

ATTACHMENT: PUBLIC COMMENT – JUNE 14

From: Charlie Payne [<mailto:cpayne@hirschlerlaw.com>]
Sent: Tuesday, June 14, 2022 2:10 PM
To: Charles R. Johnston <crjohnston@fredericksburgva.gov>
Cc: Timothy J. Baroody <tjbaroody@fredericksburgva.gov>; 'daviddurham.fxbgpc@gmail.com' <daviddurham.fxbgpc@gmail.com>; Mary Katherine, Greenlaw <mkgreenlaw@fredericksburgva.gov>
Subject: [EXTERNAL] RE: City Proffer Changes
Importance: High

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Chuck,

I hope this finds you well. Just circling back on this. We sent Kathleen some questions and research regarding the city's ability to create cash guidelines for special use permit application impacts. I believe she is reviewing those and I will check in with her as to her thoughts and comments.

The following are additional comments from our consultants who typically handle my rezoning proffer analyzes:

- The Tischler Bise study does not address two requirements of the proffer statute. As cited below, Section C.2 of the proffer statute requires that proffers address a need for improvements in excess of existing capacity. Additionally, new development must receive a direct and material benefit from a voluntary and reasonable proffer.
- If an offsite proffer, it must address an impact to an offsite public facility, such that (i) 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 (ii) 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.
- The Tischler Bise study notes that there is capacity in existing schools. It states that there is no capacity for fire and EMS facilities, but it does not document this in any way. Fire and EMS capacity is normally calculated based on time to get the property served and a maximum number of calls appropriate for the facility. There is no analysis to determine either of these factors for existing or future facilities.
- In order to meet the requirements of the proffer statute addressing existing capacity and direct benefit, it is necessary to evaluate the need for facilities specifically for each

project. One project maybe located in a school attendance area where the school has excess capacity or a fire station may be able to adequately serve the new development. In this case, it would be necessary to take into consideration the excess capacity. It is also necessary to take into consideration whether future improvements will serve this new development to conclude the project will receive a direct and material benefit from the new improvements.

- To the extent the Tischler Bise study is understood as a general framework and not a required proffer for every new residential development, I think it serves a useful purpose in providing information that may be used to estimate proffers. It is necessary, however, to understand that these calculations must be made specifically for each project.
- I would raise a few questions about the Tischler Bise methodology whereby it concludes that a townhouse with three or more bedrooms will generate fewer students than a townhouse with two bedrooms. The population per unit data in the study shows that there will be more residents on average in townhouses with three or more bedrooms and two bedrooms. This raises the question regarding the estimate that there will be more students in townhomes with two or fewer bedrooms than three or more bedrooms. Surveys are expected to provide results that will vary around a mean. Accordingly, survey results should not be taken as absolute values. It is important to apply good judgement to the use of data from a survey. In this case, I believe better judgment would assume the same student generation factor for all townhomes.
- The Tischler Bise study identifies a future middle school and additional capacity to the high school. No additional capacity for elementary schools is noted. If no additional capacity for elementary schools is proposed, it would not be possible to conclude the projects would receive a direct and material benefit from the portion of the proffer calculated to provide elementary school facilities.

Please let me know if you require any additional thoughts or comments. We appreciate your time and attention to this matter.

Respectfully submitted,

From: Charlie Payne <cpayne@hirschlerlaw.com>

Sent: Friday, May 27, 2022 2:17 PM

To: 'Charles R. Johnston' <crjohnston@fredericksburgva.gov>

Cc: Timothy J. Baroody <tjbaroody@fredericksburgva.gov>; 'daviddurham.fxbgpc@gmail.com' <daviddurham.fxbgpc@gmail.com>; 'mkgreenlaw@fredericksburgva.gov' <mkgreenlaw@fredericksburgva.gov>

Subject: RE: City Proffer Changes

Thank you Chuck. We are reviewing the analysis in more detail. I'm not completely clear on the analytical process the consultant is using, but will figure out before formally responding. We also need to better understand what the city may be requiring under a special use permit application process vs. a rezoning. No need on this email to drill into the legal differences.

Typically, I provide with all projects a fiscal impact analysis that addresses not only operating costs but also public facility prorata analysis. Most residential projects today, with exceptions, satisfy applicable operating costs requirements (especially with assessments so high), but there is usually a need to contribute (prorata impact) towards public facilities, like schools and public safety buildings. However, mixed use projects, again depending on the residential and commercial uses, can generate annual revenues that cover both prorata capital costs and operating expenditures. There are also projects that may only be residential that are necessary to support commercial developments. There are also projects that provide in kind public improvements, like utility improvements or roads or dedications of real estate, that are beneficial to the city.

Again, my point is there are many ways to generate positive benefits for the city without a rigid proffer methodology, and we should further be very careful not to create a perceived disincentive for investment. It could cause serious harm to our near term needs.

The city also has other resources it can look to for helpful support (e.g. FRA) regarding the benefits of new growth and development. Also remember, the surrounding jurisdictions are starting to understand they need better synergies and denser population areas in order to attract commercial and employment investment. Thus, these jurisdictions are becoming much more competitive in developing greater "urbanism" in their respective communities. The city use to have a significant edge in this regard, but that's changing.

I think we can find common ground. I am simply suggesting not to get to far ahead of the investment community, and would think their input is vital to the city's future goals.

Have a nice weekend.

From: Charles R. Johnston <crjohnston@fredericksburgva.gov>

Sent: Friday, May 27, 2022 11:17 AM

To: Charlie Payne <cpayne@hirschlerlaw.com>

Cc: Timothy J. Baroody <tjbaroody@fredericksburgva.gov>; 'daviddurham.fxbgpc@gmail.com' <daviddurham.fxbgpc@gmail.com>; Mary K. Greenlaw (marykatherine.greenlaw@thalhimer.com) <marykatherine.greenlaw@thalhimer.com>

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Charlie

I appreciate your comments.

The PC will be continuing its discussion on the topic at a work session on June 8, with action on a recommendation on June 22.

I encourage you (and anyone else) to submit comments for the PC's consideration.

Just to be clear, Council will be considering accepting the proffer formula developed by our consultants, TischlerBise, as a reference point in proffer discussions.

Members of the PC believe that there should a written statement that anticipates reduction/elimination of proffers derived from the formula if other City policies are achieved, such as: historic preservation, affordable housing, environmental sensitivity, etc.

I acknowledge that adopting this proffer formal could be perceived as a deterrent to development. That is the ying.yang of this topic.

The intent is not to adopt the formulas as an 'ordinance' requirement, but as a guide for discussion. As you know, tax revenues for a project cover the operation costs of new facilities. Addressing the cost of additional capacity needed by a development has been acknowledged by the General Assembly as a reasonable expectation rather than putting that cost on current tax payers.

Glad to receive your comments and discuss further.
Chuck

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From: Charlie Payne [<mailto:cpayne@hirschlerlaw.com>]
Sent: Friday, May 27, 2022 9:32 AM
To: Charles R. Johnston <crjohnston@fredericksburgva.gov>
Cc: Timothy J. Baroody <tjbaroody@fredericksburgva.gov>; 'daviddurham.fxbgpc@gmail.com' <daviddurham.fxbgpc@gmail.com>; Mary K. Greenlaw (marykatherine.greenlaw@thalhimer.com) <marykatherine.greenlaw@thalhimer.com>
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Chuck,

I hope this finds you well. In reviewing the proposed capital impacts, cash policy for new development (links below), I am concerned whether the policy, well intended, may have an adverse impact on new development and investment in the City. I believe the development community will perceive this proposed policy as affront to deter new development within the city, especially new residential development that I believe the city does need, including within areas of the city requiring near term redevelopment.

Also, in all of the jurisdictions in which I practice, I have never experienced, as a special use permit condition, that an applicant is required (e.g. not voluntarily proffered) to make cash payments for industrial and commercial projects. Certainly, for rezoning projects cash or in kind proffers may be volunteered by the applicant, but never as a condition of a special use permit.

The policy also does not appear to take into account the overall value of a project. Meaning, if a project (prior to the application of the proffer policy) is reasonably anticipated to generate positive net tax revenues, including the full mitigation of its anticipated impacts, then why would this project be required to make cash payments?

Please also note that once this policy is established, it becomes a standard (whether legal or political) for the requirement of certain cash proffers/payments. Deviating from the standard may very well prove difficult. I foresee this being a significant issue for future investors and elected officials.

I have also found that zoning works best where the negotiation environment is most flexible. The development community is well aware of the impacts a project may cause and is willing to mitigate those impacts; however many times what is lost in the equation is the costs already incurred by prior developments that failed to pay their prorata share of those impacts. Hence, the new projects pay the disproportionate penalty.

I'm hoping the city avoids this circumstance and encourages an environment whereby reasonable negotiation may continue to occur.

I also encourage the city to reach out to the development community and seeks its input on this analysis before it is finalized.

<https://www.fredericksburgva.gov/AgendaCenter/ViewFile/Item/15336?fileID=12428>

<https://www.fredericksburgva.gov/AgendaCenter/ViewFile/Item/15336?fileID=12426>

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