

The rule prohibiting unreasonable proffers is found at Virginia Code § 15.2-2303.4(B):

No locality shall

- (i) Request or accept any unreasonable proffer, as described in subsection C, in connection with a rezoning or a proffer condition amendment as a condition of approval of a new residential development or new residential use, or
 - (ii) Deny any rezoning application or proffer condition amendment for a new residential development or new residential use where such denial is based in whole or in part on an applicant's failure or refusal to submit an unreasonable proffer or proffer condition amendment.
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All of the underlined terms are defined. So let's unpack them:

“Unreasonable proffer” and “Unreasonable proffer condition amendment” means (based on § 15.2-2303.4(C)):

Every proffer and proffer condition amendment is deemed to be unreasonable unless it passes the following tests:

- (i) For either an onsite proffer or offsite proffer, it addresses an impact that is specifically attributable to a proposed new residential development or other new residential use applied for, and
- (ii) An offsite proffer shall be deemed unreasonable pursuant to subdivision (i) unless it addresses an impact to an offsite public facility, such that both of the following tests are met:
 - (a) The new residential development or new residential use creates a need, or an identifiable portion of a need, for one or more public facility improvements in excess of existing public facility capacity at the time of the rezoning or proffer condition amendment, and
 - (b) Each such new residential development or new residential use applied for receives a direct and material benefit from a proffer made with respect to any such public facility improvements.

“Onsite proffer”

“Onsite proffer” means a proffer addressing an impact within the boundaries of the property to be developed and shall not include any cash proffers.

“Offsite proffer”

“Offsite proffer” means a proffer addressing an impact outside the boundaries of the property to be developed and shall include all cash proffers.

“New residential development”

“New residential development” means any construction or building expansion on residentially zoned property when such new residential development requires a rezoning or proffer condition amendment.

“New residential use”

“New residential use” means any use of residentially zoned property that requires a rezoning or a proffer condition amendment to allow for new residential development.

“Residentially zoned property”

“Residentially zoned property” means property zoned or proposed to be zoned for either single-family or multifamily housing.

Because the terms “New residential development” and “New residential use” are always used together in the statute, let’s just use shorthand to cover both: “activity on residentially zoned property.”

“Public facility”

“Public facilities” means public transportation facilities, public safety facilities, public school facilities, or public parks.

“Public facility improvements”

“Public facility improvement” means an offsite public transportation facility improvement, a public safety facility improvement, a public school facility improvement, or an improvement to or construction of a public park. No public facility improvement shall include any operating expense of an existing public facility, such as ordinary maintenance or repair, or any capital improvement to an existing public facility, such as a renovation or technology upgrade, that does not expand the capacity of such facility. For purposes of this section, the term “public park” shall include playgrounds and other recreational facilities.

“Public transportation facility improvement”

“Public transportation facility improvement” means

- (i) Construction of new roads;
- (ii) Improvement or expansion of existing roads and related appurtenances as required by applicable standards of the Virginia Department of Transportation, or the applicable standards of a locality; and

(iii) Construction, improvement, or expansion of buildings, structures, parking, and other facilities directly related to transit.

“Public safety facility improvement”

“Public safety facility improvement” means construction of new law-enforcement, fire, emergency medical, and rescue facilities or expansion of existing public safety facilities, to include all buildings, structures, parking, and other costs directly related thereto.

“Public school facility improvement”

“Public school facility improvement” means construction of new primary and secondary public schools or expansion of existing primary and secondary public schools, to include all buildings, structures, parking, and other costs directly related thereto.

Again, because these public facility improvements are always used together in the statute, let’s just use shorthand to cover all of them: “new or expanded road, transit-related improvement, police station, fire station, hospital, school, or recreational facility.”

Now let’s revisit the definition of an “unreasonable proffer” again, but substitute some simplified language:

All proffers are unreasonable except for those that pass the following tests:

- (i) For all proffers, the proffer addresses an impact that is specifically attributable to the proposed activity on residentially zoned property this is being applied for, and
- (ii) For all cash proffers and proffers that address at least one impact outside the boundaries of the residentially zoned property, the proffer addresses an impact to an offsite public facility, such that both of the following tests are met:
 - (a) The activity being applied for creates a need, or an identifiable portion of a need, for a new or expanded road, transit-related improvement, police station, fire station, hospital, school, or recreational facility in excess of the capacity of the facility that exists at the time of the application, and
 - (b) Each such activity applied for receives a direct and material benefit from the proffer made with respect to a new or expanded road, transit-related improvement, police station, fire station, hospital, school, or recreational facility.

The test for determining whether a proffer is “unreasonable” has several steps:

- (1) Does the proffer address an impact that is specifically attributable to the proposed activity on the residentially zoned property that is being applied for?
 - (a) If NO, stop. **The proffer is unacceptable. (fails to meet definition of either “onsite proffer” or “offsite proffer” at § 15.2-2303.4(A), and fails § 15.2-2303.4(C)(i))**
 - (b) If YES, continue.
- (2) Does the proffer address at least one impact outside the boundaries of the residentially zoned property that is the subject of the application?
 - (a) If NO, stop. **The proffer is acceptable. (satisfies § 15.2-2303.4(C)(i))**
 - (b) If YES, continue.
- (3) Does the proffer address an impact to an offsite road, transit-related improvement, police station, fire station, hospital, school, or recreational facility?
 - (a) If NO, stop. **The proffer is unacceptable. (fails § 15.2-2303.4(C)(ii))**
 - (b) If YES, continue.
- (4) Does the activity being applied for create a need, or an identifiable portion of a need, for a new or expanded road, transit-related improvement, police station, fire station, hospital, school, or recreational facility in excess of the capacity of the facility that exists at the time of the application?
 - (a) If NO, stop. **The proffer is unacceptable. (fails § 15.2-2303.4(C)(ii)(a))**
 - (b) If YES, continue.
- (5) Does each of the activities proposed for the residentially zoned property receive a direct and material benefit from the proffer?
 - (a) If NO, stop. **The proffer is unacceptable. (fails § 15.2-2303.4(C)(ii)(b))**
 - (b) If YES, stop. **The proffer is acceptable. (satisfies all applicable requirements of § 15.2-2303.4)**

Now, let's come back to off-site proffers...

“Offsite proffer” means a proffer addressing any impact outside the boundaries of the property to be developed and shall include all cash proffers.

For all activity on residentially zoned property, what sorts of proffers might satisfy the definition of “offsite”?

- A sidewalk located adjacent to the property, but just outside the boundary of the property and inside the public right-of-way
- Perimeter berms, landscaping, fencing and edge treatments that screen parking areas, loading areas, dumpsters, or other aspects of the development that might have a negative impact if seen or heard from neighboring properties or the public right-of-way, even when located on the property.
- Exterior architectural design visible from neighboring properties or the public right-of-way if the design may have (or be interpreted by a court as having) a beneficial impact on the overall character of the neighborhood.
- A nature walk, pier, park, meeting room, or other improvement that is made available for use by the public at any time.
- Specific features of the development that are designed to reduce adverse impacts to public utilities or services, such as water, electricity, storm water, waste water, solid waste, etc.