



## Virginia Local Government Law

### Issues with Cash Proffer 'Delayed Payment' Law

By: Andrew McRoberts. *This was posted Friday, July 9th, 2010*

A number of local government attorneys have been asking tough questions about [HB 374](#) and [SB 632](#), identical bills which became effective law on July 1. [2010 Va Acts of Assembly ch. 549](#), [2010 Va Acts of Assembly ch. 613](#).

The text of the new law says:

“§ 1. Notwithstanding the provisions of any cash proffer requested, offered, or accepted pursuant to § 15.2-2298, 15.2-2303, or 15.2-2303.1 of the Code of Virginia for residential construction on a per-dwelling unit or per-home basis, cash payment made pursuant to such a cash proffer shall be collected or accepted by any locality only after completion of the final inspection and prior to the time of the issuance of any certificate of occupancy for the subject property.”

These bills were adopted as a [priority of the Home Builders Association of Virginia](#) as a benefit to struggling homebuilders. They were intended to save the financing costs on money borrowed to pay the cash proffer between the date of the building permit (when these have been paid in most cases) and the date of the certificate of occupancy (when the builder can close on the home and pay off the debt).

Good for the homebuilders. But there are issues.

First, the law is causing some practical problems. For example, unlike at the building permit stage, the local government does not typically collect money at the C.O. stage, so new procedures for the locality and another trip to the building official's office by the builder may be required. The locality obviously loses out on the use of the money during that period for purposes such as schools and road improvements.

But the bigger issues seem to be nagging legal questions.

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For example, a cash proffer is not merely a statute that can be amended. It is a local zoning ordinance adopted in a specific zoning case. A proffer's language, including the requirement (in most cases) to pay the cash proffer at the building permit stage is actually a zoning regulation, legally identical to a setback requirement or use limitation. See [Jefferson Green Unit Owners Assoc. v. Gwinn, 262 Va. 449, 458, 551 S.E.2d 339 \(2001\)](#) ("proffers become part of the zoning ordinance" and are legislative enactments).

This being the case, some have asked how local governments can comply with this new law but not comply with statutory prerequisites to changing such regulations, such as notice and a public hearing. Some have raised constitutional objections on similar grounds. Some have asked whether this new law may disturb vested rights. Some see proffers as more in the nature of a contract between the zoning applicant and the local government, and ask whether the law may unconstitutionally disturb these contractual relations.

With these questions and hundreds of existing proffers that specify the date of payment at the building permit stage, localities are reacting in various ways. Some localities are applying this new law prospectively only or requiring past proffers to be amended. Others are considering applying the proffers as submitted or accepted and waiting to see how future proffers are submitted. Some are not amending pre-existing proffers themselves but are implementing the delay in payment by policy.

Local government attorneys and legislative liaisons raised these serious issues with the Virginia General Assembly and Governor McDonnell before HB 374 and SB 632 were adopted and before they left the Governor's desk. Now, they are the law.

HB 374 and SB 632 are certainly helpful to our builders in "this economy." But, inarguably, this law also has serious issues that our local governments are left to address.

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