Virginia Value Capture Negotiated Exaction-Proffer

As Virginia's economy grows and its commercial development expands, the need to provide the workforce with affordable housing becomes both clear and pressing. While jurisdictions have sought to maximize and leverage funding from State, Federal, and, in some instances, local appropriations dedicated to addressing this issue, affordable housing production continues to lose pace with job and population growth. Impact fees, linkage fees, and proffers are tools that can provide solutions to housing needs.

With thousands of affordable units lost over the past decade and a need for more than 400,000 affordable units to be developed over the next two decades, consideration might be given to policies that take advantage of growth already underway, with responsibility for mitigating their impact shared across a wide range of partners.

Commercial Impact Fees, Commercial Linkage Fees, and Proffers

A commercial impact fee is one applied to commercial development and used to provide a service or public good to absorb the impact of that commercial development. Hundreds of jurisdictions across the country have expectations that new developments — hotels, apartment complexes, subdivisions, office buildings, and shopping malls — should contribute resources to cover infrastructure, facilities, or other public amenities needed in the jurisdiction. The developer may be asked either to provide the benefit directly, or to pay fees that will go toward providing the benefit. Typically, the benefit in question may be related to impacts on roads and transportation, schools, adequate utilities, storm water, or waste management.

When impact fees are dedicated to creating or preserving affordable housing to mitigate development pressures, they are called commercial linkage fees**.** Many jurisdictions have policies that allow developers the option to provide either the housing unit or a fee that could be used to support development of a unit.

If the fees are voluntary, they are referred to as proffers. The developer typically gets some benefit in exchange, usually a density bonus or use change: i.e. the right to build more than what would occur under by-right development. It is the application by the developer for this change in density or use that prompts the proffer.

Negotiated Proffers

Proffers (voluntary contributions) are always negotiated. However, some jurisdictions establish a per-square-foot rate to provide a baseline expectation of the fee, and some predictability of costs for developers. This also gives jurisdictions an estimate of revenue to be provided for their affordable housing programs. These fees are requested when developers seek zoning changes to support either additional density, or a change in allowable use beyond what they can do by-right

on their parcel of land. Project-by-project negotiation of fees and other benefits can often result in variations. Setting an expected rate allows negotiations to at least begin at the same place for each project. Experience shows that the collaborative process of establishing a per-square-foot rate that includes a broad range of stakeholders results in a higher level of acceptance by developers, who absorb the resulting fee as a cost of doing business.

Arlington County is the only jurisdiction with a commercial linkage fee in Virginia. All other Virginia jurisdictions collecting fees to support affordable housing are collecting voluntary contributions (proffers) from developers.

Exactions

An exaction of money or other benefits mandated by a jurisdiction that violates the developer's constitutional right to ownership, value, and use of his or her own property is called a "taking." When a jurisdiction imposes a mandatory impact or linkage fee without meeting the two tests established by Nollan-Dolan (two Supreme Court cases that set limits on the government's ability to impair property interests with land-use regulations), its action can be considered a taking. Nollan established that a jurisdiction must demonstrate a strong relationship, or "nexus" between its (public) interest and the requirement that an owner use his or her private property to advance their interest without being compensated to do so. Dolan further established that any requirement that an owner use his or her property to advance a jurisdiction's public interest must be related "in nature and extent" to the impact of the development proposed by the owner.

A range of cases have affirmed that the Nollan-Dolan rulings extend to linkage fees. Together, these rulings state that in order to impose a linkage fee, jurisdictions must successfully demonstrate that an owner's proposed development will negatively impact the availability of affordable housing, and as a result, the owner can provide resources to close the gap in availability created by the proposed development.

Virginia is a "Dillon Rule" State, which means that local governments derive their power from the State and localities cannot exercise powers not expressly granted to them by the State. With the exception of Arlington County, Virginia law does not provide for the collection of linkage fees.

Implementing Linkage Fees

A body of best practices has begun to emerge detailing how to successfully implement linkage fees. A successful policy might, for example, illustrate the effect that existing affordable housing has on the jurisdiction and its employers, and the need for additional affordable housing units; show how the plan would provide consistent and meaningful returns to developers; and build community consensus for the policy through an advisory body of residents, government staff, and private-sector employers.

The Proffer Reform Bill

Virginia's Proffer Reform Bill (Virginia Code § 15.2-2303.4) was an effort by the Virginia General Assembly to overhaul localities' proffer programs. Proffers originated as voluntary offers by developers to abide by certain conditions, including capital contributions to localities. Exactions, in contrast, are requirements imposed on developers as conditions to approval.

In 1975, the Supreme Court of Virginia ruled that it was a violation of the equal protection clause for a local government to condition development upon providing a public improvement when that public improvement is unrelated to the proposed development. Nationally, it was not until 2013 that the Supreme Court imposed similar restrictions on localities' imposition of exactions. However, localities still wanted to impose conditions on development, and developers still wanted to develop after exactions were restricted resulting in developers imposing such conditions.

In 2001, Virginia Code directed the Commission on Local Government to collect data annually concerning local government revenues and expenditures resulting from the acceptance of cash proffers. The results of the survey for 2003 revealed that the aggregate amount collected and expended was $37,384,315. In 2014, that number more than tripled to nearly $100 million.

As a result, in 2013, the Virginia General Assembly attempted to restrict localities' use of proffers. Virginia Code § 15.2-2303.2 prohibited the use of cash proffers for capital improvements to existing facilities that did not expand the capacity of such facilities. The legislature was attempting to connect cash proffers by developers to the impacts of their developments. However, cash proffers continued to increase. In reaction to this continued growth, the General Assembly enacted the Proffer Reform Bill.

Reasonable vs. Unreasonable Proffers

The Proffer Reform Bill prohibits localities from requesting or accepting any unreasonable proffer in connection with a rezoning or a proffer condition amendment. The statute defines an unreasonable proffer according to the type of proffer being offered, either an onsite or an offsite proffer. An onsite proffer addresses impacts within the boundaries of the property to be developed. In contrast, an offsite proffer addresses impacts outside of the property to be developed (and includes cash proffers).

Offsite proffers and cash proffers are likely to have a more tenuous connection to the impacts of the development and, thus, are more restricted by the new law. If the proffer is onsite, it must be specifically attributable to the proposed development, or it will be considered unreasonable. If the proffer is offsite, it must be specifically attributable to the proposed development. Such proffers will still be deemed unreasonable unless the project creates a need or an identifiable portion of a need for that public facility improvement. Such proffers will still be deemed unreasonable unless the development receives a direct and material benefit from the proffers.

The Proffer Reform Bill Sets a New Standard for Reviewing Proffers

The new Proffer Reform Bill has set up a strong basis for challenging the denial of rezoning applications with a residential component. The bill has increased both the chances of, and the eventual benefits of, a win in court. The bill prohibits localities from requesting or accepting unreasonable proffers. Also, localities may not deny an application if the denial is wholly or partly based on an applicant's refusal to submit an unreasonable proffer. This shifts the burden onto the locality, for the new statute specifically prohibits acceptance by the locality (not the proffering by the applicant) of an impermissible proffered condition.

The Proffer Reform Bill has set a new standard for reviewing the reasonableness of proffers that has yet to be interpreted or defined, and the burden has now shifted onto localities to determine what exactly the General Assembly intended.

Sources:

Northern Virginia Affordable Housing Alliance, *Commercial Linkage Fees in Northern Virginia – A Primer*

Williams Mullin, *Dissecting the Proffer Reform Bill*