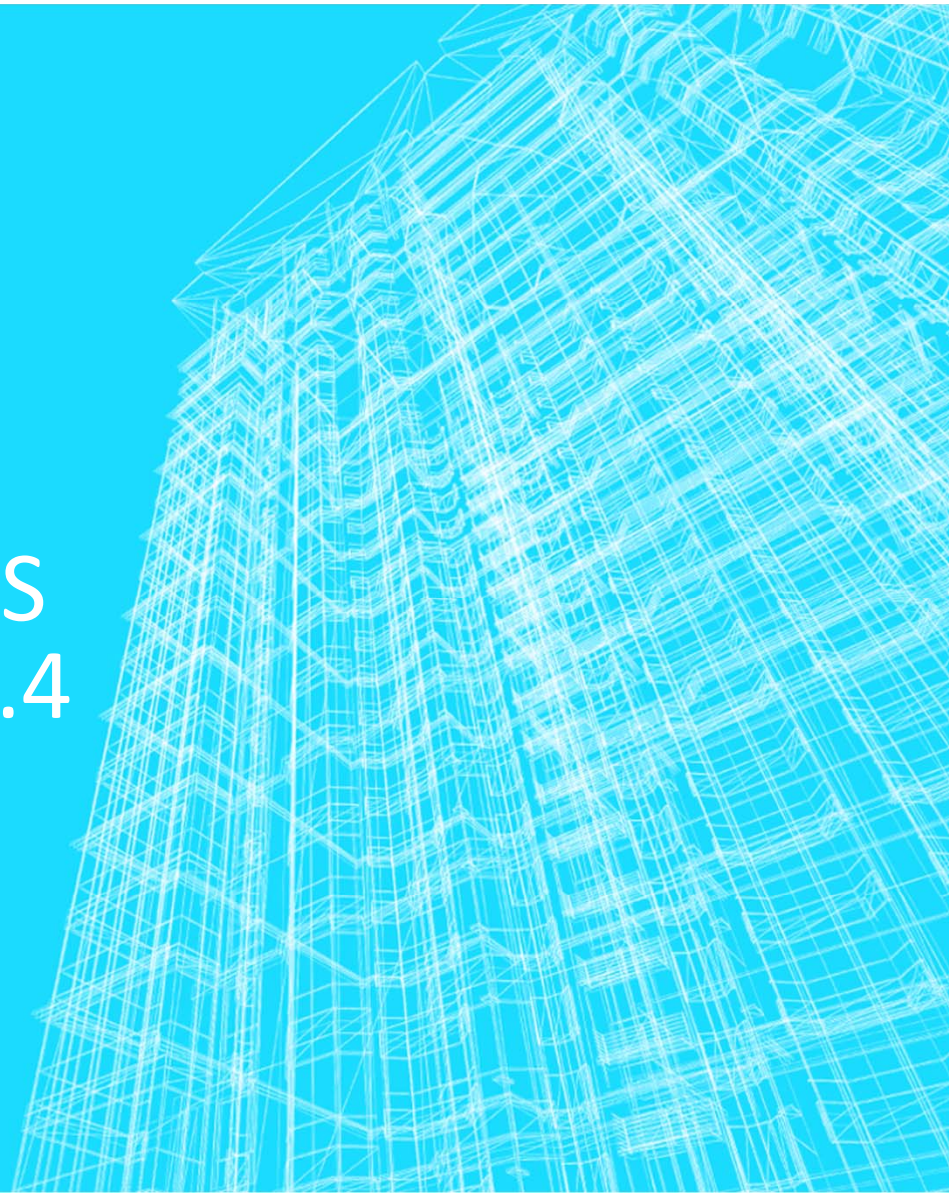
PROFFERS:

POLICIES AND STANDARDS UNDER NEW § 15.2-2303.4



EVOLUTION OF PROFFERS

- Proffers developed out of zoning and land use law
- *Proffer* = a voluntary proposal by an applicant for a property rezoning to mitigate the impacts of the development they propose to undertake
  - Means by which property owners/developers to offset local impacts associated with commercial and residential development, particularly public schools, roads, parks, libraries, utilities, and other public services and amenities
- Pivotal cases:
  - *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) – spawned term "Euclidean Zoning" and recognized local authority to regulate land use via zoning ordinances based on authority to provide for the public health, safety and welfare (police powers)
  - *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) – recognized concept of conditioning permit approval to advance a "legitimate state interest" (BUT balanced against "takings clause" - taking required just compensation)
  - *Dolan v. City of Tigard*, 512 U.S. 374 (1994) – must be an "essential nexus" between the "legitimate state interest" and the imposed permit condition

EVOLUTION OF PROFFERS, cont'd

- Pivotal cases, cont'd:
  - *Koontz v. St. John's River Water Management District*, 133 S.Ct. 2586 (2013)
    - "[E]xtortionate demands for property in the land-use permitting context run afoul of the [Fifth Amendment] Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."
    - Reiterated *Nollan* and *Dolan* standards in the context of cash proffers.
    - However, also recognized the "two realities of the [land use] permitting process:
      1. Land use permit applicants are vulnerable to coercion prohibited by *Nollan* and *Dolan* due to broad discretion of the government.
      2. Many proposed land uses threaten to impose costs on the public that dedications of property (or cash) can offset.

         Cited example: Where a building proposal would increase traffic congestion, permit approval may be conditioned on property owner deeding over land needed to widen a public road.
    - Requiring landowners/developers to internalize "the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack".
    - *Koontz* seeks to strike a balance, enabling "permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in 'out-and-out … extortion' that would thwart the Fifth Amendment right to just compensation."
    - Balance is the key.

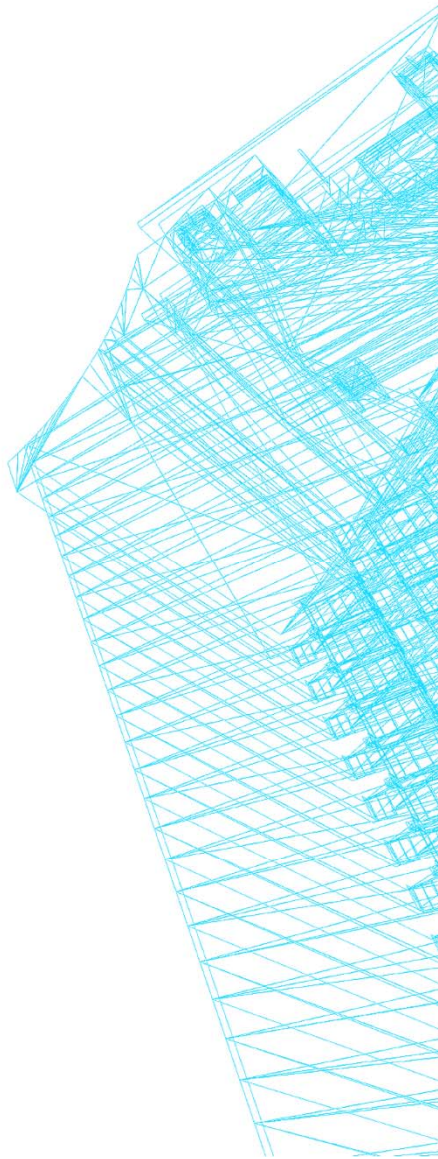
KEY VIRGINIA PROFFERS CASES

- *Board of Supervisors of Powhatan County v. Reed's Landing Corp.*, 250 Va. 397 (1995)
  - Zoning denial based solely on failure of applicant to submit a per-lot cash payment consistent with county's proffer guidelines
  - Proffers must be voluntary.
- *Gregory v. Board of Supervisors*, 257 Va. 530 (1999)
  - Rezoning denial based, in part, on applicant's failure to submit cash proffers but ALSO on valid community health, safety, and welfare concerns – deference to legislative decisions

In vast majority of instances, Virginia local governments have done a fine job in balancing the exercise of police powers to address public health, safety, and welfare, with respect for property rights and legal constraints against alleged coercion, extortion, and uncompensated "takings".

SENATE BILL 549/HOUSE BILL 770

- Proponents' anecdotal allegations as basis for legislation:
  - Local governments were going to far
  - Developers pressured to install certain types of shower heads – *low flow to address water concerns?*
  - Developers pressured to install granite countertops to enhance value of development
- VML, VACO and other stakeholders engaged early in the process to effect revisions to draft legislation
- Examples:
  - Original bill allowed proffers only for transportation facilities, public safety facilities, and public school facilities.
  - Worked to add libraries and public parks and compromise resulted in inclusion of public parks (includes playgrounds and other recreational facilities)
  - Original bill would have required proffers to be "specifically and uniquely attributable to the particular development.
  - Successfully removed "uniquely" from the legislation, which would have been a higher standard



SB 549/HB 770 >>> § 15.2-2303.4

So, where did we end up? That's a good question.

- First, § 15.2-2303.4 only applies to new residential developments and new residential uses. Does not apply to commercial projects or developments prior to July 1, 2016.
- Second, there is a distinction between "onsite" and "offsite" proffers
- **Onsite Proffers** = Address impacts within the development's boundaries. Does NOT include cash proffers.
- **Offsite Proffers** = Address impacts outside the development's boundaries. Includes ALL cash proffers.
- Third, localities cannot request or even suggest an **"unreasonable proffer"**

§ 15.2-2303.4

What is an "unreasonable proffer"? What are the standards?

- § 15.2-2303.4 – "a proffer, or proffer condition amendment*, whether onsite or offsite, offered voluntarily … shall be deemed unreasonable unless it addresses an impact that is *specifically attributable* to a proposed new residential development or other new residential use…" AND…
- **ALL proffers (onsite AND offsite)** must be ***specifically attributable*** to a proposed development – new standard; undefined
  - Applies to onsite proffers
  - Examples: roads, sidewalks, trails, parks

***What is a "proffer condition amendment"?**

- An amendment to an existing proffer statement – however, § 15.2-2303.4 is prospective only, so it only applies to rezonings or proffer condition amendments that were submitted AFTER July 1, 2016.
- **These new standards DO NOT apply to rezonings that occurred prior to July 1.**

§ 15.2-2303.4

- **Offsite proffers** must be ***specifically attributable*** **AND** must address an impact to an offsite facility such that the development:

- **Creates a need, or an identifiable portion of a need, for one or more public facility improvements:**
    1. In **excess of existing public facility capacity** at the time of rezoning or proffer condition amendment
    2. Each new residential development or use must receive a **direct and material benefit** from a proffer made with respect to any such public facility improvements
    3. Must be new facilities or expansion of existing facilities
    4. Repairs or maintenance to existing facilities do not qualify

§ 15.2-2303.4

Key Questions:

1. **How does one determine if a "need" is in "excess of existing capacity"?**

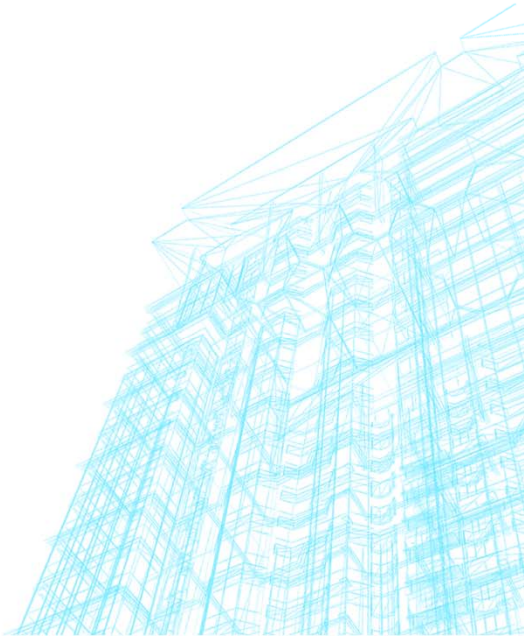
2. **What is the definition of "direct and material benefit"?**

Stakeholders across Virginia are struggling with these questions.

Options:

1. Rely upon Comprehensive Plans and Capital Improvement Plans to provide direction.
   Problem: May not provide necessary focus on a given project and its particular impacts and the needs it may create.

2. Require applicants to undertake studies and provide analysis regarding impact of development and public facility needs to address impact.



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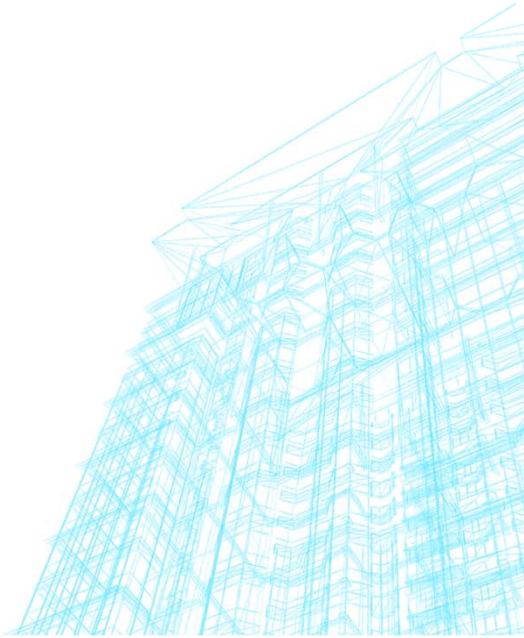
Require applicants to undertake studies and provide analysis regarding impact of development and public facility needs to address impact.

This makes good sense, particularly in light of the potential for liability under subsection D of § 15.2-2303.4.

Potential Liability – Subsection D:

1. Deference to local legislative decisions is severely curtailed.
2. If aggrieved applicant proves by preponderance of the evidence (more likely than not) that the locality "suggested, requested, or required" an "unreasonable proffer" AND
3. The aggrieved party proves by preponderance of the evidence that it failed or refused to submit such a proffer then…
4. The court **shall presume**, absent clear and convincing evidence to the contrary, that such refusal or failure was the controlling basis for the denial.



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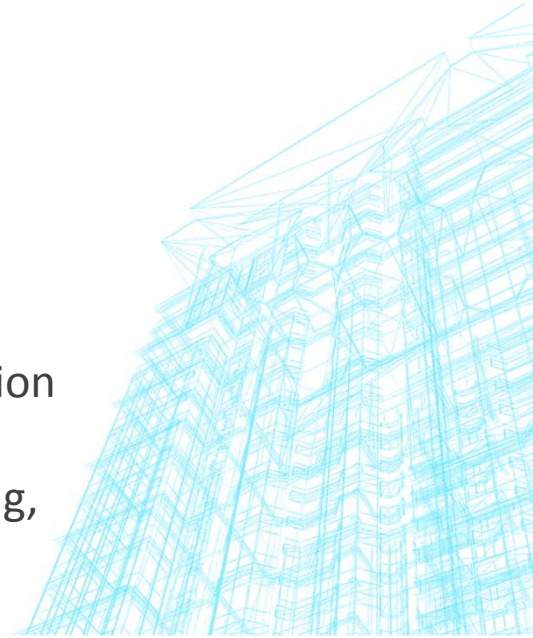
So, what happens next?

If an aggrieved party is successful in persuading a court to reach this presumption/finding, then:

1. Applicant may be entitled to an award of reasonable **attorney fees and costs**, and
2. **Order remanding case** back to the governing body with a direction to approve the rezoning or proffer condition amendment without the "unreasonable proffer" - constitutional question about separation of powers.
3. If the governing body fails or refuses to approve within a reasonable time, not to exceed 90 days, the court **shall enjoin the locality** from interfering with the use of the property as applied for without the "unreasonable proffer" – again, constitutional question about separation of powers and local governing authority
4. On remand, § 15.2-2204 requirements do not apply (notice, advertising, etc.)



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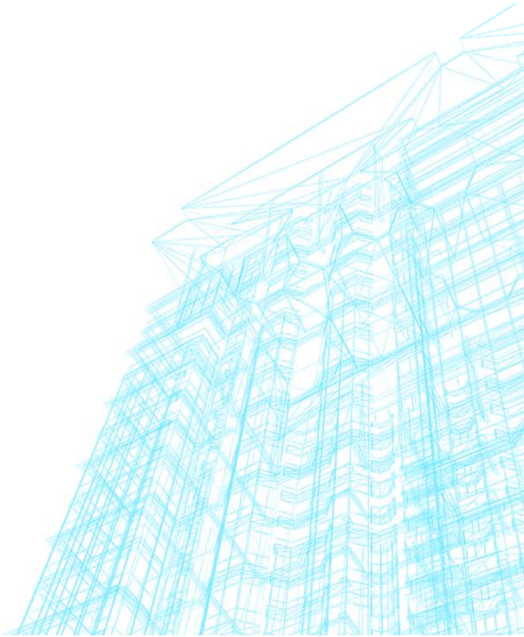
So, how can local governments comply? What are the options?

First, many of the terms in the new law are undefined and untested – *we do not know how they will be interpreted and applied.*

Second, there are varying interpretations and approaches:

- Repeal or considering repealing proffer policies and guidelines.
- Continue to accept on-site, in-kind proffers (property, infrastructure, etc.) but not cash proffers.
- Continue accepting on-site and off-site (w/ or w/out cash) proffers with modifications to policies, guidelines and procedures.



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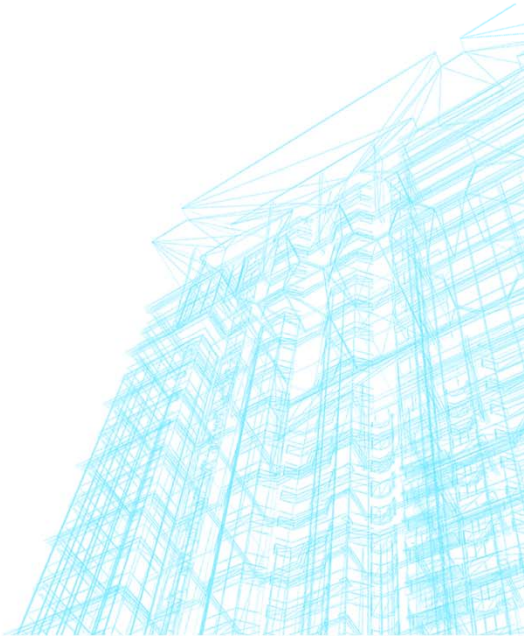
Third, consider how you talk to property owners and developers:

1. One point of contact.

2. Before or upon application, discuss HOW you're going to discuss the rezoning with them.

3. Consider requiring the applicant and all interested parties to sign a certificate verifying that any proffers discussed or offered are fully voluntary AND have not been suggested, requested, or required by the locality.

4. This verification should be restipulated throughout the process and included on all documents touching on proffers or the rezoning – application, proffer statement, etc.



~~§ 15.2-2303.4~~ - THIS IS NOT A TYPO

Should local governments pursue legislation to "fix" § 15.2-2303.4, i.e. "counter legislation"?

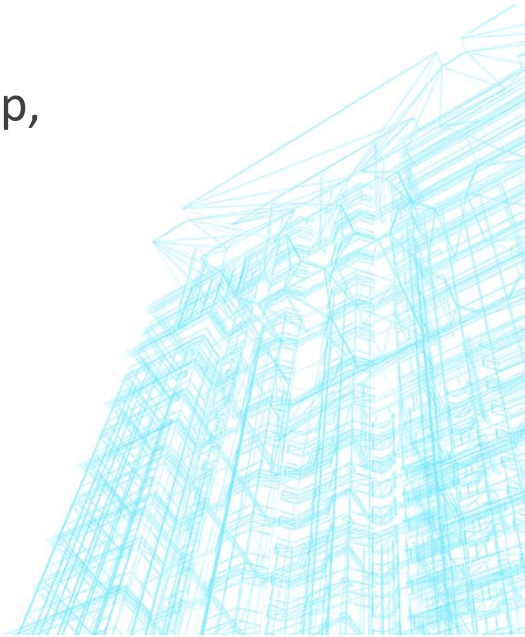
At this point, not advisable, because:

1. General Assembly does not have the appetite.

2. We do not know how the statute will play out – let things develop, wait and see…

3. Not likely to achieve much.

4. But, if industry seeks legislation, we may offer our own suggestions…



QUESTIONS?

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THANK YOU!