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POLICY BRIEF

How to Streamline Housing Permitting in Virginia

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January 2024

Virginia state law requires that counties and cities follow certain procedures in the planning, zoning, entitlement, and development of land. In practice, however, those procedures vary widely from place to place, with many local additions. Some state laws also actively hinder clear and timely local decisions on the development of land. Few in the Commonwealth are served by delays and uncertainty in the construction of housing, workplaces, and infrastructure.

To identify potential improvements to Virginia's land entitlement system, we interviewed several local government planners, land use lawyers, and developers, each of whom contributed a detailed perspective on a particular aspect of the land entitlement process in one part of the state.

The most obvious result of our research is that the land entitlement process in Virginia differs sharply from place to place, and even between neighboring jurisdictions. This is not necessarily a bad thing, but it creates a challenge for legislators. Statutory changes that streamline procedures in one county may add to their complexity in another. Legislators have recognized this in the past by exempting Metrorail areas from some proffer restrictions, for example.[1] With this cautionary note, we offer our recommendations and encourage legislators to have in-depth discussions of their own proposals with officials and land use professionals from all parts of the Commonwealth.

Below we discuss and offer possible solutions to four problem areas:

1. Capacity constraints
2. Proffers and planning
3. Design and environmental review
4. Zombie deed restrictions

1. CAPACITY CONSTRAINTS

Small, rural jurisdictions face challenges distinct from those confronted by the urban and suburban localities that attract the most development money. With fewer staff members, typically required to be generalists, small jurisdictions are slower to adapt to new statutory requirements, more fearful of being sued, more likely to have outdated zoning codes, and more likely to use pen-and-paper permitting procedures. These are realities for smaller jurisdictions with limited financial resources, but they add delay and cost.

Solutions:

1. The General Assembly should offer a competitive grant to help jurisdictions migrate from pen-and-paper to digital permitting. This would save staff time and reduce delays. We recommend that the grant program be targeted to jurisdictions with zoning ordinances where development can occur on a by-right basis.

2. State agencies should write model zoning codes that any jurisdiction can adopt and apply on its zoning map. Having a common "zoning language" across many jurisdictions would improve communication between developers and local staff and could expand healthy competition in rural areas.

2. PROFFERS AND PLANNING

Our interviewees consistently identified land use planning (or its absence) and the proffer system as principal sources of frustration. Although most Virginia land development professionals see these as separate issues, we respectfully disagree: local governments' reliance on proffers creates a large fiscal distortion of the planning process.

The proffer system is a unique Virginia institution. It emerged first in Fairfax County as a way for the local government to extract material benefits from new development without running afoul of Virginia's strong jurisprudence protecting private property. In 1978, the legislature expanded the proffer system statewide. It has been the object of constant tinkering ever since.[2]

In most states, localities can charge impact fees, also known as exactions, on property developers, so that new development covers the approximate costs associated with expanded government services—including schools, police, and roads[3]—needed to support the new residents. Impact fees apply to by-right development as well as development requiring discretionary government permission.

Virginia localities do not have the authority to levy direct impact fees. Instead, state statutes allow them to accept so-called voluntary proffers. These proffers are contributions from developers in return for rezoning permissions. Proffers are limited to developments requiring discretionary gov-

ernment permission. And proffers cannot be used for general services, such as schools. Instead, they can only be used for improvements directly related to site conditions, such as nearby roads or streams. Proffers can also include conditions that run with the land, restricting land use long after the development in question has been completed.[4]

The main difference between proffers and impact fees is that proffers occur only when development requires discretionary government permission, such as rezoning. This fiscal distinction distorts the planning process: in Virginia, piecemeal rezoning is the fiscally responsible approach to growth, whereas broad planning and zoning is fiscally risky.

Virginia requires local governments to update their comprehensive plans every five years. In theory, zoning should follow these comprehensive plans. Even the counties that plan for growth do not zone for growth, however, since doing so would short-circuit their ability to extract value from growth through the proffer system. Instead, interviewees noted, counties await developer proposals in accord with their comprehensive plans, approving those rezonings and extracting proffers in the process.

The primary complaint of Virginia developers regarding the proffer system was not that proffer costs were excessive.[5] Instead, both developers and planners disliked the uncertainty associated with the proffer system in some jurisdictions. Smaller, low-growth jurisdictions in particular have relatively little experience with the proffer system, leading to unpredictability in outcomes.

In the current planning-and-proffer system, developments that comply with a comprehensive plan must nonetheless go through a lengthy and uncertain process attended by public meetings, extensive staff work, and uncertain approval. These costs must ultimately be paid through tax revenue or higher prices for new homes.

Solution:

The General Assembly should pass a statute or constitutional amendment allowing limited exactions as a replacement for the proffer system. Localities that adopt the new system would be able to plan for growth on their own terms and then approve compliant projects through a simple by-right process. The fiscal costs of growth would largely be borne by impact fees. To protect new homebuyers against exorbitant fees, the state should require that fees above some modest level be carefully documented and justified. In 2008, the Senate narrowly approved such a bill—SB 768—but it did not advance in the House.[6]

3. DESIGN AND ENVIRONMENTAL REVIEW

Many Virginia jurisdictions regulate and review the aesthetics of new construction, especially in historic districts. Setting aside the question of whether aesthetic regulation is an appropriate

use of government authority in every case, our interviewees found the process of design review cumbersome and costly.

Other jurisdictions, notably Charlottesville, also have environmental reviews. Although the substance of local environmental review may be worthy, the process should be designed to yield clear, prompt, technically grounded decisions.

Design and environmental review often include public hearings. This practice is questionable given that these reviews are premised on privileging technical knowledge or expert opinion. In practice, hearings often diverge from the technical subject matter and duplicate planning and zoning hearings on issues such as land use and traffic.

In at least two Virginia jurisdictions, development proposals must pass through design or environmental review prior to obtaining rezoning approval.[7] That means that a developer must pay for detailed architectural and engineering drawings before knowing the basic parameters, such as building height and parking, and repeat the entire review process if the rezoning process takes an unexpected turn.

Solutions:

1. The General Assembly should limit design and environmental review to local government staff members and opinions they may solicit from qualified technical experts. Design review should not involve public hearings. Design and environmental review requirements should be specific and objective to avoid wasting staff and developer time.

2. Design and environmental review should only be conducted for development projects that have received zoning approval.

4. ZOMBIE DEED RESTRICTIONS

Private, voluntary deed restrictions that limit a property's use can serve valuable purposes, such as credibly committing a developer to follow its published plans. Over decades, however, the deed restrictions' voluntary nature becomes strained.[8] As a result, deed restrictions that made sense under now-defunct market conditions, or which made sense only as part of an openly racist and exclusionary legal regime, may persist. In a 2023 case, a developer was blocked from building a duplex by a 1938 deed restriction in a document that also banned non-white residents.[9]

We expect that the dead hand of such zombie deed restrictions will become increasingly relevant during the next several decades. Homeowners' associations (HOAs), usually accompanied by detailed deed restrictions, are a relatively new phenomenon. When houses subject to an HOA reach the end of their service life, it will be important that property owners are able to reuse their land in equitable and profitable ways.

Proffered conditions, likewise, may be an important part of reaching agreement around a specific land development. But they should not become permanent and unchangeable.

Solutions:

1. The General Assembly should declare void all deed restrictions contained in covenants that included racial restrictions and provide a simple means for property owners to selectively continue permissible restrictions if they wish. It should also require that any new or existing[10] deed restriction within a homeowners' association receive the affirmative vote of over half the lot owners every 30 years.[11] A deed restriction that falls short of majority support is voided.

2. The General Assembly should also void all new and existing proffered conditions after a comparable passage of decades.

CONCLUSION

Land use permitting processes are a thicket of unintended consequences—and so are attempts to reform them. We approach this topic knowing we cannot possibly have imagined every way that a local government or developer will respond to new possibilities or limitations. We are also aware that Virginia's permitting system—with all its flaws—has allowed Northern Virginia to grow at a rate far exceeding comparable high-wage regions on the East and West Coasts.[12] Virginia's processes could be improved, but they do not need to be reinvented.

To improve Virginia's permitting processes, Virginia legislators should (1) recognize the role of red tape in compounding the difficulties local governments face and in raising the cost of housing and (2) pursue reforms that can reduce uncertainty, shorten delays, and provide all parties with predictability regarding future development.

ABOUT THE AUTHORS

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NOTES

1. Williams Mullen, "Dissecting the Proffer Reform Bill," last modified December 21, 2016, https://www.williamsmullen.com/news/dissecting-proffer-reform-bill.
2. For concise legal background on proffers, see John W. Farrell, "Virginia Subdivision and Site Plan Law," last modified September 2019, pp. 14-17, https://mccandlishlawyers.com/wp-content/uploads/2019/09/Virginia_Subdivision_and_-Site_Plans_Law.pdf.
3. Montgomery County, Maryland, offers a good example of a detailed exaction regime; it uses the term "development impact taxes." Montgomery County's exactions for schools, for example, are based on the number of schoolchildren likely to inhabit a new housing unit and whether local schools are already crowded. See Montgomery County Department of Permitting Services, "Development Impact Taxes," last visited December 2023, https://www.montgomerycountymd.gov/DPS/fees/Taxes.html.
4. City of Roanoke, "Guide to Proffered Conditions," last visited December 2023, https://www.roanokeva.gov/DocumentCenter/View/1213/Guide-to-Proffered-Conditions-PDF.
5. Several developers did note that prior to 2016 reforms, proffer demands in fast-growing counties were above $50,000 per house, a level that seemed unjustified and significantly raised the price floor for new construction. A 2012 study notes that several Northern Virginia counties had published specific proffer demands ranging from $11,000 to $60,000 per unit. Specific cash demands are no longer legal. See Agnès Artemel, "Impact of Local Regulatory Processes and Fees: On Ability to Deliver New Housing Units," (George Mason University, Center for Regional Analysis, June 21, 2012), 5–6, https://cra.gmu.edu/pdfs/Impact_of_Regulatory_Processes_Fees_on_Housing_Montgomery.pdf.
6. The 2008 bill is summarized here: Jeffrey S. Gore, "Evolution of Proffers in Virginia" (presentation, Virginia Association of Counties, 2016 Annual Conference, November 2016), https://www.vaco.org/wp-content/uploads/2016/11/ProffersGore16.pdf.
7. The jurisdictions are the cities of Fairfax and Charlottesville.
8. See Andrea J. Boyack, "Common Interest Community Covenants and the Freedom of Contract Myth," *Brooklyn Journal of Law and Policy* 22, no. 2 (2014).
9. Joe DeVoe, "A Restrictive Covenant Used to Block a Duplex Also Barred Non-white People from Buying or Renting It," *ARLnow*, September 8, 2023.
10. Existing HOA deed restrictions can be treated as though they have been renewed on schedule every 30 years. An HOA deed restriction first recorded in 1983 would thus be valid until 2044, at which point residents could renew it or allow it to lapse.
11. We chose a 30-year period to align with the duration of a typical home mortgage (30 years) and the depreciation period for residential property (27.5 years). A different period—perhaps 25 or 50 years—might be equally wise. Obviously, conditions will change at different rates in different places, so there is no period that can perfectly balance the benefits and costs of deed restrictions.
12. Emily Hamilton, "How DC Densified," *Works in Progress*, May 23, 2023.