considered that specific issue. One problem with using county-wide averages is the fact that an average, by definition, means most of the developers will pay more *or less*, than their specific impacts would require.

[74] In *Koontz*, the court said requiring a developer to pay to improve nearby wetlands violated the Fifth Amendment, stating that the Due Process Clause protected a developer "from an unfair allocation of public burdens." *Koontz* 570 U.S. at 618. In *Rowe* and *Cupp*, the Virginia Supreme Court also required the mitigation be tied specifically to the impacts of the development. *Cupp* at 594 ("[E]ven if we assume that the Board had the authority, in a proper case, to impose such a condition, it could not do so in this case because the dedication and construction requirements were unrelated to any problem generated by the use of the subject property.").

[75] Increasingly, the courts have been requiring governments to justify their decisions with data. *Shelby County v. Holder*, 570 U.S. 2 (2013) (the court found the lack of appropriate supporting data to be fatal to the government's position).

input that seeks protections within constitutional limitations, including objections to density and other deviations from the comprehensive plan. In addition, it is important to note that the judicial limits placed on the zoning process only apply to government actions. Developers have occasionally entered into private contracts with citizens (and/or recorded covenants) to address the citizens' specific concerns. There is nothing in the Proffer Reform Law that prevents this, and it has the added benefit of providing a direct enforcement mechanism for those citizens. There are thus benefits to being able to have a less inhibited discussion of potential mitigation tools, including those suggested not just by staff but by citizens. The above-described proposals would address this issue by revising the particular provisions thought to be most likely to stifle conversations.

5. Impact Fees

Some have suggested broadening the ability to use impact fees or the small area plans exemption in § 15.2-2303.4(E).[76] It is important to recognize that neither impact fees nor exemptions are free from constitutional constraints. Impact fees clearly constitute a "monetary exaction," subject to the nexus and rough proportionality requirements of *Nollan* and *Dolan*."[77] Before any such fee may be imposed, there must be an individualized determination that the fee is related both in nature and extent to the impact of the proposed development.[78] Thus, an impact fee regime that provides set amounts for dissimilar cases(in essence being a substitute for proffer schedules) may be subject to constitutional attack for lack of an individualized (project-based) determination.[79] Additionally, set fees are particularly vulnerable to failing the "rough proportionality" test. Assume, for example, that an individualized analysis leads to a determination that an appropriate cash proffer to mitigate the school impact for a particular new residential development is $10,000 per single family home. A required set fee of $80,000 per single family home would not appear to be "roughly proportional." With the data available to calculate specific impacts and reasonably appropriate mitigation on a case-by-case basis, set fees and categorical exemptions therefore remain vulnerable to constitutional challenges.

Conclusion

The Virginia Proffer Reform Law was an effort to course-correct by reiterating the constitutional limits on Virginia's proffer system, which seemed to have – at times – lost its mooring from those constitutional underpinnings. While the statute fundamentally reflects the constitutional limits applied to land use decisions by the Virginia and U.S. Supreme Courts, legislative changes are needed to strike a proper constitutional balance between the legitimate needs of local governments and the property rights of land owners. Finding this balance should continue to be the objective of all parties.

[76] VML reports that two bills dealing with impact fees, SB208 and SB944, will go to the floor of the Senate at the 2019 General Assembly Session. *See* Virginia Municipal League, VML eNews (July 26, 2018); https://www.vml.org/enews-july-26-2018/.

[77] *Koontz*, 570 U.S. 595 (holding that "so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.").

[78] *See Dolan* at 391.

[79] Even road impact fees – the only impact fees enabled by Virginia law – are authorized only to the extent the road improvements are "reasonable" and "benefit the new development." Va. Code § 2319, *et seq*.