

DEVELOPER PERSPECTIVES ON DEVELOPMENT AGREEMENTS AND PROFFERS

I. DEFINITIONS OF “PROFFERS” AND “DEVELOPMENT AGREEMENTS”

What do we mean by “proffers”?

- Broad definition: to include all types of “Development Conditions”, such as Site Plan conditions, building code requirements, variances, and other governmental requirements (in addition to the standard rezoning process).
- Use of “proffers”: See Virginia Code Sections 15.2-2297, 15.2-2298, and 15.2-2303. The use of proffers became an important part of the rezoning process in the 1970s in Fairfax County, when developers were being turned down for zoning proposals because of their impacts on local roads. A provision allowing for Proffers was written into the State Code in Section 15.1-491.2 (now Section 15.2-2250).

✎ **Nuts & Bolts Alert:** *Get ready to pay (\$51,113 per single family detached house in neighboring jurisdiction).*

What do we mean by “development agreements”?

- Agreements between and among a landowner/developer, and a County/City/Town, in two separate capacities (e.g., the County as owner, and the County as the sovereign). These types of agreements will be referred to as “County Agreements”
- Agreements between developers and off-site owners (“Off-site Agreements”)
- Agreements between and among multiple developers in a project (“Development Agreements”)
- Agreements between and among multiple developers in a project, allocating proffer responsibilities (“Proffer Allocation Agreements”)

What do transaction lawyers need from our land use brethren?

- Clear language: See Gwinn vs. Walker, et al, 62 Virginia Circuit 325 (2003). The Walkers proffered “no outside storage” when rezoning their property and were found in violation. The Court interprets the phrase “outside storage” and amends the Proffer.
- Flexibility:

✎ **Nuts & Bolts Alert:** *Avoid narrow definitions and limiting terminology; allow for staff discretion.*

II. IMPLEMENTATION OF DEVELOPMENT CONDITIONS: DRAFTING DOCUMENTS

- County Agreements
 - **Nuts & Bolts Alert:** *Even if you are dealing with the County as a landowner, do not expect the same type of provisions as in a normal transaction. Don't ask for indemnities from the County.*
- Off-Site Agreements
 - **Nuts & Bolts Alert:** *At the very least, obtain "agreements to agree" before signing proffers.*
- Development Agreements
 - **Nuts & Bolts Alert:** *Use Recitals, Exhibit List and cross references.*
- Proffer Allocation Agreements
 - **Nuts & Bolts Alert:** *Don't expect perfection.*
- Density Allocation Agreement
 - **Nuts & Bolts Alert:** *Get your zoning colleagues to look over your shoulder.*
- Creation of Association documents
 - **Nuts & Bolts Alert:** *Allow for possibility of multiple associations instead of one Master Association.*

III. SPECIFIC GOVERNMENTAL AGREEMENTS

- Building Code Agreements
 - **Nuts & Bolts Alert:** *Beware of parking garages: Where is the property line?*
- Parking Agreements
 - **Nuts & Bolts Alert:** *Bring in the experts.*
- Stormwater Management Agreements
 - **Nuts & Bolts Alert:** *Make sure you record these agreements.*

- Affordable Dwelling Unit agreements
 - ✦ **Nuts & Bolts Alert:** *Get these documents recorded sooner rather than later (before a unit is sold to an owner!).*
- School Site Contributions
 - ✦ **Nuts & Bolts Alert:** *Be careful of need to schedule for Board agendas in advance of closing date.*

IV. SPECIFIC PROBLEMS

- Oversight of Proffer compliance
 - ✦ **Nuts & Bolts Alert:** *For any work to be done for a client, get copies of everything related to the property.*
- Unintended Consequences: “No one has a crystal ball.”

V. SOLUTIONS

- Zoning Interpretation Requests
 - ✦ **Nuts & Bolts Alert:** *Talk before writing.*
- Writ of Mandamus
 - ✦ **Nuts & Bolts Alert:** *Read before filing.*

Interesting Cases: See Mountain Venture Partnership Lovettsville II and James P. Campbell, Trustee v. Town of Lovettsville, et al, 42 Va Cir 109 (1997), and Mountain Venture Partnership Lovettsville II, et al v. Town of Lovettsville Planning Commission, 26 Va Cir 50 (1991).