

**GOVERNMENT PERSPECTIVE: DEVELOPMENT AGREEMENTS,
PROFFERS, AND SPECIAL USE PERMITS\SPECIAL EXCEPTIONS**

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I. INTRODUCTION

- A. For local governments, development agreements are the means by which private developers become obligated to implement and achieve the locality's land use goals.
- B. In the land use development context, the principal transaction is the locality's approval of a proposed project, including the conditions of such approval.
- C. The following outlines some of the fundamentals of local land use planning authority in Virginia, and the tools available to implement local land use goals, including those associated with development agreements.

II. LAND USE PLANNING FUNDAMENTALS

- A. From the local government perspective, land use planning is the effort to articulate a local policy that provides for the rational and orderly development of public and private land within the locality.
 - 1. The General Assembly's declared intent in enacting *Chapter 22 of Title 15.2, VA Code Ann. (§§15.2-2200 et seq.)*, setting forth local enabling authority for planning, subdivision of land and zoning, is "to encourage localities to improve the public health, safety, convenience and welfare of its citizens and to plan for the future development of communities to the end that
 - a. "transportation systems be carefully planned;
 - b. "new community centers be developed with adequate highway , utility, health, educational, and recreational facilities;
 - c. "the need for mineral resources and the needs of agriculture, industry and business be recognized in future growth;
 - d. "residential areas be provided with healthy surroundings for family life;
 - e. "agricultural and forestal land be preserved; and
 - f. "the growth of the community be consonant with the efficient and

economical use of public funds. " §15.2-2200 VA. Code Ann.

2. This enabling authority authorizes localities to establish, in essence, a blueprint for the build out of the community and an itemization of the mechanics of how to implement that blueprint, ideally managing development as it occurs.
- B. Land use planning is all about establishing, implementing, and protecting a locality's policy for growth and development within its boundaries.
1. Quintessential legislative activity.
 2. Local land use policy defines the kind, amount and intensity of development the locality desires and where, and possibly even when.
 3. The policy also elaborates what might be regarded as socially oriented objectives important to the locality such as the availability of housing for a variety of income levels, preservation of places and structures of historic significance, and protection of environmentally sensitive areas.
 4. Further, the adopted land use policy reflects the locality's effort to harmonize competing public and private interests given the fiscal constraints posed by the locality's tax base.
 - a. Specifically, what kind and what pace of development can the locality afford given the realities of its tax base and the anticipated demands for expenditures to provide essential and desired public services spawned not only by existing development but also development that is in the pipeline as well as that which is forecasted.
- C. A locality's land use policy, whatever it may be, is furthered or frustrated by the constraints of Virginia's Dillon Rule and existing land use enabling authority provided by state law.
- D. The fundamental statutory tools enabling local land use planning are:
1. The Comprehensive Plan and its related components which address such details as the range of permissible land uses; the transportation system including roads, bicycle and pedestrian accommodations, and public transportation facilities; community service facilities like schools, parks, hospitals, sewage and waste disposal areas, and fire stations; historic areas; urban renewal areas; areas appropriate for affordable housing; and a capital improvement program, to name a few. §15.2-2223 VA. Code Ann.
 2. The Zoning Ordinance which sets forth permitted uses, whether by-right or by special use, conditional use or provisional use; and development standards

relating to such things as density, height, lot size, lot coverage, and set backs.
§15.2-2280 VA. Code Ann.

3. The Capital Improvement Plan (CIP) which elaborates the locality's fiscally constrained, projection of public infrastructure improvements including roads, schools, libraries, parks and other services and facilities demanded by the public, the costs for those improvements, and the means to finance them.
§15.2-2239 VA. Code Ann.
 4. The foregoing are fundamental to effective land use planning and decision making, and function in concert with additional statutory tools such as the subdivision ordinance, site plan regulations, the Uniform Statewide Building Code, and the ordinances effectuating the Chesapeake Bay Preservation Act, among others.
- E. Success in promoting and managing development is a function of how well a locality uses its tools within the constraints of state land use enabling authority.

III. DILLON'S RULE

- A. Dillon's Rule, a rule of judicial interpretation, determines the manner in which the foregoing land use tools are interpreted and applied.
1. Statement of Rule: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." *1 Dillon on Mun. Corp (3rd ed.), sec. 89; City of Winchester v. Redmond, 93 Va. 711, 714, 25 S.E.1001, 1002 (1896); Board of Supervisors v. Horne, 216 Va. 113, 120, 215 S.E.2d 453, 458 (1975); Commonwealth v. County Board of Arlington, 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977).*
 - a. Dillon's Rule is converse of Home Rule where localities have all powers other than those prohibited by the legislature and those in conflict with the state constitution or statutes.
 - b. The development community and the locality view Dillon's Rule from opposite sides of the prism.
 2. For representatives of private property owners, this is a glass half empty rule, *i.e.*, it is a strict limitation on local governmental powers.

- a. except when it operates to its benefit, the development community will usually cite Dillon's Rule to assert that the locality's action is ultra vires.
3. For the local government practitioner, this is a glass half full rule, *i.e.*, it permits reasonable arguments for the extension of local government powers.
 - a. Localities seeking to enforce its vision of development in the Comprehensive Plan and assert control over development may adopt an aggressive interpretation of its land use enabling authority.
 - b. Localities more inclined to be managed by development than to manage it may use Dillon's Rule as an excuse for doing nothing to control development.
4. At its most liberal, and perhaps purest interpretation, Dillon's Rule would stand for the proposition that all things local should be legislated locally, and what could be more peculiarly local than land use?
 - a. General health, safety and welfare enabling authority should be interpreted to authorize localities to regulate and administer local and internal affairs of the locality. *City of Winchester v. Redmond, supra, 93 Va. at 714-15, 25 S.E. at 1002.*
5. But, the General Assembly has historically intervened with strict pronouncements on the limits of local land use authority.
6. And, the Virginia courts have traditionally been strong proponents of private property rights and have used Dillon's Rule to curtail local land use authority.
 - a. Yet, in past fifteen years or more, a progressive softening seems evident in what may have been a hard line stance, particularly as the onerous economic impacts of unchecked development on local governments have become apparent.
 - i. see discussion in chapter on *Planning and Zoning, (pages 1-1 to 1-2), by John H. Foote, Esq., Handbook of Virginia Local Government Law, Local Government Attorneys of Virginia, Inc.*
7. Whether localities are worse or better off with Dillon's Rule as compared to Home Rule authority remains debatable.
 - a. Reality is that Home Rule and Dillon Rule states end up roughly in same position with legislature taking powers from home rule localities and granting powers to Dillon rule localities.
 - b. see: *The Dillon Rule in Virginia: What's Broken? What Needs to be*

Fixed?, Robert M. de Voursney, *University of Virginia News Letter*, Vol. 68, No. 7, July/August 1992 and *Home Rule in Virginia: Perception and Reality*, Dick Hall-Sizemore and M. H. Wilkinson, *University of Virginia News Letter*, Vol. 66, No. 8, March/April 1990.

IV. COMPREHENSIVE PLAN

- A. §15.2-2223 VA. Code Ann. mandates that all localities must adopt a Comprehensive Plan for the territory under its jurisdiction. *Town of Jonesville v. Powell Valley Village L.P.*, 254 Va. 70, 487 S.E.2d 207 (1997).
1. The Comprehensive Plan is for "the purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the territory which will, in accordance with present and probable future needs and resources, best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants." §15.2-2223 VA. Code Ann.
 2. The Comprehensive Plan is to be "general in nature, in that it shall designate the general or approximate location, character, and extent of each feature shown on the Plan and shall indicate where existing lands or facilities are proposed to be extended, widened, removed, relocated, vacated, narrowed, abandoned, or changed in use as the case may be." §15.2-2223 VA. Code Ann.
 3. The locality's recommendations for general development in the long-range are to be shown in the Comprehensive Plan which may include, but need not be limited to:
 - a. Areas designated for various types of public and private development and use, such as residential, business, industrial, agricultural, conservation, recreation, and drainage;
 - b. Designation of a system of community service facilities such as parks, forests, schools, public buildings, hospitals, waterworks, and waste disposal areas;
 - c. Historic areas and areas for urban renewal;
 - d. Areas suited for ground water protection measures; and
 - e. An official map, a CIP, a subdivision ordinance, a zoning ordinance and zoning district maps, mineral resource district maps, and agricultural and forestal district maps. §15.2-2223 VA. Code Ann.
 4. The Comprehensive Plan must include "a transportation element that designates a system of transportation infrastructure needs and recommendations that shall include, as appropriate, but not be limited to,

roads, bicycle and pedestrian accommodations, railways, bridges, waterways, airports, ports, and public transportation facilities.” *§15.2-2223 VA. Code Ann.*

5. The Plan is also required to include “the designation of areas and implementation of measures for the construction and maintenance of affordable housing, sufficient to meet the current and future needs of residents of all levels of income in the locality while considering the current and future needs of the planning district within which the locality is situated.” *§15.2-2223 VA. Code Ann.*
6. In preparing the Comprehensive Plan for a local government's adoption, the local planning commission is required to survey and study matters such as the following:
 - a. use of land;
 - b. preservation of agricultural and forestal land;
 - c. characteristics and conditions of existing development;
 - d. trends of growth or changes
 - e. historic areas;
 - f. ground and surface water;
 - g. population factors;
 - h. employment;
 - i. environmental and economic factors;
 - j. existing public facilities;
 - k. transportation facilities;
 - l. the need for affordable housing in both the locality and the planning district in which it is located; and
 - m. the probable future economic and population growth of the territory and the requirements therefore. *§15.2-2224.A.1 and 2 Va. Code Ann.*
7. The local planning commission may also study the public facilities that would be needed if the Comprehensive Plan were fully implemented including estimates of the annual prospective operating costs for such facilities and any

revenues, including tax revenue, that may be generated by such facilities.
§15.2-2230.1 VA. Code Ann.

- a. Public facilities may include but are not limited to water and sewer lines and treatment plants, schools, public safety facilities, and streets and highways. *Id.*
 8. The Comprehensive Plan is required to recommend methods of implementation which may include, but need not be limited to: (1) an official map; (2) a capital improvement plan; (3) a subdivision ordinance; (4) a zoning ordinance; and (4) a mineral resources map. *§15.2-2224.A. 2 VA. Code Ann.*
 9. At least once every five years the local planning commission must review the Comprehensive Plan to determine whether it is advisable to amend the Plan.
§15.2-2230 VA. Code Ann.
- B. The Plan belongs to the locality and private property owners cannot compel amendments to it.
1. Amendments to the Plan are initiated by the local planning commission itself, or as directed by the governing body. *§15.2-2229 VA. Code Ann.*
 2. Localities likely permit applications for amendments to the Plan but specific applications are not required to be acted on within a specified time period, nor considered at all.
- C. While not a binding document, consistent adherence to the Comprehensive Plan establishes a forceful basis for legislative approval of uses in some locations and denying them in others.
1. Utility of the Plan to rigorously scrutinize development proposals is in many respects a function of its detail and ease of interpretation and application.
 2. This is true not only for the locality in making land use decisions but for the development community in being able to predict what those decisions are likely to be.
 3. The Plan is the general formulation of the locality's land use policy and it makes more likely the achievement of goals for economic development, concentration of growth, preservation of open space and low density areas, and the concurrency of development and public infrastructure, among other policy objectives.

V. CAPITAL IMPROVEMENT PROGRAM.

- A. *§15.2-2239 VA. Code Ann.* provides that the local planning commission may,

and if directed by the local governing body shall, prepare a CIP based on the Comprehensive Plan for a period not exceeding the next five years.

- B. The CIP shall include estimates of the cost of the projects in the plan and the means of financing them to be undertaken in the ensuing fiscal year and in a period not to exceed the next four years. *Id.*
- C. The CIP is to be revised annually. *Id.*
- D. A locality's CIP is constrained by its budget and, thus, effectively becomes the engine, large or small, that drives the locality's build out in accordance with the Comprehensive Plan.
 - 1. It also determines the extent to which a locality can keep pace with the demands for public services placed on it by development.
 - 2. When properly linked to the Comprehensive Plan, the CIP becomes an important factor in allocating limited public resources to meet the demands of development and, thus, in determining whether and when development approvals may be warranted.

VI. ZONING ORDINANCE.

- A. Zoning ordinances are for the general purpose of promoting the health, safety or general welfare of the public and to accomplish the objectives of §15.2-2200 *Va. Code Ann.*, (see: section II.A.1. above).
- B. Zoning ordinances must be designed to give reasonable consideration to each of the following purposes, where applicable (see, §15.2-2283 *Va. Code Ann.*):
 - 1. Adequate light, air, convenience of access, and safety from fire, flood, crime and other dangers;
 - 2. Reduce or prevent congestion in the public streets;
 - 3. Facilitate the creation of a convenient, attractive and harmonious community;
 - 4. Facilitate the provision of adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, airports and other public requirements;
 - 5. Protect against destruction of or encroachment upon historic areas;
 - 6. Protect against one or more of the following: overcrowding of land, undue density of population in relation to the community facilities existing or

available, obstruction of light and air, danger and congestion in travel and transportation, or loss of life, health, or property from fire, flood, panic, or other dangers;

7. Encourage economic development activities that provide desirable employment and protect the tax base;
 8. Provide for the preservation of agricultural and forestal lands and other lands of significance for the protection of the natural environment;
 9. Protect approach slopes and other safety areas of licensed airports; and
 10. Promote the creation and preservation of affordable housing suitable for meeting the current and future needs of the locality as well as a reasonable proportion of the current and future needs of the planning district within which it is located.
- C. *§15.2-2280 VA. Code Ann.* provides that a locality may, by ordinance, classify the territory under its jurisdiction into districts and, in each district, regulate, restrict, permit, prohibit, and determine the following:
1. The use of land and buildings for agricultural, business, industrial, residential, flood plain, and other specific uses;
 2. The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing or removal of structures;
 3. The areas and dimensions of land, water, and air space to be occupied by buildings and uses, and of courts, yards, and other open spaces to be left unoccupied; or
 4. The excavation or mining of soil or other natural resources.
- D. *§15.2-2286.A.1-12 VA. Code Ann.* provides an illustrative list of the matters for which a Zoning Ordinance may provide reasonable rules and regulations including, among others:
1. variances;
 2. special use permits;
 3. special exceptions;
 4. modifications by the Zoning Administrator of Zoning Ordinance provisions relating to physical requirements on a lot or parcel, including but not limited to size, height, location or features of a building, structure, or improvement;

5. administration and enforcement;
 6. penalties and fees;
 7. amendment, supplementation, or change of the regulations, district boundaries, or classifications of property whenever public necessity, convenience, general welfare, or good zoning practice require such;
 8. mixed used development and planned unit development;
 9. incentive zoning;
 10. clustering of single-family dwellings to preserve open space; and
 11. appeals.
- E. Zoning Ordinances are authorized to contain more specially tailored provisions.
1. Various statutes authorizing conditional zoning permit a locality, subject to specified limitations, to accept voluntary proffers as part of a rezoning. *§§15.2-2303, 2296, 2297, and 2298 VA. Code Ann.*
 - a. Conditional zoning means the allowing of reasonable conditions governing the use of property, such conditions being in addition to, or a modification of the regulations provided by the Zoning Ordinance. *§15.2-2201 VA. Code Ann.*
 - b. Conditional zoning may permit proffers that enable a locality to obtain contributions beneficial to the public such as dedication and construction of roads, donation of land for schools, parks, and other public facilities, and affordable housing units or cash for affordable housing funds.
 - c. The enabling authority for conditional zoning varies among jurisdictions and determines the nature of the proffers that may be accepted.
 - i. Old conditional zoning. *§15.2-2303 VA. Code Ann.*
 - ii. New conditional zoning. *§15.2-2297 VA. Code Ann.*
 - iii. Modified new conditional zoning for high growth localities. *§15.2-2298 Va. Code Ann.*
 2. Affordable housing goals may be achieved through an optional increased density ordinance administered through such means as a special use, special exception, or conditional zoning process. *§§15.2-2304 and 2305 VA. Code*

Ann.

- a. Arlington County has unique authority to require affordable housing as a condition of special exception approvals. *§15.2-735.1 VA. Code Ann.*
3. Incentive zoning provides a means for localities to entice the fulfillment of locally desired objectives as a condition of development.
 - a. Incentive zoning is defined as the use of bonuses in the form of increased project density or other benefits to a developer in return for the developer providing certain features or amenities desired by the locality within the development. *§15.20-2201 VA. Code Ann.*
 - b. Thus, the Zoning Ordinance may, for example, offer a more desirable zoning category or enhance or relax development standards in return for meeting objectives set forth in the Comprehensive Plan and the Zoning Ordinance.

VII. SPECIALLY TAILORED ZONING ORDINANCE PROVISIONS PROVIDE MEANS TO ACHIEVE LOCAL LAND USE POLICIES IDENTIFIED IN THE COMPREHENSIVE PLAN.

- A. Using the Comprehensive Plan as a guide to identify the locally desired ends, the Zoning Ordinance provides the means to implement them by specifying the kinds of uses permitted and development standards applicable thereto for all areas of the locality, as well as the type and form of governmental approval required to actually develop them.
 1. This where local government's perspective on enabling authority, in the context of Dillon Rule, is likely to differ from that of the land owner.
- B. The districts provided for in the Zoning Ordinance specify permitted uses, consistent with the Comprehensive Plan.
 - a. Uses permitted by right may commence once zoned, subject to receipt of any other applicable approvals, such as site plan approval, subdivision approval, land disturbance permits, and building permits.
 - b. Uses permitted by special use or special exception are subject to legislatively imposed conditions beyond those applicable to by right uses and provide the locality a higher degree of control over the site and the use.
- C. Special uses and special exceptions may be used to impose conditions that benefit the public by mitigating the deleterious impacts of a use, *e.g.*, construction of transportation improvements, increased set backs between the use and adjacent

- properties, limits on hours of operation, and the like.
- a. Special uses and special exceptions are used interchangeably and the decision to grant or deny one is a legislative function. *Rinker v. City of Fairfax*, 238 Va. 24, 30, 381 S.E.2d 215, 218 (1989); *Board of Supervisors of Fairfax County v. Southland Corporation*, 224 Va. 514, 521-22, 297 S.E.2d 718, 721-22 (1982).
 - b. Conditions imposed as part of a special use or special exception must be substantially necessitated by the proposed use. *Cupp v. Board of County Supervisors of Fairfax County*, 227 Va. 128, 318 S.E.2d 407 (1984); *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975).
 - c. Raises question as to what is necessitated by a proposed use.
 - i. How attenuated can the nexus be?
 - ii. The standard of “roughly proportional to the impact on the community” articulated by the United States Supreme Court may set the constitutional limit. *Dolan v. City of Tigard*, 512 U.S. 374, 129 L.Ed. 2d 304, 114 S.Ct. 2309 (1999).
 - iii. This will likely remain an evolving concept as the wider impacts of development are acknowledged by the General Assembly and courts.
 - d. However, additional, “non-nexus” conditions voluntarily agreed to may be equally enforceable. *see, Board of County Supervisors of Prince William County v. Sie-Gray Developers, Inc.*, 230 Va. 24, 334 S.E.2d 542 (1985); 1989 Op. Atty. Gen. Va. 96., *see, Tyco Associates, Inc. v. Fairfax County*, 22 Va. 291, 293-4 (1990) and *A&H Holding Corporation v. Arlington County*, 3 Va. Cir. 426 (1973).
 - e. Also, is nexus required where conditions result from an incentive offered to the developer, *e.g.*, increased height in exchange for energy efficient, LEED rated building?
 - i. Not contract zoning since governing body is not obligated to approve the application.
- D. By-right development regulations can be structured to achieve consistent standards relating to such things as lot coverage, height, set backs, and parking, and to ensure uniformity in appearance.
- E. Overlays may be established that encompass a portion of a zoning district to provide a means to modify the Zoning Ordinance’s provisions otherwise

applicable to properties within that district, thereby providing a means to achieve objectives of the locality.

1. For example, an environmental overlay may restrict such things as density, lot coverage, and amount of impervious area within a part of a district where steep slopes and sensitive topography exists.
- F. Historic properties can be protected through the local designation process under §15.2-2306 VA. Code Ann., but may also be voluntarily protected by using incentive measures that reward preservation in return for such things as a wider range of permitted uses, increased density, greater height, relaxed set backs, reduced parking requirements, and the like.
- G. Cluster development may be used by a locality to meet its open space objectives.
- H. Transfer of density and other development rights from an undeveloped area that will be left undisturbed to an area proposed for development may also be used to achieve open space and other development objectives. §§15.2-2316.1 and 2 VA. Code Ann.
1. Arlington County has separate enabling authority for transfer of development rights. §15.2-750 VA. Code Ann.
- I. Growth control measures that relate to the timing and public cost impacts of permitted development remain a largely unexplored and untested frontier.
1. Moratoria are not expressly authorized.
 - a. The Virginia Supreme Court has held that there is no authority to adopt an interim zoning ordinance suspending the filing of subdivision plats and site plans for a specified period. *Board of Supervisors of Fairfax County v. Horne*, 216 Va. 113, 120-22, 215 S.E.2d 453, 457-59 (1975).
 - b. Attorney General has given mixed signals on the issue.
 - i. A moratorium on development of recreational properties pending completion of a detailed study of the requirements for such development would require a zoning text amendment and the moratorium must be reasonable in scope and duration. 1973-74 Op. Atty. Gen. 267.
 - ii. A moratorium on all zoning changes until certain highway improvements are made is not permissible because there is no express authority to establish a moratorium on the rezoning of land and because such a moratorium would render meaningless the governing body's mandatory obligation to scrutinize the merits of a rezoning

application and its relationship to the comprehensive plan. *1978-79 Op. Atty. Gen. 196.*

iii. A moratorium on rezonings to protect existing retail businesses from new competition lacks enabling authority; however, enabling legislation that permitted such would not be unconstitutional per se. *1986-87 Op. Atty. Gen. 124.*

2. Concurrency requirements, forestalling development until the public infrastructure necessitated by it is in place, may be achievable despite the absence of express legislative authority enabling adequate public facilities ordinances.
 - a. The Virginia Supreme Court has provided some indication that appropriately crafted provisions of a Comprehensive Plan may provide "triggers" for when development proposals otherwise consistent with the Plan must be approved. *Board of County Supervisors of Loudoun County v. Lerner, 221 Va. 30, 267 S.E.2d 100 (1980).*
 - b. Tying the Comprehensive Plan and the Capital Improvement Program together may be especially important in demonstrating a locality's rational plan for funding the infrastructure needed to build out the locality in accordance with the Plan.
3. The Attorney General has opined that a locality may adopt, as part of its Comprehensive Plan, a proffer policy that considers the degree to which adequate public facilities requirements have been met before rezoning applications may be approved. *2002 Op. Atty. Gen. VA. 85.*
 - a. In the same vein, the Attorney General has concluded that statutory authorization is required before localities may deny rezonings solely on the basis of the lack of adequate public facilities and services to meet the needs generated by development of the rezoned property. *2003 Op. Atty. Gen. ____, 2003 Va. AG Lexis 57.*
 - b. This is to be distinguished from an earlier Attorney General Opinion that concluded proffered impact fees could not be accepted as part of a conditional rezoning where the locality had no authority to accept cash proffers. *1989 Op. Atty. Gen. Va. 96.*
4. The Virginia Supreme Court upheld the denial of a rezoning as a fairly debatable question where, in applying a methodology for calculating the cost of providing public facilities for new homes, including schools, roads, parks, libraries, and fire stations, the locality found that the development proposal was contrary to the public health, safety and welfare because of the adverse impact on roads and schools. *Gregory v. Board of Supervisors of Chesterfield*

County, 257 Va. 530, 514 S.E.2d 350 (1999).

- a. This is to be distinguished from *Board of Supervisors of Powhatan County v. Reed's Landing Corporation, 250 Va. 397, 463 S.E.2d 668 (1995)*, which held that local governments may not require a specified proffer as a condition precedent to rezoning, and that a rezoning may not be denied solely for failure to make a certain proffer.

VII. CONDITIONAL ZONING AND SPECIAL USES\SPECIAL EXCEPTIONS PROVIDE MOST SIGNIFICANT BASES FOR DEVELOPMENT AGREEMENTS.

- A. Conditions associated with legislatively approved rezonings and special uses or special exceptions detail both the obligations of the developer and the expectations of the public.
 1. Obligations arise out of locality's approval of a proposed development project.
 2. The obligations are unilateral as locality has already performed.
 3. Not contract zoning as conditions as not a quid pro quo for approval but rather arise out of and are necessitated by the development.
 4. Distinguish true contractual arrangements, such as in a public private development plan, where land use approvals are not necessarily required.
 - a. These types of arrangements are not the subject of this outline.

VIII. ENFORCEMENT OF CONDITIONS.

- A. Generally, development agreements may be enforced as any contractual arrangement.
- B. However, agreements embodied in proffered conditions and special use or special exception conditions are typically enforced through zoning enforcement mechanisms.
 1. The process is generally faster and may have certain advantages for locality.
- C. Zoning Administrator is authorized to administer and enforce Zoning Ordinance, including conditions.
 1. May order the remedying of any conditions found in violation of the Zoning Ordinance. *§15.2-2284.4 VA. Code Ann.*
 2. May ensure compliance through legal actions, including injunctions, subject

to appeal to the board of zoning appeals. *Id.*; §15.2-2311 VA. Code Ann.

- D. Enforcement action may begin with Zoning Administrator's determination that conditions are not being, or have not been, complied with.
 - 1. Upon proper notice of such determinations, appeal must be taken within 30 days or the determination is final and binding. §15.2-2311.A. VA. Code Ann.
 - 2. Appeal is to the board of zoning appeals. §15.2-2309.3. VA. Code Ann.
 - 3. Decision of board of zoning appeals may be reviewed pursuant to a writ of certiorari issued by the circuit court. §15.2-2314 VA. Code Ann.
 - a. De novo review provided by circuit court.
 - b. Evidence may be admitted beyond the record of the board of zoning appeals record.
 - c. Board of zoning appeals decision is presumed correct and may be rebutted by a preponderance of evidence.

IX. DRAFTING OF PROFFERS AND CONDITIONS.

- A. Assurance that public will obtain the benefits of condition language directly correlates to the attention paid to the drafting of those conditions.
 - 1. Involvement of counsel, both for developer and local government attorney is crucial although often overlooked.
 - a. For locality, counsel's involvement may be practically limited by the availability of office resources.
 - 2. Use of standard language may help resolve disadvantages of deficient language.
 - a. Developers may reject standard language thereby necessitating development of specially negotiated crafted language.
 - b. Similarly, nature of condition may be unusual such that standard language does not exist.
 - c. Use of standard language may undercut notion that the condition was truly voluntary.
- B. Drafting conditions is no different than drafting a contract and should be approached with same degree of care.

C. Considerations to bear in mind in drafting conditions.

1. Object and purpose of condition is clear.
2. Language is unambiguous.
3. Documents, plans, etc. incorporated by reference are clearly identified.
4. Standards for determining compliance are objective and capable of measurement.
5. Provisions are made for initial construction of public improvements and for ongoing maintenance thereof.
6. Desirable, advantageous obligations should be interspersed with undesirable ones, *e.g.*, require a percentage or phase of retail to be developed with or just after a percentage or phase of residential development.
7. Condition should not contradict or undermine Comprehensive Plan, Zoning Ordinance, or other land use plans and policies.
8. Condition must be within lawful authority of locality, *e.g.*, no illegal indemnification, no violation of debt restrictions, no waiver of lawful powers, no unauthorized delegation of legislative powers, no violation of Public Procurement Act.
9. Avoid creating performance obligations on locality's part.
10. Fully identify obligated parties, including applicability to successors and assigns.
11. Anticipate potential project failure and resulting division of interests in land and whether and how to apportion obligations under conditions.
12. Use escalators for monetary contributions in the event of protracted development.
13. Secure obligations with bonds, letters of credit, or escrow agreements.