THE CHANGING LANDSCAPE OF PROFFERS

I. THE CONSTITUTIONAL LIMITS ON PROFFERS AND OTHER EXACTIONS

An exaction is an appropriation of private property for public use in exchange for a development approval; *e.g.*, a subdivision approval conditioned upon dedication of right of way or road construction for a road not internal to the subdivision. An exaction, at common law, was a felony.

A. Federal Constitution Limitations

First, there was *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) where the Court held that the governmental authority's imposition of an ingress/egress easement as a condition to the expansion of a beachfront house was held to be an unconstitutional taking of a property right that had no "essential nexus" to the visual restriction on the beach vista from a nearby public highway caused by the expansion of the Nollan's house authorized by the permit.

Then came *Dolan v. City of Tigard*, 512 U.S. 377 (1994). The U.S. Supreme Court ruled that in order for an exaction (an appropriation of private property for public use in exchange for a development approval; e.g., subdivision conditions requiring right of way dedication or road construction) to avoid the characterization of "taking," the exaction had to be "roughly proportional" to the impact of the development approval. The roughly proportional standard requires that a locality make an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* 2317-2319. Fixed proffer schedules would seem to be inconsistent with an "individualized determination of the extent and impact of a proposed development."

B. Virginia Constitutional Limitations

Virginia's constitutional limitations on permissible exactions are far more limiting on the powers of local government than *Nollan* and *Dolan*.

In *James City County v. Rowe*, 216 Va. 128 (1975), the Virginia Supreme Court held that it was a violation of the equal protection clause for a local government to condition a landowner's use of their property upon dedication or construction of a public improvement when the need for the dedication or improvement is not substantially generated by the proposed development.

Then, in *Cupp v. Board of Supervisors of Fairfax County,* 227 Va. 580 (1984), the Court held that, on the same grounds as *Rowe*, a local government may not condition approval of a special exception upon dedication or construction of a public improvement when the

need for the dedication or improvement is not substantially generated by the proposed development. The facts are important here, the exactions which were invalidated were the dedication and construction of a third lane on eastbound Route 7 and a deceleration and acceleration taper on either side of the applicant's existing nursery entrance onto Route 7.

Also, though not directed specifically at proffers but related, the Virginia Supreme Court has also held, in *Hylton v. Prince William County*, 220 Va. 435 (1979), that a local government may not condition subdivision plan approval upon an improvement to an existing public road; even where it can be shown that the need for such improvement is substantially generated by the proposed development. It should be obvious, then, that the local government may only require a subdivider to build the roads, sewer and water lines, storm drainage facilities, storm management facilities and other improvements when the improvements are required by the proposed development. *See also Alexandria v. Texas Co.*, 172 Va. 209 (1939)

Then, Virginia Supreme Court ruled that where the only basis for the rejection by a locality of a proposed residential rezoning was refusal by the developer to make a cash proffer in an amount suggested by the locality to cover the cost of school related capital improvements in a schedule incorporated into its Comprehensive Plan, the proffers were not voluntary and the denial was therefore invalid. *Board of Supervisors of Powhatan County v. Reed's Landing Corp.*, 250 Va. 397 (1995).

But even if the lack of full cash proffer "played a key factor" in the denial of a rezoning, if there are other valid reasons for the denial, the denial will be upheld. *Gregory v. Board of Supervisors of Chesterfield County*, 257 Va. 530 (1999).

Thus, the map was clearly laid out for the players, proffers schedules were invalid in Virginia but so long as the local government could come up with any other "fairly debatable" excuse for denying the legislative act, the denials would not be overturned. So applicants proffered to pay the unconstitutional exactions.

II. DILLON'S RULE

Any discussion of local governmental actions in Virginia must include a review of Dillon's Rule (John Forrest Dillon, *Commentaries on the Law of Municipal Corporations*, 4th ed. (Boston: Little Brown and Company, 1890), p. 145) which is used by Virginia courts to construe strictly any ambiguities in enabling authority against localities.

Dillon's Rule is quite vigorous in Virginia. During preparation of the current Constitution of Virginia in 1969 and 1970, consideration was given to repudiating

Dillon's Rule, *See Report to Commission on Constitutional Revision* (1969) 228-83, but such provisions were not incorporated in the new Constitution and the Virginia Supreme Court has interpreted that failure as a reaffirmation of the rule in Virginia. See *Commonwealth v. County Board of Arlington*, 217 Va. 558, 574 (1977).

Dillon's Rule was first recognized by the Virginia Supreme Court in *City of Winchester v. Redmond*, 93 Va. 711 (1896).

The rule is set forth most fully in *Commonwealth v. County Board of Arlington*, 217 Va. at 574, which stated that localities have only those powers (1) expressly granted, (2) necessarily or fairly implied from express grants, and (3) those that are essential and indispensable. Any doubt about the existence of authority is construed against the locality. *See also Hylton Enterprises v. Board of Supervisors of Prince William County*, 220 Va. 435 (1979), and *Lawless v. County of Chesterfield*, 21 Va. App. 495, 502 (1995) where the Virginia Court of Appeals elaborates on the rule as applied to a local land use regulation and states that "We will not imply a grant of power from the legislature's silence."

The force of Dillon's Rule in Virginia is evident from the strictness with which the Virginia Supreme Court has applied the rule. Any locality is a "mere administrative subdivision" of the Commonwealth. *Lynchburg v. Amherst*, 115 Va. 600 (1913). Unless the legislature has provided an express grant of the power in question, the Court rarely upholds local authority to exercise that power. *See, e.g., County Bd. of Arlington County v. Brown*, 229 Va. 341 (1985) (authority to lease "unused" county land does not allow a locality to lease a parking lot to a developer); *Tabler v. Board of Supervisors*, 221 Va. 200 (1980) (authority to regulate trash does not allow a locality to require deposits on disposable containers); *Board of Supervisors of Fairfax County v. Horne*, 216 Va. 113 (1975) (authority to require subdivision plat approval does not allow locality to suspend acceptance of applications for such approval).

This principle was re-emphasized in the *Glazebrook v. Board of Supervisors of Spotsylvania County*, 266 Va. 550 (2003) and *Gas Mart v. Board of Supervisors*, 269 Va. 334 (2005) opinions, where our Supreme Court ruled that the failure to comply with the notice requirements of §15.2-2204 deprived the local government of the power to amend its zoning ordinance. Thus, the amendments were rendered void *ab initio*.

A. Implied Powers

The Supreme Court of Virginia will usually imply local power only when an expressly granted power would be rendered ineffective without such an implication. *See, e.g., City of Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 243 (1997) (the authority to regulate existing structures associated with non-conforming uses must be implied from the authority to prohibit the construction of new structures in support of the non-conforming use otherwise the purpose behind granting the authority to regulate existing structures would be thwarted); *Gordon v. Board of Supervisors of Fairfax County*, 207 Va. 827 (1967) (a locality's authority to create a commission to develop an airport implies the power to lend money to that commission because otherwise the commission could not be effective); *Light v. City of Danville*, 168 Va. 181 (1937) (locality's authority to build a dam implies the power to condemn land for that purpose).

The Court looks to the purpose and objective of statutes in considering whether authority is necessarily implied from powers expressly granted. See *Gordon v. Board of Supervisors of Fairfax County*, 207 Va. 827 (1967) and *Pony Farm Associates, LLP v. City of Richmond*, 62 Va. Cir. 386 (2003).

A statute must be given a rational interpretation consistent with its purposes and not one which will substantially defeat its objectives. *Mayor v. Industrial Dev. Auth.*, 221 Va. 865 (1981).

If there is a reasonable doubt about whether legislative power exists, the doubt must be resolved against the existence of the asserted authority. *City of Richmond v. Confrere Club of Richmond*, 239 Va. 77 (1990). However, when an enabling statute is clear and unambiguous, its intent is determined from the plain meaning of the words used and, in that event, neither rules of construction nor extrinsic evidence may be employed. *Id.*; *Marsh v. City of Richmond*, 234 Va. 4, 11 (1987).

Consistent with the necessity to uphold legislative intent, the doctrine of implied powers should never be applied to create a power that does not exist or to expand an existing power beyond rational limits. The test in application of the doctrine is always reasonableness, in which concern for what is necessary to promote the public interest is a key element. *See Id.*; *National Linen Service v. City of Norfolk*, 196 Va. 277, 281 (1954).

B. A Corollary to Dillon's Rule

A corollary to Dillon's Rule is codified in *Va. Code* § 1-13.17 which prohibits the enactment of ordinances that are inconsistent with the laws of the United States or the Commonwealth. *Blanton v. Amelia County, et al*, 261 Va. 55 (2001).

III. KOONTZ V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, 568 U.S. __, 133 S. Ct. 2586 (2013)

There had been a school of thought that argued that government exactions which required only the payment of money instead of the dedication of land were not subject to *Nollan* and *Dolan* analysis because such governmental actions did not constitute a taking of real property and, thus, were not covered by the Fifth Amendment to the U.S. Constitution.

That theory was rejected by the five justices of the majority in *Koontz*. Justice Alito wrote that the cost to improve wetlands on another's property, as the District had required of Koontz, was a burden on his land and therefore was a takings claim and subject to *Nollan* and *Dolan* review.

This holding implicated the Virginia proffer system as being ripe for *Nollan-Dolan* anaylsis though some would suggest that *Reeds Landing* had already held the cash proffer system to be unconstitutional.

Prompted by the *Koontz* holding, Del. Morris introduced HB 1084 during the 2014 General Assembly session which passed and was signed into law by Governor McAuliffe as Chapter 671 of the Acts of 2014.

IV. CHAPTER 671 OF THE 2014 ACTS OF ASSEMBLY:

1. That the Code of Virginia is amended by adding a section numbered 15.2-2208.1 as follows:

§ 15.2-2208.1. Damages for unconstitutional grant or denial by locality of certain permits and approvals.

A. Notwithstanding any other provision of law, general or special, any applicant aggrieved by the grant or denial by a locality of any approval or permit, however described or delineated, including a special exception, special use permit,

conditional use permit, rezoning, site plan, plan of development, and subdivision plan, where such grant included, or denial was based upon, an unconstitutional condition pursuant to the United States Constitution or the Constitution of Virginia, shall be entitled to an award of compensatory damages and to an order remanding the matter to the locality with a direction to grant or issue such permits or approvals without the unconstitutional condition and may be entitled to reasonable attorney fees and court costs.

B. In any proceeding, once an unconstitutional condition has been proven by the aggrieved applicant to have been a factor in the grant or denial of the approval or permit, the court shall presume, absent clear and convincing evidence to the contrary, that such applicant's acceptance of or refusal to accept the unconstitutional condition was the controlling basis for such impermissible grant or denial provided only that the applicant objected to the condition in writing prior to such grant or denial.

C. Any action brought pursuant to this section shall be filed with the circuit court having jurisdiction of the land affected or the greater part thereof, and the court shall hear and determine the case as soon as practical, provided that such action is filed within the time limit set forth in subsection C or D of § 15.2-2259, subsection D or E of § 15.2-2260, or subsection F of § 15.2-2285, as may be applicable.

2. That the provisions of this act shall apply only to approvals or permits that are granted or denied on or after July 1, 2014.

Emphasis added.

So when the staff of a locality suggests that the applicant for any land use approval commit to the dedication or construction of a public improvement when the need for the dedication or improvement is not substantially generated by the proposed development as a condition of that approval, or in the case of a subdivision or site plan, seeking the improvement to an existing public right of way, counsel for the applicant should be sending a letter to the staff invoking §15.2-2208.1.

It would also be advisable for local builder associations to be sending those localities that still have adopted proffer schedules a similar letter regarding repeal of those schedules.

V. A LOCAL GOVERNMENT ABANDONS PROFFERS!

Hanover County voted in November 2012 to eliminate its $19,503 cash proffers per house requirement. *Richmond Times Dispatch* 11/29/2013. Hanover Supervisors who supported the repeal characterized proffers as an unfair tax paid by only some home buyers and were concerned over the adverse impact on housing affordability.

Chesterfield County also looked at eliminating its $18,966 proffer per new home in early 2013 but chose not to increase the amount to $21,261 as staff recommended. *Village News* July 3, 2014. The failure to change position has prompted one applicant to withdraw. *Virginia Real Estate Blog* 2/27/2014. With the City of Richmond and Henrico and Hanover Counties not collecting proffers and the change in the State Code, how much longer will Chesterfield hold out?

In 2012, the Chesapeake Planning Commission recommended that City suspend collecting proffers until the City achieved a 2% growth rate. *Virginia Real Estate Blog,* November 19, 2012.

Spotsylvania County has had an ongoing controversy regarding the Summerfield project's proffers. *Free Lance Star*, October 29, 2013. There have also been complaints about the application of the County's proffer policy to less than all rezonings. *Free Lance Star*, June 19, 2014.

Meanwhile, Stafford County's Finance, Audit and Budget Committee recently recommended that its cash proffers be set at $55,540. *Free Lance Star*, June 21, 2014.

VI. ANOTHER CHANGE TO LAND USE LAW IN VIRGINIA

Chapter 393 of the 2014 Acts of Assembly amends §15.2-2260 to exempt subdivisions of 50 or fewer lots from mandatory preliminary plan review and approval prior to submission of a final record plat. The State Code never mandated preliminary plan approval prior to final plat submission. It had merely authorized preliminary plan review. Many localities had made preliminary plant approval a prerequisite to final plan submission. The General Assembly corrected this practice for smaller subdivisions.