

Evolution of Proffers in Virginia

Virginia Association of Counties

2016 Annual Conference

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Tension between the need to fund public infrastructure caused by growth and private property rights

I. Historical context: federal and state law

II. Use of cash proffers in Virginia

III. SB 549 (2016), § 15.2-2303.4

IV. Looking ahead

Historical context: federal and state law

U.S. Constitution 5th Amendment (1791)

...No person shall ...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation....

14th Amendment, §1 (1868)

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...

Historical context: federal and state law

- Pivotal U.S. Supreme Court decisions:
 - *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
 - *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.

Historical context: federal and state law

However, Koontz 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.
3. Balance is the key.

Pivotal Virginia Supreme Court Decisions:

- *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

Historical context: federal and state law

Va. Code § 15.2-2296. Conditional zoning; declaration of legislative policy and findings; purpose. It is the general policy of the Commonwealth ... to provide for the orderly development of land, for all purposes, through zoning and other land development legislation. Frequently, where competing and incompatible uses conflict, traditional zoning methods and procedures are inadequate. In these cases, more flexible and adaptable zoning methods are needed to permit differing land uses and the same time to recognize effects of change. It is the purpose of §§ [15.2-2296](#) through [15.2-2300](#) to provide a more flexible and adaptable zoning method to cope with situations found in such zones through conditional zoning, whereby a zoning reclassification may be allowed subject to certain conditions proffered by the zoning applicant for the protection of the community that are not generally applicable to land similarly zoned. The exercise of authority granted pursuant to §§ [15.2-2296](#) through [15.2-2302](#) shall not be construed to limit or restrict powers otherwise granted to any locality, nor to affect the validity of any ordinance adopted by any such locality which would be valid without regard to this section. The provisions of this section and the following six sections shall not be used for the purpose of discrimination in housing.

1978, c. 320, § 15.1-491.1; 1997, c. 587.

Historical context: federal and state law

- *Proffer* = a voluntary proposal by an applicant for a property rezoning to mitigate the impacts of the development they propose to undertake.
 - Upon approval by governing body proffers become part of rezoning and pass with the ownership of the property
 - In-Kind (land dedications, road improvements, etc.)
 - Cash for onsite or offsite improvements

Historical context: federal and state law

Virginia Statutory Authority for Proffers

- 1978: § 15.2-2297. Conditions as part of a rezoning or amendment to zoning map (all localities)
 - Rezoning must give rise to need for the conditions
 - Reasonable relation between conditions and rezoning
 - Conditions must comply with comprehensive plan

Also:

- Cash not permitted
- Can't require land dedication for public facilities except as provided under subdivision authority
- No offsite improvements unless provided under subdivision authority

Historical context: federal and state law

Cash Proffer Authority:

- 1989: § 15.2-2298. High-growth localities (decennial census 5% growth), and towns/cities in or adjacent a high growth county or localities adjacent to 3 high growth counties
 - Reasonable relationship requirements like 15.2-2297
- § 15.2-2303. Fairfax County, its neighbors and Eastern Shore localities
 - Reasonable conditions allowed but no statutory requirement for reasonable relationship or “nexus”

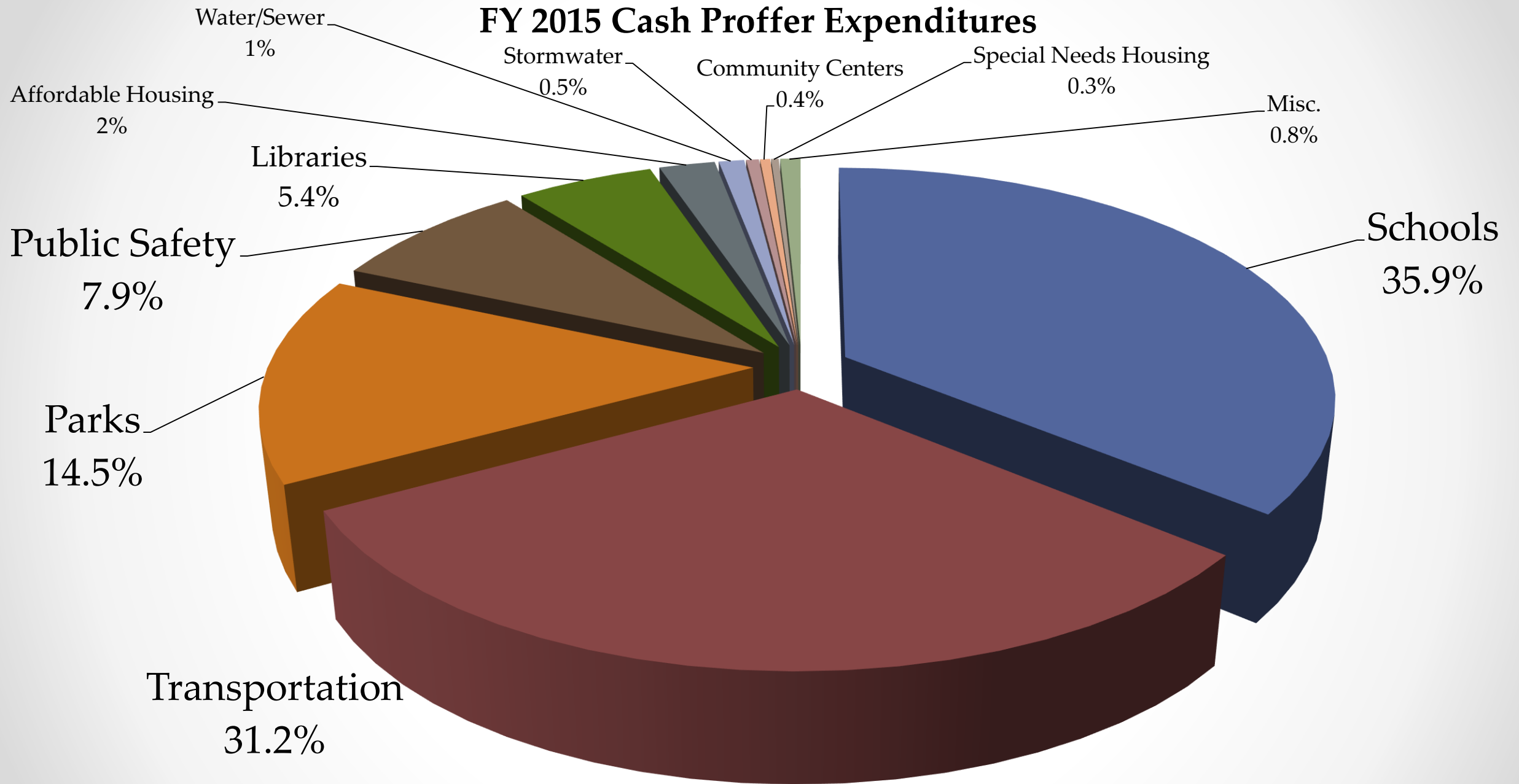
Historical context: federal and state law

- Statutory limitations
 - 2001: Proffer report by Commission on Local Government
 - 2005: Twelve years to spend cash proffers or forfeited to Commonwealth (CTB)
 - 2010: Residential cash proffer can only be accepted upon Occupancy Permit
 - 2012: Annual scheduled increases to cash proffers cannot exceed Consumer Price Index
 - 2013: No cash contribution for maintenance or renovation to existing public facility unless it expands capacity
 - 2014: Damages for unconstitutional grant or denial by locality of certain permits/approvals (reaction to Koontz decision)
 - 2016: SB549 Defines “unreasonable proffer, limits facilities, tightens “nexus”, imposes new penalties

Use of Cash Proffers

- 89 Counties authorized to accept cash proffers in FY 15
- 27 counties reported accepting cash proffers in
 - \$92,132,096 collected
 - \$49,513,549 spent

FY 2015 Cash Proffer Expenditures



SB 549 (2016) >>> § 15.2-2303.4

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. Offsite facilities limited to schools, transportation, public safety, **and parks.**

Third, localities cannot request or suggest an “unreasonable proffer”

§ 15.2-2303.4

What is an “unreasonable proffer”?

- § 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...”

§ 15.2-2303.4

What is an unreasonable offsite proffer?

- 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

§ 15.2-2303.4

Potential Liability – beyond *Koontz*, which only applies to unconstitutional actions

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.

§ 15.2-2303.4

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

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

- 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.

Looking Ahead

- Back to the future?
- End of Conditional Zoning/Proffers due to over-restrictive state law?
- Broad impact fee authority?
 - SB 768 (2008) Would have replaced cash proffers with impact fee system
 - Passed Senate, continued by House subcommittee
 - Roads, schools, public safety impact fees in designated service areas
 - For new development - Not limited to rezonings
 - Required capacity analysis of facilities
 - Creation of “unit costs”
 - Fees capped for residential (\$12,500 per unit in Northern Virginia; \$7,500 per unit elsewhere)

Time for a new legislative study of how growth related public facilities are funded?

QUESTIONS?

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THANK YOU!