Land Use Politics Southern Style: The Case of Cash Proffers in Virginia

by

Shannon Ashley McKay

Submitted to the Department of Urban Studies and Planning
on May 30, 2012 in partial fulfillment of the
requirements for the degree of
Doctor of Philosophy in Urban and Regional Planning

ABSTRACT

The linkage between the political dynamics at the state level and actual implementation of land use regulations at the local level is the focus of this dissertation. This focus is explored through the genesis and efficacy of cash proffers, a land use regulatory tool in Virginia. Using a mixed methods approach, I answer research questions on how and why cash proffers came into existence; are implemented; and affect housing development.

The importance of this dissertation topic stems from the uniqueness of the case. Virginia is the only state in the United States using cash proffers on such a large-scale as a growth management tool. It is important to understand whether this tool has applicability beyond Virginia. Further, the “politics of land use” are complicated with important consequences for society. We need to understand the role of state level interest groups in the efficacy of local land use regulations, as well as, how the dynamics underlying these regulations at the local level feedback into the statewide debate on growth management and land use. Finally, the costs of servicing new development with public infrastructure have rapidly increased over time. Localities are in search of new revenue sources to cover these infrastructure costs. This dissertation addresses whether cash proffers can be considered as one such source.

Through historical analysis of archival materials as well as interviews, I find that cash proffers were an unintended practice resulting from the implementation of state-approved conditional zoning at the local level political process. Data collected through a self-conducted statewide survey of Virginia counties plus state mandated revenue reports shows counties trying to add more certainty to their implementation of cash proffers in the face of the tool’s high revenue variability. Multivariate regression results for a short panel of counties suggest that a county’s cash proffer activity is negatively associated with new housing construction.

Thesis Supervisor: Frank S. Levy
Title: Daniel Rose Professor of Urban Economics
Land Use Politics Southern Style: The Case of Cash Proffers in Virginia

by

Shannon Ashley McKay

Dissertation Committee:

Frank S. Levy, Daniel Rose Professor of Urban Economics
Department of Urban Studies and Planning, MIT

Eran Ben-Joseph, Professor of Landscape Architecture and Urban Planning
Department of Urban Studies and Planning, MIT

Lynn M. Fisher, Associate Professor
Kenan-Flagler Business School, University of North Carolina at Chapel Hill
# Table of Contents

Chapter 1: Historical Overview ................................................................. 10
Implementing Cash Proffers .................................................................... 11
Significance of the Problem and Justification for Investigating It .......... 12
Methods .................................................................................................. 14
Dissertation Structure ........................................................................... 15

Chapter 2: Land Use Regulations ............................................................ 20
Infrastructure Financing ......................................................................... 30
Political Economy .................................................................................. 43

Chapter 3: Zoning Without a Plan ............................................................ 54
Trying to Create a Master Plan ............................................................... 55
Attraction of Sewer Systems .................................................................. 56
Influence of the Black Robes .................................................................. 59
Development Forces at Work .................................................................. 61
Trying to Buy County Certainty .............................................................. 63
The Search for Solutions to Fix a Stressed System .............................. 65
Gaining Zoning Flexibility and Development Certainty ...................... 66
Foreshadowing the Evolution to Cash Proffers ...................................... 68
Seeking State Approval .......................................................................... 69

Chapter 4: Theoretical Foundations .......................................................... 73
Hypotheses ............................................................................................ 77
Methodology ........................................................................................... 77
Data and Evidence .................................................................................. 80
Historical Overview .............................................................................. 81
Conclusion .............................................................................................. 83

Chapter 5: Issue Context and Emergence ................................................ 91
Agenda Setting/Alternative Selection/Enactment ................................. 97
Implementation ...................................................................................... 114
Conclusion ............................................................................................ 118
<table>
<thead>
<tr>
<th>Chapter 6</th>
<th>Issue Context and Emergence</th>
<th>Agenda Setting/Alternative Selection/Enactment</th>
<th>Implementation</th>
<th>Conclusion</th>
<th>119</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>125</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>147</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>156</td>
</tr>
<tr>
<td>Chapter 7</td>
<td>Issue Context and Emergence</td>
<td>Agenda Setting/Alternative Selection/Enactment</td>
<td>Implementation</td>
<td>Conclusion</td>
<td>157</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>162</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>183</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>191</td>
</tr>
<tr>
<td>Chapter 8</td>
<td>Issue Context and Emergence</td>
<td>Agenda Setting/Alternative Selection/Enactment</td>
<td>Implementation</td>
<td>Conclusion</td>
<td>193</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>198</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>244</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>249</td>
</tr>
<tr>
<td>Chapter 9</td>
<td>Methodology and Data Collection</td>
<td>Who is Accepting Cash Proffers</td>
<td>How Cash Proffers are Administered</td>
<td>How Cash Proffers are Used</td>
<td>Conclusion</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>252</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>254</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>262</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>267</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>275</td>
</tr>
<tr>
<td>Chapter 10</td>
<td>Literature Review</td>
<td>Model</td>
<td>Dataset</td>
<td>Regression Results</td>
<td>Alternate Level of Analysis</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>278</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>281</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>285</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>292</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>297</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>299</td>
</tr>
<tr>
<td>Chapter 11</td>
<td>Policy Implications</td>
<td>Future Research</td>
<td>References</td>
<td>Appendix</td>
<td>Acknowledgements</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>303</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>306</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>311</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>329</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>353</td>
</tr>
</tbody>
</table>
CHAPTER 1

This dissertation is about the development, implementation, and influence of cash proffers. Cash proffer is “a voluntary offer of money, submitted as part of rezoning application to offset the impact of a particular development.”¹ The concept of a cash proffer is universally accepted. The right for local governments to actually collect them, however, has been a source of great debate. It has been hailed as “one of the most significant growth management tools” in Virginia, as well as, “the greatest legal fix in Virginia history.”² Growth management is a balance between the market’s economic power (industry, trade associations, land development, designers, and financial institutions) and the state’s government power (local government, regional government, state government, federal government, and executive, legislative and judicial branches) (Randolph 2004). Civil society’s people power (the community, citizens, neighborhood groups, environmental organizations, land trusts) monitors the balance between the two sides (Randolph 2004).

Cash proffers are part of the land use regulatory framework. Land use regulations have far-reaching impacts. For example, the decision to zone part of a community as large-lot residential rather than high-density residential has ramifications on the environment and its natural resources, public infrastructure and services, traffic flow patterns, community demographics, and economic growth. The impacts extend well beyond the borders of that single jurisdiction because labor and capital can be footloose. A land use regulation like zoning is characterized as “the product of a political process, and it serves the interests of those who control that process” (Fischel 2000: 404). A potential cost of regulation may be to restrict housing supply and supply elasticity which may translate into higher housing prices and more volatile housing markets (Glaeser, Gyourko, and Saks 2005). This cost is balanced against the benefit of coordinated development and growth. It is important to understand what or who determines the nature of land use regulations with their vast reach and positive and negative implications.

The power to impose land use regulations is rooted in the police power granted to a locality by the state where they are given the responsibility “to guard the health, safety, morals, and general welfare of the public” (Johnson 1997: 35). For the planning field, the implementation of land use regulations is justified for three major reasons: “maintaining residential property values, shaping a compact urban form, and promoting efficient public service provision” (Carruthers 2002: 396). When former U.S. House Speaker “Tip” O’Neill coined the phrase, “All politics are local,” he could have been describing the dominant approach taken to modeling the politics of land use

regulation. The “politics of land use” literature has typically focused on the local level political models of land use regulations ignoring the state level dynamic.\(^3\)

This dissertation takes the step of examining the linkage between the political dynamics at the state level and actual implementation of land use regulations at the local level. I trace the evolution of state statutes authorizing land use regulations and the actions of interest groups at the state level over time. I focus on the interplay between local government decision makers, other interest groups like the homebuilding industry, and state legislators. I look at how the state level debate impacts the ways in which a locality implements land use regulations because the “politics of land use” are complicated with important societal consequences.

My dissertation is built around three major research questions. First, how and why did the cash proffer tool come into existence? This question fits into the politics of land use regulations component of this dissertation. Second, how are cash proffers implemented by localities? Finally, how do cash proffers affect housing development in localities? The last two research questions present different aspects of the implementation investigation. Together, these questions contribute to our understanding of the role of state level interest groups in the efficacy of local land use regulations, as well as, how the dynamics underlying these regulations at the local level feedback into the statewide debate on growth management and land use.

HISTORICAL OVERVIEW

In 1973, the General Assembly of Virginia passed a statute authorizing conditional zoning for counties with an urban executive form of government. At that time and still today, there is only one county that has this governmental form -- Fairfax County. Under a conditional zoning system, a developer or landowner makes an application for a zoning change to a parcel (rezoning) and may volunteer conditions (proffers) to the locality that they believe will lessen the impact of the zoning change. These conditions can consist of property, off-site and/or on-site improvements (roads, aesthetics, libraries, parks), as well as, cash payments. Developers supported the legislation because they “saw this new zoning as a way to make county leaders ‘offers they couldn’t refuse’” and thereby facilitate new development.\(^4\) The original intent of the statute was a desire to increase the flexibility in the zoning system with the focus on design elements as opposed to financial concerns. However, the legislation only stated that the conditions needed to be “reasonable” rather than providing a specific list of what was considered an acceptable condition to be volunteered by rezoning applicants. Absent clearly defined


boundaries on what could be proffered, proffers evolved from the traditional on-site improvements, to off-site improvements, and then to cash payments.

The passage of the 1973 legislation was a joint effort between localities and the development community. The introduction of cash proffers, however, started a pitched debate between the two sides over the eventual expansion of conditional zoning system and cash proffers. As a result, Virginia has three different statutes enabling cash proffers. Each has its own eligibility requirements and conditions of use. Plus, there is one statewide statute allowing conditional zoning without cash proffers. This 1978 statute grants the power of conditional zoning to the entire state of Virginia, but does not allow localities to accept cash proffers as part of the rezoning application (localities authorized under the 1973 legislation and its amendments are not affected). Further, it imposes additional constraints on the conditions such as they need to be aligned with the comprehensive plan.

In 1989, the General Assembly authorized conditional zoning with the acceptance of cash proffers, but only to those localities with a certain rate of population change and the localities adjacent to them. Thus, the legislation officially tied the use of cash proffers to growth rates. It also imposed the requirement that the project being funded by cash proffers must be part of a locality’s capital improvement plan and that the rezoning must directly give rise for the need of cash proffers. Despite their differences, the multiple statutes are all based around the same principle – a cash proffer must be voluntarily offered by the developer. Over time, the development community has become less supportive of cash proffers as their use has expanded and the proposed amounts have increased. Despite their initial backing of cash proffers, the home building industry in 2008 lobbied state legislators to abolish the whole system of cash proffers.

A key question is whether fiscal concerns about growth are ideally linked to rezonings. For example, why not separate financial concerns completely from conditional zoning, i.e. eliminate cash proffers, and authorize the use of a different growth management tool whose focus is the raising of revenue like impact fees. The resulting system would allow conditional zoning to return to its origins. Conditional zoning would bring flexibility to a locality’s zoning code to accommodate growth. At the same time, it could shape the growth to fit the community’s vision. Meanwhile, a different tool would be used to generate revenues to pay for the public infrastructure needs of that growth.

**Implementing Cash Proffers**

Cash proffers can be used to fund a variety of purposes including law enforcement and traffic control; fire and rescue services; highways, streets, bridges, and sidewalks; education; parks and recreation; library; housing; transit; and mental health services. Cash proffers are generated as part of a conditional zoning system. Under a conditional zoning system, a developer or
landowner makes an application for a zoning change to a parcel (rezoning) and may volunteer conditions to the locality that they believe will lessen the impact of the zoning change. The proffers are made under the belief that the offering of these conditions will make a rezoning application more palatable for approval by a local governing body and their constituents. The conditions address or alleviate particular impacts of the rezoning.

Localities can set a maximum cash proffer level per building permit based on the net cost of development per public facility. This amount gives developers an idea of how much to volunteer as payment and more certainty in their share of the costs. At the other end of the spectrum, localities can negotiate on a case-by-case basis given what the developer originally proffers as the cash payment amount. It is important to stress that the offered conditions must be voluntary and that approval of the rezoning application cannot hinge on the proffers alone for legal reasons to be explored. From the beginning of its history, a question over the revenue raising effectiveness of cash proffers has existed. This questioning stems from its limited applicability to only rezonings.

The Virginia Chapter of the American Planning Association (VAPA) in its revised 2007 publication Managing Growth and Development in Virginia: A Review of Tools Available to Localities lists cash proffers in the section entitled, “Tools for Managing the Financial Impacts of Growth.” This categorization reinforces the idea that cash proffers in Virginia are a growth management tool. A widely-accepted definition of growth management is “those policies, plans, investments, incentives, and regulations to guide the type, amount, location, timing, and the cost of development to achieve a responsible balance between the protection of the natural environment and the development to support growth, a responsible fit between development and necessary infrastructure, and quality of life” (Randolph 2004: 39). The history of cash proffers illustrates the two-sided nature of growth management: regulation and financing.

**Significance of the Problem and Justification for Investigating It**

Cash proffers are one of the few tools given to Virginia localities to manage growth-related issues. This tool has become highly politicized and yet there has not been an official study of its effects. The Virginia General Assembly, the state’s legislative body, has for the past couple of years convened meetings on the status of cash proffers in the state, particularly whether they are being abused. Although no official report has been released on the issue, the abuse complaints arise from developers who see the cash proffer system as becoming one of extortion by local governments rather than voluntary offerings by developers. Yet at the same time, it continues to expand the number of localities that can qualify to accept cash proffers. So this study may help end the mixed messages. Furthermore, local governments in Virginia have fought for years about being able to use a variety of impact fees instead of cash proffers, but have been continually rebuffed. Lastly, the exploration of how cash proffers came to exist and implemented may offer
insight to other governments on how they can achieve successful passage of growth management tool legislation.

This case is particularly interesting because no other place has adopted such a tool – although cash proffers can be considered analogous to impact fees, they are nonetheless different. Cash proffers can only arise from a rezoning application rather than by-right development. Virginia is the only state with an explicit use of conditional zoning and cash proffers. A question to be answered is why other states have not followed Virginia’s lead. Is this a sign that Virginia is lagging behind the rest of the nation on the growth management movement or has it developed a unique solution that others need to be made aware of more? Second, the world is not static and one suspects that interest group politics might shift over time, so it is equally interesting to ask how or why the use of this tool has persisted. In addition, the implementation and effectiveness of regulatory tools is expected to change over time and in different contexts so that the corresponding impacts on growth, for example, may also change. The early history of proffers suggests that cash proffers were not initially intended to be a growth management tool at all (despite the claims to the contrary), but a tool designed to help developers win the ability to do new development.

In cases of the delegation of authority to local governments, Virginia follows the narrow construct of Dillon’s Rule as well as a corollary to it. The implication for localities is that they can only pass land use regulations that are expressly authorized by the passage of legislation by the Virginia General Assembly. Further, they face a reduction in the “flexibility with which local government can exercise its land use control powers, even though the societal context in which these powers are applied is in a state of a flux” (BeVier and Brion 1981: 22). Fischel (2007) contends that Dillon’s Rule is a moot point in today’s era of land use regulations. His argument is if a state court does strike down a locality’s land use regulation on the basis of Dillon’s Rule, the locality will turn around and lobby their state legislators for the passage of a bill granting them the power to impose such a regulation. This dissertation will provide the opportunity to examine Fischel’s conclusion on the current relevance of Dillon’s Rule, as well as, the ability of local governments to overcome the power and influence of other interest groups in their pursuit of the authority to use specific land use regulatory tools.

The demand for public services is not declining yet sources of revenue for localities are limited. Local governments need to know the full consequences of choosing certain growth management tools as an additional revenue source. Variations of development exaction models have been implemented across the United States without a solid research foundation (theoretically or empirically) behind them to support their effectiveness. The academic literature does not include a study that focuses on the use of cash proffers. Most studies have focused on impact fees. So the completion of this dissertation would fill a gap in the growth management literature. This
dissertation makes empirical contributions in its modeling of the effect of cash proffer activity on housing development.

The concept of cash proffers in the case under study is also linked to the topic of conditional zoning which is a tool that has been largely ignored in the planning literature. It was popular in law journals from the mid-1960s to the early 1980s. This dissertation provides the opportunity to update the planning field on conditional zoning and what it offers the field. Authors have tended either to focus on the process to get a certain piece of legislation passed or the implementation of that newly passed law. In this dissertation, I show the complete political process from conception to implementation. Furthermore, the work will be of interest to those studying negotiation/bargaining because of the examination of the strategic behavior of those parties involved in the process of the development of the tool and then its implementation, particularly the interactions between developers and localities.

This research will contribute to the ‘politics of land use’ literature and inform the practice of policymakers and planners. By carefully documenting the life cycle of cash proffers, this investigation addresses the concern of Quigley and Rosenthal that the literature on land use regulations and its effects “tends not to recognize the complexity of local policymaking and regulatory behavior” (Quigley and Rosenthal 2005: 69-70). In addition, researchers like Fischel (2007) have typically focused on the local level political models of land use regulation ignoring the state level dynamic because of the inherent nature of land use planning as a local decision. Recently, as state governments have taken a bigger role in planning matters through state-wide growth management programs or state-level departments of planning, there has been a growing recognition that the state level is an important place where interest groups may impact the “politics of land use.” States like Massachusetts and New Jersey are just two example places where important laws with major impacts on land use, Chapter 40B (1969) and the Fair Housing Act (1985), respectively, were the outcomes of similar state level politics with important and dynamic ramifications for localities.

**Methods**

The three major research questions of my dissertation are examined through a mix of qualitative and quantitative methods. I answer the question of how did the current system of cash proffers come to exist by qualitatively establishing a history of the political process behind the creation and authorization of conditional zoning and thereby, cash proffers. I create this history through the use of archival and present day research materials including newspaper articles, legislative session journals, government reports, videotaped legislative sessions, legislation drafts, and signed legislation. My investigation is broken up chronologically into ten year increments representing each decade beginning with the 1970s and ending with the 2008 legislative session, so four time periods overall. For each time period, I look at the stages of policymaking – issue
context and emergence; agenda setting/alternative selection/enactment; and implementation. I focus upon the agents involved at each stage and ask a series of questions about these agents. For example, how did the agents influence the outcomes? Agents can range from local governments and the development community to state legislators and the judicial system. Each piece of legislation related to the conditional zoning statutes is examined regardless of whether the legislation was signed into law.

In regard to the question of how are cash proffers implemented, I use a more data-driven approach. Before looking at implementation, I need to know who was actually in a position to accept cash proffers. This data was not available, so I conducted a survey of all counties in the state to obtain the information. I take my survey data and supplement it with data collected annually by the state on cash proffer revenue collections and expenditures, as well as, other sources like the U.S. Census Bureau. I then perform statistical analysis tests (i.e. difference of means tests) comparing “Accepting” counties to “Non-Accepting” counties to determine what factors explain acceptance status. I use the same methods to look at different implementation approaches among “Accepting” counties.

A multivariate regression approach is used to analyze the question of how do cash proffers affect housing development. I model the natural log of the number of single-family building permits in a year as a function of the cash proffer revenue collected in a community in the prior year, the change in housing price index for the community in the prior year growth rate, and a community’s year of eligibility to accept cash proffers. I make specification changes to the basic model to take into account issues with endogeneity, omitted variable bias, and spatial dependence. I run the different specifications using a panel dataset of 82 counties for the 2001 to 2008 time period which is treated as a pooled cross-sectional dataset. The software package, STATA, is used to estimate these models.

**Dissertation Structure**

This dissertation has three major structural divisions with nine chapters split among them. The first division lays the foundation upon which this dissertation is built. Chapter 2 reviews the major themes in the literature on land use regulation and infrastructure finance essential to understanding the cash proffer and the factors that have influenced its design. There are three major sections to the literature review. The first section focuses on land use regulations from their origins in the United States to the development of conditional zoning. Cash proffers are linked to land use regulations since the ability to accept cash proffers is authorized through a locality’s zoning ordinance. Further, cash proffers can only be accepted through a rezoning application that is done via conditional zoning. Section 2 explores the topic of fiscal responsibility with regards to public works. A discussion of the growth management literature is found within this section. Cash proffers are a revenue raising tool through which unplanned
growth contributes to the cost of providing public infrastructure to the new development. The final section focuses on the political economy landscape in which land use regulations and infrastructure finance operate. This literature points out the importance of actors, context, language, and implementation. As Chapter 2 laid the literature foundation, Chapter 3 illustrates many of the tensions discussed in the literature as I lay out how Fairfax County, Virginia came to be in a position where it saw conditional zoning as a potential solution to its growth problems. The Fairfax County story is the foundation for the historical analysis presented in the dissertation’s second division. Together, Chapters 2 and 3 lay the groundwork for the investigation of the legislative history of conditional zoning and cash proffers with an emphasis on the importance of actors, context, language, and implementation of land use regulations.

The goal of the second division is to understand how and why Virginia arrived at its unique practice of allowing cash proffers in conjunction with conditional zoning. To answer these questions, I focus on the impact of interest groups on the conception and fruition of the law enabling cash proffers. This division consists of Chapters 4 through 8. Chapter 4 provides the theoretical framework and methodology behind this analysis, as well as, an executive summary of findings from the historical analysis. Each decade of historical analysis is discussed in a separate chapter, so the 1970s, 1980s, 1990s, and 2000-2008 are covered in Chapters 5, 6, 7, and 8, respectively. I find that conditional zoning was never envisioned as a growth management tool or a source of revenues. Second, the multiplicity of conditional zoning authorization statutes is a sign of power by both the development community and local governments. Third, cash proffers at the state level were an unintended practice resulting from implementation at the local level political process.

The third structural division in the dissertation is focused on an investigation of the implementation of cash proffers by local governments, as well as, any impact of cash proffers on growth in a locality. In Chapter 9, I look at which counties in Virginia are accepting cash proffers and whether there are any differences in how they implement their cash proffer systems. I find that “Accepting” counties are statistically different from “Non-Accepting” counties in terms of socioeconomic measures, building activity, geography and eligibility timing. Further, administrative hurdles do not explain the lack of acceptance among “Non-Accepting” counties. Over the years, counties have transitioned from a “case-by-case” approach to a more standardized policy approach. Regardless of the implementation approach, the annual revenue stream from cash proffer collections is highly variable. The impact of cash proffers on growth is investigated empirically in Chapter 10. Through multivariate regression analysis, I find that increases in cash proffer revenue collection per building permit are more likely negatively associated with new housing development activity. In addition, development activity in a given county is negatively affected by the new housing construction in its border counties.
In Chapter 11, I discuss the overall findings from this dissertation, as well as, potential future research questions in this arena. In addition, I present my thoughts on what a cash proffer system could look like if politics at any level was not a factor. Bibliography and Appendix sections can be found at the end of the dissertation.
This chapter offers a review of the literature relevant to understanding the general cash proffer concept. Cash proffers are an innovation in infrastructure finance that arose from problems on the ground in Virginia’s localities. Innovation in municipal infrastructure financing has been aimed at shifting financial responsibility for new development from the sole responsibility of local governments. However, a cash proffer can only result from a change in the regulation of a property’s land use. This change is an attempt to increase flexibility in a locality’s zoning ordinance in the face of growth. I argue then that cash proffers are a hybrid of infrastructure finance and land use regulation. Thus any discussion of the tool needs to involve both the land use regulation and infrastructure finance literatures in order to see where cash proffers fit into them. Further, land use regulation and infrastructure finance decisions are made in a political environment. The political economy literature can help to understand how politics may have shaped the cash proffer tool.

The first section of this chapter reviews land use regulations. It begins with a brief history of land use regulations in the United States followed by a critical perspective on their impacts. The focus then shifts to the dominant land use regulation in operation – zoning. Euclidean zoning, another name for traditional zoning in the United States, has not developed without its own faults, particularly, a lack of flexibility. Conditional zoning is introduced in this section for two reasons. First, it represents an evolutionary attempt to inject flexibility into zoning. Second, conditional zoning is the foundation for the concept of proffers.

The next section is an exploration of the topic of fiscal responsibility with regards to public works. I begin with a history of the financing of urban infrastructure in the United States with a particular focus on the tools that have been developed to generate revenues from the private sector, in particular, impact fees. I then discuss the legal perspective on shifting of costs from the public to the private sector. An exploration of the connection between land use planning and issues of fiscal responsibility ends this section through the topic of growth management which generally represents an attempt to combine two (or more) separate problems into a more comprehensive whole.

The last section of this chapter focuses on the political economy landscape in which land use regulations and infrastructure finance operate. The first subsection is a discussion of Dillon’s Rule, the 1911 legal opinion of Iowa Supreme Court Justice John F. Dillon. Justice Dillon concluded that local government powers are only those expressly granted by the state. A state government’s level of adherence to Dillon’s Rule may restrict the ability of local governments to self-legislate. This means that the type of land use regulations and financing tools available to localities may be limited. The last subsection explores the importance of land use politics for
understanding the legislative process through which regulation occurs. Typically, the focus is on how regulations are developed at the local level. I will demonstrate that the state level process is just as important. Given the influence of Dillon’s Rule in a state, as well as, efforts to think more broadly about growth issues, the potential exists for its importance to grow larger. Land use issues are likely to be controversial and the power to decide them resides in the political process. While the political process, itself, matters, there are other contextual factors that play a role, too.

**Land Use Regulations**

*Introduction*

Land use regulations are principally an attempt to control nuisance and ensure compatibility between land uses. In trying to accomplish these aims, they have far-reaching impacts. For example, the decision to zone part of a community as large-lot residential rather than high-density residential has ramifications on the environment and its natural resources, public infrastructure and services, traffic flow patterns, community demographics, as well as, economic growth. The impacts extend well beyond the borders of that single jurisdiction because labor and capital can be footloose. A potential cost of regulation may be to restrict housing supply and supply elasticity which may translate into higher housing prices and more volatile housing markets (Glaeser, Gyourko, and Saks 2005). Given the vastness of their reach with the possibility of positive and negative implications, it is important to understand who or what determines the nature of land use regulations. Typically, in their regulation of land, public entities have focused on the type, density, and aesthetics of a use, as well as, how it relates to a community’s cultural and social values (Salsich 1998). Over time, however, striking a balance between flexibility and rigidity; uniformity and individualism; certainty and risk are the evolutionary hallmarks of American land use regulations. In this section, I explore the development of land use regulations in the United States.

While many presume that government land use regulations are a product of the twentieth century, they have existed in the United States since the colonial times. The primary change over time has been the comprehensiveness of their scope in terms of the level and extent of regulations. Originally, regulations focused on protecting a person’s property from others such as building codes detailing the materials that a structure could be built with in order to prevent a city-wide fire that might occur if every building were still made of wood instead of brick and stone. The protection of private property was grounded in the concept of nuisance from the United States’ English common law heritage.

A “nuisance” is what we would today call a negative externality. The nuisance doctrine forced private property owners to more carefully consider how their property could be used. Nolon and Salkin conclude, “[h]istorically, the powerful right of individuals to use their land under the
common law was balanced to a degree by the doctrine of nuisance, which established that private landowners may not use their property in a way that is injurious to property held by others” (Nolon and Salkin 2006: 14-15). Nuisances included “the effects of smoke, dust, noise, odors, heat, or other discernable effects that interfered with or diminished the normal uses of nearby property” (Nolon et al 2006: 15). These disputes were handled privately, between the property owners themselves, without government regulatory interference. Property owners could voluntarily choose to take their dispute to the court system. Cases would result in injunctions or damage awards if substantial harm could be clearly demonstrated (Nolon et al 2006). Over time, local governments, anticipated well-known problems and established nuisance rules to separate uses that would typically become injurious to other parties. The public hand that in 1672 regulated building materials in Boston grew into a series of 1908 ordinances in Los Angeles which established seven industrial districts where mills and factories were allowed and three districts for the sole purpose of being home to residences (Garvin 2002).

Within the common law heritage, individuals also enacted preemptive private controls over land use. They did not have to wait for a nuisance to develop before taking action. Individuals, as well as, developers could engage in private land use planning (and can still today). Property law has four recognized types of private land use controls – easements, real covenants, equitable servitude, and common interest communities like condominiums or home owner associations (Sprankling 2007). These tools are applicable and or used most frequently with residential development.

Real covenants and its modern successor, equitable servitude, are the most widely recognized forms of private land use control and were conceived to reconcile “individual liberty and the efficient use of land” (Sprankling 2007: 576). Real covenants bind the original parties and future owners to a set of conditions on the use of land whereby damages may be sought for any violation of the promises (Sprankling 2007). In a covenant, the injured party is entitled solely to financial compensation. An equitable servitude, by contrast, goes a step further with the ability to seek an injunction against the offensive use. This distinction means that with equitable servitude the action that violates the promise can be legally stopped with an injunction while a covenant would allow the offending use to remain after damages are paid (Sprankling 2007).

Real covenants are also known as restrictive covenants because they are typically employed in land deeds to restrict one’s use of his or her property. Originally, restrictive covenants were not held in high regard in the United States because of “deep-seated beliefs in property rights, homeownership, and suburbia” (Fogelson 2005: 55). The issue was why someone would want to buy a lot to build a house on it when the lot came with a series of restrictions tied to its use, particularly if there were unrestricted lots in the community. The whole idea seemed to go against one’s right to do whatever they wanted with their private property. The attitude towards these private land use controls changed towards the end of the 19th century. Individuals became
concerned about maintaining the architecture and design integrity as well as the general appearance of their community. To allay the worries of potential or future clients, subdividers, as residential developers were known then, resorted to the placement of restrictive covenants on the undeveloped lots in their new subdivisions. The appeal of covenants was their “supposed” ability to maintain a sense of permanency in a surrounding neighborhood, as well as, stabilization of property values. One author concludes, “[w]ith restrictions in place, . . ., Americans no longer need(ed to) fear that an attractive subdivision would soon ‘give way to something less desirable and perhaps hideous” (Fogelson 2005: 111).

As much as subdividers at the time thought that restrictive covenants could maintain a level of standardization in land use, privately enforced covenants have limitations. Although their use is easy to achieve in a new subdivision, covenants run into difficulties in existing built-up communities where property owners are reluctant to lose existing rights. Secondly, enforcement is the key to making covenants work and if there is no one enforcing the agreement, then it is worthless. Often times, enforcement involves the legal system which generates a financial cost to individuals. In addition, Fogelson points out that “[o]nce the restrictions expired, . . ., the courts would not enforce them. Nor would they enforce them if the plaintiff had ignored the violations for an unreasonably long time or if the neighborhood had changed so much that an injunction would do damage to the defendant without giving relief to the plaintiff” (Fogelson 2005: 113).

Finally, there is the “border” issue which revolves around the fact that a covenant’s restrictions are only applicable within the subdivision or particular area under the same deed. So one cannot control what happens on the property across the street or next to it if its deed is not bound by the same covenant. For all of these reasons, Garvin concludes that, “[m]ost localities stopped regulating land use solely by private agreement because the time, cost, and complexity of separately and individually making, amending, and rescinding these agreements proved to be too great. It seemed better to prescribe actions by legislation rather than by written agreement among the property owners affected, to make decisions by majority vote rather than by unanimous consent, and to have them enforced by administrative agencies rather than by the courts” (Garvin 2002: 429).

Despite the drawbacks, covenants have not disappeared completely as a form of land use control. In fact, the champions of zoning at the beginning of the 20th century, envisioned a cooperative relationship between the public and private land use controls because of the level of detail to which a covenant could go. The focus in zoning as detailed in the next subsection was on the compatibility of uses not architectural styles or minimum housing costs which could be outlined in a deed’s covenants. This led Fogelson to conclude that, “[z]oning and private restrictions do not interfere with each other; . . . ‘both may exist hand in hand. Prudent developers will still use private restrictions to supplement zoning regulations’” (Fogelson 2005: 115). For example, Houston, Texas is known for using deed restrictions city-wide to control the use of land as opposed to a comprehensive zoning ordinance. In addition, gated communities and neighborhood associations still rely on deed restrictions to a degree to invoke a sense of community.
responsibility and sameness within their bounds, but they are still subject to a local government’s land use regulations.

Prior to the 20th century, government involvement in land use controls was driven by concerns over nuisance. While nuisance is still relevant, governments no longer rely upon the concept to justify their intervention in the land use arena. Modern land use regulations are rooted in the concept of police power whereby a government is given the responsibility “to guard the health, safety, morals, and general welfare of the public” within the boundaries of the U.S. Constitution (Johnson 1997: 35). A constitutional limitation was imposed presumably on the power to regulate land in the 1922 U.S. Supreme Court case – Pennsylvania Coal v. Mahon – where Justice Oliver Wendell Holmes wrote in the majority opinion that “while a property maybe regulated to a certain extent, if regulation goes too far it will be recognized as a taking” and thus the property owner would be entitled to compensation from the government for the reduction in the value of their property caused by the land use regulation (Garvin 2002: 430).

“Police power” is a concept applicable to the states, but its scope is restricted by the U.S. Constitution, specifically the Fifth and Fourteenth Amendments. Constitutional amendments are not the only way that the federal government is involved in the regulation of land use. The federal government has responsibility for regulating navigable waterways, so they are involved in the construction of bridges, dams, and other structures that go into these waters, as well as, controlling what is discharged into them. In fact, federal monies may be the federal government’s most direct method of influencing land use because with any appropriation of federal dollars, Congress may specify certain requirements that must be met in order to receive the money. The authority to regulate land use at the local level is delegated to local governments by their state government. Garvin points out, “City, county, and regional governments are considered to be ‘creatures’ created by the states and are entitled to carry out only state-authorized functions” (Garvin 2002: 430). This relationship between local and state governments is explored later in the chapter around the topic of Dillon’s Rule.

Zoning

Comprehensive zoning came to the United States in 1916 with New York City’s Zoning Resolution Act. This was the first time that a city had an ordinance that specified at the same time, “the permitted land use, building height, and building placement for the entire city” in a series of “zoning maps, which designated the regulations that applied to every block and lot within the city limits, and a zoning text that explained them” (Garvin 2002: 432). After the adoption in New York City, municipalities around the United Stated rushed to adopt similar measures. The number of cities with zoning ordinances increased from eight at the end of 1916 to almost eight hundred by the end of the 1920s (Toll 1969). Roughly 37 million people were now subject to zoning controls (Toll 1969). What exactly was the zoning bandwagon that municipalities were so quick to join? A standard definition of zoning is that
"Zoning consists of dividing a community into districts or zones and regulating within such districts the use of land and the use, heights, and area of buildings for the purpose of conserving and promoting the health, safety, morals, convenience, and general welfare of the people of the community. Zoning is the instrument for giving effect to that part of the comprehensive city plan or master plan which is concerned with the private uses of and the private developments on, privately owned land—as distinguished from that part which is concerned with public uses and facilities. The zoning map or zoning plan along with the regulations pertaining thereto are thus a part of the master plan—in essence the comprehensive land-use plan of the community—while the enactment of the zoning ordinance and its administration are the legislative and administrative acts or processes for giving effect to or carrying out this part of the comprehensive plan" (Smith 1983: 30-31).

One might conclude from the above passage that zoning was used to supplement a locality’s comprehensive plan and bring about the plan’s goals. However, the evidence is that early adopters enacted zoning ordinances without the prior consideration of a comprehensive plan (Kaiser and Godschalk 1995). Zoning supplanted comprehensive planning. When planning did occur, it was done to justify the decisions made in the zoning ordinance. This disconnect is exemplified by the Federal government first publishing the Standard Zoning Enabling Act in 1924 followed by its revision in 1926. It then takes two more years before publishing Standard City Planning Enabling Act in 1928. Thus the Federal government is signaling that zoning should take place before comprehensive planning.

As a result of the Federal government’s action to publish zoning statutory language before planning statutory language, by 1930, there were thirty-five states who had adopted in some form the Zoning act while only ten states for the Planning act. In addition, the boiler plate nature of these federal publications resulted in states having very similar statutes. Lack of master planning prior to the adoption of a zoning ordinance may lead to two possible outcomes for a community. The first is a zoning ordinance with unnecessary as well as inappropriate regulations for the community’s level of development. This situation arises when localities copy each other on their ordinance’s elements. Second, interest groups have the power to shape regulations to fit their needs rather than the overall welfare of the community. For example, localities and developers negotiated the exchange of the amount of land zoned for commercial and residential uses for political support (Toll 1969).

The rapid adoption of zoning ordinances in the 1920s was aided by the 1926 U.S. Supreme Court case – *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926). In its ruling, the court decided that Euclid’s zoning ordinance was constitutional even though it did result in the diminution of value for Amber Realty’s property. At the heart of the case, Ambler Realty owned a piece of property prior to the passage of Euclid’s comprehensive zoning ordinance that it thought was best suited for industrial uses. With the zoning ordinance, the property was zoned into three
different uses that escalated in permissible uses. Escalation of uses, which is at the heart of Euclidean zoning, is typically represented by a triangle where the bottom layer of the triangle has the most allowed uses and as you progress up the layers of the triangle, the number of permissible uses decreases. Usually, the top of the triangle is composed of single-family dwellings only while the next layer down would allow single-family dwellings, but also two-family houses, and so it would proceed to the bottom of the triangle which would allow all the uses above it along with industrial uses. Ambler argued that the ordinance exemplified a taking by the government because two out of the three zoning categories assigned to the property did not allow for industrial development and thus reduced the usable value of the property. But because Euclid designed their staggering of uses in the village’s districts as way to separate uses that would be nuisances from each other, so that single-family homes were buffered from industrial uses by apartment buildings and commercial buildings, its actions could be interpreted as the exercise of police power. Justice George Sutherland in the majority’s opinion supported this notion by writing,

“the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc.” (Garvin 2002: 442).

Traditional zoning in the United States is thus known as “Euclidean” zoning because of the court case which declared a zoning ordinance of hierarchical uses as constitutional.

While its use by local governments has lasted for more than ninety years, Euclidean zoning’s relevance to modern land use regulations has become strained over time. The initial assumptions that formed the structure of zoning ordinances in the 1920s were appropriate for a low growth environment. Today, however, these assumptions are viewed as flaws that need to be revamped. Elliott (2008) has described seven of them. The first deals with simplicity in that the assumption was that “only a few simple rules would be needed” (Elliott 2008: 40). Building on simplicity, there was the belief that one could just continue to add permissible uses to land use categories as they developed (Elliott 2008). The next four assumptions all shared a common element around how responsive zoning needed to be to the changes in a community which was not much. First, there was the assumption that “a single set of development standards can apply in both old and new areas of the city”; secondly, “exceptions to the rules would be infrequent”; third, “nonconformities will go away over time”; and finally that “zoning could be ‘static’ – that once the city had adopted its picture of the future (i.e., its plan), zoning could be made to match that picture and would guide future development to achieve it” (Elliott 2008: 45-55). The static nature of Euclidean zoning was a fear held by Newton D. Baker, the attorney for Amber Realty
Co. and former mayor of Cleveland, Ohio. He said, “To subdivide a municipality, to classify it and crystallize restrictions into laws, it to embed a fly in amber.” The last assumption was that “zoning could be made into a technical exercise,” so that it was free from any outside influences (Elliott 2008: 58). This assumption runs completely counter to Fischel’s observation that zoning is “the product of a political process, and it serves the interests of those who control that process” (Fischel 2000: 404).

There have been attempts over the years to introduce new tools to get around the rigidity of Euclidean zoning and introduce some flexibility into land use regulations in order to better deal with growth and its ramifications. Of course, flexibility, too, has its good and bad points as concluded by Salsich that “[f]lexibility produces uncertainty, which makes it difficult for developers to plan financial and construction commitments. Flexibility can prove tempting to officials disposed to exercise power in inappropriate ways or to achieve inappropriate ends” (Salsich 1998: 176). Certainty and standardization coupled with a slower growth environment provide explanations for why Euclidean zoning remained the dominant player in land use regulations through the majority of the twentieth century.

**Conditional Zoning**

The pursuit of flexibility in reaction to the rigidity of Euclidean zoning suggests that local governments place a higher value today on flexibility and innovation over standardization and certainty in land use regulations. Attempts to break the Euclidean rigidity fall into two camps—“natural” atoms of flexible zoning” and “synthesized methods of achieving flexibility” (Freilich et al 1979: 210). The “natural” tools of flexibility are variances, special use permits, floating zones, overlay zones, and conditional techniques while planned unit development (PUD) and transfer of development rights (TDR) are examples of “synthesized” tools (Freilich and Quinn 1979; Brown and Shilling 1981). The distinction between the two groups is that “natural” tools still operate within the existing zoning ordinance and inject a level of discretion with conditions. While the “synthesized” tools are adopted in the zoning ordinance, their application does not follow the existing ordinance’s rules on density, uses, design. They make their own rules for what falls within their selected boundaries. Brown and Shilling found that “[a]lthough variances and special exceptions provide some relief to the strictures of Euclidean zoning, local governing bodies, faced with complex land use issues and ever-increasing development pressures, have found the limited flexibility of variances and special exceptions to be inadequate to meet their needs.” (Brown and Shilling 1981: 121)

Conditional zoning, in particular, arose as an alternative to the hierarchical structure of uses embodied in Euclidean zoning. The focus of this subsection is on conditional zoning because cash proffers are a type of condition. Under a conditional zoning system, a developer or landowner makes an application for a zoning change to a parcel (rezoning). To lessen the impact of the zoning change, the locality attaches a set of conditions to the case. These conditions are
what sets apart conditional zoning from a regular rezoning application. Depending on the authorizing statute, the conditions can consist of property dedication, off-site and/or on-site improvements (roads, aesthetics, libraries, parks), as well as, cash payments. The applicant agrees to the conditions under the belief that abiding to them will make the rezoning application more palatable for approval by a local governing body and their constituents. Conditional zoning has garnered names of contract zoning and spot zoning due to legal problems associated with its use.

Indeed, legal scholars point out that conditional zoning has a rocky legal history. In his 1974 article, Miller wrote, “[t]he current status of the legal profession regarding the subject of zoning accompanied by conditions is one of thorough confusion. The legality of this method of land-use regulation is still questioned, and to this day courts and textwriters have not even been able to uniformly to define conditional zoning” (Miller 1974: 121). Since the 1970s and early 80s, the topic of conditional zoning has faded from the pages of law journals, but whether this is a sign of its legal acceptance is unclear. There are four major issues raised about the use of the tool. Freilich and Quinn (1979) state, “that it amounts to ‘spot zoning’; that it will lead to problems in meeting the uniformity requirement inherent in Euclidean ordinances; that it will lead to disregard of the comprehensive plan; and that its use will create situations in which either powerful developers or overweening bureaucrats will reach too far” (Freilich and Quinn 1979: 195). These concerns could just as well apply to the other “natural” tools of flexibility mentioned above, but the application of conditions within variances and special use permits has been generally accepted as a reasonable use of a governing body’s discretionary power. Because conditional zoning involves the act of rezoning a property from its original planned use to any number of other possible uses, the tool has generated more controversy. In court cases, the legal arguments have centered on whether first, the conditions asked for or offered bear a reasonable relationship to the effects generated by the rezoning, i.e. do the conditions mitigate to some extent the repercussions caused by the change in zoning; and second, by granting a rezoning in exchange for the conditions, a legislative body is selling or bargaining away its governing power (Miller 1974; Freilich and Quinn 1979; Brown and Shilling 1981).

For many years, the landmark case in favor of conditional zoning was out of New York in *Church v. Town of Islip.* The dispute in this case revolved around the change in zoning from a residential use to a business use with the following conditions: “the area of the buildings could not constitute more than 25 percent of the rezoned tract; a six-foot-high fence was to be located on a certain boundary; shrubbery was to be planted and allowed to grow to the height of the fence and was to be maintained; and retail business, permissible within the new zone, could not

---

5 Uniformity requirement has its origins in the Equal Protection Clause also known as the 14th Amendment to the U.S. Constitution where all persons in similar circumstances are to receive equal treatment under the law. The extension of this to land use regulations is that “all property with the same classification should enjoy all possible uses allowed by that classification” (Shapiro 1968: 282).

begin until the first three conditions were met” (Miller 1974: 122-123). The abutting property owners challenged the rezoning on the grounds that “the amendment was not in conformity with a comprehensive plan, that it arbitrarily singled out one tract for business zoning, and that it was illegal ‘contract zoning’” (Brown and Shilling 1981: 124). The case made its way up to the New York Court of Appeals which sided with the town because it viewed the conditional zoning as an attempt by Islip to deal with the growth issues facing the town. In their ruling, they stated, “[t]o meet increasing needs of Suffolk County’s own population explosion, and at the same time to make as gradual and as little of an annoyance as possible the change from residence to business on the main highways, the Town Board imposes conditions. There is nothing unconstitutional about it. Incidentally, the record does not show any agreement in the sense that the owners made an offer accepted by the board” (Brown and Shilling 1981: 125). The court’s ruling established the rationale of allowing conditional zoning if the underlying change in zoning is legal and the conditions being attached to the rezoning are “reasonable.” In addition, the imposed conditions should not be so onerous that a property owner could challenge them on the grounds of a taking. One could say that Church v. Town of Islip set up very broad boundaries for conditional zoning and that future cases would try to refine the concept (Miller 1974).

Two cases out of Washington and California added a degree of narrowness to the reasonableness doctrine of Church v. Town of Islip. In State ex rel. Myhre v. Spokane7, at issue was whether the city of Spokane had bargained away its future governing power when in a set of conditions to allow the change in zoning for a piece of property that would become a large shopping center, there was a concomitant agreement between the property owner and the city whereby the property owner would pay for future widening of streets as well as sidewalks, curbs, streetlights, etc.; dedicate land for street widening at no cost; and apply for the vacation of land that would be used for future streets (Miller 1974). The court ruled in favor of the city because it did not find any evidence to indicate that the city had made legal promises if the property owners did acquire future land for street vacation and that the city only agreed to be reimbursed financially if future condemnation took place (Miller 1974). In their ruling, they argued, “[w]hen the city requires the cost of such safety measures to be borne by the company, it is not bargaining away its regulatory power but, rather, is determining that the cost should be borne by the persons who created the necessity for the expenditure of such funds, instead of the city generally. Such a determination is within the city’s legislative authority. It follows that a written agreement results therefrom is not ultra vires8” (Miller 1974: 136).

---

7 70 Wash. 2d 207, 422 P.2d 790 (1967).
In another case, the Court of Appeal of California ruled against the county because one of its conditions went too far, *Scrutton v. County of Sacramento*\(^9\) reinforced conditional zoning as being within the realm of a locality’s police powers. The court even stated, “[t]he power to impose conditions on rezoning furthers the well-being of landowners, generally, promotes community development and serves the general welfare” (*Scrutton v. County of Sacramento* 1969: 418). It narrowed the broadness of “reasonable” with the statement that “[a]lthough ‘reasonableness’ has been postulated as the hallmark of validity, a more precise standard is available. . . . [T]hat conditions imposed on the grant of land use applications are valid if reasonably conceived to fulfill public needs emanating from the landowner’s proposed use. . . . [D]ecisions illustrate two kinds of need: the community’s protection against potentially deleterious effects of the landowner’s proposal . . . and the community’s need for facilities to meet public service demands created by the proposal” (*Scrutton v. County of Sacramento* 1969: 421). Additionally, it is important to note that the Court addressed the issue of conditional zoning versus contract zoning. In its opinion, the Court found that contract zoning has no “legal significance” and that there are no California decisions dealing with the issue. The opinion defined contract zoning as “a reclassification of land use in which the landowner agrees to perform conditions not imposed on other land in the same classification” and admitted that “[i]t has been criticized and defended, nullified in some states, sustained in others” (*Scrutton v. County of Sacramento* 1969: 419). In the end, the distinction between contract and conditional zoning remains unclear because the opinion’s definition is quite similar to how the California court defined conditional zoning, “a zoning change which permits use of a particular property subject to conditions not generally applicable to land similarly zoned” (*Scrutton v. County of Sacramento* 1969: 417).

Based on this history, Brown and Shilling offered the following guidelines to localities for the likelihood maximization that the decision in a conditional zoning case will be upheld by the courts: “[t]he rezoning amendment, considered independently of the conditions, should represent a reasonable exercise of the zoning power; the conditions should be imposed by a method that avoids the abrogation by the governing body of its police powers, and the municipality should avoid a promise, or appearance of a promise, that the rezoning will be granted or obtained in consideration of the landowner’s promise; and the promise exacted should have a reasonable relation to the rezoning and not be solely the purpose of effecting a collateral benefit on behalf of the municipality” (Brown and Shilling 1981: 130). The first guideline is important because no matter how valid the attached conditions are if the underlying rezoning is unconstitutional then the whole matter is illegal. The majority of the conditional zoning cases that have been found in favor of plaintiffs have involved illegal zoning because there was no underlying reason to approve the change in zoning (Brown and Shilling 1981). The remaining guidelines are to protect public officials from overreaching and abusing the powers. A 2005 issue of the *Michigan Real Property Review* reports that at a minimum nine states “explicitly sanction

---

conditions to a rezoning” – Arizona, Indiana, Maine, Maryland, North Carolina, Rhode Island, Tennessee, Virginia, and Wisconsin (Pierson 2005: 68). For California, New York, Colorado, and North Carolina, Pierson summarized that “courts have found conditional zoning valid on the basis of their original zoning enabling legislation and home rule laws” (Pierson 2005: 68). If conditional zoning is used properly, then it can become a key tool in land use planning for a locality because it “provides a source of flexibility by allowing an intermediate use permit, between absolute denial and complete approval of the [rezoning application]” (Smith 1974: 145).

This section has discussed the historic rationales behind land use regulations. In the course of this discussion, I reviewed the most prominent form of land use regulation – zoning. In an effort to bring flexibility into zoning ordinances, localities have developed innovations like conditional zoning. The use of conditional zoning in Virginia resulted in the cash proffer tool. Conditional zoning links cash proffers to land use regulations. A locality can only receive cash proffers when it approves a rezoning case with them attached. In the next section, I discuss how cash proffers are linked to infrastructure financing.

**Infrastructure Financing**

*Historical Background*

The standard argument for infrastructure provision by local governments is derived from the public goods literature. It is more efficient for the public sector to provide infrastructure because they are better able to take advantage of the economies of scale and overcome the coordination issues inherent in the provision of a public good. While this argument explained the initial provision of infrastructure, the decision-making that has justified new extensions of infrastructure has centered around three major reasons.

First, there is the attraction of new investment for potential economic activity. One could say that infrastructure provision is characterized as “If you build it, they will come.” Thus when a locality wanted to attract economic development and population growth, the best way to achieve it was the construction of the infrastructure to support it. New residential development signaled a thriving area and local governments were willing to do whatever they could do to continue the economic growth such as paying for the infrastructure costs of sewer and water lines, roads, schools, parks, etc.

Second, development is not always the purest motivation for the provision of infrastructure. As one author wrote, “[w]hile infrastructure construction patterns do relate closely to swings in the development process and to city building cycles, government has also used public works for countercyclical, employment, and political patronage purposes” (Tarr 1985: 5). Municipal infrastructure development was and continues to be influenced by multiple interest groups.
including politicians, subdividers or developers, as well as, neighborhood groups. Throughout the history of municipal infrastructure, providers have ranged from public to public-private to private. This gives importance to acknowledging when there has been a transition in the type of provider.

Finally, there is the people's expectations reason where infrastructure provision was assumed to occur no matter the geographic location because the services were provided in the past. This rationale has become costly for localities as cities have decentralized from their urban core into suburbs and exurbs, their residents still expect access to the public services that they had in more centralized locations. However, the cost of provision increases the further one lives from the main infrastructure lines. While all of the reasons above justify the provision of municipal infrastructure, there have been increasing concerns over the years about the rising costs of infrastructure expansion from suburban sprawl (Carruthers and Ulfarsson 2003; Rosenberg 2003).

After approving a capital project, local governments face the decision of how to pay for it. From colonial times up to the 20th century, governments typically resorted to three methods of financing -- taxes, assessments, and municipal bonds. Each instrument is discussed in this section. Economic conditions and the specific capital project are influences on the selection of financing tools. The historical review of this section begins in the middle of the 19th century because it was during this time that widespread construction of the core infrastructure of U.S. cities began to take place. Local governments (cities or counties) are the constant financing presence while state governments and the federal government drifted in and out. Infrastructure finance innovations do not take off until the beginning of the 20th century with the widespread adoption of zoning and subdivision regulations (Snyder and Stegman 1986).

The first traditional source of infrastructure financing is taxes. Tax revenues result from either general or special taxes levied by local governments. The largest source of general tax revenue for funding urban infrastructure was and continues to be property taxes on real estate. The reliance on the property tax stems from this country's emphasis on ownership and total property wealth as opposed to income and rental value of property (Melosi 2000). Furthermore, property taxes are the single area where the federal government has never been allowed to levy taxes. The rate of taxation does not have to be uniform across localities in a single state. Other general tax revenue sources are income and sales, but these tend to be restricted to state level taxes rather than local. Furthermore, state governments have the power to control the type, rate, and base of a local government's taxation scheme. In comparison to general taxes, special taxes are those which are levied on a narrow base and restricted to a specific economic activity (Snyder et al 1986). Localities may have special sales taxes on restaurants, gasoline, hotels or special property taxes on personal property like automobiles, but these revenues tend to be funded towards specific infrastructure needs like road construction or other public facilities which are directly
impacted by the taxed economic activity. In general, as the demand for more services increases in the absence of alternative funding sources, tax rates must escalate in order to finance projects. Assessments are a second traditional infrastructure financing instruments. They are tied to financing specific infrastructure projects, usually on a smaller scale and may result in the inequitable distribution of infrastructure. As an example, if a residential neighborhood wanted to pave its streets, then residents comprising two-thirds of the street frontage on a block might need to agree to an assessment in order for a city to act on the paving petition. The city would then charge all of the abutters (regardless of how they voted) a special assessment to cover the cost of the paving. The cost would vary depending upon the type of material used. As a result, one could tell the wealth of a neighborhood by whether their streets were paved and the type of material uses (gravel, cobblestone, etc.). If the funds collected from the assessment did not fully cover the paving costs, revenues from the general tax fund made up the difference. The use of general tax revenues was to be seen as backup measure rather than the entire funding source. So assessments are really only a successful financial instrument if the infrastructure costs can be solely paid by them rather than having to fall back on general tax revenues. In general, assessments follow four defining principles. The first is the applicable parties to the assessment are all of those property owners who would derive some benefit from the new infrastructure in a designated area. Secondly, assessments are used because they can be applied to the current property owners who enjoy a direct benefit. Third, it is the property owners themselves who ask for the assessment. Finally, because the infrastructure is for their direct use, property owners should share in the burden of its financing above what would be covered through their taxes.

Municipalities first ventured into debt financing on a large-scale because tax rates could only be increased so much before citizens revolted, and special assessments were limited by their nature. As one author described the scenario “[t]he demands of urban growth meant that a reliance on taxes and special assessments to meet the needs and wants of the city was likely to satisfy neither the citizenry nor the local business establishment” (Melosi 2000: 76). Debt financing is divided into two instruments – funded and floating. The distinction between the two is that funded debt is in the direct form of bonds or another tool of indebtedness while floating debt is not directly tied to a specific form of debt (Melosi 2000). Typically, before a locality can issue a series of bonds to fund an infrastructure project, the general public must give their approval at the ballot box. Citizen approval is required because future tax revenues are used to secure the bonds. Debt financing and assessments are supposed to slow down or even prevent future tax rate increases on a locality’s residents, but this may not always be possible given that both financing instruments use tax revenues as their backups.

From the middle of the 19th century to the beginning of the 20th century, local governments found their access to infrastructure capital periodically restricted. One factor creating the restrictions was the economic turmoil of this time period which included depressions in 1873 and
1893. Some local governments pursued strategies where their infrastructure projects coincided with economic upswings. Others, however, used public works construction as opportunities to turnaround their local economies which generated massive amounts of municipal debt. Because increased debt raised fears of default, states stepped in to impose limitations on the borrowing capacity of municipalities. States were able to pass statutory restrictions on municipalities’ debt load because local governments are creatures of the state and beholden to states for their powers. This period marks the ascendency of Judge John F. Dillon and his infamous Dillon’s Rule which asserted that local governments possess only those powers that states have expressly granted to them. Municipalities responded to statutory restrictions by either depending on the private sector to pick up the slack in infrastructure provision or resorting to a “pay-as-you-go” mentality where the level of construction corresponded to how much money was directly available to fund it at the time.

For the remainder of the twentieth century, urban infrastructure was funded through the conventional methods of municipal bonds, tax revenues, and assessments while new financial tools were developed for the funding suburban infrastructure. A distinctive feature of these new instruments was an attempt to shift part or all of the capital costs of infrastructure to the subdivider or developer. Subdivision development prior to the 1930s in the United States was not the result of a comprehensive process by one subdivider or development firm that completed all planning, building, and financing elements of the development alone. Instead, the process as described by one author was more of a cobbling of different parties at different points in time for various elements. The first step began when “a landowner typically hired a civil engineer to determine streets and lots, and then, depending upon local circumstances, either pressured the municipal government to extend pavement at public expense or brought in private crews to construct roads. The land was subsequently sold, often at auction in the nineteenth century, to numerous buyers who would either build houses for their own occupancy for sale, or would retain vacant lots for speculation” (Jackson 1985: 134). While some subdivisions were fully built out by a single developer, the typical process described often led to the creation of subdivision plans which were subdivisions on paper only. These plans provided few if any at all details on how and where public infrastructure should be provided for the subdivided lots. There was nothing in the law that forced a subdivider to cover the costs of the necessary infrastructure for their subdivided lots. Hence, the name, “paper subdivisions” developed (Smith 1987). Since the subdivider did not take the steps of installing the necessary infrastructure like streets, the responsibility fell to municipal governments or those private individuals who bought lots in the subdivisions. For either side, it was an unexpected and possibly, burdensome, financial expense.

“Paper subdivisions” resulted because suburban land conversion was largely a private enterprise. Minimal government supervision only required filing accurate survey maps (Altshuler et al 1993). The proliferation of “paper subdivisions” created a cycle of effects. First, there ended up being an oversupply of subdivided lots. The oversupply was the result of the ease at which land
could be subdivided on paper without consideration for the provision of public improvements. In many cases, there was no forethought given to whether this was an area where there was demand for a subdivision, so land was subdivided prematurely. Since the subdivider did not have to make any infrastructure improvements, these subdivisions were not attractive to the average buyer who could not afford to buy the lot and pay for the necessary infrastructure. So these “paper subdivisions” became “dead land” (Smith 1987). New residential development leapfrogged over these failed areas in search of new greenfields of unsubdivided land. Thus suburban sprawl begins with its patchwork pattern of land development. Furthermore, the tax delinquencies started to appear in the “dead” subdivisions which made them more unattractive to sellers and deprived the local governments of needed tax revenues. Finally, when the local government was able to provide infrastructure to subdivisions, it was through assessments. However, this method of financing had its own drawbacks. First, assessment revenues had to be used to pay the debt service on the special assessment bonds. These bonds, which had been issued to finance the construction of the infrastructure, are highly sensitive to swings in the economy. Therefore, if an economic depression occurred, then both homeowners and bondholders are placed in dire financial positions. All of these effects combined created momentum whereby “more and more cities sought to solve the problem by securing the construction of physical improvements in subdivisions” (Smith 1987: 6).

Localities needed statutory authority to force subdividers or developers to provide the necessary infrastructure in subdivisions. The federal government provided a model for the statutory language when the U.S. Commerce Department published its 1928 Standard City Planning Enabling Act which was a template of statutory language related to planning issues. The Act contained wording that “authorized local governments to require that subdividers or developers provide streets, water mains, and sewer lines within the boundaries of their own sites” (Altshuler et al 1993: 18). States followed this model from the federal government and thus adopted statutory language in their state codes that allowed local governments to adopt subdivision regulations. The early versions of these subdivision ordinances “required subdivision plats to be approved and recorded” where as part of the approval process, local governments could require “land be dedicated to the local government for streets, sidewalks, rights of ways, utility easements, and drainage systems” (Delaney et al 1987: 141). These dedications are known as “subdivision exactions” which are defined as “[t]raditional construction, dedication, or in-lieu-fee payment for site-specific needs imposed at the time of subdivision. These improvements are usually categorized as being ‘minor’ in scope and cost, and are typically provided on-site” (Delaney et al 1987: 139). Localities began by mandating the dedication of land for on-site improvements by the end of the 1950s, subdivision exactions evolved to include the construction and dedication of on-site improvements by the subdivider. The next evolution in subdivision exactions included the dedication of land for on-site schools and parks, as well as, in-lieu payments for those instances where land dedications were not practical, but the funds could be used for the provision of public facilities at other locations (Delaney et al 1987; Altshuler et al
The goal with all of these exactions was “to shift improvement costs to subdividers and new residents” (Delaney et al 1987: 141).

Subdivision regulations established a precedent for shifting the costs of infrastructure improvements away from being the sole responsibility of local governments. However, not all residential development was subject to subdivision review, so financing local infrastructure needs for other types of residential development remained. The expansion of the exactions concept to the general development process entailed a larger level of growth-related issues and community-wide support. Even though localities resorted to subdivision exactions in the 1930s, growth was still viewed as positive event for communities which improved their economic outlook and brought in additional revenues to fund the expansion of public services (Nelson 1988a). The environmental movement of the 1960s and 1970s along with other activist groups began to raise concerns over the other byproducts of growth – traffic congestion, pollution, loss of greenspace, overwhelmed municipal services, rising crime, etc (Nelson 1988a). Revenue studies showed growth’s costs exceeded its revenues (Burchell and Listokin 1978). At the same time, all levels of government (federal, state, and local) were decreasing their commitment to fund public facilities driven in part by the taxpayer revolt of the 1970s. Citizens voted down general obligation bond referendums while simultaneously passing initiatives which restricted a municipality’s ability to increase property tax rates (Nelson 1988a). California’s Proposition 13 was a product of this environment. Thus municipalities compelled by the actions of their residents resorted to a broader use of exactions as the tools for financing the costs of new infrastructure.

Impact fees are the most popular form of exactions and represent the cash payment element of the exaction family. The generally accepted definition is that “impact fees are a monetary payment, predetermined by a formula adopted by the governmental unit and levied to fund large-scale off-site improvements, public facilities, and services that are necessary to serve new development adequately; typical off-site projects include library expansion, streets, parks, municipal buildings, schools, police/fire facilities and personnel, and water/sewer treatment facilities” (Lawhon 2003: 27). They are not derived from a form of zoning and are applicable to by-right development, so they can be assessed on every new house built in a community. Typically, their application is tied to residential development because homeowners are more of financial burden on public facilities and infrastructure than commercial and industrial development. The tax revenues generated by non-residential development, typically, more than covers the cost of providing public services to them. The opposite relationship applies to residential development (Oakland and Testa 1995; Brueckner 2000; Lewis 2001; Crompton 2004). An impact fee’s implementation and management is also considered easier than other exactions because there is a set fee amount or schedule as opposed to individualized negotiated payments with each developer over his or her project. Additionally, the amount is usually paid at
the time the building permit is issued and the monies are deposited in a fund whose single purpose is the construction of public infrastructure necessitated by the developer’s project.

Across the United States, twenty-seven states have statewide enabling legislation for impact fees not dealing with water and sewer infrastructure (Mullen 2007). In a 1984-1985 survey of 1,000 local governments across the United States, seventy-nine communities out of the 220 respondents reported the use of impact fees (Bauman and Ethier 1987). There was very little use in the New England and Mid-Atlantic regions with increasing numbers in the South, Midwest, West, and California (Bauman and Ethier 1987). A more recent survey completed in 2002 received responses from 407 cities and 144 counties with 103 and 10 of them, respectively, imposing impact fees (Lawhon 2003). As in 1984-1985, use of impact fees was still spread throughout the nation.

Judicial Approval / Legal Legitimacy

Exactions raise concerns about property rights issues and their legality like conditional zoning has been tested through the court system. Until the rulings by the U.S. Supreme Court in Nollan v. California Coastal Commission (1987) and Dolan v. City of Tigard (1994), the issues of infrastructure finance were left to the domain of the state courts. In summary, the rulings by various courts in different states have been far more favorable to local governments on the issue of on-site exactions than off-site exactions. Smith points out that “[a]s one would expect, the real estate community was initially reluctant to recognize either the wisdom or the constitutionality of conditioning subdivision plat approval on the installation of public improvements in the subdivision. Most courts, however, did not share the real estate community’s sense of outrage at this burden, and such requirements were virtually uniformly upheld” (Smith 1987: 7). The case law on exactions is built around two major questions – “(1) does the local government have authority to enact the [exaction] and (2) does the [exaction] comply with state and federal constitutional limitations” (Leitner et al 1995: 61). Typically, the first question is defused by a state legislature passing statutory language which expressly enables local governments to adopt exactions and defines which ones are permissible. In states where the legislature has not taken this clear-cut tactic, then questions arise over whether there is anything in the state code that expressly forbids the imposition of exactions or is this the type of locality that can adopt exactions without the permission of the state.

On the issue of constitutionality, the tests from three different states (Illinois, Florida, and California) present a spectrum of interpretation in regards to development conditions and

---

10 These local governments were communities that subscribed to American Planning Association’s Planning Advisory service. No distinction is made between government type, i.e. city v. county v. town.

11 The counter-intuitive results on the survey responses between cities and counties where you would expect to see more or equal participation by counties relative to cities because of the sprawling nature of counties and the existing infrastructure of cities may be a function of the different samples sizes (1,350 cities v. 539 counties).
exactions (Leitner et al 1995; Selmi 2004). The most rigid test is Illinois’ “specifically and uniquely attributable” or just “uniquely attributable” which “requires that the burden placed on a developer be directly and uniquely attributable to that development” (Leitner et al 1995: 61). Based on this test, a local government is “prohibited [from] charging developers where other developments generated the demand for the infrastructure improvement or non-project residents would enjoy the benefits from the conditions imposed” (Selmi 2004: 145). In the middle of rigidity spectrum is Florida’s “rational nexus” test where there is the requirement of “proportionality between the amount of the fee and the type and amount of facilities demand generated by the development and that there be a reasonable connection between the use of the fees and the benefits accruing to new development” (Leitner et al 1995: 61). The majority of states have followed the lead of Florida and used the “rational nexus” language in their state enabling legislation. California follows the test with the most room for flexibility – “reasonable relationship” whereby the only requirement is a “‘reasonable’ connection between the proposed project and the condition such that project residents would benefit from the improvement and the project would contribute to the demand for it” (Selmi 2004: 145). Regardless of which test a state may follow, there are six factors that should be well-defined in the development of an exaction to insure its constitutionality – (1) spatial, (2) temporal, (3) amount, (4) need, (5) benefit, and (6) earmarking (Leitner et al 1995).

While the states may have various tests, the U.S. Supreme Court in Nollan and then Dolan established some clearer boundaries on the use of exactions in infrastructure finance. On the one hand, these precedents were a victory for the development interest groups, but at the same time, the decisions validated the principle of being able to shift the costs of infrastructure to the development industry. The U.S. Supreme Court found in Nollan that the ability of a government “to impose conditions on discretionary permits, such as approvals of subdivisions, site plans, variances, conditional rezoning, and use permit approvals” was limited by the principle of “nexus” (Selmi 2004: 145). In order to prevent such conditions from being considered a “taking” under the “Takings Clause” of the Fifth Amendment, the said conditions must meet the requirement of the nexus test that “the condition must actually serve a legitimate state police power interest” (Selmi 2004: 145). The right to regulate land use is based on police powers. While Nollan focused on the constitutionality of a government’s right to impose exactions, Dolan according to Selmi “addresses the quantitative relationship between the demand for infrastructure generated by the project and the cost of any condition or exaction imposed” (2004: 153). Out of the Dolan decision, the “rough proportionality” test is born which assesses the fit between the condition and the project’s needs. This test was actually the court’s attempt to strike a middle ground between the onerous nature of the “uniquely attributable” test and the too lenient “reasonable relationship” test. Chief Justice Rehnquist in the majority’s opinion wrote, “[w]e think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, by the
city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development” (Selmi 2004: 156).

For all the certainty that Nollan and Dolan brought to some elements of infrastructure finance, these cases involved specific exaction examples. Thus questions remain on how relevant the decisions are to instances which differ from them. For example, the Dolan case centered on the dedication of land, so what does that mean for an exaction which involves the payment of money. Both cases involved regulatory bodies making a ruling in adjudicative manner that applied to a specific instance as opposed to the local governmental body approving a legislative decision that could be applicable to everyone (Selmi 2004). Furthermore, there is a growing trend among local governments to reach for exactions that fall outside of the legally recognized aims of the police powers – the protection and promotion of the “health, safety, and welfare of the community” (Taub 1995: 127). Exactions in the form of impact fees and its new innovation, linkage fees, are being used to move beyond traditional infrastructure finance to fund nontraditional facilities and services like “child day care, public art, historic artifacts, public transit systems, bookmobiles, jogging tracks, helicopter pads, recreational community gardening, job training, the providing of low- or moderate-income housing, library sites, and police and fire personnel and stations” (Taub 1995: 126-127). Indeed, local governments continue to be expected to provide and modernize public services, facilities, and infrastructure. So their search for additional sources of revenue outside of the historical triad of taxes, assessments, and bonds continues.

Evolution of Planning

Throughout the discussion of infrastructure finance, there was a noticeable absence of a key concept from land use-related matters – planning. In fact, the first and only mention of planning comes up in regard to the 1928 Standard City Planning Enabling Act and there the focus was on subdivision regulations not comprehensive planning. Perhaps, it was the absence of land use planning in the United States until the early part of the 20th century that is partially responsible for infrastructure financing issues that plague local governments into the 21st century. Prior to the 1900s, the number of U.S. cities influenced by a plan was small – Philadelphia by William Penn in 1683; Savannah by General Oglethorpe in 1733; and Washington, D.C. by Pierre L’Enfant in 1791. However, Kaiser and Godschalk point out that “[t]hese plans . . . were blueprints for undeveloped sites, commissioned by unitary authorities with power to implement them unilaterally” (1995: 367).

The walking cities that formed the urban foundations of the United States were defined by a set of standard features. These early cities were not quiet places, but centers of intense and

---

12 Linkage fees are defined as “fees imposed on developers of office buildings or other forms of nonresidential uses, such as commercial, retail, or institutional development to provide housing in the community” (Leitner 1995: 59).
congested activity. There was clear visual demarcation between where the residential districts of the city ended and the surrounding countryside began. Neighborhoods were predominately mixed-use in nature which led to a pattern of individuals living close to where they worked, perhaps even right above their place of employment. Finally, residences close to the center of the city were those most coveted by a city’s elite population. Real estate, itself, operated then on the concept of “fee-simple tenure [which] enabled families to buy, sell, rent, and bequeath land with great ease and a minimum of interference by government” (Jackson 1985: 53). The “fee-simple” principle led to the situation where “whether well-born or an indentured servant, practically everyone set himself quickly to the task of organizing the landscape into private parcels and somehow procuring a share of the division” (Jackson 1985: 53). Furthermore, there really was no institution around before 1860 to tell an individual how to efficiently use their lot for home construction. So a person could either follow the model of their neighbors next to them or develop their own method for house siting. The grid system became the organizing principle of cities, but not because city planners developed a city master plan looking at where the best land uses should go and the infrastructure to support them. Instead, a grid’s design of straight lines and right angles was chosen because it “simplified the problems of surveying, minimized legal disputes over lot boundaries, maximized the number of houses that fronted on a given thoroughfare, and stamped American cities with a standardized lot, often twenty-five feet wide and one hundred feet deep” (Jackson 1985: 74). Additionally, the ease and uniformity of grid system made the real estate world operate more smoothly.

By the late 1850s, planning outside of the grid pattern was taking place in the plans for the subdivisions that were located in the growing suburbs of the cities. Rather than just stamping a grid pattern onto a natural landscape, here a concerted effort was made to integrate nature with the design and location of homes. As a result, streets were no longer at right-angles, but wide and curvilinear. Although these subdivisions were well-planned out in terms of design, they were still based on speculation with no guarantees that public infrastructure would be connected and funded and no real consideration to whether this was the best use for this land or that the city needed another subdivision of this concept.

The origins of modern land use planning in the United States can be traced to the City Beautiful movement of the early 1900s when it was thought that the social ills of urban life could be lessened by the provision and beautification of public spaces. The city plans of this time period, most notably, Daniel Burnham’s 1909 plan for the City of Chicago, focused on the design of public spaces in the city with grand boulevards and ornately designed buildings (Kaiser et al 1995). As the 1920s ended, the City Beautiful approach to plans had become more comprehensive. The plans no longer focused solely on public spaces, but were extended to include private lands in their designs. Thus a comprehensive or master plan for a city would contain the following elements: “the general location and extent of new public improvements[;] . . . the general distribution amongst various classes of land uses, such as residential, business,
and industrial uses[; and] . . . [be] designed for . . . the future, twenty-five to fifty years’’ (Kaiser et al 1995: 367). Unfortunately, what seemed to be a consensus around what constitutes a plan and how planning should be done gets lost in the wording of the 1928 Standard City Planning Enabling Act, and as a result, planning becomes subservient to zoning.

With the resulting situation by the 1950s/60s that “planning and general plans gave way to developers’ site plans, highway engineers’ concrete cloverleafs and asphalt ribbons, federal officials’ urban renewal, environmental regulations and impact reports, and lawyers’ codes” (Neuman 1998: 211). There was a shift in emphasis from plan to process. This separation of the different elements that used to be part of the general plan (land use, transportation, housing, environment, etc.) did not bode well for the coordination of residential development and infrastructure with its financing, particularly if the infrastructure plan did not call for the extension of public improvements to one segment of a jurisdiction while the land use plan called for intensive resident development there or if a community only required a land use plan to be created. By the 1990s, a new model of planning developed with influences from the growth management movement – the hybrid-design-policy-management plan – which attempts to combine the historical general plan with area specific policies and processes that looks at the short term and long term while making sure there are linkages to transportation, environmental protection and social concerns (Kaiser et al 1995).

Of course, all the plans in the world can be made, but they are useless if not adopted and supported by the local government’s governing body, as well as, the appropriate tools given to government officials to carry them out. Part of the difficulty in the adoption of these plans is that they operate in a political environment. In making land use decisions, government officials must weigh political reality against the democratic process, itself. Both infrastructure financing and subdivision review fall under the rubric of land use decisions. The conflict between politics and the process leads to the situation where “[v]ery few communities adopt, through their legislative bodies, a binding capital facilities plan and an accompanying budget that reflects the plan and ensures that facilities plan and an accompanying budget that reflects the plan and ensures that the extension of infrastructure is consistent with growth projections” (Selmi et al 2004: 146). The explanation offered for the widespread failure to adopt such fiscally responsible and binding plans is that they may lead to unpopular tax increases. Thus, there has been and continues to be a movement to shift infrastructure costs to developers via the development of financing tools like impact fees.

**Growth Management**

Roughly fifty years after the introduction of comprehensive zoning, it started to become apparent that local zoning alone was not capable of dealing with the ramifications of growth on the scale that communities across the United States began to experience after the end of World War II. Popper described the situation as “[t]hey could not handle huge suburban residential projects that
might affect dozens of rapidly growing localities beyond the boundaries of the regulating one. They could not deal with big energy facilities that might have regional, state, or even national impacts. They could not deal with large, complicated public works projects.” (Popper 1988: 292) The proposed solution was to engage a higher level of government in land use related issues. This began what was known as the “Quiet Revolution in Land Use Controls” organized by “a loose coalition of environmentalists, city planners, land use lawyers, state and federal officials, progressive business people and developers, and citizen activists of all kinds” whose goal “was new regulation that would operate at higher levels of government and would apply mainly to projects that were large or in environmentally sensitive areas” (Popper 1988: 292).

Since 1961, fourteen states have become involved in state-sponsored land use planning through their state-wide program with another two states playing an active role in designing local and regional land use policies. While the revolutionary involvement of the federal and state governments in land use regulations was taking place, local governments were also beginning to focus on the problem with two different paths from the status quo – reduce the level of growth or encourage growth, but make the growth generators start to share in the costs. Thus, growth management can be defined as “those policies, plans, investments, incentives, and regulations to guide the type, amount, location, timing, and cost of development to achieve a responsible balance between the protection of the natural environment and the development to support growth, a responsible fit between development and necessary infrastructure, and quality of life” (Randolph 2004: 39).

In terms of growth management models for local governments, there are four cities whose experience has been looked to as other communities have contemplated growth management programs over the years. Ramapo, New York is the earliest of the cities with its program in 1969 to have development occur in stages over time along with provision of public infrastructure and facilities. Fairfax County, Virginia actually looked to Ramapo’s model and developed a similar growth management strategy around adequate public facilities, but never implemented it. In 1972, Boulder, Colorado and Boca Raton, Florida both implemented growth boundaries in that their communities would only accommodate an additional 40,000 housing units. At the same time, Petaluma, California went in a more stringent direction by developing a growth cap whereby only 500 additional housing units could be added annually.

No national database exists detailing the growth management measures in effect for every municipality in the United States, so it is difficult to know how far and wide the measures have

---

13 The number of states with a state growth management program has grown from the eight (FL, GA, ME, OR, RI, VT, and WA) identified in Gale (1992) to fourteen (HI, VT, OR, FL, NJ, ME, RI, GA, WA, MD, AZ, TN, CO, and WI) in Anthony (2004). Hawaii and New Jersey could have been in Gale’s study, but were either excluded or examined individually because of the structure of the program. There was also discussion in Anthony’s work about whether California should be included in the list because of its local and regional land use policies, but lack of a state-wide program. Both California and North Carolina were featured in DeGrove’s (1984) First-Wave States.
spread since the 1970s. Landis (1992) reports that as of 1989, there were 406 instances of growth management measures being adopted by a California city and 76 by a county, respectively. The tools were grouped into five major categories – housing infrastructure requirements and public service standards; residential down-zoning; commercial infrastructure requirements & public service standards; commercial down-zoning; and urban limit line or greenbelt (Landis 1992). A 2006 report by the Brookings Institution on land use regulations in the United States’ fifty largest metropolitan areas found that 16.4 percent of jurisdictions in these areas which covered 27.1 percent of the population and 37.9 percent of land had an urban containment program or policy in place (Pendall et al 2006). The report’s survey also asked about infrastructure tools – 37.5 percent of the jurisdictions with 55.6 percent of the population and 45.6 percent of the land employed impact fees while 18.6 percent of the jurisdictions with 28.5 percent of the population and 36.5 percent of the land an adequate public facilities ordinance (Pendall et al 2006).

Missing from the discussion, so far, has been whether growth management programs are effective in their varied aims. The answer is that reported results have been mixed. Pendall et al writes, “[s]tudies have shown that in some jurisdictions regulations have had little visible influence on the location and amount of development or on the price of land. Other studies have identified places and regions where regulations have had substantial direct effects on development patterns and land prices” (Pendall et al 2006: 6). The varied results are a function of the initial design of the growth management regulation and its implementation and the attempt to measure the impacts, but also the political nature of local government and the influence of interest groups.

Cash proffers are a municipal infrastructure financing tool. They follow in the tradition of subdivision regulations and impact fees in shifting the costs of municipal infrastructure improvements away from being the sole responsibility of local governments. Since cash proffers have the generators of growth share in its costs, cash proffers are also part of the growth management movement. The exaction court cases have set legal precedents for how localities can have developers assist in financing the new or expanded capital projects that come with residential growth. They also offer guiding principles that administrators of cash proffer systems should keep in mind. A local government’s comprehensive plan is the opportunity for a locality to look at where there is existing infrastructure and envision which areas they plan for its extension. The extent to which a locality aligns its zoning ordinance with its comprehensive plan has an impact on rezoning activity and cash proffer collection.

The options available to localities to finance capital projects and regulate land uses may be limited by their own governing authority. In addition, capital improvement plans and rezoning cases are subject to the approval of the elected local governing body, for example, a county’s Board of Supervisors. The next section discusses how state and local political environments in
theory can have an impact on a tool like cash proffers. I also illustrate how these concepts have been applied in Virginia.

**POLITICAL ECONOMY**

*Dillon’s Rule*

The ability of a locality to develop innovative land use regulations is directly impacted by the institutional setting within which it operates. Local governments are creatures of the state and thus reliant upon state legislatures to delineate the specific governing powers of localities. Within the United States, the level of local government autonomy varies from state to state. The distinction results in two groups of local governments – (1) “Dillon’s Rule” where local government powers have to be delineated by the state government and (2) “Home Rule” where municipalities are fairly autonomous and can pass legislation without prior state approval. Judge John F. Dillon, an Iowa Supreme Court justice in 1911, stated,

“It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and not other: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, -- not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied” (Hall-Sizemore 1992: 15).

The opposing legal doctrine was championed by a Michigan judge named Thomas M. Cooley. The doctrine of “Home Rule” consists of two major parts:

1. *Imperium in imperio* (state within a state)—says that a locality can do anything that is of a purely local character or not inconsistent with state law or policy.
2. devolution of powers—stands Dillon on its head and says that a locality can exercise any power not expressly denied to it” (de Voursney 1992: 2).

The question of local government autonomy is important, particularly if municipalities need to rely on higher levels of government in order to obtain the power to manage growth within their own boundaries. Absent the right *ex ante*, local municipalities must have the clout to influence state legislature members to pass statutory language authorizing the use of power in favor of local governments as opposed to, for example, developers. Likewise, municipalities will be restricted if there is no political will by the state legislature or other governing body to pass growth management or other favorable legislation.
A 2003 discussion paper for the Brookings Institution attempted to classify the fifty states into a “Map of Local Government Autonomy” based upon their adherence to Dillon’s Rule (Richardson et al. 2003). Using the court cases in each state from 1944 to 2002 and other supporting material, the authors came up with four classifications – Dillon’s Rule State; Dillon’s Rule only for certain types of municipalities; Not a Dillon’s Rule State; and Conflicting Authority (Richardson et al. 2003). Thirty one states were classified as “Dillon’s Rule State” because all of their municipalities are subject Dillon’s Rule. This finding was largely based on the appearance of the words, “Dillon’s Rule” or “Dillon Rule” in any state court cases (Richardson et al. 2003). Eight states (Alabama, California, Colorado, Illinois, Indiana, Kansas, Louisiana, and Tennessee) were found to hold only select municipalities to Dillon’s Rule. So these states make up the “Dillon’s Rule only for certain types of municipalities” category. Ten states (Alaska, Iowa, Massachusetts, Montana, New Jersey, New Mexico, Ohio, Oregon, South Carolina and Utah) ignore Dillon’s Rule completely and were classified as “Not a Dillon’s Rule State” (Richardson et al. 2003). Florida was the only state where the use of Dillon’s Rule could not be clearly determined. It was put into the “Conflicting Authority” category (Richardson et al. 2003). The report, however, makes no claims about how much autonomy a local government has in each state relative to the other states, so just because two states fall into the same category does not mean that the local governments in each state have the same level of autonomy.

In cases of the delegation of authority to local governments, Virginia follows the narrow construct of Dillon’s Rule. The implication for land use regulations is that “the Virginia [Supreme] Court has never upheld a claim that a particular land use regulation power can be read by implication into the enabling acts” (BeVier and Brion 1981: 21). So a Virginia locality cannot adopt a land use regulation on the basis that “the claimed power is ‘essential to the accomplishment of the declared objects and purposes’ of a locality or that the claimed power can be ‘necessarily or fairly implied in or incident to the powers expressly granted” (BeVier and Brion 1981: 21). Localities can only adopt land use regulations that are expressly authorized by the passage of legislation by the Virginia General Assembly. Additionally, Virginia follows a corollary to Dillon’s Rule whereby “[i]f a power is expressly delegated to local government, a limitation on the scope of that power cannot be derived by implication from other legislative language” (BeVier and Brion 1981: 22). This corollary leads to a greater reduction in “the flexibility with which local government can exercise its land use control powers, even though the societal context in which these powers are applied is in a state of a flux” (BeVier and Brion 1981: 22).

In states like Virginia which follow Dillon’s Rule, localities are dependent upon the state government to pass legislation to grant them the authority to try new policies and tools if that authority has not already been explicitly endowed in an existing law or statute. Furthermore, the legislature does not have to grant powers equally among locality types. For example, Virginia counties, which are the focus of this dissertation, are more hindered by the practice of Dillon’s
Rule than the state’s cities because cities have been granted the authority to levy new taxes without prior approval from the Virginia General Assembly.

The question remains unanswered on whether Dillon’s Rule has restricted the ability of Virginia localities to respond to growth-related issues and if not restrict them, perhaps complicated their responses. I would argue that a direct causal relationship may be difficult to determine, but that Dillon’s Rule is not something to be easily dismissed or erased from one’s political heritage. If this judicial line of thought were really harmless then there would not have been efforts in the state since 1969 to add language to the state constitution that could be considered a reversal of Dillon’s Rule. The discontent with Dillon’s Rule by local governments pops up in particular public policy issues such as land use regulations and the discrepancies between the taxing and borrowing powers of cities and counties (deVoursney 1992). The debate becomes whether the state government would ever see these issues as purely local problems or ones that still require involvement by the state and hence a continued adherence to Dillon’s Rule. There has been a clamoring for increased local discretion to deal with the ramifications of growth. The Local Government Attorneys of Virginia has taken the position that “[t]he time has come to take a comprehensive look at the powers granted to localities to regulate land development and its effects on every public service, from public education to public roads. While the state considers land use a local issue, it has significantly limited local freedom to develop an adequate response to the pressures and costs of growth” (deVoursney 1992: 8).

In their respective works, authors like Fischel (2007) and Richardson (2000) contend that Dillon’s Rule is a moot point in today’s era of land use regulations. Fischel’s argument centers around his belief that if a state court does strike down a locality’s land use regulation on the basis of Dillon’s Rule, the locality will turn around and lobby their state legislators for the passage of a bill granting them the power to impose such a regulation. So he concludes that “debate about the jurisprudential merits of Dillon’s Rule is kept alive even though its practical implications have been negligible for nearly a century” (Fischel 2007: 18). Richardson and his co-authors argue that Dillon’s Rule is a non-factor because it “bears far less on the likelihood that a particular region or state will implement effective growth management than such critical factors as timing, political outlook, and socioeconomic issues” (Richardson et al 2003: 31). They contend that Virginia’s growth management style or lack thereof one is a function of strong historical support for property rights; level of state funding on public infrastructure and facilities to localities; and structure and number of local governments (Richardson et al 2003). Richardson (2000) in an earlier work does admit that Dillon’s Rule has complicated things for local governments in rapidly responding to their growth issues, but has at the same time, possibly slowed the spread of sprawl. This two-sided nature of Dillon’s Rule stems from its ability to prevent the development of innovative growth management tools by local governments, so each locality cannot come up with its own unique solution. Thus, there is a forced consistency of solutions which may hinder localities from shifting growth to their neighbors, so sprawl slows. In some ways, Dillon’s Rule
forces local governments to act as one unified voice at the state legislature if they want to achieve greater autonomy to control growth because there are still opposing groups who will argue against granting more authority on the grounds that they are not “going to give the local governments a blank check to slam the door on development like this” (Richardson 2000: 23).

Reliance upon state legislators for the passage of growth management authority at the local level highlights the potential for interest groups to play an important role in the adoption of legislation enabling certain types of regulation at the state level. In illustrating their political models of local government, both Ellickson (1977) and Fischel (2007) offer anecdotal evidence about the power of interest groups in large counties in Virginia. In states like Virginia where there is great diversity among the political, geographic, socioeconomic, and cultural facets of its localities, the fact that the political process is not at the discretion of the localities only further complicates legislative matters. A distinctive focus of this dissertation’s analysis, however, is the interplay between county decision makers, state-wide interest groups, and state legislators. The historical analysis in Chapter 5 through Chapter 8 will trace the process of taking an issue at the local level and following its path through the state legislature and back to localities for implementation of the solution. As a result, these chapters will provide the opportunity to examine (1) Fischel’s conclusion on the current relevance of Dillon’s Rule and (2) the ability of local governments to overcome the power and influence of other interest groups in their pursuit of the authority to use specific land use regulatory tools.

*Land Use Politics*

Typically, when one thinks of politics and land use regulations, the assumption is made that an individual is referring to the local government level. There are four major points that drive the discussion of land use politics. The first is that land use issues are inherently likely to be controversial. The discussion below will show that this controversy stems from the unresolved conflict over the purpose of land. Second, it is important to know who has the power in the political process and when they have the opportunity to use it. The power of interest groups will vary depending upon the political landscape in operation. The focus in the majoritarian/median voter and influence/interest group models has been at the local level, but with the assertion that the influence/interest group model grows in domination as the level of government rises. Actors must work within a prescribed political process. Thus, thirdly, the process, itself, matters and may influence the strategies that actors pursue. In particular, because Virginia strictly adheres to Dillon’s Rule, state politics are especially important. So there must be an understanding of the relevance of the influence/interest group model in explaining the legislative process at the state level. Finally, there are the contextual factors outside of the actors and the political process which must be understood. Together, these elements contribute to the complicated nature and cyclicality of land use regulations.
Controversy

A major reason for the conflicts over land use is that communities have yet to reconcile their beliefs over the purpose of land. Is land solely a factor of production to be exchanged into something else for the pursuit of profit? Or is it to remain an element of nature to be enjoyed and used for its natural properties with minor changes? In effect, you have private economy versus public sector. The ideologies, however, are not without their own internal debates. Altshuler points out that within the private ideology there is a conflict between “the right of homeowners to undertake collective action against change (via private covenants or public zoning) and the right of investors to develop their land with minimal concern for side-effects” (Altshuler 1999: 196). For the public ideology, the debate centers on the level of scale of involvement and where it originates, so small-scale versus large-scale; democracy at the grass-roots level versus government bureaucracy (Altshuler 1999).

Communities end up sending both ideologies mixed messages. Rather than choose one belief system, policymakers select elements that appeal from both of them. For example, there may be a stated goal of the protection and enhancement of property values, as well as, goals for environmental protection even though there may arise a point when they conflict. At the same time that communities use a mix of the ideologies, those who have wealth and influence will pick and choose elements of the ideologies that best suit their needs (Altshuler 1999). In most cases, one ideology will dominate the other one if it is the appropriate setting for that value to triumph since Americans support both ideals. A role for state government is as the moderator of these ideologies, particularly when the dispute is over controversial topics. Any influence that a state government could exert to curb issues of inequality and exclusion, however, is tempered by the fact that local governments will never willingly give up “the most valued jewel in the local land-use crown—the capacity to veto unwanted development” (Altshuler 1999: 199).

Power Players

It is interest groups who have the power to influence which value ideology directs a locality’s land use regulations. There are two major models – majoritarian/median voter model and influence/interest group model – whose origins stem from the social choice theory and public finance literature (Ellickson 1977; Fischel 2007). Under the majoritarian model, conditions are ripe for a local government to implement land use regulations that would make the locality an exclusionary suburb when the local area is relatively small and homogenous in population (Ellickson 1977). This would occur because “an individual’s influence over governmental decisions is proportionate to his voting strength at general elections” (Ellickson 1977: 405). The majoritarian model is apt for describing how homeowners are able to dominate the land use planning agenda of small municipalities in pushing for exclusionary policies that preserve the value of their houses against the interests of prodevelopment groups.
In the influence model, interest groups are “a function of [their] ability to contribute money, manpower, or other political assets to election campaigns” (Ellickson 1977: 407). Interest groups gain in strength as the number of issues and the size of a municipality increases. Thus the influence model thrives on complexity and chaos. In applying the influence or interest group model to land use regulations, Fischel acknowledges that its application is not as clear-cut as it would be under the other model because one interest group has the capabilities to counteract the power of other interest groups, for example, homeowners versus homebuilders because both groups may be active political forces. House values and schools are issues that can bring homeowners together despite their varying incomes, but close proximity, so that “homeowners can easily form a group to jawbone city officials about the evils of some threatening development” (Fischel 2007: 8). Ellickson points out that “homeowner domination of suburban politics will lead to enactment of growth controls and the imposition of development charges. Political domination by developers will lead to a different, but also troublesome, set of political outcomes: for example, graft and the unwarranted subsidization of development” (Ellickson 1977: 409-410). Overall, Fischel concludes that “[t]he interest-group model is more likely to produce a more elastic supply of housing, since developer interests will at least partially counter the interests of homeowners” (Fischel 2007: 9). Both Fischel (2007) and Ellickson agree that certain localities often engage in a regular cycle between “predevelopment and antidevelopment phases” which might correspond to one or the other group gaining control periodically (Ellickson 1977: 409). Thus different settings are likely to be described by different interest group models and in fact, the size of the constituency under the government’s control matters whether the geographic area is a neighborhood suburb, city, county, region, or state.

**Legislative Process**

Building on the theoretical discussion of competing values and interests embodied in land use politics, it is important also to understand how things play out in the actual legislative process and the resulting regulations. One of the first steps in the legislative process is the setting of the agenda for a legislative session. When local governments are reliant upon the state government to pass legislation to grant powers beyond those already explicitly endowed in an existing law or statute, it is imperative that they are able to get their issues placed on the legislative calendar. In Cobb and Elder (1983) theoretical framework, the ability to get an issue on the agenda of a legislative body is a function of three things: definition of the issue (scope); expansion of the issue to different subgroups within the conflict (intensity); and nature of the conflict (visibility) (Assendelft 1994). The broadness or expansion of these things will in general lead to their placement on the agenda. Assendelft explains, “[t]he more an issue is defined in ambiguous and nontechnical terms and as having extended relevance and social significance, the greater the likelihood it has to reach an expanded public and achieve a place on the agenda” (Assendelft 1994: 525). James Q. Wilson (1980) theory of the agenda setting process, policy change will
occur through entrepreneurial politics if the costs are concentrated and the benefits diffuse (Assendelft 1994). Concentration implies that the costs of the policy change are focused upon one group which could be small or large in number, financially strapped or well-endowed, powerless or powerful, etc. Diffusion of benefits would spread the benefits of the policy change across the whole public. Entrepreneurial politics involves the “process by which a political entrepreneur ‘sells’ the issue, using symbols and defining the problem in such a way that it mobilizes latent public sentiment and attracts the attention of elected officials” (Assendelft 1994: 526). Wilson’s theory presumes that only one group will engage in an entrepreneurial manner and that it is most likely the group in favor of the regulation whose action catches the anti-regulation forces offguard and possibly makes them susceptible to defeat (Assendelft 1994). The caveat to Wilson’s theory of entrepreneurial politics is that both sides can engage in the practice and end up neutralizing each other. In the end, the influence of politics can result in the desired legislation or no legislation or much stronger legislation based on interest group participation (Assendelft 1994).

Once a piece of legislation makes it onto the agenda, then the focus in the legislative process shifts to how politics affects what passes, as well as, how it passes into law. The theoretical underpinning here is that members of a legislative body “take their voting cues from constituents, other lawmakers, and interest groups” (Peters 1994: 62). Building on this foundation, five factors are theorized to affect the content and success of a bill: “the proportion of legislative districts confronting the problems of rapid growth; the ability of interest groups to conduct effective grass roots campaigns; the use of floor amendments to ‘catch the opposition off guard’; effective communication between a bill’s negotiators and its supporters; and the appearance of flexibility on the part of the bill’s supporters” (Peters 1994: 61). Peters (1994) found that constituent interests do affect legislative voting patterns, but that they can also influence the composition of the legislative package before the vote. Restructuring of a piece of legislation either to remove those parts that generate the most opposition or adding elements to generate interest among legislators who originally had no stake in the legislation. Factors 3 through 5 as listed above (floor amendments, communication, and flexibility) can also be used to overcome the power of constituent interests, but they are less effective in achieving bill passage than the actual content of the legislative package. For example, in Pennsylvania, passage of impact fee legislation was achieved at the state level, but it was characterized as “legislation constraining a locality’s ability to shift infrastructure expansion costs to developers” (Peters 1994: 67). This characterization was the result of localities with either a stable or declining population having held a numerical seat advantage in the legislative body and were convinced by interest groups that the impact fee legislation held no interest for them and should not receive their support. One could then argue that the passage of impact fee legislation in Pennsylvania was also an example of symbolic politics. In symbolic politics, a gesture is made towards supporting an idea like growth management, but in actuality, what was done was more of a symbol of action than a policy with actionable consequences (Warner et al 1995). In the case of
Pennsylvania, state legislators could say that they gave localities the ability to adopt impact fees while localities could counter that it is purely symbolic because their effectiveness at shifting costs was hampered by the legislative language.

The notion of broadness versus specificity in the legislative language and how it achieves passage is illustrated in Virginia’s distinction between “general law” and “special act” and the necessary number of votes needed to pass each type. In Section 1 of Article VII of the Virginia State Constitution which focuses solely on local government, “general law” is defined as, “a law which on its effective date applies alike to all counties, cities, towns, or regional governments or to a reasonable classification thereof.” A “special act” is a “law applicable to a county, city, town, or regional government and for enactment shall require an affirmative vote of two-thirds of the members elected to each house of the General Assembly.” If a local government wants a piece of legislation passed that directly refers only to them by name, the procedure requires them to obtain 2/3rds of a majority. Regular legislative acts only require a simple majority for passage. As a result, “the reasonable classification thereof” element of a “general law” definition is used often to avoid a “special act” wording. The key to writing the “reasonable classification” is to make the act specific enough, so that it applies to a particular locality, but still broad enough, so there is the possibility of other localities being eligible. For example, the legislation on conditional zoning that passed in 1973 applied only to a locality having an urban county executive form of government. At that point in time, Fairfax County was the only county in the state with that form of government (and still is today), so the legislation was targeted for Fairfax, but written in broad enough terms that it could be applicable to another county with an urban county executive form of government, whenever that occurs.

Contextual Factors

In the end, the political environment is the most important element in preventing contrary policy results. Both the length of a political regime and the institutionalization of policy tenets are essential to give policies the chance to be effective (Warner et al 1995). Warner and Molotch argue that it is “a favorable political environment sustained over time” more than “the number, type, or title of controls” that leads to a set of policies having their desired impact (Warner et al 1995: 400). This sustained political environment is essential because interest groups will always have the comparative advantage to local governments in terms of money, influence, mobilization, and expertise. The majority of contrary policies may be considered unintentional and occur via three factors -- episodic intervention, countervailing policies, and initiatives of the regulated (Warner et al 1995). Episodic intervention occurs when a policy is not always active either by design or a lapse in policy enforcement. During these periods of inactivity, interventions take place which run counter to the lapsed policies leading to results that are the opposite of the original policies. The third factor is countervailing policies where “[l]ocal governments may be restraining development with some policies and simultaneously
encouraging it with others” (Warner et al 1995: 379). A project that may not meet the goals of growth management could be spun to show it supports other government goals like revitalization or economic development and hence, gain approval to go forward. The final factor is initiatives of the regulated where “actors may be able to take advantage of the unforeseen slack, loopholes, or opportunities to ignore the rules” (Warner et al 1995: 380). Basically, the authors characterize it as “[g]rowth grows in the legal and institutional cracks” (Warner et al 1995: 393). Strategies range from pure litigation against a local government to fears over losing out on a project to another jurisdiction to starting a project illegally and daring a local government to challenge it to agreeing to development conditions, but never fulfilling them. Interest groups forcing local governments to weigh the costs and benefits of having the unwanted growth occur versus the costs and benefits of trying to prevent it and what the public perception becomes of those local officials. Thus it may be that negotiation is a key to the successful passage of land use regulation rather than imposition. The debate between negotiation and imposition played a major role in the history of enabling conditional zoning in Virginia.

The section above reviewed the major theories about the involvement of politics in the land use arena. They showed that just because a local government wants to control its level of growth does not mean that it always can. Their power to do so may be limited by the state government, for example, through adherence to Dillon’s Rule. Further, legislation may be passed that on the surface appears to give them additional power. However, it may be so restrictive in implementation that it achieves minimal results. Interest groups have the ability to shape legislation, as well as, impede its path through the political process. Given the appropriate political environment, local governments may be able to gain passage of growth management legislation. Negotiation should not be overlooked as a tool. Land use regulations will always operate within a contentious environment as long as there are conflicting views on the purpose of land.

In this chapter, I have presented topics from the fields of land use regulation, infrastructure financing, and political economy. Together, these topics provide a foundation upon which cash proffers can be understood. Cash proffers are linked to both land use regulation and infrastructure financing. Their link to land use regulations is through the rezoning activity that leads to their generation. Once they are generated, cash proffers are used to finance the new or expanded infrastructure needed by the rezoning activity. Cash proffers exist in an environment influenced by politics. This influence extends from the state level down to the local level. Through a discussion of Fairfax County’s growth struggles in the post-World War II period, the next chapter will illustrate many of the issues raised in this literature review. For example, struggles within Fairfax County over the adoption of a zoning ordinance and comprehensive plan. Chapter 3 lays out the historical foundation for the political process analysis conducted in Chapters 5 through 8.
CHAPTER 3

Before the detailed exploration of the progression of conditional zoning in 1973 to cash proffers in 2008, it is important to understand how and why conditional zoning was proposed as one of the solutions to help Fairfax County with the impacts of its rapid population growth. Not only is Fairfax County the progenitor of conditional zoning in Virginia, its story also establishes the nature of land use problems under the extant system of rules. There were two major issues that conditional zoning was initially used to address for the county. First, the zoning ordinance was not sufficient to deal with the level and type of development that occurred in the county. As a result, the county engaged in “extra-legal procedures and practices” (Fairfax County Zoning Procedures Study Committee 1967). As reported by The Washington Post newspaper, “the Fairfax County Board frequently sees to it that applicants file indentures binding themselves to higher standards then required by the zoning they seek” (Anderson 1960). Thus the county earned a reputation for better or worse as “the metropolitan area’s leader in experimenting with flexible zoning rules, adaptable to varying topography and neighborhoods” and these activities eventually got the county in legal trouble (Anderson 1960). Second, the county lacked authority to enforce promises made by rezoning applicants. The departure between the “fantasy” presented and the reality of what was eventually constructed generated anger and distrust toward members of the development community. Neighborhood groups who opposed rezoning cases entirely or supported them because of developer and local official promises were also angry with local officials.

The influence of interest groups at the county level shaped the solutions to these two issues. The role of interest groups at the government level has been well-examined in the literature by individuals such as Fischel (2007). Interest groups in Fairfax County played an important role in the origins of conditional zoning. I contend that county interest groups are supplanted by state level interest groups in the push towards passage of legislation by the Virginia General Assembly which granted the authority to local governments to engage in conditional zoning.

Fairfax County’s growth has been well studied and documented by other researchers. However, such literature looked at the County as a case study in sewerage planning or traced the development of its Planning and Land Use System (PLUS) (See Hysom 1973; Peters 1974; Dawson 1977; Mastran 1988). In contrast, I document in this chapter the history of this growth through the lens of conditional zoning and cash proffers. Below, I discuss growth and other major factors influencing the county’s complicated path towards conditional zoning.
ZONING WITHOUT A PLAN

Like many local governments across the United States, Fairfax County had a zoning ordinance and subdivision regulations before it created a master plan for envisioning how the county would grow over time. The county’s first zoning ordinance was passed in 1941 and its subdivision regulations followed in 1947. However, the completion of the county’s first preliminary master plan did not occur until 1954. While the U.S. Supreme Court’s 1926 decision established the constitutionality of zoning, Virginia did not give all of its counties the power to zone until 1938, nor regulate subdivisions until 1946. Exceptions were made for four counties that legislators felt needed the ability to engage in zoning because of the level of urban development – Arlington (1927), Chesterfield (1930), Henrico (1930), and Norfolk (1932) (Makielski 1969). The piecemeal allotment of zoning authority is a precedent for how later sessions of the General Assembly doled out conditional zoning eligibility. While zoning authority was delivered in a staggered manner, all counties in 1936 had been granted the authority to set up a planning commission whose main task was to create a master plan. The plan “was to act as the major guide for zoning, subdivision regulation, streets and highway planning, public works planning, and a variety of other municipal activities, including civic beautification” (Makielski 1969: 21). Fairfax County set up its planning commission in 1938, but it would take almost twenty years for a master plan to be developed and adopted.

Netherton et al (1992) detailed that the county’s zoning ordinance “provided that the county be zoned into districts, that permits be obtained for building, altering or repairing structures; it regulated the use and size of yards and other open spaces and provided penalties for failure to comply” (Netherton et al 1992: 621). It was essentially an instrument that said, “[y]ou can build here for things other than housing; here you can only build housing” (Dawson 1977: 15). The zoning ordinance followed the Euclidean model of keeping incompatible uses away from each other. The concern was over the prevention of nuisance claims, rather than whether an area was suitable for new denser forms of suburban development. There was no forethought to what this meant for development patterns in the county and whether services existed to support them (Dawson 1977).

The lack of a planned vision for where growth in the county should occur contributed to such issues as septic tank system failures, and water shortages as the county’s population grew rapidly. In fact, the county’s natural features (soils, water table, and topography) are not suitable for wide-scale use of septic tanks. The development of residential subdivisions should have been predicated upon a sewer system to transport sewage waste (Tabors et al 1976). The Circuit Court was actually responsible for the establishment of Fairfax County’s first two sanitary districts for

---

15 Norfolk is no longer a county because in 1963, it merged with South Norfolk City to form the City of Chesapeake.
the provision of sewer and water service (Netherton et al 1992). The districts were delineated in 1943 along the eastern edges of the county after the County decided they were necessary because of the "close concentration of population" in the area (Netherton et al 1992). To mitigate the septic tank failures, the county needed to put forth a $20 million bond issue to fund the infrastructure for a county-wide sewer system (Dawson 1977). By 1952, the county sought to find a solution to its growth troubles in the creation of a county master plan which would then "form the basis for a modern zoning ordinance" (Fairfax County Zoning Procedures Study Committee 1967: 1).

Figure 3.1. There were still elements of Fairfax County's rural heritage as it entered into the 1960s. A field near Sunset Hill farm in 1959. This area would later become part of the Reston development.


**Trying to Create a Master Plan**

More so than the initial steps of a zoning ordinance and subdivision regulations, the debate over the adoption of Fairfax County's first master plan signified the county's transition from a rural county to a suburban county. However, it set into motion future development problems. The proceedings for the plan were initiated in 1952. It was completed by Francis Dodd McHugh, a professional planning consultant in 1954. His plan addressed public facilities, sewer and water service, residential, commercial, and industrial development, and roads and highways. It also sought to concentrate development in the already urbanizing eastern third of the county with a 3 to 5 acre minimum lot sizes in the western part of the county (BeVier et al 1981). The rationale for the large-lot zoning by McHugh was made on an assumption that the western half of the county would not have sewer service until the 1980s, so large minimum acre size would slow down the rate of development, or even discourage it in this part of the county (Dawson 1977).
McHugh’s plan, however, was not adopted by the Board of Supervisors. The county’s planning staff was directed to take the plan and revise it. The Board, at that time, was composed of a majority of supervisors who represented the rural interests of the county. These rural-minded supervisors deemed the plan “unacceptable,” as well as, “excessive and controversial” because of concerns over how such large-lot zoning would affect the development value of their land (Office of County Attorney 1974: 2; Fairfax County Zoning Procedures Study Committee 1967: 1).

Public sentiment, however, wavered in its support for the Board’s action. The shift stemmed from the view that certain supervisors put the interests of the development community and, possibly, their own before those of the county’s residents. In the run-up to the 1955 Board of Supervisors election, residents were urged to examine seriously the past actions of board members. For example, “voters were advised to check on voting records on zoning changes, many of which had been a gold mine for speculative buyers and often not in the short- or long-range interest of Fairfax County taxpayers” (Netherton et al 1992: 637). In addition, residents were told that they could take a stand for the county’s interests by voting into office candidates with “broad public interest” rather than “narrow private interest,” as well as, encouraging the adoption of the master plan (Netherton et al 1992: 637). In 1956, the revised plan was presented to a new Board of Supervisors, whose composition for the first time represented the interests of the county’s new urban and suburban residents as opposed to solely its rural heritage: “the political posture of the board shifted from rural interests, favoring the protection of potential development profits, to suburban interests, favoring the protection of the natural attributes of the land (BeVier et al 1981: 44). The newly elected Board did not act upon McHugh’s full master plan, but they did amend the zoning ordinance with the Freehill Amendment which largely adopted the residential zoning map in McHugh’s Plan. In a striking departure from the plan, the amendment changed the recommended zoning of 3 to 5 acre lot sizes in the western two-thirds of the county to 2 acre lot sizes. At the same time, they added a grandfather clause to the amendment that any plats filed within two years of the adoption date would not be affected by the change in minimum lot size. The clause essentially erased any initial attempts at the management of the county’s rural growth because the existing minimum lot sizes in some areas were as dense as ½ acre.

Attraction of Sewer Systems

In the absence of a comprehensive plan, the development in the county had to rely on other strategies to guide its growth. The use of these approaches to direct growth was not a coordinated and planned effort. One strategy was to avoid the “no residential build” areas indicated in the zoning ordinance. The other tactic was to follow the availability and location of sewer lines. In the end, the location of the majority of the population growth was determined by the presence of sewer systems. For example, a 1961 report predicted that an area of the county with 3,600
residents could grow to 55,000 with full sewerage service or 20,000 with partial sewerage service in just over 20 years (Stansbury 1972). Tabor pointed out “[w]hat the planners and their supporters did not realize was that sewerage, not planning, dominates the growth game in Fairfax County” (Tabor 1976: 137). As a result, the planning staff would come up with development plans for the county that revolved around land use, which would then be undercut by the Board of Supervisors and the Division of Sanitary Engineering’s decisions to extend trunk sewer lines. The policy of trunk sewer extensions was conducted without regard to the county’s own development plans. This was a pattern that held when the county adopted a master plan in 1958 and revised it over a period of years beginning in 1963.

The lack of coordinated and planned development was not the only downside to the reliance upon sewer service extensions as the county’s growth strategy. To prevent a build-up of development pressures, this tactic required the county to follow through on the construction of these lines. Sewer expansion was a not cheap enterprise. Typically, it was financed through the issuance of bonds like the $20 million in 1954. These financing schemes, however, were predicated upon the county’s attainment of minimum occupied housing development levels. For example, the interest payments on these bonds would be paid through the connection fees assessed on each building that tapped into the line. In order to prevent enormous size fees, there needed to be a minimum number of buildings paying them. Thus, in a roundabout way, growth was further encouraged in order to pay for sewer expansion. The county could have let these special-purpose bonds become general obligation boards. This change would shift the financial responsibility for sewer line extensions to all county taxpayers. They would pay for the extensions through their property taxes which would raise the issue of why residents with septic tanks should pay for other county residents to have sewerage service. An alternative financing scheme was the creation of new sanitary districts. The county resorted to strategy in order to ease development pressures. These designated areas were given special taxing powers to finance the construction of sewer lines in those parts of the county which had not been approved for sewerage service in the 1958 comprehensive plan, i.e. western half of the county. Bonds could be issued by these districts based on a majority vote by the district’s residents. Like the financing through connection fees, the districts actually encouraged growth because the more individuals that could be attracted to the area, then the lower the tax rate.

Growth through sewer line construction may not have seemed like a bad strategy in the early years. With the passage of time, the absence of holistic thinking about the county’s growth patterns resulted in environmental problems. For example, a portion of the county’s drinking water supply became undrinkable. It was at this point in the late 1960s that the county’s residents finally organized as one voice against the level of rapid development occurring over the years. In 1970, residents voted 2 to 1 against a $39 million bond issue that would have financed a better sewer technology, as well as, the expansion of three sewerage plants (Stansbury 1972). Using
this vote as launching pad, sewer moratoriums and reductions in sewerage plant capacity limits would become major growth management tools for the county.

Figure 3.2. Fairfax County’s sanitary landfill was constructed on land that the county had since 1962. It covers 104 acres. When the facility was completed in 1982, it was the highest land mass in the county with a top elevation of 575 feet. More than 3 million tons of solid waste had been held within it.


Figure 3.3. Ductile pipe like the type shown below was used as transmission mains to provide water to customers in Fairfax County. The size of the pipe illustrates why infrastructure provision can be so costly.

INFLUENCE OF THE BLACK ROBES

When the 1955 Board of Supervisors election shifted the power balance in the county from rural interest dominance to suburban interests, rural landowners and their development allies were not without other options to advance their agendas. Indeed, a key supporter was found in the Virginia court system which was known as an advocate and protector of private property rights. The county’s original 1941 zoning ordinance had been declared unconstitutional by the Circuit Court at the end of the 1940s. The Virginia Supreme Court of Appeals overturned the lower court’s decisions in 1947. A former member of the Board of Supervisors, G. Wallace Carper, who was also a larger landowner in the county, along with other property owners, filed suit against the county on the grounds that the Freehill Amendment was unconstitutional. Altogether, they represented seven percent of the land in the county (BeVier et al 1981). The plaintiffs contended that “it had no reasonable relation to the public welfare and that a grandfather clause built into the zoning ordinance was unconstitutionally discriminatory” (BeVier et al 1981: 45).

In 1959, Virginia Supreme Court ruled in Board of Supervisors v. Carper that the Freehill Amendment was “invalid” and an “unacceptable” economic effect on landowners while the grandfather clause consisted of “unacceptable arbitrariness” (BeVier et al 1981: 45-46). The county argued that the amendment was needed to prevent “an exhaustion of ground water supplies by subdivisions of less than two-acre lots in the western two-thirds of the county; and that it abolished the threat to public health by prohibiting the development of less than two acre lots, using septic fields or private sewer systems” (BeVier et al 1981: 47). In addition, the county argued that it had the power to decide “the density and distribution of population” (BeVier et al 1981: 47). Nonetheless, the court decided that the exclusionary impacts of minimum two-acre lots combined with the fact that a date on the calendar would allow one neighbor to build at a high density while another neighbor could not outweighed any public welfare concerns (BeVier et al 1981). Following the Supreme Court decision, the Board of Supervisors resorted to a minimum lot size of one-acre zoning in the western two-thirds of the county. Then, in 1959, the Board of Supervisors adopted a new zoning ordinance which was based on the comprehensive plan completed in 1958 by an outside zoning consultant. Dawson characterized the county’s land use planning as “seven pages plus one land-use map, with only two residential zones designated on the map—open development (one- and two-acre lots) and closed development (multi- and single-family development on smaller lots)” (Dawson 1977: 22). The actions at the end of that 1950s were significantly because “[t]his represents the first and only time planning and zoning have been coterminously related to each other on a countywide basis” (Office of County Attorney 1974: 4).

The Carper decision fell within a time period in Virginia Supreme Court’s history when the court was in a transition on how it viewed the use of zoning power. BeVier et al characterized the

period from 1955 to 1971 as the “transitional phase” (BeVier et al 1981). From its first zoning case in 1926 (Gorieb v. Fox) to the case of Blankenship v. City of Richmond in 1948, the Supreme Court upheld the actions of local governments in seven different court rulings. A view of the court developed that “presumed that the zoning actions undertaken by local legislatures were valid, thus placing a heavy burden on one who challenged these actions. The zoning actions of local government were upheld except, under the ‘plainly wrong’ standard, in egregious circumstances” (BeVier et al 1981: 36). This level of judicial deference to local governments created a sense that their zoning powers were quite expansive. For example, BeVier et al states, “Even if it caused substantial economic harm to the landowner, the challenged action was reasonable so long as there was no denial of procedural due process. Failure to treat like properties in a like manner did not constitute a denial of equal protection substantial enough to invalidate a zoning action” (BeVier et al 1981: 37). The 1955 decision of Hopkins v. O’Meara, 197 Va. 202, 89 S.E.2d 1 (1955) signaled the end of the deference period. This was the first time that the court ruled against actions taken by a local government in regard to land use. Out of the six rulings made from 1955 to 1971, four did not uphold the decisions made by the local government. No longer could local governments rely upon at least the Supreme Court of Virginia to support their decisions. The result according to BeVier was a significant reduction in “the discretion of local government to exercise the zoning power in order to advance the general welfare if the effects of that exercise were to treat similar parcels of land differently and to prevent landowners from putting their land to a more intensive use” (BeVier et al 1981: 56). Furthermore, it seemed that the court was a creating a position for itself in land use decisions which was better suited to the expertise of the local governments. BeVier writes that the general welfare question “has been broadly redefined for the review of zoning challenges generally, thereby ensuring a substantial judicial role in a decisionmaking process well within an area of local legislative expertise” (BeVier et al 1981: 56).

While the transition of the Supreme Court of Virginia away from deference towards local government on zoning matters occurred over a sixteen year time span, the Carper decision did make an immediate impact on how Fairfax County dealt with its growth issues. The result was the promotion of further sprawled growth: “[f]rom 1959 to 1963, urban sprawl was openly encouraged by the Supervisors and planning staff” (Stansbury 1972: 13). The county, apparently, put on hold any county-initiated innovation in planning tools out of concern for potential future legal action, so an attitude of “if-you-can’t-beat-them-join-them” emerged (Stansbury 1972). The county viewed itself as painted into a corner with only two options – “work like the devil and the tax same way” or “say ‘no rezonings’ and watch the builders go into court and have the man in black rezone the county” (Stansbury 1972: 22). The latter path was not chosen. From 1960 to 1963, out of the 148 residential rezoning cases that involved ten or more acres, 106 of them were granted with 21 denials and 21 withdrawals (Hysom 1973). Approximately, forty-seven percent of the cases involved single-family rezonings (Hysom 1973). The second largest category was “RM-2, Apartments” at roughly 24 percent (Hysom 1973). While the total number
of multi-family rezoning cases outnumbered single-family, the difference was only eight cases. By these numbers, there is a clear pattern of support by county officials for sprawl in the form of single-family subdivisions.

Figure 3.4. The aerial images below show the development of the Springfield area in Fairfax County. The image on the left shows what it looked like in 1950 as the county emerged from World War II. The image on the right captures how developed the area had become by 1981.


DEVELOPMENT FORCES AT WORK

During the 1960s, a perfect storm for rezoning applications was created by a growing real estate market and the county’s failure to rezone the county in accordance with a series of new comprehensive plans. Virginia state law requires a locality’s comprehensive plan to be updated every five years. Fairfax County decided to conduct its update through a division of the county into planning districts with a plan developed for each district. Together these district plans would form the master plan for the county rather than updating the existing plan which covered the county in its entirety. The plans for the fourteen districts were completed over a series of years beginning in 1963 and starting with the eastern districts where growth pressures were the greatest (Peters 1974). It was at this point that planning and zoning in the county became disconnected again. The disconnection occurred as a result of the failure by the county to amend comprehensively the zoning ordinance to conform to the use, location, and intensity of development called for in the newly adopted district plans. The adoption and amendment should have occurred simultaneously or at least directly right after the other. The result was that property owners of individual parcels who wanted to take advantage of the changes in the district plans, particularly the more intensive uses, had to file a rezoning application with the county. Fairfax County became flooded with record numbers of rezoning applications from the mid-
1960s onward. Rezonings, themselves, in effect gradually updated the old zoning ordinance, but on a piecemeal basis over several years.

Land supplies in the metropolitan Washington, DC area, particularly Fairfax County, became scarcer due to the continued population growth in the region. In 1935, roughly 60 percent of the land in Fairfax County was employed in farming while after 1960, less than 20 percent remained in agricultural use (Jantz 2005). People’s expectations for future population growth and development opportunities were reflected in the rapid rise in land prices in the county. In 1951, the average price for an acre of land zoned residential and located near the construction of the county’s new transportation network, the Beltway, was $1,900 (Dawson 1977). By 1964, the price was up to $16,700 (Dawson 1977). Typically, a locality may have a few rezoning applications a year as property owners would like to change the designated use of their individual parcel(s). Market forces combined with the government’s “unintentional” encouragement resulted in a backlog of hundreds of rezoning applications for the Board of Supervisors to decide. At the beginning of January 1965, there was a backlog of 166 rezoning applications (Fairfax County Zoning Procedures Study Committee 1967). By January 1967, the number was up to 287 applications (Fairfax County Zoning Procedures Study Committee 1967). Figure 3.5 shows a clear pattern where for the majority of the 1960s the number of rezoning applications exceeded levels from the 1950s. From 1950 to 1959, 1,260 rezoning applications were submitted while over the 1960s, the number totaled 2,033 (Mastran 1988). Of the 2,033 cases in the 1960s, 854 involved residential zoning (Hysom 1973). In a further breakdown of residential rezoning applications, there were 523 approvals, 112 denials, and 219 withdrawals or cancellations (Hysom 1973). These approval levels led to conclusions that “[b]ecause the development industry and land investment, in general, formed the backbone of the county’s economy, development interests continued to exert considerable political power within the county government” (Dawson 1977: 24).
**Figure 3.5** Rezoning Application Submissions for all land use categories in Fairfax County, 1950 to 1969


**Figure 3.6.** Images of Tysons Corner area of Fairfax County before and after it became a retail and business center for the Northern Virginia region. The image on the left is from 1957 and shows the two shopping markets that used to occupy the crossroads of Route 7 and Route 123. The righthand image is circa 1982 and looks down on the intersection of Routes 7 and 123. The Tysons Corner development was made possible through rezoning.


**TRYING TO BUY COUNTY CERTAINTY**

Rezoning applications not only had an impact on the natural and built environment in Fairfax County, but also on the political and administrative leaders of the county. The changing politics of the county raised questions over whether rezoning applications would be approved as readily...
as they had been previously. Therefore developers looked for ways to guarantee certainty to solve their need. One way could be by bribery. Government officials accepted the bribes as a way of having their own insurance policies to force developers to stick to the plans presented in their rezoning applications. From 1966 to 1967, Federal and state grand juries indicted individuals across five rezoning cases from Fairfax County on the grounds of bribery conspiracy (federal crime) and bribery (state crime). Fifteen indictments were handed out at the federal level and twelve at the state level. Out of the individuals indicted at either the federal or state level or both, there were three current member of the Board of Supervisors, three former members of the Board of Supervisors, two Planning Department officials (former Planning Director and present deputy Planning Director), along with a former State Senator whose jurisdiction covered Fairfax County and was in private practice as a zoning attorney. The remaining indicted individuals were developers and zoning and land use attorneys. The majority of the indicted individuals were not isolated to one rezoning case. In each case, the aim was to gain a favorable rezoning approval with bribe amounts ranging from $1,000 to $27,487 (McLaughlin 1966). The rezoning cases also involved a range of rezoning types from a 15-acre site zoned as single-family residences to apartments; construction of a shopping center; allowing a trailer park on one site, but only allowing apartments on the adjoining site; and granting an apartment rezoning within a residential subdivision. In one particular case, the topic of conditional zoning comes up because in its first appearance before the Board of Supervisors for rezoning approval, the application was approved with the condition that no more than 700 trailers would be allowed in the two parks (Burchard 1966). However, county residents filed a suit against the county for approving the trailer park rezonings and the court overturned the rezonings on the grounds that “[c]onditional zoning is illegal” (Burchard 1966). It was in the case’s second round before the Board of Supervisors after the court’s verdict overruling the first that the charges of bribery were made. In the end, three former members of the Fairfax County Board of Supervisors were convicted on the federal charges of bribery conspiracy.¹⁸

Whether these five cases were aberrations given the hundreds of rezoning applications, it demonstrates that the decisions on rezoning applications may not have been decided solely on the merits of the case, and rather were influenced by particular interest groups. Dawson writes, “because the development industry and land investment, in general, formed the backbone of the county’s economy, development interests continued to exert considerable political power within the county government—as evidenced by the number and percentage of rezoning applications approved during the 1960s” (Dawson 1977: 24). After the first indictments in September of 1966, Fairfax County initiated a year-long study of its zoning and planning procedures in order to prevent further scandals. As I explain in later sections, the power to engage in conditional zoning emerged out of this study as one of a number of proposed solutions.

¹⁸ It is unclear from newspaper articles what happened with the cases at the state level.
The Search for Solutions to Fix a Stressed System

For any proposal on zoning and planning procedure reforms to have had serious weight in the county, membership of the committee that developed the proposal needed to be balanced among the different interest groups in Fairfax County. The Zoning Procedures Study Commission (ZPSC) was composed of nine members with an executive director. Members represented the Northern Virginia Builders Association, League of Women Voters of the Fairfax Area, Fairfax County Chamber of Commerce, Fairfax County Federation of Citizens Association, and Fairfax County Bar Association. The Fairfax County government was represented by a member of the Board of County Supervisors, a member of the Fairfax County Planning Commission, the Commonwealth Attorney for Fairfax County, as well as, the County Attorney for Fairfax County. It is important to note that the representative of the Board of Supervisors, John L. Beerman, on the committee was indicted by the state on charges of bribery during the course of the study and the representative of the Fairfax County Bar Association, John T. Hazel, Jr., was the legal representation for the former State Senator, Andrew W. Clarke, who was indicted on both federal and state charges connected to the rezoning cases. This is not to say that their ties to the rezoning scandal would color their views on reform, but to indicate the closeness in connections within the land use community of the county at the time. The only individual without ties to Fairfax was the executive director, Fred A. Mauck, who was a land-use attorney in Chicago.

Besides a balanced membership, there needed to be on the part of ZPSC an acknowledgement that the proposal should arise above the political fray, as well as, be developed from a set of common principles that reached across all interest groups in agreement. From September of 1966 until the committee’s proposal was released in September of 1967, there were a total 36 regular meetings of the members, 3 public hearings, and one panel discussion. 1967 was also a county-wide general election year and the committee was cognizant of their proposal being released into such a political environment. In the proposal’s preface, they wrote, “We are aware that election campaigns often generate far more heat than light. The Committee can only express its hope that this report will be carefully evaluated before judgments are made on its recommendations. We sincerely believe that the contents of this report are of such importance to the well-being of the county for the next several decades that it would be most unfortunate to pass judgment on these contents within a time span of a few weeks” (Fairfax County Zoning Procedures Study Committee 1967: iii). The Committee’s recommendations for reform were based on four underlying principles:

“1. Zoning should be regarded as one of a number of governmental devices to implement planning programs and policies. The proper place to formulate policies and programs to influence, regulate and control land development is the planning process, not the zoning process.
2. The Virginia governmental philosophy is that elected legislators serve only as part-time public servants.

3. The organizational structure and procedural standards for administering planning programs and zoning regulations should result in maximum efficiency, effectiveness and essential fairness. Unnecessary duplication of effort should be avoided to the extent possible.

4. Initiative in the development of land should continue to remain in the private sector, but the legitimate interest of the County in the nature, extent and timing of development must be recognized. The powers of the County over land development must reflect this legitimate interest. At the same time, the County should regulate, restrict and control land development only to the extent required to protect the County’s interest in the process of land development”.

(Fairfax County Zoning Procedures Study Committee 1967: 4)

The first and fourth principles speak to issues raised in earlier chapters, as well as, this chapter’s subsections. These issues are connection between planning and zoning; whether zoning supplements or supplant planning; and the tension between private land development and governmental land use regulation.

**Gaining Zoning Flexibility and Development Certainty**

The Committee’s task was to develop recommendations on reforms to lessen the possibility of additional rezoning scandals and hopefully, prevent future ones which may seem at odds with the concept of conditional zoning. The potential incongruity arises from concerns about the susceptibility of political officials to the seduction of developers when making agreements on conditions. Conditional zoning or “Conditional rezoning” as it was called in the proposal, was introduced in the section of the proposal entitled, “New Development Powers for Fairfax County,” some of which were powers that the Committee admitted the county had engaged in over the years, but without true legal authority and thus had resorted to “devious procedures” to use them (Fairfax County Zoning Procedures Study Committee 1967: 49). The justification given for their “illegal” use was “[i]n an effort to bridge the gap between the powers available to the county under various enabling acts and the powers that are needed to control development, the county has been forced to adopt some ‘extra-legal’ procedures and practices” (Fairfax County Zoning Procedures Study Committee 1967: 49). The press coverage characterized conditional zoning as a way of “forcing developers to stick to plans they present at the time rezoning” (Yenckel 1967). More specifically, it would give the county the enforcement power to do two things. First, they could make certain that the “pretty” drawings submitted as part of a rezoning application are actually built, i.e. make reality match the fantasy. Second, the county would have the ability to impose time limits on a rezoning whereby construction must begin at a certain date and avoid speculative plans.
Conditional zoning was summarized in the proposal as “[a]uthority to approve rezoning applications conditionally by imposing reasonable conditions concerning use, site layout and design and time schedule for development at the time of granting the rezoning” (Fairfax County Zoning Procedures Study Committee 1967: 49). Like efforts from 1966 to 1969 in Montgomery and Prince George’s Counties, Maryland19, the impetus for Fairfax County to have the power to impose conditions on a rezoning application stemmed from instances where rezoning applicants tried to gain approval by the visual representation of their project, i.e. “selling” their application, but what results after approval, “as built” oftentimes did not match the “as advertised” version (Fairfax County Zoning Procedures Study Committee 1967). The Committee saw two options to deal with this problem -- (1) conditional zoning or (2) “refusing to hear any evidence as to use, design, lay-out or occupant at the rezoning hearing”, so a “see no evil, hear no evil” strategy where the rezoning decision was totally driven by what was submitted with the application (Fairfax County Zoning Procedures Study Committee 1967: 49). The second option was ruled out under the rationale that this evidence actually played a large role in rezoning decisions, plus those applicants whose projects would be built as advertised would be penalized for the actions of others.

Besides the ability to force applicants to actually build what they presented, conditional zoning was lauded because it allowed for the restriction of uses. A rezoning would open a site up to all permissible uses listed in the new zoning category. Applicant may say that he or she would only be utilizing one use, but there is no assurance about actions of future landowners. Under conditional zoning, a condition could be a limit on the permissible uses which would remain in force with the new zoning category. The additional plus for conditional zoning as envisioned by this committee for Fairfax was that it could address the issue of speculative rezoning.

Montgomery County, Maryland officials had raised speculative zoning as a justification for their pursuit of conditional zoning. Speculative zoning is minimized through the use of specific conditions on the time frame in which construction on the requested rezoning project must begin. No longer could a developer hold a monopoly on land use type like a grocery store or shopping center for a number of years in a certain region of the county and prevent similar developments from occurring because there was already one in the planned pipeline, but just not constructed. Thus a rezoning application approval with a time limit condition imposed through conditional zoning could be used as a planning tool to reinforce connectedness with the comprehensive plan.

19 Prince George’s County, Maryland is geographically located along Washington, D.C.’s southeastern border. From 1966 to 1969, Prince George’s County and Montgomery County, which lies along Washington, D.C.’s northeastern border, were engaged in efforts at the local and state levels to gain the authority to engage in conditional zoning. Prince George’s received state approval in 1968 and their local zoning ordinance was amended in 1969. Montgomery failed to achieve passage of its legislation at the Maryland General Assembly. Since the 1960s, only one other county in Maryland has been granted the authority by the state legislature to do conditional zoning – Worcester County in 2000.
To accompany the different types of conditions, the Committee identified four options for
enforcement of these conditions. In the first instance, any required certificates or permits such as
occupancy would be withheld until the conditions were met. The second option would be to treat
any unmet conditions as violations to the zoning ordinance and the appropriate penalties
assessed. Assurances by the developer to the county in the form of an escrow deposit or
performance bond are the third method. The fourth technique which the Committee admitted
should be the least used out of the four was reversion whereby if the property owner failed to
fulfill the conditions of the rezoning then the property would revert back to its original zoning
use.

Based on the paragraphs above, there may be the appearance of the Committee having
recommended giving the county carte blanche authority on attaching conditions to rezoning
applications. However, this was not the case and it was made clear with their statement, “Finally,
we do not believe that it would be appropriate for the County to have blanket authority to
attached conditions in connection with all rezoning applications” (Fairfax County Zoning
Procedures Study Committee 1967: 54). In their vision of conditional zoning, it would actually
be the applicant seeking the rezoning who would have control over whether conditions could be
imposed to his or her application, perhaps in a nod to Virginia’s history of protecting private
property rights. If the applicant was willing to accept the attachment of conditions, then the
county was free to seek them. In cases where the applicant was unwilling to have conditions
imposed, then the county was out of luck, but the trade-off for the applicant was the loss of the
ability to make “any representations whatsoever with regard to the use, site layout and design,
time schedule for development and eventual tenant or occupant” (Fairfax County Zoning
Procedures Study Committee 1967: 54). If an applicant went forward with a presentation of their
representations, then they made themselves subject to the imposition of conditions by the county.
It was not clear in the discussion of conditional zoning for Montgomery and Prince George’s
Counties whether they would give this level of deference to the applicant seeking the rezoning.

**FORESHADOWING THE EVOLUTION TO CASH PROFFERS**

At the time of ZPSC’s proposal in 1967, there was no connection made between conditional
zoning and infrastructure financing. ZPSC did have a series of recommendations on new
development powers that addressed the financing and provision of public facilities. They were:

> “Authority to require the payment of a school site acquisition fee upon the
issuance of a building permit;

Authority to require pro-rata contributions to the cost of off-site improvements
necessitated by a development;

Authority to require the installation of oversized improvements in new
developments;

Authority to reserve land for public purposes shown for such purposes on an official map, and authority to reserve land for school and park purposes in connection with subdivision plat approval, but not necessarily shown on an official map; and

Authority to adopt, in conjunction with the State Highway Department, a priority program for road and highway land acquisition and construction, and authority to establish a revolving fund to finance such acquisition and construction” (Fairfax County Zoning Procedures Study Committee 1967: 49).

There is a clear trend among the recommendations that the county is looking to share the financial burden of public infrastructure and facilities with other parties like developers and the state. A Washington Post article made the point that at the time, the county already did some of the above practices as part of those “extra-legal” activities referenced earlier. The reporter wrote, “[w]hile these practices are not now mandatory, many developers voluntarily contribute land for schools and parks and pay for drainage and other improvements in order to obtain approval for their projects from the Supervisors. Because such practices are carried on outside the public view, they can lead to abuses . . .” (Yenckel 1967). There was also the suggestion of a rezoning tax which would be based on a percentage value change between the new zoning and the old zoning classification, so it would apply to only those upzonings of properties where the increase in intensity of use made the property more valuable. However, the Committee decided that the defects of the rezoning tax technique outweighed its benefits, so it never made it to the official recommendation list.

SEEKING STATE APPROVAL

Lacking home rule authority, Fairfax County needed the approval of the Virginia General Assembly, the state legislature, before it could pass its own ordinance to allow conditional zoning. Members of ZPSC acknowledged that their proposal’s recommendations could not occur within the given state statutory framework and that the Virginia General Assembly needed to recognize the limitations of the existing enabling legislation to deal with the growth-related problems of Fairfax County. They wrote, “Thus, the recommendations reflect the fact that what may be appropriate for the greater portion of the Commonwealth of Virginia insofar as planning and zoning is concerned, is not necessarily appropriate or desirable for Fairfax County. The development pressures and rate of urbanization confronting Fairfax County must be taken into account in establishing procedural and organizational standards for planning and zoning and in determining the legislative powers available to implement planning programs. The present Virginia enabling acts do not adequately reflect these considerations” (Fairfax County Zoning Procedures Study Committee 1967: 4). A newspaper reporter writes of the position that the
General Assembly was in, “[n]ow the General Assembly, which must enact any changes, will choose between going along with the committee, formulating its own reforms or preserving the status quo” (Yenckel 1968a).

The situation was complicated by the mixed messages that the General Assembly was receiving from Fairfax County, itself, because the major reform of the committee’s proposal was to turn rezoning decisions from a legislative function done by the Board of Supervisors to an administrative question decided by a newly created review board. On February 7, 1968, the Fairfax County Board of Supervisors asked their delegation at the Virginia General Assembly to offer legislation granting all of the recommendations in the zoning study, including conditional zoning (Yenckel 1968b). This point in time was chosen because if they delayed, then they would have to wait another two years for a regular session of the General Assembly. 20 All of the recommendations were bundled together in one bill, so that then the Board of Supervisors could go back and decide on an individual basis which of new powers to adopt in their ordinance. On February 12th, all thirty-seven pages of Bill 455 was introduced in the Senate under the patronage of Fitzgerald, Hirst, and Brault. The bill would amend Title 15.1 Counties, Cities and Towns, Chapter 11 Planning, Subdivision of Land and Zoning by adding a new article – Article 10 Planning, Subdivision of Land and Zoning in Urbanizing Counties. Given the distinction between general and special legislation, the bill did not specifically restrict itself to Fairfax County, but rather was applicable to “urbanizing county” defined as “any county in the State that (1) … a population of more than two hundred forty thousand persons, (2) … total jurisdictional land area, including areas within the corporate . . . of towns and areas owned or controlled by the United States government of more than 300 square miles, (3) does not adjoin a city lying . . . within the State which has a population of more than 200,000 persons” (Virginia Senate 1968, S 455). Conditional zoning came up on pages 19 and 20 of the bill in the section labeled, “§ 15.1-503.42. Individual rezoning applications—imposition of reasonable conditions.” The opening paragraph stated,

“The board of supervisors may by resolution or ordinance adopt regulations permitting reasonable conditions, concerning use, site layout and design, and time schedule for development of the proposed project, to be attached or imposed upon the granting of any individual rezoning application; provided, however, that such conditions may be attached or imposed only in those applications where the applicant indicates in writing at the time of filing an application for rezoning he consents to the attachment or imposition of such conditions in connection with the granting of the requested rezoning. Such conditions may be in addition to any standards or conditions of general applicability set forth in the zoning district regulations of the zoning ordinance.” (Virginia Senate 1968, S 455)

20 In 1971, the General Assembly amended the State Code to hold regular sessions every year instead of the previous pattern of every two years. § 30-1.
The remainder of the conditional zoning section echoed the ideas on applicability and enforcement raised in the Committee's proposal. Senate Bill 455 was referred to the Committee on Counties, Cities, and Towns, but unfortunately, it never made its way out of the committee and was essentially killed. In fact, the committee hearing to decide whether the bill would move to the Senate floor was held on the last day possible. The bill was left in Committee because "[f]acing a legislative deadline, busy Senate Committee members said the Fairfax measure was too complex and innovative to be acted on hastily. They suggested Fairfax return with the bill in two years" (Yenckel 1968c). It was one of 529 bills introduced in the Senate that session and only 255 of those bills gained passage in both houses and 248 were enacted into law. In an effort to salvage the concepts of the Fairfax bill, two of Fairfax's senators (Fitzgerald and Hirst) suggested it be used as the foundation of a two-year statewide study on rezoning problems in the state. Hirst and Fitzgerald's rationale was that the other fast-growing localities in the state may be facing their own ticking timebombs of rezoning scandals that just have not exploded yet, so that "not only the quality of government" may be affected, but also "the honor of Virginia" (Yenckel 1968c). A statewide study on urban zoning problems was authorized (The Washington Post 1968). So the failure to pass Senate Bill 455 was not a statement about the political feasibility of conditional zoning gaining passage in the General Assembly, but a comment on the General Assembly's ability to deal with innovation and the unfamiliar in the arena of land use regulations. All future legislation on conditional zoning would stand-alone on its own merits for better or worse and a new conception of this land use regulatory power emerges.

This chapter laid out the historical foundation for the political process analysis to be conducted in Chapters 5 through 8. The next chapter will describe the methodology behind this analysis. Fairfax County's struggles in the post-World War II environment illustrated many of the themes raised in Chapter 2's literature review. We clearly see the tension between county officials and the development community over where growth should be occurring in the county and at what pace. Both sides appeal to outside parties, for example the court system and the state legislature, for resolution. Neither side receives the perfect answer. At this point in time, conditional zoning is sought for flexibility and enforcement rather than infrastructure financing.
CHAPTER 4

Conditional zoning is one of the tools enacted by the Virginia General Assembly to assist Virginia localities in their management of growth-related issues. Yet, there is no consensus on its effectiveness as a growth management tool. Furthermore, over the years, the state’s conditional zoning statutes have developed specific distinctive features. For example, developer participation is voluntary and state authorization operates through a multiplicity of eligibility systems. The most notable and controversial feature, cash proffer, is an anomaly in land use regulations. Given that no other state has allowed cash proffers in conjunction with conditional zoning, the goal of this chapter is to understand how and why Virginia arrived at such a policy.

Through an exploration of the state legislative history behind the creation and authorization of conditional zoning, I investigate the hypothesis that conditional zoning’s distinguishing features, such as cash proffers, are a function of the state’s political process. More specifically, I hypothesize that it is the interactions between different agents at points along the political process which shape the conditional zoning legislative outcomes. I will examine these interactions, or lack thereof between agents at each stage of the political process model over four decades to see whether the outcomes of the political process can be attributed in some way to these agents. Historical evidence about the influence of the political process on the adoption of conditional zoning in Virginia may be applicable elsewhere. To the extent that the same types of agents shape the political process in other states, and due to the fact that state legislatures are increasingly involved in local land use regulation, my findings suggest that the consequences of the political process for legislative outcomes need to be anticipated in the design and evaluation of state land use interventions.

THEORETICAL FOUNDATIONS

The theoretical underpinnings of this chapter are found in the political process theory literature. This literature is relevant for questions that seek to understand how public policy is made in a particular area. In this dissertation, the area is land use regulations and infrastructure financing. My questions focus on the creation and maintenance of conditional zoning statutes. According to McFarland (2004), the political process model is applicable to “questions on power, policymaking, and interest groups in some field of action” (4). For conditional zoning statutes, I seek to understand, for example, why every bill introduced on the issue was not enacted in law and who benefited from these legislative outcomes. Other questions center on how and why statutory wording changes occurred, as well as, who was responsible for them. Potential explanations for these occurrences suggest a relationship between power, interest groups, and
policymaking. I use the political process model to explore the dynamics between interest groups, political outcomes, and power.

The political process model is based on the works of Arthur F. Bentley (1908/1967) and David Truman (1951) and is composed of the following facets:

“(1) empirical observation indicates a large number of agents having causal impact; (2) these agents are seen as groups and individuals representing group interests; (3) the numerous agents interact and affect one another’s behavior; (4) the numerous agents act to pursue their interests, defined according to their agents’ own definitions of interest, although sometimes this needs to be inferred from behavior; (5) interests are not taken as given, but frequently change in the process of interaction among the agents over time; and (6) implicit by the foregoing, empirical observation should be made over a period sufficient to understand the fluctuations in power, interest groups, and policy-making activities” (McFarland 2004: 5).

These facets show that the political process is complex. Multiple agents have plenty of chances to interact with one another and redefine their interests over time. The connection between political process and political power is established in two parts. The first is a sustained observation of the political process where any interactions between agents are noted. The second is the examination for signs of whether agent(s) gained the advantage in the process’s outcomes from these interactions. If the agent(s) succeeded, then this represents evidence of active political power in the political process. Interest groups are an example of potential agents involved in these interactions who may have power to determine specific outcomes to fulfill specific needs.

In the political process model, a clear distinction is made between influence and power. Influence refers to any type of behavioral change in agents during their interactions with other agents in the course of the political process. The definition of power is “an agent’s ability to cause changes in the sequence of events in the process in the direction of the agent’s goals” (McFarland 2004: 158). Power is a refinement of influence whereby the behavioral changes occur in an agent’s desired direction. An agent’s goal does not necessarily have to be a bill’s passage. For example, an agent exerts influence on a bill that normally would move to the floor of the legislature for debate. Instead, because of the agent’s influence, the bill is killed in committee because it goes against the interests of the agent. Influence thus becomes power. In comparison, you can have a case where a bill is amended from its original language. But, the new wording accomplishes a different goal than that of the agent who initiated the change interaction. Thus the agent was able to exert influence which resulted in an amendment, but they lacked the power to ensure that the final outcome was in their favor. As a result, an agent can be influential in the political process, but influence does not necessarily lead to power.

There are variations of power based on how the favorable behavioral change is achieved. At one extreme is suggestive power and at the other extreme is coercive power. Additionally, Baumgartner (1998) allows power to be direct or indirect, as well as, reciprocal or unilateral.
Power is achieved through the use of resources. Depending on the agent involved and the policy area, the resources could range from money to military supplies, to votes to laws, and court rulings. The literature has raised questions as to whether one agent’s power over another agent is actually measurable. The difficulty stems from the complexity of the interactions and outcomes, which do not always allow for a clear path of causality to be determined. As a result, there is an acceptance of studies in the literature that are only able to show a “high degree of plausibility” about who has power rather than an absolute certainty (McFarland 2004: 157). I acknowledge that there are times when outcomes of the political process may result from exogenous factors like economic shocks rather than the influence or power of interest groups on the political process. My analysis focuses on the determination of whether political outcomes like bill amendments, legislative committee failures, or floor votes are the result of influence by interest groups in the political process. To the extent possible, I attempt to draw direct lines of causation between outcomes and interest groups to show power beyond influence.

Given the policy area under investigation, the opportunity exists for a wide range of agents to be involved in the political process. As mentioned by McFarland (2004), agents could include individuals, political parties, groups, the bureaucracy, and the courts. It is the interactions of these agents at events in the political process that I suggest lead to certain political outcomes. In the case of conditional zoning in Virginia, I argue that the interactions of interest groups with each other and with other agents like state legislators are responsible for features such as the voluntary nature of developer participation. In addition, the type and number of agents involved in process interactions are not constant. Variations in agents result from redefinitions of the interests that make up the policy area. Certain interest definitions attract more attention than others. Their ramifications for policy outcomes may be controversial in nature. Furthermore, every agent in the political process is not actively in pursuit of another agent to put under their influence in the hopes of power achievement. Certain agents are better suited as intermediaries in the interactions of other agents. For example, interest groups may use decisions or rulings by the courts as a way to employ their power or exert influence indirectly on other agents such as legislators.

Thus, tension between private and public interests in land use regulations leads to movements in and out of the political process by a variety of agents. I focus on the actions of agents embodied by two interest groups -- local governments and the development community. I use a relatively broad definition of interest groups from Hrebenar and Thomas (1992) which is “any association of individuals or organizations, whether formally organized or not, that attempts to influence public policy” (Hrebenar and Thomas 1992: 9). With Virginia’s adherence to Dillon’s Rule, local governments do not have expansive powers to deal with their pressing growth concerns. They have to lobby the state’s legislative body, the General Assembly, for additional powers. Typically, individual local governments are not treated as interest groups, but as entities that are acted upon by various interest groups. Local governments are interest groups in the context of
conditional zoning and its features allowed by state statutes. This characterization holds because they must lobby the state legislature for passage of legislation that serves or protects their own interests. They may act as individual agents for legislation that is tailored to their specific jurisdiction or band together through membership organizations like the Virginia Association of Counties (VACo) and the Virginia Municipal League (VML), which are paid to lobby on behalf of the various interests of local government organizations. Besides the membership organizations, which are open to all local governments, certain local governments may coalesce around a specific interest and form a lobby around that topic. For example, counties experiencing high growth rates in the state may not feel that their needs are being fully served by large organizations like VACo and VML. They may therefore form new interest groups, like the Coalition of High Growth Counties whose lobbying platform specializes on the needs of high growth counties.

Typically, the development community exerts direct influence through lobbying or campaign donations in opposition to the interests of local governments in the realm of land use regulations. Like individual local governments, individual homebuilders and contractors contact their respective delegate or senator to sponsor legislation to solve a problem that affects them. At the same time, the individual homebuilder brings the problem to the attention of various membership organizations of which they are a member. These organizations can have local chapters, a state association, as well as, a national association. By taking the issue to a membership organization, the individual homebuilder is able to tap into a network of fellow builders who may have encountered the same problem or see the potential for it to affect them at a later date. Membership also gives them access to the organization’s financial and lobbying resources. For Virginia, the development community is embodied by the Home Builders Association of Virginia (HBAV) and its local chapters, in particular Northern Virginia Building Industry Association (NVBIA) and the Home Building Association of Richmond (HBAR).

Empirical research is mixed on whether interest groups really are powerful in the political process. Baumgartner states, “a literature . . . has been divided among those who see interest groups and lobbyists as ‘pressuring’ legislators and distorting democracy and those who see lobbyists playing a more passive role” (Baumgarter 1998: 121). Part of the confusion stems from the fact it is often assumed that they should be using their resources to affect outcomes in their favor all the time. However, many studies only look at one point in time to assess the power of interest groups. If the evidence shows that a participating group was not powerful, then it leads the researchers to conclude that interest groups do not matter in the political process. Because the issue context and issue definition matter for the involvement of interest groups in the political process, when resources for power are limited, it makes sense to conserve them for opportunities that will really affect change in the political process. Therefore interest group involvement is more likely to exhibit a pattern of ebbs and flows over time. The question becomes not whether
interest groups have power in the political process, but how, when, and why they seek to cause changes in the political process, which may or may not result in their desired outcome.

**HYPOTHESES**

Because conditional zoning has direct implications for local governments and the development community, I expect interest groups composed of individuals and/or organizations from these groups to attempt to assert influence over the state political process. However, the intensity and level of influence by interest groups will likely vary over time. As a result, agent interactions may provide a causal link in political outcomes. Evidence of influence is the intermediate step on the path towards the characterization of power as the causal mechanism in the political process interactions of interest groups. Their actions may be carried out in various ways such as agent interactions, legislative events, and local level implementation efforts. Using the theoretical foundation laid out above, combined with my focus on interest groups, my analysis is guided by a singular hypothesis.

_Hypothesis: Conditional zoning statutes in Virginia resulted from variations over time in the power of interest groups to affect outcomes of the political process._

**METHODOLOGY**

Qualitative methods will be used to establish the history of the political process behind the creation and authorization of conditional zoning and thereby, cash proffers. After a historical overview of initial conditions, which sets up the issue definition and context, the history is broken up chronologically into ten year increments representing each decade beginning with the 1970s and ending with the 2008 legislative session, so that there are four time periods overall. For each of the four decades under study, my analysis starts with an explanation of how the issue of conditional zoning emerged and was maintained or redefined over the ten year time span.

Issue emergence is the first stage of Birkland (2001)’s six stage model of policymaking. While the linearity suggested by the model is not necessarily a perfect description of the political process, the division of the process into stages allows me to isolate the path of influence exerted by various agents. In addition, I can draw conclusions about whether influence has been transformed into power. For this reason, among others, I use the stages model as a tool for the

---

21 I justify the ten year time increments on the grounds that there was conditional zoning-related legislation introduced during each of the decades with at least one significant state statute enacted. The year in each decade when the centerpiece bill(s) passed is not consistent, for example, one was in 1973 while another was 1989. Thus given that I want to fully capture the swings in power over time, I have chosen a length of time that allows for an examination of the years before the legislation passes and afterwards.

22 The six stages in order are issue emergence, agenda settings, alternative selection, enactment, implementation, and evaluation (Birkland 2001). The third stage, alternative selection, only occurs if alternatives are proposed. The last stage, evaluation, feedbacks into the first stage of issue emergence.
structure of my analysis of the political process. The stages model matches well with the step-by-step illustration of how a bill becomes law in the Commonwealth of Virginia shown in Figure 4.1. I initially focus on Fairfax County because it serves to describe how the concept of conditional zoning was born. As implementation expands across the state, it becomes increasingly important to pay attention to how conditional zoning is defined as an issue. The importance stems from the contention that the issues associated with conditional zoning in the 1970s are unlikely to be the same across every decade. If the definition varies, does the context of issue emergence also vary? The early history of conditional zoning suggests that proffers were not initially intended to be a growth management tool at all (despite the claims to the contrary), but a tool designed to help developers win the ability to do new development. An examination of issue emergence will shed light on this transformation of the justification for conditional zoning.

After issue emergence and context, I investigate the legislative process stages of agenda setting, alternative selection, and enactment within the stages framework. Given that legislators are dealing with thousands of bills in a legislative session, it is imperative for bills to be able to move out of committee and to the floor for debate by the entire legislative body. During the legislative process, the interactions of agents at various points may lead to wording changes, roadblocks, parliamentary maneuvers, or passage of a bill. Legislative failures are just as important to my analysis as legislative successes, i.e. enacted bills. The point of my analysis is to uncover what these agents are doing. These interactions show influence in action and, depending on the direction of the outcome, power, too. Furthermore, it is important to examine whether there is variation in the content of conditional zoning bills introduced over time. If I find that the issues have been redefined over time, then there should be corresponding changes in the types of bills introduced in each time period. In addition, variation in bill type and content suggests that agents may have to switch the strategies used to exert influence in the political process. This level of change over time generates an expectation for different outcomes. An absence of outcome variation in each decade leads to the mindset that one agent, perhaps an interest group, controls the political process.
Citizen has a problem and requests that Delegate introduce legislation to deal with problem. Delegate considers the request and, finding it worthy, asks Division of Legislative Services to draft bill.

Bill is introduced into House by Delegate. Speaker of the House refers bill to appropriate Standing Committee . . . Standing Committee chairman refers bill to subcommittee, where hearings are held and the bill is debated.

Subcommittee reports bill back to Standing Committee, which reports bill to full House.

The bill is read three times in the full House. During the First Reading, the bill’s title is read to the House and members vote to advance the bill to its Second Reading. On the Second Reading, the Delegate who sponsored the bill makes himself available for questions and the bill is debated by the full House. Amendments are considered during the Second Reading. The House then votes to advance the bill to its Third Reading. On the Third Reading, a roll call vote is held to determine whether the bill passes or fails to pass.

If the bill is passed by the House, it is then sent to the Senate. In the Senate, the bill goes through similar process, and after approval, is printed and signed by the presiding officer of each chamber.

If the version of the bill that is passed by the Senate and House differ, then a temporary committee made up of members of both the House and Senate is formed to reconcile the differences in the bills. Once this Conference Committee has agreed on the same version, the bill is then sent back to each chamber where roll call votes are again taken.

The bill is then sent to the Governor for his approval. The Governor can either sign the bill into law, veto the bill, or sign the bill into law with suggested changes.

The bill is then sent to the Governor for his approval. The Governor can either sign the bill into law, veto the bill, or sign the bill into law with suggested changes.

Bill is enacted into law during a regular session are effective on the 1st of July following the adjournment of the regular session. Bills enacted during a special session are effective the 1st day of the 4th month following the adjournment of the special session. Appropriations Acts are usually effective July 1st.

Bill is enacted into law during a regular session are effective on the 1st of July following the adjournment of the regular session. Bills enacted during a special session are effective the 1st day of the 4th month following the adjournment of the special session. Appropriations Acts are usually effective July 1st.

I examine each piece of legislation related to state statutes involving conditional zoning from which cash proffers are derived. My analysis does not focus only on the bills that make it through to the implementation stage, but rather on all of the bills introduced that pertain to conditional zoning and cash proffers. I follow bills through committee hearings, the floor of the legislative body, etc. through the “Enactment” stage to describe how many fail or are amended, and where these changes occur in the process. I also examine outcomes, i.e. the enacted bill. By comparing the initial set of bills to those which are ultimately enacted through the legislative process, I will be making a judgment on which interest group won the legislative battle.

The final stages of the political process are implementation and evaluation. In this chapter, my analysis emphasizes implementation rather than evaluation. I evaluate cash proffers in later chapters. Because I review the political process over time, I observe how implementation feeds back as an influence on issue emergence in later time periods. I expect that the manner in which conditional zoning is implemented at the local level generates demand for future legislative changes at the state level.

Throughout the stages of the political process model, the agents involved are highlighted. Particular attention is paid to how agents contribute to the political process, i.e. the form and level of their involvement over time. For each time period, a series of questions are asked for these agents based on the research material. These questions are:

- Which agents are originators, sustainers, and/or amenders?
- Why are these specific agents involved?
- What are the goals and interests of these agents?
- Which outcomes were influenced by these agents?
- How did the agents influence the outcomes?

The questions are worded in terms of agents, generally, rather than interest groups. Although the focus is on interest groups, there are times when other agents may dominate the political process. It is important to know which agents are always active in the political process. Besides local governments and the development community, state legislators and the courts play varying roles over time in the legislative history of conditional zoning. The roles can range from intermediaries for other agents to solo agents in pursuit of their own agenda.

**DATA AND EVIDENCE**

This chapter’s qualitative analysis is based on the use of archival materials and interviews. The primary data used to establish how the legislative process proceeds is archival materials which include newspaper articles, legislative session journals, government reports, videotaped legislative sessions, legislation drafts, and signed legislative bills. This dissertation is not a study
of the power of interest groups or more generally, interest groups themselves; therefore my research materials have focused on the political process rather than the specific defined goals and inner-workings of local governments and the development community for each decade. I arrive at conclusions about interest group power through the use of newspaper articles, as well as, legislative language and outcomes. Thus I will be using proxies for the power of either interest group rather than the direct measures suggested by the literature.

Interviews with key participants in the process are used to fill in gaps or sort out discrepancies raised by archival materials. The method behind the selection of interviewees is loosely based on a snowball sampling scheme. I started with individuals identified in the archival materials as active agents in the legislative history. During the course of my interviews, I asked if the interviewee had any suggestions for other individuals involved, but not recognized in print. In total, ten individual phone interviews took place. I conducted follow-up interviews via phone or email with some of the interviewees.

HISTORICAL OVERVIEW

In 1973, the General Assembly of Virginia passed a statute authorizing conditional zoning for counties with an urban county executive form of government, which meant that the new law was only applicable to Fairfax County. The impetus for conditional zoning stemmed from Fairfax County’s level of population growth and housing development that was at a level never experienced before by the state. Since the 1920s, Fairfax County had experienced a decennial population growth rate in the double digits, which by 1950 had reached triple digits and peaked in the 1960s with a population growth rate of 179 percent over that decade. In sum, from 1930 to 1970, the Fairfax population increased from 25,264 persons to 454,275. The explosiveness of the population growth is immense when one realizes that the county took more than a hundred years to double its population size from 12,320 in 1790 to 25,264 in 1930. Furthermore, while the Commonwealth of Virginia, as a whole, has had positive decennial growth rates since 1850; its peak was the change between 1940 and 1950 at 24 percent. To accommodate the population growth, the number of housing units in the county also increased at decennial double-digit rates. In 1940, there were 8,747 occupied housing units by 1980, the number stood at 205,106.

---

23 Based on the author’s calculations using data from the Weldon Cooper Center for Public Service at the University of Virginia, Charlottesville, Virginia – http://www.coopercenter.org/demographics/sitefiles/documents/excel/census2000/historiccensus/historic_census.xls. Additionally, Fairfax County had two geographic areas annexed out of it to form two independent cities – Falls Church City in 1948 and Fairfax City on June 30, 1961.

24 Ibid.

25 Ibid.

26 Ibid.

The original state statute focused the creation of a system whereby the development community could offer conditions attached to their rezoning application to make the proposed zoning change more palatable for approval by the local governing body and its constituents. Conditions provided a way to make the existing zoning ordinance more flexible. At the time, the general understanding was that proffers dealt with issues of design and uses. Proffers would be used to make a rezoning more successfully blend in with its neighboring properties or mitigate any perceived negative impacts. The enacted legislation, however, did not codify this mindset into the details on what constituted an acceptable condition to be offered by rezoning applicants. The only specific requirement was a “reasonable” connection between the proffer and the impact of the rezoning. Thus with no clear declaration of their unauthorized status, cash payments began in the mid-1970s to be proffered by developers to Fairfax County and other localities that had been enabled to use conditional zoning under amendments to the 1973 legislation.

The passage of the 1973 legislation was a joint effort between localities and the development community. The subsequent introduction of money into the conditional zoning system through cash proffers led to a pitched battle between the two sides over eligibility expansion of the conditional zoning system and cash proffers. The conflict among interest groups detailed in Chapters 5 through 8 resulted in three different cash proffer enabling statutes. Each statute has its own eligibility requirements and rules (See Table 4.1). In addition, there is one statewide statute that allows conditional zoning without cash proffers. The 1978 statute granted the power of conditional zoning to the entire state of Virginia, but did not allow localities to accept cash proffers as part of the rezoning application (localities authorized under the 1973 legislation and its amendments are not affected by the 1978 law). It also imposed additional constraints on conditions, like requirements that conditions must be consistent with the comprehensive plan. In 1989, the General Assembly authorized conditional zoning with the acceptance of cash proffers, but only to those localities with relatively high population growth rates and the localities adjacent to them. Thus, this legislation officially tied the use of cash proffers to growth rates and also provided a greater structure for the acceptance and expenditure of cash proffers. For example, it imposed the requirement that the project being funded by cash proffers must be in a locality’s capital improvement plan (CIP) and that the rezoning itself must have created the need for cash proffers. Despite their differences, all the statutes are based on the same principle – a cash proffer must be voluntarily offered by the developer in a rezoning application.
### Table 4.1 Locality Cash Proffer Acceptance Eligibility Requirements by State Statute

<table>
<thead>
<tr>
<th>Statutory Authority</th>
<th>Types of Localities Eligible to Accept Cash Proffers</th>
</tr>
</thead>
<tbody>
<tr>
<td>§15.2-2298</td>
<td>With the exception of localities eligible under the terms of 15.2-2303:</td>
</tr>
<tr>
<td></td>
<td>• Any locality with a decennial census growth rate ≥ 5%;</td>
</tr>
<tr>
<td></td>
<td>• Any city adjoining another city or county which had a decennial census growth rate ≥ 5%;</td>
</tr>
<tr>
<td></td>
<td>• Any towns located within a county which had a decennial census growth rate ≥ 5%; and</td>
</tr>
<tr>
<td></td>
<td>• Any county contiguous with at least three counties which had a decennial census growth rate ≥ 5%;</td>
</tr>
<tr>
<td>§15.2-2303</td>
<td>• Any county with an urban county executive form of government (i.e. Fairfax County);</td>
</tr>
<tr>
<td></td>
<td>• Any town within a county with an urban county executive form of government;</td>
</tr>
<tr>
<td></td>
<td>• Any city adjacent to or completely surrounded by a county with an urban county executive form of government;</td>
</tr>
<tr>
<td></td>
<td>• Any county contiguous to a county with an urban county executive form of government;</td>
</tr>
<tr>
<td></td>
<td>• Any city adjacent to or completely surrounded by a county contiguous to a county with an urban county executive form of government;</td>
</tr>
<tr>
<td></td>
<td>• Any town within a county contiguous to a county with an urban county executive form of government; and</td>
</tr>
<tr>
<td></td>
<td>• Any county east of the Chesapeake Bay.</td>
</tr>
<tr>
<td>§15.2-2303.1</td>
<td>• Any county with a 1990 census population between 10,300 and 11,000 through which an interstate highway passes (i.e. New Kent County).</td>
</tr>
</tbody>
</table>

Source: Commission on Local Government.

The fact that the General Assembly was willing to extend conditional zoning without cash proffers to the entire state five years after the original legislation, but that it took sixteen years to expand conditional zoning with cash proffers to other parts of the state outside of Northern Virginia and the Eastern Shore suggests the greater level of controversy with cash proffers compared to non-cash proffers. It is less clear why cash or the financial ramifications of development needed to be combined with the conditional zoning system at all. The historic concern of zoning flexibility and the more current public financing problems are not necessarily served or solved by the same tools.

**CONCLUSION**

Chapters 5 through 8 present the detailed analysis of the political process by decade. Each chapter represents an individual decade beginning with the 1970s in Chapter 5 and ending with the period of 2000–2008 in Chapter 8. They contain the evidence for the overarching conclusions that I present below as an end to this chapter. These conclusions serve as a preview of what to

---

28 "HB 1506, enacted by the General Assembly in 2006, became effective on July 1, 2006 and amended 15.2-2298 to permit locality to accept proffered conditions if such locality has had population growth of five percent or more from the next-to-latest to latest decennial census year, based on population reported by the United State Bureau of the Census" (Commission on Local Government 2007: 2).
look for in the next four chapters. Table 4.2 shows the major events that I consider the most important out of all of those discussed in Chapters 5 through 8, as well as, Chapter 3. Finally, Table 4.3 displays a timeline of all the conditional zoning and impact fee legislation in Virginia mentioned throughout the historical analysis.

In the early 1970s, Fairfax County needed conditional zoning to deal with its growth issues. Conditional zoning was a solution, but not the only solution. The county could have been granted the statutory authority by the General Assembly to implement additional land use tools as envisioned by SB 455 in 1968. Their lack of familiarity with Fairfax’s problems and a historical reluctance to embrace the unknown prevented state legislators from properly enabling Fairfax with all of the necessary tools. Fairfax’s use of conditional zoning with rezoning applications did resolve some of the tension between the development community, citizens, and government officials that had developed because of the county’s rapid growth. When other localities over the years developed growth issues, conditional zoning became the go-to solution regardless of whether it was appropriate for the situation. It was much easier for the state legislature to expand conditional zoning authority and amend its applicability and regulations rather than grant authority for a new innovative tool with which they had no experience. As a result, conditional zoning became a catch-all tool used for flexibility issues, as well as, infrastructure financing.

Dillon’s Rule has created a political structure where everything circles back to the state level. If a local government’s solution has not already been expressly authorized or restricted in state statutes, the locality must go to the state legislature to seek the authority for the remedy. This structure allows interest groups an amount of freedom to concentrate their lobbying activities on the state legislature rather than individual local governments across the state. Interest groups whose work is concentrated in a single interest area like development have an advantage in this political structure compared to local governments who would have a range of issues before the state legislature. As a result, localities have to selectively choose the issues with which to engage. Thus they may succeed in getting a few bills passed or killed while with the majority of bills, they have to be content with getting an amendment added to the original language.

Chapters 5 through 8 show a clear influence by the development community and local governments on the political process of conditional zoning. The legislative efforts by local governments in regard to conditional zoning can be characterized as the pursuit of legal authority, widest eligibility possible, and the most legally unrestrictive system possible. To answer the question of when do local governments intervene in the political process to influence the outcome, most often, their influence was visible in the cases where their existing statutory authority was threatened. The loss of existing authority when a locality’s authority was already limited was enough of a threat to both fractionalize local governments, as well as, unite them. Amendments to the conditional zoning statutes have been driven by the development community’s efforts to limit the amount of discretion and variation that local governments can
introduce into their land use regulations. Ideally, the development community would like to encounter the same conditional zoning framework and policies in a place regardless of its geographic location. Conditional zoning should be implemented the same in Fairfax County, Chesterfield County, Albemarle County, James City County, etc.

The distinguishing features of conditional zoning can largely be attributed to both the intentional and unintentional actions of the development community. As originally proposed, local governments only had to get the permission of the rezoning applicant to be able to impose conditions. The localities would come up with the conditions. In order to remove their opposition to the bill’s passage, the development industry insisted that the conditions had to be voluntarily offered by the rezoning applicant. The only role for the local government was to approve the rezoning application and approval could not be based on the conditions proffered. The applicant would come up with the conditions that he or she agreed to have attached to the rezoning application. As a result, conditional zoning has the “voluntary” feature. A condition in the form of cash payments was the unintentional result of a developer trying to find a way to gain approval votes from members of Fairfax County’s Board of Supervisors during a hearing on his rezoning application. His unintended action combined with no clear restriction on the offering of cash payments in the 1973 original statute created a precedent for what became known as cash proffers. This unintentional action led to the very much intended third feature of conditional zoning. The third feature was the multiplicity of conditional zoning statutes. To limit the use of cash proffers, two new sections were intentionally added to the original statute. The first in 1978 set up a statewide system where conditional zoning could be used, but cash proffers were not allowed. The second in 1989 set up a system based around growth rates that allowed cash proffers as a part of conditional zoning.
<table>
<thead>
<tr>
<th>Event</th>
<th>Year</th>
<th>Category</th>
<th>Action / Consequence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Zoning Procedures Study Commission</td>
<td>1967</td>
<td>Local Government Study</td>
<td>Introduced the idea of conditional zoning to Fairfax County</td>
</tr>
<tr>
<td>Senate Bill 455</td>
<td>1968</td>
<td>Legislation</td>
<td>First legislative bill in the General Assembly to authorize conditional zoning; Failed to gain passage but led to a two-year statewide study on rezoning problems in the state</td>
</tr>
<tr>
<td>Charles E. Smith Company Rezoning Case</td>
<td>1969</td>
<td>Land Use Decision</td>
<td>Developer offered conditions as part of his rezoning case and the county approved them; Local neighborhood civic associations filed suit against the county; Court upheld the county's decision but questioned the legality of the developer contributing up to $50,000 for construction of a new governmental office</td>
</tr>
<tr>
<td>Sewer and Zoning Moratoriums</td>
<td>1972-1973</td>
<td>Land Use Decision</td>
<td>Fairfax County's Board of Supervisors tried to control county's growth through a series of moratoriums; Developers challenged the moratoriums in court; Courts found the moratoriums to be invalid</td>
</tr>
<tr>
<td>Senate Bill 637</td>
<td>1973</td>
<td>Legislation</td>
<td>Bill passage established the first conditional zoning statute in the state; Applicable only to a locality with an urban county executive form of government (Fairfax County); Cash proffers are allowed</td>
</tr>
<tr>
<td>House Bill 1398</td>
<td>1975</td>
<td>Legislation</td>
<td>Bill passage expanded conditional zoning eligibility to include towns with planning commissions in a county with an urban executive form of government; Three towns were affected</td>
</tr>
<tr>
<td>House Bill 1185</td>
<td>1976</td>
<td>Legislation</td>
<td>Bill passage expanded conditional zoning eligibility to cities surrounded by a county with an urban executive form of government; Two cities were affected</td>
</tr>
<tr>
<td>House Bill 487</td>
<td>1976</td>
<td>Legislation</td>
<td>Bill passage expanded conditional zoning eligibility to counties contiguous to a county with an urban executive form of government; Three counties were affected</td>
</tr>
<tr>
<td>House Bill 840</td>
<td>1976</td>
<td>Legislation</td>
<td>Bill passage expanded conditional zoning eligibility to counties east of the Chesapeake Bay; Two counties were affected</td>
</tr>
<tr>
<td>Statewide Public Hearings</td>
<td>1977</td>
<td>State Government Study</td>
<td>Public hearings held across the state to gain input on whether conditional zoning should be expanded statewide, but in a more limited form; Led to the introduction of House Bill 135 in the 1978 General Assembly Session</td>
</tr>
<tr>
<td>House Bill 135</td>
<td>1978</td>
<td>Legislation</td>
<td>Bill passage established the second conditional zoning statute in the state; Applicable to all localities; Cash proffers are not allowed</td>
</tr>
<tr>
<td>House Bill 348</td>
<td>1983</td>
<td>Legislation</td>
<td>Bill passage expanded conditional zoning eligibility under the 1973 statute to the Town of Leesburg; One town was affected</td>
</tr>
<tr>
<td>Senate Bill 141</td>
<td>1988</td>
<td>Legislation</td>
<td>Bill passage expanded conditional zoning eligibility under the 1973 statute to any town within a contiguous county whose population is less than 100,000; Ten towns were affected</td>
</tr>
<tr>
<td>House Bill 1484</td>
<td>1989</td>
<td>Legislation</td>
<td>Bill passage established the third conditional zoning statute in the state; Eligibility based on decennial population growth rates as well as proximity to</td>
</tr>
</tbody>
</table>
high growth localities; Cash proffers are allowed; Forty-one counties, twenty-four cities, and sixty-one towns were affected
Bill passage allowed for the use of impact fees in counties with a population over 500,000; Impact fees may only be used for roads
Attorney General Opinions provide guidance to local governments on how to administer conditional zoning and cash proffers
Chesterfield County was the first locality in the Richmond MSA to allow cash proffers under the 1989 statute; In 1990, they adopted a cash proffer policy; Bill to grant the locality the power to levy impact fees failed
Bill passage prohibited downzoning in future cases involving conditional zoning and established a five year time window for developers to comply with what they proffered
Landmark case that established a bright-line test of what a locality could not do in a rezoning case involving cash proffers; Both the Circuit Court and State Supreme Court ruled against the county and its decision to deny a rezoning application on the basis of the developer’s refusal to pay the county’s cash proffer amount
Federal Court ruled that Chesterfield’s cash proffer policy does not violate the takings clause under the Fifth Amendment of the U.S. Constitution; Decision was upheld by the U.S. Court of Appeals
Landmark that established a bright line test of what a locality could do in a rezoning case involving cash proffers; Court supported the county’s actions and the State Supreme Court affirmed the decision; Case showed that a rezoning decision will be upheld if there is enough evidence in the application’s record to show that multiple factors contributed to the decision; Circuit Court upheld Chesterfield County’s denial of a rezoning application; Judge laid out a framework that plaintiffs need to meet if they want to overturn a county’s rezoning decision; Provided further substantiation to how Chesterfield conducts its cash proffer system
Bill passage required localities to begin disclosing to the Commission on Local Government their proffered cash payments and expenditures on an annual basis; First real statewide monitoring of cash proffer systems by the state government
Bill passage standardized the timing of when cash payments occur and the indexing of increases in cash proffer amounts; Represented another step by the development community in standardizing cash proffer administration across the state
<table>
<thead>
<tr>
<th>Bill type</th>
<th>Year</th>
<th>Category</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>House Bill 1506</td>
<td>2006</td>
<td>Legislation</td>
<td>Bill passage reduced the decennial population growth rate from 10 percent (House Bill 1484) to 5 percent for localities to be eligible to accept cash proffers; Seven jurisdictions were affected</td>
</tr>
<tr>
<td>House Bill 2500</td>
<td>2007</td>
<td>Legislation</td>
<td>Bill passage expanded conditional zoning eligibility under the 1973 statute to locality eligible under the 1989 statute; Allowed more local governments to have greater flexibility in the structure of their conditional zoning system</td>
</tr>
<tr>
<td>David J. Sowers v. Powhatan County, Virginia et al.</td>
<td>2008</td>
<td>Judicial</td>
<td>Federal court ruled against the plaintiff in his suit against the County over the denial of his rezoning application; Importance of the case is that it shows how a county conducts its rezoning process involving proffers</td>
</tr>
<tr>
<td>Senate Bill 768</td>
<td>2008</td>
<td>Legislation</td>
<td>Bill passage would have given localities the authority to impose impact fees for a range of public facilities, but in return, they had to give up the ability to accept cash proffers and off-site proffers; Failed to gain passage in 2008 and was held over to the 2009 General Assembly session</td>
</tr>
</tbody>
</table>
### Figure 4.3 Timeline of All Conditional Zoning and Impact Fee Legislation in Chapters 5 through 8

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Date</th>
<th>Event</th>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1968</td>
<td>Senate Bill 455</td>
<td>1989</td>
<td>House Bill 1521</td>
<td>1998</td>
<td>House Bill 2657</td>
</tr>
<tr>
<td>1972</td>
<td>House Bill 305</td>
<td>1990</td>
<td>Senate Bill 48</td>
<td>1998</td>
<td>House Bill 440</td>
</tr>
<tr>
<td></td>
<td>Senate Bill 637</td>
<td>1990</td>
<td>Senate Bill 1122</td>
<td>1998</td>
<td>Senate Joint Resolution 107</td>
</tr>
<tr>
<td>1975</td>
<td>House Bill 1398</td>
<td>1990</td>
<td>House Bill 1121</td>
<td>1999</td>
<td>Senate Bill 1137</td>
</tr>
<tr>
<td>1976</td>
<td>House Bill 840</td>
<td>1990</td>
<td>Senate Bill 613</td>
<td>2000</td>
<td>House Bill 1129</td>
</tr>
<tr>
<td></td>
<td>House Bill 1185</td>
<td>1991</td>
<td>House Bill 146</td>
<td>2000</td>
<td>Senate Bill 714</td>
</tr>
<tr>
<td>1977</td>
<td>Senate Bill 871</td>
<td>1991</td>
<td>House Bill 1254</td>
<td>2000</td>
<td>House Bill 2476</td>
</tr>
<tr>
<td></td>
<td>House Bill 1594</td>
<td>1991</td>
<td>House Bill 1141</td>
<td>2000</td>
<td>Senate Bill 874</td>
</tr>
<tr>
<td></td>
<td>House Bill 1141</td>
<td>1992</td>
<td>House Bill 166</td>
<td>2004</td>
<td>House Bill 417</td>
</tr>
<tr>
<td>1981</td>
<td>House Bill 1627</td>
<td>1993</td>
<td>House Bill 1780</td>
<td>2005</td>
<td>House Bill 2456</td>
</tr>
<tr>
<td></td>
<td>Senate Bill 340</td>
<td>1994</td>
<td>House Bill 683</td>
<td>2006</td>
<td>House Bill 2888</td>
</tr>
<tr>
<td></td>
<td>House Bill 141</td>
<td>1995</td>
<td>House Bill 1782</td>
<td>2006</td>
<td>House Bill 5048</td>
</tr>
<tr>
<td></td>
<td>House Bill 348</td>
<td>1995</td>
<td>House Bill 2187</td>
<td>1995</td>
<td>House Bill 5048</td>
</tr>
<tr>
<td></td>
<td>House Bill 554</td>
<td>1995</td>
<td>House Bill 2234</td>
<td>1995</td>
<td>House Bill 1520</td>
</tr>
<tr>
<td>1987</td>
<td>House Bill 636</td>
<td>1995</td>
<td>Senate Bill 141</td>
<td>1995</td>
<td>Senate Bill 141</td>
</tr>
<tr>
<td></td>
<td>Senate Bill 141</td>
<td>1996</td>
<td>House Bill 2485</td>
<td>1996</td>
<td>House Bill 2485</td>
</tr>
<tr>
<td></td>
<td>House Bill 902</td>
<td>1996</td>
<td>Senate Bill 542</td>
<td>1996</td>
<td>House Joint Resolution 542</td>
</tr>
<tr>
<td></td>
<td>House Bill 1021</td>
<td>1996</td>
<td>Senate Bill 681</td>
<td>2007</td>
<td>House Bill 2500</td>
</tr>
<tr>
<td>1989</td>
<td>House Bill 1033</td>
<td>1996</td>
<td>Senate Bill 681</td>
<td>2007</td>
<td>House Bill 2500</td>
</tr>
<tr>
<td></td>
<td>Senate Bill 1084</td>
<td>1996</td>
<td>Senate Bill 681</td>
<td>2007</td>
<td>Senate Bill 681</td>
</tr>
<tr>
<td></td>
<td>Senate Bill 768</td>
<td>1996</td>
<td>Senate Bill 681</td>
<td>2008</td>
<td>House Bill 3202</td>
</tr>
<tr>
<td></td>
<td>Senate Bill 768</td>
<td>1996</td>
<td>Senate Bill 681</td>
<td>2008</td>
<td>House Bill 954</td>
</tr>
<tr>
<td></td>
<td>Senate Bill 768</td>
<td>1996</td>
<td>Senate Bill 681</td>
<td>2008</td>
<td>House Bill 726</td>
</tr>
<tr>
<td></td>
<td>Senate Bill 768</td>
<td>1996</td>
<td>Senate Bill 681</td>
<td>2008</td>
<td>House Bill 111</td>
</tr>
<tr>
<td></td>
<td>Senate Bill 768</td>
<td>1996</td>
<td>Senate Bill 681</td>
<td>2008</td>
<td>House Bill 1084</td>
</tr>
<tr>
<td></td>
<td>Senate Bill 768</td>
<td>1996</td>
<td>Senate Bill 681</td>
<td>2008</td>
<td>Senate Bill 768</td>
</tr>
</tbody>
</table>

89
CHAPTER 5

The conditional zoning story of the 1970s is not one of clear-cut tension between the two interest groups – local governments and the development community. It is much more a story of the navigation of the political process to achieve authorization of conditional zoning. Fairfax County served as the poster child or the frontman in the push for conditional zoning authorization from the state legislature. The driving force behind their efforts was an attitude change among government officials in regard to growth, as well as, continued frustration with a local government’s ability to develop innovative land use tools for dealing with growth issues. The conflict over the local government’s use of other land use tools fuels the tension between the interest groups. This fighting is partially responsible for the joint effort between the interest groups to gain conditional zoning authority. The experiences in Northern Virginia between the two are used to shape future relations in later decades. This period of time gave us some of the unique characteristics of the conditional zoning that remain with us today. Despite other changes to the statutes over this decade, the one constant has been its applicability to zoning amendments only.

ISSUE CONTEXT AND EMERGENCE

Conditional zoning emerged in the 1960s in the context of a multi-agent effort to bring reform to the zoning system in Fairfax County. For the 1970s, the issue resurfaced in an environment that was becoming ripe for growth management efforts. Both citizens of the county and their local government representatives, members of the Board of Supervisors, engaged in efforts to affect the level of growth in the county, but not always on the same side. Both groups, however, did find their efforts ending up in the same location -- the courts. I discuss below two illustrations of the environment in which conditional zoning resurfaced. The first instance involves a case of citizens who filed suit against the county on the grounds that they engaged in conditional zoning without the authority to do so. This case is relevant because it provides evidence on how the county hoped to use conditional zoning. It also exemplifies a situation where local government and development community are on the same side. The second illustration is the county’s multiple attempts to exert some control over the county’s level of growth. While conditional zoning is never directly referenced, it shows the county’s willingness to try any tool available in its effort to affect growth. Furthermore, in contrast to the first illustration, it shows our two interest groups, local government and the development community, in conflict, and how the court system is resorted to in an effort to establish who has the upper hand. Finally, both examples demonstrate the limited ability of local governments to create land use regulations at
will, thus forcing local governments to fight to put their needed expansion of powers on the state legislative body’s agenda.

As much as local governments sought ways to add flexibility to an existing zoning ordinance, the development community was just as active. Conditional zoning is touted for the added flexibility that it can bring to a local government’s existing zoning classifications. Prior to the concept of conditional zoning, the development community sought to increase flexibility in Fairfax’s zoning ordinance with the addition of a new series of land use codes. In the mid-1960s, developers influenced the planning department to introduce Planned Development Housing (PDH) and Planned Development Commercial (PDC). These new codes allowed for the creation of communities which conformed to their own development plan rather than the county’s zoning regulations and were characterized by higher levels of density. Planners supported these new codes because their flexibility and denser population would allow for open space preservation, as well as, the possibility of mass transit (Dawson 1977). In October 1969, the developer, Charles E. Smith Co., proposed a $200 million complex of residential and commercial uses as the county’s first development under these new planned development zoning codes. Rezoning of the project was approved in December of 1969 with several conditions agreed upon by the county’s planning staff and the developer. Recall, however, the General Assembly had not granted Fairfax County the power to use conditions in a rezoning application. The conditions ranged from the removal of 66 town houses to be replaced with an open recreation area; financial contributions for the purchase of a site for public safety facilities, as well as, road construction; reservation of office space for government services; realignment and enlargement of roads; and attainment of certain road standards (Pettey 1969).

Unhappy with the size and potential growth impacts of the new development, a local civic association challenged the legality of the rezoning decision. The Dowden Terrace Civic Association filed the suit on grounds that “the planned development commercial zoning classification under which the project was approved ‘makes no provision for conditions to be attached to the granting of any rezoning applications’” (The Washington Post 1970). Their argument was that the Board of Supervisors only approved the rezoning because of the attached conditions. But, if the county was not allowed to impose conditions on a rezoning application because of the lack of conditional zoning authority, then the decision was invalid. A second civic association, the Aurora Highlands Civic Association, threw their support behind the plaintiffs. In May of 1970, Judge Barnard F. Jennings, a Fairfax County Circuit Court judge, ruled in favor of the County’s decision by upholding the rezoning. His rationale behind his ruling was that “the various conditions agreed to by the developer, Charles E. Smith Co., before the supervisors granted the rezoning last December were tied to the development plan for the project and not to the rezoning itself” (Bredemeier 1970). Although the judge upheld the county’s decision, he did have concerns about some of the conditions and their appropriateness. According to The Washington Post, Jennings had “‘serious reservations and doubts about enforceability’ of the
two conditions: that by September the developer prepay $500,000 in county taxes and contribute up to $50,000 for construction of a proposed county governmental office in the Baileys area. He said these two conditions were ‘not a proper part of a development plan’” (Bredemeier 1970). Despite the judge’s misgivings over certain conditions, the developers offered the county the assurances that all agreed upon conditions would be met and construction on the project began in December 1970.

Besides its role in the establishment of the issue context, this case is important in the evolution of cash proffers out of conditional zoning. First, it highlights a distinction between the legality of condition(s) attachment to a development plan versus attachment to a rezoning application. While the judge of this case upheld the county’s decision, it called in to question the county’s actions and paved the way for further legal action in regard to rezoning decisions. Secondly, the specter of financial payments as a term of a condition is brought up. There was no mention of financial payments in Fairfax County Zoning Procedure Study Committee’s (ZPSC) proposal for conditional zoning. Based on newspaper accounts, it was actually the developer, Charles E. Smith Co., who offered financial payments as a condition rather than the county’s request. But it stipulated that there was the expectation that the county would match the developer’s payments. As the allowable conditions in conditional zoning evolved to cash proffers, this example suggests that developers were partly responsible for its introduction.

The 1971 Board of Supervisors election in Fairfax County was a watershed moment for the county in its growth management efforts. All nine members of the Board of Supervisors were up for reelection – five Democrats and four Republicans. The debate across the board centered on how the incumbent supervisors had handled the issues on the growth. The challengers argued that growth had not been properly managed with negative ramifications, for instance, on the county’s natural environment, traffic levels, tax rates, and development design. The outcome of the election was the replacement of five of the incumbent members. Dawson credited their defeats to “failing to convince voters that growth control could be accomplished only at a price – higher taxes, denser development patterns, or perhaps both . . .” (Dawson 1977: 26). The new board consisted of eight Democrats and one Republican. While growth management candidates were elected, it is important to point out that their victories were not landslides of support for putting an end to development in the county. Out of the thousands of votes cast in their respective districts, the margins of victory in some cases were a few hundred votes, but also as small as six votes (Dawson 1977). No matter the size of their victory, however, the new Board started in January 1972 to implement their attempts at controlling the county’s growth. Their growth management efforts were focused on sewer capacity and rezoning applications.

The newly elected Board decided to try to control the county’s growth by a manipulation of sewer capacity allocation. At first, the county changed course by not following the existing policy where available sewer capacity was allocated to developers on a “first-come, first-served”
basis (Dawson 1977). The courts, however, did not uphold the county’s refusal to allocate sewer taps. In *Alexander Feldman v. Board of Supervisors* (*Cir. Ct. of Fairfax County, Law No. 29409, 1973*), the judge ruled that the county was not operating under the police powers justification of protecting general welfare, but rather the unjustified practice of growth control. The Board of Supervisors were not be deterred from their growth management efforts. In *Camelot Builders, Inc. v. Board of Supervisors* (*Cir. Ct. of Fairfax County, Chancery No. 38968, 1973*), the county’s second effort at a sewer moratorium was more successful, but geographically limited in its impact. The limitation stemmed from its restriction to only the one sewer shed where the moratorium could be upheld on the grounds of pollution control, i.e. protection of public welfare, rather than growth control. Growth management in the form of sewer moratoria was heavily opposed by the development community. In addition to the cases above, there were at least four other cases filed against the county.29

Besides the legal challenges, the sewer moratoria may not have been the county’s best growth management strategy because of its unintended consequences. Rather than chasing developers away from the county, the moratoria intensified their efforts to take advantage of the windows of development opportunity that were still open in the county. So there was a rush by developers to have their projects vested and construction started to gain the right to a portion of the available sewer capacity. In some cases, these efforts were done prematurely. A surge in permit requests accompanied the sewer moratoria rather than a decline. Another effect of the moratoria was an increase in development in areas with septic tanks. Because a developer could not have the same level of density on a lot served by a septic tank as opposed to sewer service, the resulting development pattern was one of large lots. The county attempted to counter this new development with changes to the subdivision ordinance regulations on the required size of septic tank fields and pumping of waste disposal. Despite their continued efforts to slow development, Dawson writes, “[b]ut again, this amendment did not stop or even slow development, but rather spread it less densely and more widely over the developable land” (Dawson 1977: 27).

In tandem with the sewer moratoria, the Board of Supervisors resorted to a multi-month zoning moratorium in early 1972. Their rationale for the halt to zoning decisions was to allow the county’s planning staff time to develop a new comprehensive growth plan for the county. Again as with the sewer moratoria, the court system on behalf of the development community ruled the zoning moratorium invalid.30 The argument made by the plaintiff which was actually twelve different cases that had been merged into one was that the county had violated their due process

---

29 The additional cases are *Levin Const. Co. v. Board of Supervisors* (*Circuit Court of Fairfax County, Law No. 29201*), *Edsall Interchange Investments, Inc. v. Board of Supervisors* (*Circuit Court of Fairfax County, Chancery N. 38978, 1974*), *Gulf Reston, Inc. v. Board of Supervisors* (*Circuit Court of Fairfax County, Chancery No. 38421, 1974*), *Chantilly Development Corporation, et al. v. Board of Supervisors* (*Circuit Court of Fairfax County, Chancery No. 43235, 1975*), *Langley Development Corporation, et al. v. Board of Supervisors* (*Circuit Court of Fairfax County, Chancery No. 46273, 1976*).

30 See *Deluca Enterprises Inc. v. Board of County Supervisors* (*Cir. Ct. of Fairfax County, Chancery No. 37254, 1973*).
by the denial of a chance to let their rezoning applications have the hearing entitled to them under the U.S. and Virginia constitutions. As a result of the decision, while the county developed its *Five-Year County-wide Development Program*, it had to keep in mind that rezoning applications were being decided at the same time which may run contrary to their plans. Figure 5.1 shows that the number of rezoning applications submitted to the county remained at high levels for most of the early 1970s. The court’s decision also forced the county to begin to deal with the backlog of rezoning applications which numbered around 300 cases in 1972 (Hazel 1976). The rezoning process was therefore in a state of disarray where a case could be deferred for seven years and newer cases heard before older ones (Peters 1974). The county finally established a zoning docket which required a minimum number of cases to be heard each month. Plus, they had to be heard in the chronological order of their filing date (Peters 1974; Hazel 1976). Despite the court’s refusal to uphold the zoning moratoria, the county showed the extremes that it was willing to go in order to bring the level of growth under its direction.

*Figure 5.1. Number of Rezoning Applications Submitted County-wide By Year for All Land-Use Categories*

![Bar chart showing the number of rezoning applications submitted county-wide by year for all land-use categories from 1966 to 1977.](image)


While the court system had dealt severe blows to their chosen growth management tools, zoning and sewer moratoria, the Board of Supervisors turned to another instrument which was outside of the court’s purview. Following the examples of previous boards, but at much more heightened and strategic level, they used their administrative powers to target developers. Peters characterized it as “the supervisors harassed developers that they could not vanquish” (Peters 1974: 52). Prior boards may have delayed a decision because they did not want to take a position on a controversial case. Under the 1972 Board, delay was a tactic used to control development. The court system had forced the supervisors to hear cases which they would do, but they would
defer a decision for an indefinite period of time under the guise of the need for and demand of additional information. In another delay tactic, the Board increased the amount of paperwork needed to complete the development process, as well as, the number of reviews of construction progress. The Board’s subjected the development community to “an ordeal of trial by paper” (Peters 1974: 53).

Prior to the election of the 1972 Board of Supervisors, the relationship between the development community and the supervisors had been civil in nature. One might even argue that it was the developers who were in charge of planning the county’s future land use patterns. Peters (1974) points to three trends over the 1960 to 1971 period that supports this argument. The first is that without initiative from the development community, there would not have been a modernization of what planning and zoning meant in the county. Second, the needs of the development community drove updates in the comprehensive plan and zoning ordinance. Finally, the general criteria for decisions on amendments to the zoning ordinance were subverted in favor of proposals by the development community. Hazel described the attitude change among developers as a move from “the prior reluctance of the development industry to become engaged in protracted litigation with local authorities . . . [to] the recognition that only by litigation would the industry survive” (Hazel 1976: 9). The environment in the county was split between “[t]he supervisors [who] saw developers as rapists of the land” and “the industry [who] claimed the board wanted to quash the entrepreneurial spirit” (Peters 1974: 59). The voters of Fairfax County would make the final decision on the victor with the Board of Supervisors elections scheduled for November 1975. Given the amount of time until the elections, the two sides, however, could not sit on the sidelines and wait each other out. The old adage of “time is money” hung over everything and set up the opportunity for the two sides to work together to develop solutions to some of their less controversial conflicts.

It was into this contentious environment that conditional zoning was introduced again. Under the subject matter heading of “Planning and Community Development” for the county’s proposed 1973 legislative program, conditional zoning occupied the top position out of thirteen subjects which ranged from public facility holding zones to underground utilities to zoning hearing examiner. The Board of Supervisors’ November 1972 general background information packet for their potential legislative program contended that “‘conditioned’ zoning may be permissible under existing enabling legislation” (Acting County Executive 1972: 2). The county made the decision to pursue the issue because “we believe a specific enabling provision should be incorporated into the Virginia enabling legislation in order to avoid any question of its legality” (Acting County Executive 1972: 2). Their conception of conditional zoning was still to resolve the discrepancies between presentations of proposed development at public hearings and the eventual construction of the development project. Insurance against deviations would be imposed as conditions to the rezoning. At the November 6, 1972 meeting of the Board of Supervisors, the legislation on conditional zoning was given the highest priority rating of “A”.
Fairfax County did reach out to other agents to garner their support for the effort to pass conditional zoning authority legislation in the 1973 legislative session. The county’s legislative proposal had the support of the Virginia Municipal League (VML). In their 1972-1973 Preliminary Report of Legislative Committee of Virginia Municipal League, VML stated “[l]ocal governments should be granted more flexibility and adaptability in guiding the physical and human growth and development in their communities”. In order to accomplish this, VML made the recommendation to “[e]nable local governments to impose conditions for the re-zoning of a parcel over and above those provided in the general regulations of the category to which the parcel is to be re-zoned”. During board meetings in November 1972, supervisors stressed the importance of attendance at meetings for the Virginia Association of Counties (VaCO) and VML to understand their legislative programs for the 1973 General Assembly session. Supervisors also reached outside of VaCO and VML for support of their 1973 legislative package. During the December 11, 1972 meeting, a motion was passed to organize a committee comprised of “Virginia Society of Professional Engineers, members of the Northern Virginia Builders Association, the Federal of Citizens Associations and other organizations, such as the Chamber of Commerce” that could be used “to aid the Board in presenting its Legislative Package to the General Assembly” (Board of Supervisors 1972: 175).

Their efforts to reach out to other agents provides evidence for the contention that Fairfax County did not have enough influence on the legislative process on its own to ensure passage of a conditional zoning bill. Further, county officials were even concerned about the loyalty of their own elected representation in the state legislature to the county’s legislative program. First, this group of supervisors at the January 16, 1973 meeting brought up the issue that not all legislation presented at the General Assembly that was related to Fairfax County was submitted to them ahead of its introduction. The Board also stated at its January 22, 1973 meeting that it wanted to be kept abreast of the voting record of Fairfax County’s delegation in regard to the county’s legislative package. In particular, they wanted to know if the legislative members supported the legislative package as proposed by the Board, i.e. the original wording. This level of vote tracking would indicate that not all the legislative members who represented Fairfax County citizens could be counted on to support the Board’s legislative package.

AGENDA SETTING/ALTERNATIVE SELECTION/ENACTMENT

The tactics for the placement of conditional zoning on the legislative agenda of the 1970s changed between the 1960s and the 1970s. Conditional zoning had to achieve passage on its own merits as a land use regulation rather than as part of a land use regulatory package. In the 1968 legislation, Senate Bill 455 (SB 455), conditional zoning was lumped together with other land use regulatory methods under a blanket authority bill. If the bill had passed, then the local government was free to choose from a variety of land use regulations which ones that it wanted
to adopt as part of its own zoning ordinance. In the 1970s, thirteen bills were introduced related to conditional zoning (See Figure 5.2). Seven bills were enacted into law. Out of the seven bills, there were two significant pieces of legislation that formed the foundation for subsequent conditional zoning statutes – SB 637 in 1973 and HB 135 in 1978.

Figure 5.2. Conditional Zoning-Related Bills Introduced in General Assembly by Year of Introduction and Status

One of the issues that conditional zoning had been proposed to solve was lack of consistency between what was proposed in a plan and what was constructed in reality. This issue was actually resolved separately from conditional zoning. For the 1972 legislative session, the Fairfax County delegation to the General Assembly sponsored a series of bills related to issues raised in the 1967 Zoning Procedures Study Committee (ZPSC) proposal. Some were successful and others were not. House Bill 305 was enacted and addressed the problem of reality not matching the visual images presented at the time of a rezoning hearing. Only applicable to a county which had adopted an urban county form of government (Fairfax County), the bill stated “may provide by ordinance for the use of plans, profiles, elevations, and other such demonstrative materials in the presentation of requests for amendments to the zoning ordinance and/or map, and may provide for the manner and extent to which construction on the property which is subject of such amendment shall conform to any such visual representations, and for the incorporation into the zoning map of notice of such required conformance” (HB 305). Thus an urban county now had the power to force the constructed built environment to conform to the demonstrative materials. With the passage of HB 305, the rationale for conditional zoning to progress along the political process needed to go beyond its original justifications.
While news accounts at the time focused on the legislation’s original justifications, later publications provided a different interpretation on the legislation’s rationale and perhaps, the real reason for the passage of the original conditional zoning statute in 1973. In a 1989 issue of *Planning in Virginia*, Roger Snyder, Chief Executive Officer of the Northern Virginia Building Industry Association (NVBIA), wrote of the legislation that it “was supported by county lawmakers who sought the opportunity to negotiate the construction of or payment for public infrastructure improvements with private developers since ‘just saying no’ to rezoning proposals was not being supported in the courts. The building industry, on the other hand, saw this new zoning process as a way to make county leaders ‘offers they couldn’t refuse’ (Snyder 1989: 11). Although the June 1991 issue of *Virginia Business* did report the history as stemming from the broken pledges, the reporter wrote, “Virginia’s proffer system began in Fairfax County in the early 1970s as a means of assuring neighbors of proposed subdivisions and commercial projects that developers would honor promises made during the heat of rezoning hearings” (Hardcastle 1991: 58). The voluntary idea stemmed from Virginia’s tradition of property rights protection. The article continued, “So local attorneys devised a concept they called ‘proffers.’ Given the strong tradition of property rights in Virginia, they theorized that governments could not demand concessions in return for rezoning. But an applicant could voluntarily agree to just about anything” (Hardcastle 1991: 58). These publications from the late 1980s and early 1990s, however, made no mention of conditional zoning’s presence in the ZOSC’s proposal in 1967 or that both Montgomery County and Prince George’s County in Maryland had made attempts at gaining conditional zoning statutory authority prior to Fairfax.

1973 was the turning point in the conditional zoning saga. The piece of legislation authorizing conditional zoning was presented, ordered printed in the Senate and referred to the Committee on Local Government on January 10, 1973 as SB 637. The bill’s chief patron was Senator Joseph V. Gartlan, Jr., State Senator from Fairfax County and a Democrat. The bill was sponsored by four additional senators—Brault, Duval, Hirst, and Waddell. Adelard L. Brault was the Senate Majority Leader at the time and a Democrat from Fairfax. Clive L. Duval and Omer L. Hirst were also members of the Fairfax County delegation and Democrats. Charles L. Waddell was a Democrat senator from Loudoun County. The bill sought to amend § 15.1-491 of the Code of Virginia with the addition of the words italicized below to the existing code:

“§ 15.1-491. Permitted provisions in ordinances; amendments.—A zoning ordinance may include, among other things, reasonable regulations and provisions as to any or all of the following matters:

(a) For variations in or exceptions to the general regulations in any district in cases of unusual situations or to ease the transition from one district to another or for buildings, structures or uses having special requirements, and for the imposition by the governing body of reasonable conditions in addition to those provided for in the general district regulations, when the owner of property seeks to have the ordinance amended to place his
property in such district and such conditions are imposed with such owner’s express consent and are incorporated in and made a part of such amendment.”

This section of the code then continued for an additional seven subsections. In the original version of the bill, there was no use of the term, conditional zoning, and no geographic limitation on which localities were eligible to add this wording to their ordinances. By the time, SB 637 made its way out of committee and back to the floor of the Senate to be read and voted on, the wording of the legislation had changed in its application and eligibility. On January 30, 1973, the agreed upon committee amendment, detailed below, was read on the Senate floor. All of the language of the original bill had been stricken and replaced, starting after “requirements” with:

“...and for the adoption, in counties wherein the urban county executive form of government is in effect as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing required by §15.1-493 by the owner of the property which is the subject of the proposed zoning map amendment.” (Journal of the Senate 1973: 200)

With the new wording, conditional zoning would be restricted to, at the time, Fairfax County because it was the only county in Virginia classified as “urban county executive.” In addition, the term, “proffered” from which proffers was derived was introduced to the lexicon of the debate. Finally, the use of “reasonable conditions” harkens back to the discussion in Chapter 2 of what constitutes “reasonableness” in terms of land use regulations.

On January 31, 1973, the bill passed the Senate on a vote of 36-1. The next step was to achieve passage in the House of Delegates. The bill began its path through the House on February 1st where on February 22nd, it was up before the House floor and an amendment was offered to slightly alter the wording by the insertion of “at or” after the word “writing” to read: “writing, at or in advance of the public hearing.” The amendment was agreed to and the bill passed the House 64-12. The passage of this amendment meant that proffers could be now be voluntarily offered at the public hearing for the rezoning application rather than just in advance of it as allowed by the Senate version of the bill. The Senate under motion of the bill’s chief patron, Senator Gartlan, rejected the amended House version 37-0 on February 23rd. Upon learning the news of the Senate vote, Delegate Moss who was a member of the Fairfax delegation made a motion for the House to drop its amendment and the members of the House agreed to do so. Finally, on March 13, 1973, SB 637 was signed into law by the Speaker of the House of Delegates and approved by the Governor on March 15th to become Chapter 286 of the Acts of the Assembly of 1973. Conditional zoning gained a legal toehold in Virginia.

Today, there is no one reliable source to explain the path of the conditional zoning legislation from its mention at the November 6, 1972, Board of Supervisors meeting to approval by the
Governor on March 15, 1973. The House of Delegates and Senate Journals provide only a minimal record of the bill’s progress through the General Assembly recording only floor votes, amendment changes, etc. There is no written transcription of committee debates or floor debates. Video recordings of floor activity did not begin until the 1982 and then only in the House of Delegates. As a result, there is no primary source to refer to in order to figure out why certain political outcomes like the amendments occurred. Interviews were conducted of individuals mentioned in various publications as participants in the conditional zoning history or identified by others as individuals who may have had some knowledge of its history. Important players included Allan C. Hubbard, Assistant County Attorney in Fairfax, John Tilghman Hazel, Jr., a land use attorney and future developer in Fairfax, William P. Croom, executive vice-president of the Northern Virginia Builders Association, and Senator Joseph V. Gartlan, Jr., State Senator from Fairfax County and a Democrat. I was able to speak via phone with Hubbard, Hazel, and Senator Gartlan who actually passed away a few weeks after our brief phone conversation.31 Given that the events happened more than thirty years ago and the age of the interviewees, ranging from late fifties to early eighties, the interviews do not provide a complete picture of the process. Thus any determination of which agent(s) were responsible for the changes in SB 637 must be made based upon the reporting of secondary sources and the recollections of important players involved in its legislative process.

The original wording of SB 637 reflected the interests of local governments. It had been drafted by Allan C. Hubbard, Assistant County Attorney in Fairfax, and the county’s lobbyist for the 1973 General Assembly session. Although the legislation was patronized by the Fairfax County delegation in the Senate, the original draft granted the authority to any local government with a zoning ordinance. The bill also gave local governments the right to impose the conditions on the rezoning application. A local government would have to have the agreement of the applicant to impose the conditions, but it is the government officials who come up with the conditions. If this version of the bill had passed, it would have provided evidence that local governments could get their own bills enacted as state statutes. SB 637 was first amended according to a Washington Post article from February 4, 1973 because the development community opposed the original wording. The author reported that after originally opposing the conditional zoning legislation, Northern Virginia Builders Association (NVBA) threw their support behind the legislation after the bill was amended to reflect their desired wording (Bredemeier 1973). The development community’s opposition was spearheaded by William P. Croom, executive vice-president of the NVBA. The 1973 legislative session was the first year that the NVBA sent a lobbyist to the General Assembly in a full-time capacity. Croom was the individual selected to fill that role. Kenneth Bredemeier writes, “Among the bills that county supervisors (Fairfax) particularly want—and the builders’ group particularly doesn’t want—are measures calling for: Conditional

---

31 Senator Gartlan passed away on July 18, 2008. I tried to find the contact information for Mr. Croom in order to arrange an interview. However, during the course of another interview when I inquired if the interviewee knew a way to contact Mr. Croom, I was informed that he was deceased.
land zoning that would permit supervisors to set conditions, with the agreement of the builder, on specific amenities to be included in a proposed development. ‘We feel it’s legalized blackmail,’ said Croom (lobbyist for NVBA). (After suggesting a change in the wording of the provision, but not its meaning, Croom supported the county’s request and a Senate committee reported the bill to the floor)” (Bredemeier 1973). In a discussion about the changes, which he characterized as “interesting”, Hubbard agreed that any amendments to the bill could be attributed to efforts by the builders’ association to lobby for corrections. So there would have been some level of horse trading done to make the bill acceptable to them.

The role of “mediator” between local government and development community interests in revisions to SB 637 was played by John Tilghman Hazel, Jr., a land use attorney and future developer in Fairfax County. Although news accounts from 1973 do not mention his involvement, later publications have hailed him as “the father of the proffer system” whether this pertains to the state level legislative authority or the development of Fairfax’s own proffer system, it is unclear (McAllister 1985). In 1991, a reporter for *Virginia Business* wrote of Hazel’s involvement, “Fairfax County couldn’t make a move without the General Assembly’s permission, so local officials turned to developer Til Hazel to sell the idea in Richmond. ‘My colleagues thought I was crazy,’ Hazel recalls. ‘Coming up with the theory of conditional zoning was treasonous as far as they were concerned’” (Hardcastle 1991: 58). It was through Hazel’s efforts that the bill was able to make its way out of the Senate committee. He was responsible for the introduction of the notion that it would be the rezoning applicants who would voluntarily offer conditions to the local government to attach to their rezoning application, i.e. proffered conditions. Hazel made clear that even though he was chosen to lobby the bill through the General Assembly, he would have opposed any changes that made the nature of conditional zoning involuntary, as well as, created allowances for cash payments. Croom and Hazel were friends, in addition to Croom’s wife’s employment as a real estate paralegal at Hazel’s law firm for several years. Further, Hazel emailed that “Bill, as most of the development/building industry, was reluctant to provide any authority to the county to demand proffers” (John T. Hazel, Jr. July 24, 2008, e-mail message to author). Hazel believed that his influence played a role in the persuasion of “Bill to accept the legislation without opposition in the General Assembly where he was a very good lobbyist” (John T. Hazel, Jr. July 24, 2008, e-mail message to author).

The selection of Hazel in this key role was interesting because he was at that time the legal representation for several developers in their lawsuits against the county for its decisions on rezoning applications. At the same time, he was a member of the ZPSC which had proposed the idea of conditional zoning for Fairfax County in the first place. Thus he occupied a unique position as someone who had clearly represented the interests of the development community, but now recognized the importance of the passage of the conditional zoning bill for the county. Hazel also acknowledged that his involvement was important because of his ability to connect
with legislators outside of Northern Virginia. This bond centered around his ties to the Byrd political organization, which basically ran Virginia politics and its Democratic party from 1920s to 1980s (Grubisich 1975). His ties gave him a way to relate to the rest of the legislators rather than being considered as some stranger from Northern Virginia. In a May 11, 1985 Washington Post article, the reporter wrote, “According to Hazel, the proffer system is legal under legislation enacted by Virginia in the mid-1970s after intense lobbying in the days ‘when Fairfax wasn’t allowed in the state capitol building’” (McAllister 1985).

While the first amendment can be viewed as a win for the development community, the second amendment was not as successful. It is clear from the evidence above that the first amendment was done to satisfy the concerns of the development community. For the second amendment, the path of influence is uncertain. From the date of the newspaper article, February 4, 1973, Croom confirmed that the development community now supported SB 637, so the second amendment which was introduced on February 22nd was unnecessary if it was being done in order to garner further support from the development community. The amendment could be interpreted as favorable to the development community because it would give them two opportunities to proffer conditions with their rezoning application either before the meeting or at the meeting. If the mood of the Board of Supervisors at a hypothetical meeting seemed to be leaning in favor of rejecting an application, this amendment would have allowed the applicant the opportunity to try to come up with a series of conditions which may change rejection votes into approval votes. While the amendment seemed to be a simple enough change or in Hubbard’s words, “a tweak,” he said that it would have the effect of “gutting the bill” (Hubbard 2008).

The amendment was offered by Delegate David A. Sutherland, a Republican who represented Fairfax County in the House of Delegates which normally might signal that the local government supported this amendment. This contention is thrown into question because I earlier acknowledged that the Board of Supervisors had concerns about legislation being introduced that affected Fairfax County which they did not support. Furthermore, Hubbard remembered this amendment and the “drama” it created in the push for final passage of the bill (Hubbard 2008). The situation was such that it left him with the impression that it was a “close call” in the passage of the bill by both legislative bodies (Hubbard 2008). Gartlan opposed the amendment, but found out too late about it to stop the House’s passage of it. Hubbard recalled that during the House vote, there was whispering of “bad bill” among the House members, but the vote was already occurring, so there were not enough “No” votes to stop it (Hubbard 2008). Gartlan made sure that the amended version failed to pass the Senate. Another Republican delegate from Fairfax County, William H. Moss, Sr., after hearing of the Senate vote, moved that the amendment be dropped and it was agreed to, so the version of the conditional zoning bill that first passed the Senate is what was enacted into law.
The passage of SB 637 was not a clear-cut victory for either interest group in the political process. While Fairfax County was the only local government to receive the authority to engage in conditional zoning which was not the original intent of the legislation, all local governments did win, in that there was now a conditional zoning state statute. In addition, the second amendment was defeated. For the development community, they were able to prevent the establishment of statewide conditional zoning authority. This is conjecture on my part, based on the fact that the restriction to Fairfax County arose out of the first amendment for which the development community lobbied. In fact, the eligibility limitation could have been the idea of other legislators who would only allow the bill to pass out of committee if it did not apply statewide. There was a division between Fairfax County and the rest of the state regarding the passage of legislation key to assisting Fairfax with its growth issues. In a March 11, 1974 Washington Post article, Delegate Wyatt B. Durrette Jr, a Republican representing part of Fairfax, was quoted as saying, “I think most members of the General Assembly wish that Northern Virginia were not part of the Commonwealth” (Nicol 1974). Senator Clive L. Duval, a Democrat from Fairfax, said, “We’re facing rapid development and we’re coming up with things they (downstate legislators) think are innovative or pie in the sky” (Bredemeier 1973). Delegate Vincent F. Callahan, Jr., a Republican from Fairfax, echoed Duval in saying, “Much of the legislation requested by the Fairfax supervisors was ‘too radical for the heavily rural and conservative legislature” (Nicol 1974). Most importantly, the development community turned conditional zoning from a concept where the local government imposed conditions with the approval of the rezoning applicant, to the applicants voluntarily offering conditions to the local government with their application. Voluntary nature, one of Virginia’s conditional zoning statutes’ distinguishing features, was the result of the political process.

After the fight to get a conditional zoning statute in the state code, the remainder of the conditional zoning bills introduced in the 1970s focused on expansion of the eligibility criteria. The expansion fight ranged from efforts for a single county to whole groups of localities to statewide. Not a single bill was introduced that would have further restricted eligibility, but then neither were all of the bills enacted. Figure 4.2 showed that out of the twelve conditional zoning bills introduced after 1973, six were enacted into law. With the exception of HB 840 in 1976 and HB 135 in 1978, successful eligibility expansion bills could be characterized as ones that focused their effort on the Northern Virginia region.

The first expansion of conditional zoning eligibility was in 1975 with the passage of HB 1398 allowing “towns therein which have planning commissions” to be eligible to perform conditional zoning. This language applied only to those towns with a planning commission in a county with an urban county executive form of leadership. The number of eligible local governments increased from Fairfax County alone to include the county’s three incorporated towns—Clifton, Herndon, and Vienna. 1976 represented a real expansion of conditional zoning power in Virginia. In three separate pieces of passed legislation, the ability to zone conditionally was
extended to “a city completely surrounded by such a county” (urban county executive form) [HB 1185]; “a county contiguous to any such county” (urban county executive form) [HB 487]; and “the counties east of the Chesapeake Bay” [HB 840]. The number of eligible localities increased from four (Fairfax County and its three towns) to eleven (Fairfax County and its three towns, Loudoun County, Prince William County, Arlington County, Accomack County, Northampton County, and the cities of Falls Church and Fairfax). §15.1-491(a) was successfully modified again in 1978 by HB 173 to include “a city completely surrounded by such a contiguous county” which expanded the number of eligible localities to fourteen with the additions of the cities of Alexandria, Manassas, and Manassas Park.

Out of the §15.1-491(a) expansion bills that were enacted into law, only two bills (HB 487 in 1976 and HB 173 in 1978) were amended during the course of the legislative process. Table 4.2 shows the conditional zoning bills for the 1970s that were amended along with their original/amended/passed language. The fact that these two bills only successfully passed both houses after being amended, suggests that certain agents involved in the political process would not have supported their passage without the amendments. Neither bill, however, received press coverage, so it is unclear who the influential agents were. All of the patrons were Democrats, so the political party in the role of agent is not an explanation for the amendments. HB 487 had five patrons – 3 from the Loudoun and Prince William County area and 2 patrons from Charlottesville and Albemarle County region. Originally, this bill was an effort to expand conditional zoning not only further within the Northern Virginia region, but also extend it to jurisdictions in the western part of the state. Specifically, the bill would have allowed counties under the “county executive” form of government to be eligible to engage in conditional zoning. Prince William and Albemarle are the only counties in the state with this form. Although HB 487 made it out of the Committee on Counties, Cities and Towns, the vote was 9-4-2 which may have been closer than some of its patrons wanted and perhaps, signaled that it may face a difficult floor vote. The first amendment was actually offered by one of the bill’s patrons, Delegate Floyd C. Bagley (D) of Prince William County. His amendment, in effect, opened up eligibility to those counties contiguous to Albemarle and Prince William County, but actually, removed those local governments with a “county executive” from eligibility. There was a procedural maneuver by Delegate Robert E. Washington (D) of Norfolk to send the bill back to committee based on this amendment and continue it to the 1977 session. His maneuver was rejected and the House passed the bill 94-2 with one of the “No” votes coming from Washington. In the Senate, HB 487 was amended again with an amendment from Senator Charles L. Waddell (D) of Loudoun County. Waddell’s amendment eliminated any language related to “county executive” local governments and focused contiguousness on proximity to “urban county executive” counties. Eligibility expansion no longer reached to the western part of the state and was consolidated around the Northern Virginia region. The bill in its amended form passed the Senate 30-7. The House passed the Senate’s amended version 72-2.
HB 173 did not have as many twists and turns in its progression toward passage in 1978 that HB 487 had in 1976, but it shared several similarities outside of its amended status. First, it was introduced by three of the same patrons as HB 487 – Bagley (D), Bell (D), and Brickley (D) of the Prince William and Loudoun county area. Second, its original wording tried to extend eligibility again to the “county executive” form of government. Given the eligibility language statutes passed in 1976, the passage of HB 173 in its original wording would have extended conditional zoning authority to the western part of the state, as well as, further south. More than the three localities added to the eligibility list under the bill’s enacted language would have been added with the original language. The bill did not encounter any difficulties in the Committee on Counties, Cities and Towns where it passed on a vote of 13-0. The House of Delegates sent it on to the Senate via a vote of 90-6. Because the Senate amended HB 173 while it was in the Local Government Committee, there is no written record to explain why the bill’s language was changed from one that dealt with eligibility criteria for counties, to cities. The amendment did not prompt any debate in the Senate where the amendments were approved by a vote of 32-0 and the amended bill passed 33-2. There was even less opposition in the House for the amended version compared to the original version as evidenced by the 75-1 vote. Finally, with its passage, HB 173 further consolidated conditional zoning eligibility to the Northern Virginia region.
<table>
<thead>
<tr>
<th>Bill Number (Legislative Session)</th>
<th>Original Wording</th>
<th>Amendment(s)</th>
<th>Passed Wording</th>
</tr>
</thead>
<tbody>
<tr>
<td>Senate Bill 637 (1973)</td>
<td>, and for the imposition by the governing body of reasonable conditions in addition to those provided for in the general district regulations, when the owner of property seeks to have the ordinance amended to place his property in such district and such conditions are imposed with such owner's express consent and are incorporated in and made a part of such amendment.</td>
<td>, and for the adoption, in counties wherein urban county executive form of government is in effect, as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by ordinance, when such conditions shall have been proffered in writing, at or in advance of the public hearing required by 15.1-493 by the owner of the property which is the subject of the proposed zoning map amendment.</td>
<td>, and for the adoption, in counties wherein urban county executive form of government is in effect, as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by ordinance, when such conditions shall have been proffered in writing, at or in advance of the public hearing required by 15.1-493 by the owner of the property which is the subject of the proposed zoning map amendment.</td>
</tr>
<tr>
<td>House Bill 487 (1976)</td>
<td>, and for the adoption, in counties, or towns therein which have planning commissions, wherein the county executive form of government or the urban county executive form of government is in effect</td>
<td>, and for the adoption, in counties, or towns therein which have planning commissions, wherein the county executive form of government or the urban county executive form of government is in effect, or in a county contiguous to such a county wherein the county executive form of government is in effect</td>
<td>, and for the adoption, in counties, or towns therein which have planning commissions, wherein the county executive form of government or the urban county executive form of government is in effect, or in a county contiguous to such a county wherein the county executive form of government is in effect, or in a county contiguous to any such county</td>
</tr>
<tr>
<td>House Bill 135 (1978)</td>
<td>... It is the purpose of 15.1-491.1 through 15.1-491.4 to provide a more flexible and adaptable zoning method to cope with situations found in such zones through conditional zoning, whereby a zoning reclassification may be allowed subject to certain conditions proffered by the zoning applicant for the protection of the community that are not generally applicable to land similarly zoned. ...</td>
<td>15.1-491.4. Amendments and variations of conditions.—There shall be no amendment or variation of conditions created pursuant to the provisions of 15.1-491.2 until after a public hearing before the governing body advertised pursuant to the provisions of 15.1-431. [2. That the provisions of this act shall not be effective as to those counties, cities or towns specified in paragraph of (a) of 15.1-491 unless and until adopted in whole or in part by amendment of the zoning ordinance.]</td>
<td>... It is the purpose of 15.1-491.1 through 15.1-491.4 to provide a more flexible and adaptable zoning method to cope with situations found in such zones through conditional zoning, whereby a zoning reclassification may be allowed subject to certain conditions proffered by the zoning applicant for the protection of the community that are not generally applicable to land similarly zoned. The provisions of this section and the following five sections shall not be used for the purpose of discrimination in housing.</td>
</tr>
</tbody>
</table>
shall not be construed to limit or restrict the powers otherwise granted to any county, city or town, nor to affect the validity of any ordinance adopted by any such county, city or town which would be valid without regard to this act.

| House Bill 173 (1978) | , and for the adoption, in counties, or towns therein which have planning commissions, wherein the urban county executive or county executive form of government is in effect, or in a city completely surrounded by such a county, or in a county contiguous to any such county, and in the counties east of the Chesapeake Bay | , and for the adoption, in counties, or towns therein which have planning commissions, wherein the urban county executive or county executive form of government is in effect, or in a city completely surrounded by such a county, or in a county contiguous to any such county, and in the counties east of the Chesapeake Bay | , and for the adoption, in counties, or towns therein which have planning commissions, wherein the urban county executive form of government is in effect, or in a city completely surrounded by such a county, or in a county contiguous to any such county, and in the counties east of the Chesapeake Bay |
Despite their lack of amendment(s) status upon passage, there was opposition to the enactment of HB 1398, HB 1185, and HB 840 in both legislative bodies. While HB 1398 passed the Senate on vote of 40-0, the House vote was 89-2 with dissent coming from delegates in Chesapeake and Richmond. HB 1185 received the most opposition with a vote of 7-4-3 to move out of the Committee on Counties, Cities and Towns and passage votes of 78-12 and 29-9 in the House and Senate, respectively. Although HB 840 advanced out of committee on a vote of 15-1, it still recorded votes of 78-14 in the House and 34-3 in the Senate. Opposition to these bills, as well as, HB 487 and HB 173 came from a geographically diverse set of legislators, but certain legislators voted against more than one of the bills. There was a mixture of Democrats, Republicans, and Independents. In addition, legislators who registered opposition were from counties, as well as, cities. The only bill where opposition came from the Northern Virginia delegation was HB 840 which extended eligibility outside of Northern Virginia to the counties in the Eastern Shore region. The lack of support from members of the Northern Virginia area may be an early sign of their reluctance to expand conditional zoning authority outside of their region without assurances that they receive something in return.

The conditional zoning legislative failures of the 1970s share a common feature. All six bills never achieved a final vote for passage on the floor of either legislative body. Any assessment of what influence(s) may have led to this result must be based solely upon the language of the bills. Five out of the six bills never made it out of committee, so there are no committee records available to indicate what agent interactions may have taken place. The bills, shown in Table 4.3, were split evenly between the House of Delegates and the Senate. Besides the commonality of being legislature failures, all of the bills aimed to expand conditional zoning to local governments outside of the Northern Virginia region. Perhaps, this shared trait was their legislative downfall. Four of the bills were specifically written to extend eligibility to one local government. Three bills out of the four attempted with various word orders to gain the authority for Chesterfield County which is located along the western border of the state’s capital city – Richmond. Another one would have extended eligibility to Roanoke County, which surrounds Roanoke City, the largest city in the southwestern area of the state. The failure of these four bills is evidence that even though an individual local government may want a certain bill passed, their need is not always enough of an impetus for a legislature to act. The other two bills attempted to extend conditional zoning eligibility statewide with the removal of any statutory language tied to the “urban county executive” form of government restriction. SB 155 in 1976 bill applied to any county, city, and town with a planning commission while 1977’s SB 871 was even less restrictive by allowing any county or municipality to adopt conditional zoning. Despite their status as legislative failures, SB 155 and SB 871 gave legislators the opportunity to grow more comfortable with the notion of statewide conditional zoning authority. This sense of fostering a familiarity over time with an issue that some consider controversial or unpopular, is important with a legislative body that has the reputation of being conservative and slow to respond.
Table 5.2 Conditional Zoning Legislative Failures in the 1970s

<table>
<thead>
<tr>
<th>Bill Number</th>
<th>Patron(s)</th>
<th>Legislative Language</th>
<th>Legislative Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Senate Bill</td>
<td>Gray, F.T.</td>
<td>, and for the adoption in counties, or towns therein which have planning commissions,</td>
<td>Indefinitely Passed by Committee on</td>
</tr>
<tr>
<td>636 (1976)</td>
<td></td>
<td>wherein the urban county executive form of government is in effect, or in a city</td>
<td>Local Government in 1977</td>
</tr>
<tr>
<td></td>
<td></td>
<td>completely surrounded by such a county, or in a county contiguous to any such county,</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>in Chesterfield County and in the counties east of the Chesapeake Bay</td>
<td></td>
</tr>
<tr>
<td>House Bill</td>
<td>Jones, G.W.</td>
<td>, and for the adoption in counties, or towns therein which have planning commissions,</td>
<td>Referred to Committee on Counties,</td>
</tr>
<tr>
<td>1594 (1977)</td>
<td></td>
<td>wherein the urban county executive form of government is in effect, or in a city</td>
<td>Cities and Towns</td>
</tr>
<tr>
<td></td>
<td></td>
<td>completely surrounded by such a county, or in a county contiguous to any such county,</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>in Chesterfield County and in the counties east of the Chesapeake Bay</td>
<td></td>
</tr>
<tr>
<td>House Bill</td>
<td>McMurtrie and</td>
<td>, and for the adoption in counties, or towns therein which have planning commissions,</td>
<td>Passed by Indefinitely</td>
</tr>
<tr>
<td>1141 (1978)</td>
<td>Jones, G.W.</td>
<td>wherein the urban county executive form of government is in effect, or in a city</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>completely surrounded by such a county, or in a county contiguous to any such county,</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>in Chesterfield County and in the counties east of the Chesapeake Bay</td>
<td></td>
</tr>
<tr>
<td>House Bill</td>
<td>Cranwell and</td>
<td>, and for the adoption in counties, or towns therein which have planning commissions,</td>
<td>Referred to Committee on Counties,</td>
</tr>
<tr>
<td>1529 (1977)</td>
<td>Robrecht</td>
<td>wherein the urban county executive form of government is in effect, or in a city</td>
<td>Cities and Towns</td>
</tr>
<tr>
<td></td>
<td></td>
<td>completely surrounded by such a county, or in a county contiguous to any such county,</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>in Chesterfield County and in the counties east of the Chesapeake Bay</td>
<td></td>
</tr>
<tr>
<td>Senate Bill</td>
<td>Colgan, Gartlan,</td>
<td>, and for the adoption in counties, cities or towns therein which have planning</td>
<td>Referred to Committee on Local</td>
</tr>
<tr>
<td>155 (1976)</td>
<td>and Waddell</td>
<td>commissions, wherein the urban county executive form of government is in effect, or</td>
<td>Government</td>
</tr>
<tr>
<td></td>
<td></td>
<td>in a city completely surrounded by such a county, or in a county contiguous to any</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>such county, and in the counties east of the Chesapeake Bay any county or municipality</td>
<td></td>
</tr>
<tr>
<td>Senate Bill</td>
<td>Gartlan</td>
<td>, and for the adoption in counties, or towns therein which have planning commissions,</td>
<td>Referred to Committee on Local</td>
</tr>
<tr>
<td>871 (1977)</td>
<td></td>
<td>wherein the urban county executive form of government is in effect, or in a city</td>
<td>Government</td>
</tr>
<tr>
<td></td>
<td></td>
<td>completely surrounded by such a county, or in a county contiguous to any such county,</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>and in the counties east of the Chesapeake Bay any county or municipality</td>
<td></td>
</tr>
</tbody>
</table>

Passage of HB 135 in 1978 represented the second turning point in the conditional zoning legislative history in 1970s. Its significance stems from the creation of a new form or system of conditional zoning applicable to the whole state with a different section number (§15.1-491.1). Thus it is not found statutorily with the existing system authorized in 1973. As will be later discussed in the Implementation subsection of this section, HB 135 was a bill influenced by the concerns of both local governments and the development community after SB 637 was enacted. Some would argue that the development community and the court system had the largest amount
of influence because HB 135 provided a specific definition for conditional zoning, the legislature’s intent and findings for conditional zoning, guidelines for what could and could not be a reasonable condition, as well as, enforcement and record keeping. Brown and Shilling (1981) write, “a review of the Virginia statute, in comparison with the experience of conditional zoning in other states, reveals that the General Assembly incorporated provisions into the Virginia statute which obviate many of the problems encountered in other states” (133). The 1978 Virginia Law Review echoed those sentiments, stating, “Virginia’s new conditional zoning provision establishes the state as one of the few jurisdictions to codify conditional zoning and as the only state to do so in a comprehensive fashion” (1497).

While the Northern Virginia legislative delegation, particularly the members in the Senate, had patronized the earlier efforts at statewide expansion of conditional zoning, HB 135’s patrons represented a cross-section of the state. They included for example Delegate C. Richard Cranwell (D) from the Roanoke area, Delegate C. D. Dunford (D) from Tazewell County along the southern border of West Virginia, and also Delegate Robert E. Washington (D) from the city of Norfolk. In having representation from both counties and cities, this bill showed its importance to urban, suburban, and rural interests. There was a clear effort to gain broad-based support for the bill. A surprising move by the bill’s patrons was the section describing the legislative intent and findings for conditional zoning. The Virginia General Assembly is known for keeping the intent of legislation guarded. Section § 15.1-491.1 as introduced read:

"It is the general policy of the Commonwealth in accordance with the provisions of § 15.1-489 to provide for the orderly development of land, for all purposes, through zoning and other land development legislation. Frequently, where competing and incompatible uses conflict, traditional zoning methods and procedures are inadequate. In these cases, more flexible and adaptable zoning methods are needed to permit differing land uses at the same time to recognize effects of change. It is the purpose of §§ 15.1-491.1 through 15.1-491.4 to provide a more flexible and adaptable zoning method to cope with situations found in such zones through conditional zoning, whereby a zoning reclassification may be allowed subject to certain conditions proffered by the zoning applicant for the protection of the community that are not generally applicable to land similarly zoned."

The “intent” section addressed the issue of flexibility in zoning while the concept of voluntary was reinforced.

---

32 § 15.1-430 (q) “Conditional zoning” means as part of classifying land within a governmental entity into areas and districts by legislative action, the allowing of reasonable conditions governing the use of such property, such conditions being in addition to the regulations provided for by a particular zoning district or zone by the overall zoning ordinance.
HB 135 was not immune from amendments. There were actually three separate amendments to the bill. However, none of the suggested changes altered the essence of the bill. The first amendment came from the Committee on Counties, Cities and Towns. Their amendment reinforced the notion of two separate conditional zoning systems. It stated, “[2. That the provisions of this act shall not be effective as to those counties, cities or towns specified in paragraph (a) of § 15.1-491 unless and until adopted in whole or in part by amendment of the zoning ordinance,].” This amendment was meant to address any concerns that Northern Virginia local governments, in particular Fairfax County, had about the loss of their existing conditional zoning powers had under the existing system if a new system of conditional zoning was approved by the legislature. A lobbyist from the Fairfax County Federation of Citizen Associations made the point in the press that “we’ll also be making sure that there is support in Richmond for the continuation of conditional zoning” (Digilio 1978). The second amendment was offered by Delegate Franklin P. Hall (D) of the city of Richmond and dealt with the notion that conditional zoning would be used by local governments as a tool for housing discrimination. His amendment read, “The provisions of this section and the following five sections shall not be used for the purpose of discrimination in housing.” Both House amendments were approved and HB 135 passed the House on a vote of 91-4. In a move to further protect the existing conditional zoning system, Senator Wiley F. Mitchell Jr. (R) of the city of Alexandria offered an amendment to the already amended House version that stated, “The provisions of this act are permissive and shall not be construed to limit or restrict the powers otherwise granted to any county, city or town, nor to affect the validity of any ordinance adopted by such county, city or town which would be valid without regard to this act.” The Senate voted 37-0 to approve the amendment followed by a vote of 39-0 to pass HB 135. The House approved the amended Senate version on a vote of 89-3. With their passage of HB 135 and failure to repeal paragraph (a) of § 15.1-491, the General Assembly set up two systems of conditional zoning. The first was very permissive while the second was more restrictive. In the establishment of a two-party system of conditional zoning, the General Assembly preordains a future showdown over cash proffers in 1989 where the final votes for passage are much more divided than that of any 1970s conditional zoning bill.

As mentioned above, conditional zoning under § 15.1-491.1 was a more restrictive regime than paragraph (a) of § 15.1-491. The increased level of restrictions was due to the influence of representatives from the development community who were members of the legislative study committee that drafted the legislation (Churn 1978). The restrictions were an attempt to reduce what conditions localities allowed rezoning applicants to voluntarily offer under conditional zoning which developers considered “legalized blackmail” (Bredemeier 1973). Under the new system, proffered conditions must meet seven requirements in order to be considered in accordance with the new statute other than just “reasonableness” requirement under paragraph (a) of § 15.1-491. The seven are listed below:

“(i) the rezoning itself must give rise for the need for the conditions;
(ii) such conditions shall have a reasonable relation to the rezoning;
(iii) such conditions shall not include a cash contribution to the county or municipality;
(iv) such conditions shall not include mandatory dedication of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided for in § 15.1-466 (f);
(v) such conditions shall not include payment for in § 15.1-466 (j);
(vi) no condition shall be proffered that is not related to the physical development or physical operation of the property; and
(vii) all such conditions shall be in conformity with the comprehensive plan as defined in § 15.1-466.1.”

It is requirement (iii) not allowing cash contributions, also known as cash proffers, that becomes the source of debate in 1989 because the fourteen eligible localities under paragraph (a) of § 15.1-491 can accept cash proffers from developers while the remainder of the state’s localities cannot. If a local government operated under paragraph (a) of § 15.1-491, there was no incentive to amend its ordinance to switch to the restrictive regime of § 15.1-491.1.

In interviews, two participants in the legislative process of HB 135 expressed support for what was finally passed by the General Assembly in 1978. John G. Kines, Jr, Planning and Zoning Administrator for the Town of Culpeper and a member of the 1977 conditional zoning study discussed in the next section, testified in 1978 at the committee hearing. He believed that part of the successful passage of the bill was that the General Assembly at the time was in stronger support of local governments than even possibly today. Furthermore, local governments were able to get more of their voice heard because the lobbying by developers was not as strong. Delegate Cranwell, one of the HB 135’s patrons, felt that since the Senate Majority Leader at the time, William B. Hopkins, was from Roanoke City, i.e. Cranwell’s home territory, this was an added assistance in the movement of the legislation through the Senate. As a local governmental official, Kines did admit that conditional zoning “certainly could have been a greater tool” (Kines 2008). Its ability to make an impact would have been improved by giving greater authority to local governments to require more in exchange for development. The resulting system in 1978 was a “compromise” (Kines 2008).

IMPLEMENTATION

The implementation of conditional zoning statutes by local governments had their first impact on future conditional zoning legislation in 1977. Legislative failures in 1976 and 1977 to expand conditional zoning across the state attracted enough attention to the issue which its supporters actually called “contract zoning” that the House of Delegates’ Committee on Counties, Cities and Towns under the leadership of Delegate Orby L. Cantrell (D) from Wise County located in the southwestern area of the state agreed to study the subject after the end of the 1977 legislative session and before the 1978 session began. The goal of the committee was to determine how to
make conditional zoning available statewide given a political climate that would not allow the Northern Virginia style system everywhere. The subcommittee in charge of the study consisted of eight members – five from the House of Delegates and three citizen members. The five delegates represented a cross-section of the state, a mix of party affiliation, as well as, locality type. The subcommittee was chaired by C. Richard Cranwell (D) who as stated earlier was affiliated with Roanoke County. The remaining four members were Floyd C. Bagley (D) of Prince William County, Clinton Miller (R) of Shenandoah County, Robert E. Washington (D) of Norfolk, and C. D. Dunford (D) of Tazewell County. The citizen members were Gladys B. Keating, Carl Bowmer, attorney for Virginia Homebuilders Association (VBA), and John G. Kines, Jr, Planning and Zoning Administrator for the Town of Culpeper. Bowmer could be characterized as the citizen member representing the interests of the development community while Kines represented local government interests. From July 18th to July 21st, the subcommittee held public hearings in four locations across the state to gather public opinion on their legislative proposal to expand conditional zoning in a more limited form to the rest of the state. Hearings began in Roanoke followed by Fairfax and Richmond with the final one held in Virginia Beach.

The three major issues at the hearings were expansion to the rest of the state; question of cash contributions; and what would expansion of a restricted system mean for localities already using conditional zoning. In their bid to determine whether expansion should be restrictive in nature, the committee relied mainly on the experiences of two counties, Fairfax and Prince William, who had adopted conditional zoning under the original system in 1975 and 1976, respectively. Developers’ experiences with these counties colored their opinion of whether conditional zoning should be expanded to the rest of the state and in what form. Although developers felt that local governments were excessive in their requirements, there was never any hard evidence of abuse given to the committee rather just anecdotes. Furthermore, there were members on the subcommittee who represented areas that did not have any zoning at all and were unfamiliar with the concerns and issues being discussed at the hearings. These areas, in the southwestern section of the state, were particularly hostile to the idea of conditional zoning for the simple reason that they viewed any type of land use regulation as government intrusion. In my interview with Kines, he recalled that the speakers could be broken down into three groups – local governments, private citizens, and development industry. As to be expected, local governments were very supportive of the effort at expansion. Northern Virginia local governments, however, did not want to lose their original system. Additionally, the bill needed the support of the Northern Virginia delegation if it would have any chance of passage in both houses, so the decision was made to retain the separate system.

Private citizens who spoke tended to address environmental concerns and were largely supportive. The majority of the development industry testified against the proposal. In their opinion, the experience in Northern Virginia had not been productive. Although in my interview
with Cranwell, he mentioned that the development industry’s attitude to expansion changed when three prominent developers stood up at one of the hearings and made the point in Cranwell’s words that “if a developer got up and said he was going to do something, then it should be done period” (Cranwell 2008). These key developers also made the point that they thought conditional zoning would increase their chances of getting zoning approvals. There was a clear stance from the development industry against cash payment allowance in the expansion. Cash may lead to the creation of an undue burden. A lot of the concern around financial payments centered on the question of whether this would authorize the buying and selling of rezonings. The voluntary nature of the system must remain.

In addition to input from various interest groups, the subcommittee took the steps to inquire from the legal system about the constitutionality of a new system. Bagley wrote to the Virginia Attorney General on whether “there is any constitutional impediment to the enactment of such legislation and whether such a statute would survive a constitutional challenge” where the legislation would be “a proposed statute which would enable all general purpose political subdivisions to adopt ‘conditional’ or ‘contract’ zoning ordinances” (Commonwealth of Virginia 1978: 516). The Attorney General concluded in his July 28, 1977 letter response that there was no such impediment if the statute is written with the guidelines that “it has a valid purpose, establishes a reasonable method of setting conditions, and the local zoning authorities do not base their decision solely upon the satisfaction of conditions by the private landowner” (Commonwealth of Virginia 1978: 517-518).

The preliminary bill was part of the discussion at the public hearings. It contained seven conditions absent from the 1973 legislation. The conditions were:

“(i) that all conditions shall have a reasonable relation to the rezoning;
(ii) that the rezoning itself must give rise for the need for the conditions that are imposed;
(iii) that such conditions shall not require a cash contribution to the governing body;
(iv) nor shall such conditions require mandatory dedication of real personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided in 151.1-446(f);
(v) shall not require payment for or construction of off-site improvements except those provided for in 15.1-466(j) of the state code;
(vi) no conditions shall be imposed that are not related to the physical development or physical operation of the property and
(vii) all such conditions shall be in conformity with the locality’s comprehensive plan” (VCPA 1977: 2).

The conditions on the prohibition of cash payments and land dedications were put in place to address the abuse concerns. The proposal also made clear the distinction between on-site and off-site improvements. At this time, conditions would be limited to on-site needs. In the
development of their proposal, Cranwell stated that the subcommittee decided to offer expansion, but in honor of Virginia traditions, to go slowly with it. In his words, this was “a new thing for us” (Cranwell 2008). So local governments would build up experience with this system over the years, and then modifications if needed could be made at a later point in time.

The conditional zoning provision passed in 1978 was quickly adopted or studied by different local governments. The Cooperative Extension Service of Virginia Tech University in September of 1978 released a publication on conditional zoning which was basically a “Frequently Asked Questions” (FAQ) document. There were answers to over twenty questions on the topic ranging from the legislation’s purpose, permissible conditions, similar tools, and administration. In March of 1979, the Planning Commission of Bedford City wrote to the VML in search of information on conditional zoning. VML ended up conducting a short survey of its members. Three cities (Alexandria, Hampton, and Portsmouth) had adopted conditional zoning while Manassas had studied it. The counties of Goochland, Henrico, Montgomery, and York had adopted conditional zoning. Frederick and Prince George counties had studied the topic. Two towns (Blacksburg and Culpeper) adopted it while Herndon had studied it. Despite the number of adoptions, there was an air of caution about conditional zoning’s longevity among the local governments. Norman F. Hammer, Jr., Herndon’s Planning Director, best captured this uncertainty when at the Virginia Chapter of the American Planning Association’s Annual Meeting in March of 1979, he said, “I fear that if suit is brought for whatever reason, the entire house of cards may collapse. On this basis, I would recommend that any jurisdiction considering adopting the system proceed very cautiously, especially in the area of spending large sums of money on legal fees and [s]taff expansion to implement such a system” (Hammer 1979: 6). The Virginia Attorney General responded in June of 1979 to concerns raised by Albemarle County about the proper course of action to follow if an applicant’s proffered conditions are amended at a public hearing and whether there needs to be a readvertisement of the case, etc. His opinion was that a proffer that is amended during a hearing before the governing body to a less intensive use does not have to be readvertised to the public (Commonwealth of Virginia 1979: 336). The first true test of the system’s fragility came less than a year later in Fairfax County.

Overall, localities that had been without the power of conditional zoning were grateful to have it because it gave them the assurance that they “can exert some control on how and when property is developed” (Churn 1978). Prior to conditional zoning, localities like Henrico County had to accept on faith that restrictive covenants between a set of property owners would be enough enforcement to ensure certain conditions were attached to the development of a property (Churn 1978). HB 135 became law effective July 1, 1978 and in August, Henrico County passed its conditional zoning ordinance followed by Chesterfield County in October (Churn 1978). The major concern of developers in the Richmond Region with the new legislation was the inequities between what a larger developer could offer to “sweeten” the rezoning application for a locality compared to a smaller developer who did not have the same amount of resources (Churn 1978).
For example, the large developer could give the county a site for a school (Churn 1978). Of course, a locality is not supposed to base their decision to approve a rezoning application on the proffered conditions.

**CONCLUSION**

In the span of ten years from when legislation was first requested on the issue (1968) to its extension statewide in 1978, conditional zoning goes from not existing as term in the Virginia State Code to having its own subheading in the 1978 version of the Code of Virginia. I would argue that local governments and the development community were influential in the political process in the 1970s. Every local government now has the opportunity to use at least some form of conditional zoning legally. Given that at the end of 1979, only 14 localities were eligible for the more permissive form under paragraph (a) of § 15.1-491 when it could have been 135 cities and counties under the original version of SB 637 in 1973 is proof that local governments did not have the power to have their legislative wish lists approved without interference from other agents. One of those agents happened to be the development community. The original legislation was worded to apply to the entire state, so there was no original intent behind the legislation’s sponsors to pit local governments against one another. There was a clear wording change to emphasis the voluntary nature of the statute, i.e. the word “imposition” disappears from the statute. The simplicity of the 1973 statute stemmed from either an assumption made by the authors that everyone involved understood what were acceptable conditions, or a naivété on their part that as time passed, the system would not try to be gamed by either side. Although the court case involved financial payments, it is clear that this was never the aim of the statute. There were efforts to finance infrastructure, but through other pieces of legislation. For the most part, the debate over conditional zoning was civil between the different parties, but as localities start to gain in familiarity with the tool and the pressure on the development community increases, the tone of the debate shifts sharply in the 1980s.
CHAPTER 6

The 1980s was a period of regulation tweaking, limited expansion of existing conditional zoning authority, and the creation of a third system of conditional zoning. This decade also witnessed the beginnings of the debate about impact fees and cash proffers. Additionally, it was significant for the change in the tone of the debate between the two key interest groups, localities and developers, over the management of growth. Finally, while conditional zoning issues in the 1960s and 1970s were defined by the experiences of the Northern Virginia region, particularly Fairfax County, other regions in the 1980s, such as the Richmond, VA Metropolitan Statistical Area, as well as, the Virginia Beach-Norfolk-Newport News, VA-NC Metropolitan Statistical Area, began to add their growth concerns to the list of issues that defined conditional zoning.33

ISSUE CONTEXT AND EMERGENCE

The issue context for conditional zoning in the 1980s was shaped by implementation at the local level, and the search at the local level for financial resources to fund infrastructure. These two factors almost act as a clear division between the types of conditional zoning legislation offered in the early 80s versus the late 80s. Present throughout the decade was still the factor of eligibility expansion, but the desire by local governments to be eligible was driven by a new need. I discuss below two examples that illustrate the issues that shaped the conditional zoning legislation in the 1980s, as well as, the changes in the dynamic between local governments and the development community. The first example focuses on the conflict that erupted between members of the development community in Fairfax County and the Board of Supervisors and the staff of the Planning Department in regard to the administration of the conditional zoning system at the beginning of 1980. At this point in time, Fairfax County had been operating with a provision on conditional zoning in their zoning ordinance for five years. The conflict centers on concerns by the development community that government officials are overreaching their authority in regard to the types of conditions that the officials suggest developers should proffer to the county. This example shows how far one interest group was willing to go in order to get their concerns addressed. While the first example focuses on the implementation issue, the

33 The Richmond, VA Metropolitan Statistical Area as defined by the Office of Management and Budget in December 2005 is composed of Amelia County, Caroline County, Charles City County, Chesterfield County, Cumberland County, Dinwiddie County, Goochland County, Hanover County, Henrico County, King and Queen County, King William County, Louisa County, New Kent County, Powhatan County, Prince George County, Sussex County, and the cities of Colonial Heights, Hopewell, Petersburg, and Richmond. The Virginia Beach-Norfolk-Newport News, VA-NC Metropolitan Statistical Area is composed of Gloucester County, Isle of Wight County, James City County, Mathews County, Surry County, York County, and the cities of Chesapeake, Hampton, Newport News, Norfolk, Poquoson, Portsmouth, Suffolk, Virginia Beach, and Williamsburg. Currituck County in North Carolina is also a part of this MSA.
second example analyzes conditional zoning as a potential tool for infrastructure financing. The illustration, here, is the work of the Commission on Transportation in the Twenty-First Century from 1986 to 1987 on potential alternative funding options for the transportation needs of local governments. Impact fees and the expansion of the conditional zoning authority under the 1973 statute (15.1-491(a)) are proposed as funding options. The second example set the groundwork for how conditional zoning through cash proffers becomes redefined as a local government revenue source.

The first flare-up between developers and localities over conditional zoning occurred in early 1980. Developers in Fairfax County felt that the county’s supervisors were overreaching in their suggestions for potential proffers. In a letter dated January 28, 1980, twelve prominent individuals involved in the “land ownership, rezoning, and development” process in Fairfax County wrote to the Board of Supervisors with their concerns about the operation of the county’s conditional zoning process. The lead signature belonged to Cecil M. Boyer, Jr., President of the Northern Virginia Builders Association, Inc. (NVBA). John T. Hazel, Jr. was also one of the signees. The signees indicated their importance by highlighting the roles that they played in the passage of conditional zoning in 1970s. The letter stated, “[a]s I am sure, you are aware, some of the undersigned participated in and helped to draft the provisions contained in Title 15.1-491(a), et seq. Indeed, some of the undersigned on more than one occasion testified in either Richmond or in Fairfax County before Committees of the General Assembly in favor of the adopted statute and against later suggestions of potential abuse” (Board of Supervisors 1981: A-3(d)).

These twelve individuals essentially accused the county of abuse because the voluntary nature of the system was being replaced with county suggested proffers. Their conclusion was that conditional zoning as practiced in Fairfax County suffered from a lack of uniformity in practice and legality. As an indication of their potential power and influence, the letter concluded with what could be considered a veiled threat. The signees wrote, “It would be indeed unfortunate if a voluntary system could not exist which would allow an applicant or developer to voluntarily bind himself to adjust his proposed development for the benefit of the community. However, the proffer process has become so onerous and extra-legal that its continuance under present circumstances compels the undersigned to request a change in practices or in the alternative, abandonment of the concept” (Board of Supervisors 1981: A-3(f)).

Given the tone of the letter, the development industry, perhaps, expected Fairfax officials to behave quickly and respond to their charges and implement the necessary changes without delay. From later communication between the County and NVBA, it was apparent that the demands of the developers were not met. The development industry took their recommendations to the Planning Commission in April of 1980. A letter dated October 1, 1980, from Boyer, himself, to the Chairman of the BOS, John F. Herrity, further conveyed the seriousness of the development industry and showed how far they had been willing to push, in order to get their demands met.
The letter led off with the claim that “to date, the response of Fairfax County has been unsatisfactory. We are now appealing directly to the Board of Supervisors for a specific response to our points of contention” (Board of Supervisors 1980: I-13(a)). Boyer ended the letter by pointing out that if the local level would not solve the problems, then things would have to be taken to the state level. He wrote, “If procedures are not established by the Board to implement these principles, we intend to seek legislative remedies at the State level. We hereby request a meeting with the full Board of Supervisors to be scheduled not later than the week of November 3, 1980. The purpose of this meeting will be to determine where the proffer procedures in Fairfax County can be modified sufficiently to obviate the need for an amendment to the current State legislation” (Board of Supervisors 1980: I-13(d)). The letter was cc’ed to Senator Joseph V. Gartlan, Jr. who was the chief patron of the 1973 legislation.

Board of Supervisors members comments ranged from “It’s an arrogant power play. I’ll be damned if I’ll just roll over” to “I feel like they think they’re holding a gun to our heads” and “I won’t stand for an ultimatum” (Grubisich 1980). The main author of the legislation, Senator Joseph Gartlan, Democrat from Fairfax, admitted that the system had problems and that abuses were possibly taking place (Grubisich 1980). But Gartlan believed that confrontation in the General Assembly was not the answer (Grubisich 1980). The Board of Supervisors ended up creating a Board subcommittee to meet with the NVBA to address their concerns. This subcommittee was appointed on October 20, 1980. By January 12, 1981, a proposed resolution had been developed for consideration by the full Board of Supervisors. The resolution responded specifically to two of the development community’s major concerns while two others were directly unaddressed. The concerns that the resolution addressed were “the voluntary submission of proffers” and “restriction of proffers to issues having a ‘reasonable relationship to the proposed rezoning’” (Board of Supervisors 1981: 11). Left unaddressed were the concerns that dealt with “[e]limination of proffers that ‘restate applicable requirements of local ordinances and State statutes’” and “[e]limination of proffers as ‘a mechanism to enforce a bonus density system’” (Board of Supervisors 1981: 12). NVBA was still disappointed in this version of the resolution and recommended additional changes. These final changes were approved by the Board and on January 26, 1981, the Board adopted the resolution by a unanimous vote. At the May 4, 1981 meeting, the Board received a status report of how the actions outlined in the resolution had been addressed.

As an end to the conflict, the Board of Supervisors on October 20, 1981 amended the zoning ordinance to add a new separate section, 18-204 Proffered Conditions Regulations. This section clearly stated the county’s procedures and regulations on proffers. It would eliminate any further confusion over what the county required where conditional zoning was applicable. While it

---

34 The bonus density system refers to the policy in the Comprehensive Plan where density ranges are given for the recommended land uses and in order to achieve the higher end of the ranges, references are made to specific conditions that must be met.
remains unclear whether NVBA had enough clout to have the original conditional zoning statute repealed, if it had been repealed, conditional zoning would still have been available to the Northern Virginia and Eastern Shore localities under the 1978 statute, but in a more restrictive format. This assumes, of course, that the development industry would only target the 1973 statute and not the 1978 statute. Herndon’s Director of Planning in 1979 cautioned that the whole house of conditional zoning was built around Fairfax County and should it fall, then everything had the potential to collapse.

The Commission on Transportation in the 21st Century was formed in 1986 by a Senate Joint Resolution to examine the transportation system in Virginia, particularly its future needs and financing concerns. The second phase of the Commission’s work which started in 1987 focused on “(1) builder contributions to off-site road improvements; (2) development impact fees; (3) granting to local governments increased statutory authority to consider the capacity of local roads and other public facilities when rendering land use decisions such as rezoning; and (4) proposals to grant to local units of government expanded power to construct and control local roads.” The Local Government Advisory Committee, which was a special advisory committee to the Commission, was given the task to conduct a survey of localities on how they felt about potential alternative funding options like those listed above.

The survey was sent to every local government in Virginia and 112 local governments responded (26 cities, 43 counties, and 43 towns). In total, the responses represented a population of over 3.9 million. For each financial option, the local governments were asked to rate their level of interest. Their response would provide an indicator of how well that tool would operate in the community. The possible rating options were strong, moderate, low, no interest, don’t know, and not applicable. The number of local governments who responded to each level of interest option for extending conditional zoning were 41, 16, 18, 17, 14, and 3, respectively. Out of the 75 local governments that expressed at least some level of interest in the extension of conditional zoning, all eight geographic areas of the state were represented. The region with the highest number of

---


36The total population number does not reflect the population of the towns.

37The respondents for each of the eight regions are as follows: Central (Albemarle County, Amherst County, Ashland, Blackstone, Bowling Green, Broadway, Caroline County, Charlottesville, Chesterfield County, Colonial Heights, Farmville, Fauquier County, Fredericksburg, Goochland County, Hanover, Hanover County, Henrico County, Hopewell, New Kent County, Orange County, Petersburg, Rappahannock, Richmond, Spotsylvania, The Plains, and Warrenton); Eastern Shore (Cape Charles, Northampton); Northern Neck (Essex, Gloucester, Richmond County, Westmoreland County); Northern Virginia (Alexandria, Arlington County, Dumfries, Fairfax County, Fairfax, Falls Church, Herndon, Leesburg, Loudoun County, Manassas Park, Middleburg, Quantico, Stafford, Vienna); Southside (Appomattox, Brookneal, Campbell, Chase City, Clarksville, Crewe, Dinwiddie, Greensville, Halifax, Martinsville, Prince Edward, South Boston, Virginia Beach, Waverly, York); Valley (Alleghany, Altavista, Berryville, Blacksburg, Botetourt, Bridgewater, Buena Vista, Christiansburg, Clarke, Clifton Forge, Craig,
local governments expressing a "strong" interest was the Central with 11 local governments, but Northern Virginia was close behind with 10 and the Valley had 9. The region with the greatest representation across the board in interest level was the Valley with 19 local governments. Local governments were also asked to give their top three financing options that they “most favored” and “least favored”. Conditional zoning garnered the most votes for being the third “most favored” choice. Impact fees and off-site road improvements received the most votes for first and second “most favored” choices, respectively. In terms of population, conditional zoning received the highest percentage of the total survey population for the “strong” response at 65.8 percent.

In the press coverage of the committee’s survey findings in 1987, the issue of extending the powers of the first conditional zoning system (15.1-491(a)) to the rest of the state was raised. At the same time, impact fees emerged as a favorite among local governments as a new source of revenue. The conclusion of the survey was that “[l]ocal governments apparently favor special assessments on property developers as the best sources of funds to finance local transportation needs” (Burrows 1987). This sentiment was also echoed in a June 6, 1987 Washington Post article stating, “In the belief that ‘growth should help pay for itself,’ officials in high-growth areas from Tidewater to suburban Richmond and beyond now favor an array of builder fees, special taxing districts, expanded zoning authority and other new powers over development” (Melton 1987). The author additionally makes the point that Delegate Cranwell (Democrat from Vinton) who was one of the patrons of the 1978 legislation alluded that “today there is considerable legislative support for extending to other jurisdictions at least one set of zoning powers that Northern Virginia has had since 1976,” i.e. conditional zoning (Melton 1987).

Local governments outside of the Northern Virginia region saw the amount of money that Northern Virginia localities were able to raise through proffers under the “old” conditional zoning system and wanted to be given the same opportunity. They were particularly envious in terms of transportation funding. In a September 1987 report entitled Report on the Contribution of Conditional Zoning Towards Meeting Northern Virginia’s Transportation Requirements, Kathleen K. Seefeldt, a member of the Local Government Advisory Committee, tried to determine the “value” of the proffers related to transportation approved in Fiscal Year 1987 for the cities of Alexandria, Falls Church, Fairfax and the counties of Fairfax, Loudoun, and Prince William. Alexandria and Falls Church did not approve any rezoning requests that involved transportation proffers for Fiscal Year 1987. Fairfax County’s data did not lend itself to the report’s format, so their response was that in 1986, the twelve largest development projects had proffered over $98 million in road improvements (Seefeldt 1987). For the Fiscal Year 1987, Fairfax City approved three rezoning cases which involved a total of 65 residential units, 650,000 non-residential square footage, and an estimated value of $792,000 in transportation improvements.
proffers (Seefeldt 1987). Loudoun County approved 20 rezoning cases with 3,977 residential units, 20.1 million in non-residential square footage, and an estimated value of $21 million in transportation proffers (Seefeldt 1987). Finally, Prince William County approved 43 rezoning cases with 2,447 residential units, 7.5 million in non-residential square footage, and an estimated value of $10.5 million in transportation proffers (Seefeldt 1987). The transportation improvements proffered ranged from right-of-way dedications/reservations, road construction, signalization and street lights, to cash contributions. Seefeldt stressed the importance of the connection between conditional zoning and transportation improvements. She concluded, “in a rapidly growing area, conditional zoning proffers have expedited specific roadway projects, have allowed private developers to contribute their fair share to the local transportation system, and most importantly, have reduced the cost of constructing major new roadway improvements and the time required to build these improvements” (Seefeldt 1987: 4).

Regardless of the interest level by local governments for each financial option, the committee needed to know the pros and cons of each option. This task fell to the state Department of Taxation which summarized the advantages and disadvantages of each financial option that the state’s Constitution authorized the General Assembly to use as a way to augment state transportation revenues. The Department of Taxation considered the expansion of 1973 conditional zoning statute (15.1-491(a)) statewide as a financial option for local governments because developers could proffer rights-of-way and road construction funds (Virginia Local Government Advisory Committee 1987). However, they identified both advantages and disadvantages to its use. The first advantage was that conditional zoning would not increase property taxes (Virginia Local Government Advisory Committee 1987). The second advantage was “[s]ubstantially increases ability of the locality and the developer to mitigate potentially damaging development problems” (Virginia Local Government Advisory Committee 1987: 20). In terms of disadvantages, the first one was the inherent level of uncertainty in conditional zoning systems because the conditions will vary by local government and project (Virginia Local Government Advisory Committee 1987). As a result, development costs would not be consistent across the state. Finally, the Department of Taxation concluded conditional zoning has the disadvantage of “[i]ncrease[ing] the cost of development and new housing,” but no figures were offered to support this conclusion (Virginia Local Government Advisory Committee 1987: 20).

Local governments were not deterred by the Department of Taxation’s findings. The 1988 General Assembly Session wish list for both Henrico County and the Richmond Regional Planning District Commission included the goal of obtaining the same conditional zoning powers authorized for Northern Virginia and the counties along the Eastern Shore (Potter 1987; Richmond Times-Dispatch 1987). The Board of Supervisors for Chesterfield County requested their General Assembly delegation to draft legislation enabling them to accept cash proffers and impose impact fees, but their delegation dropped them from the legislative agenda for 1988 out of the fear that they would chase developers away from the county (Williams 1988).
were brought to the 1988 General Assembly under the guise of providing municipalities with a greater range of options to finance public improvements.

AGENDA SETTING/ALTERNATIVE SELECTION/ENACTMENT

In light of the conflict in Fairfax County that was resolved in 1981, legislative activity related to the two conditional zoning statutes occurs almost annually in the 1980s. Despite the threat from the Northern Virginia development community, none of the bills contain any language on the abolishment of either system. In total, twenty bills were introduced over the 1980s that dealt with changes to the two conditional zoning statutes. Figure 6.1 shows the total number of bills by their year of introduction. Out of the ten years in this decade, only two legislative sessions (1985 and 1987) did not have any bills related to conditional zoning introduced in them. In terms of bill passage, nine out of the twenty bills passed which meant that eleven failed. In contrast to Figure 6.1, Figure 6.2 shows that a trend for the 1980s was an increase in the number of bills whose legislative outcome was determined in a legislative session different from the one in which the bill was introduced. For example, 1985 and 1987 were the two years without conditional zoning bills introduced in them while Figure 6.1 has 1980, 1984, and 1986 as the only years where a legislative outcome was not decided for the bills introduced that year. The carrying over of bills to a later legislative session is not a new strategy for legislators, but its use in regard to conditional zoning bills definitely increased in the 1980s. During the 1970s, only one conditional zoning bill was carried over to the next legislative session (SB 155 from 1976 to 1977) compared to more than five in 1980s.
While the bills of the 1970s were focused exclusively on the establishment and eligibility expansion of conditional zoning, the 1980s bills were an even mix of eligibility expansion bills and statutory changes related to the implementation of conditional zoning. Ten of the bills focused on eligibility expansion while ten proposed changes not related to eligibility to the
statutes. Based on a bill’s original language, legislators attempted to amend the 1973 conditional zoning statute (15.1-491(a)) twelve times. There were eight bills whose original language wanted to amend the 1978 conditional zoning statutes (15.1-491.1 to 15.1-491.6).

Since the 1978 statutes applied to every local government in the state, the bills amending these statutes addressed non-eligibility issues. In comparison, ten of the twelve bills that sought to amend the 1973 statute were eligibility expansion bills. These ten bills are summarized in Table 6.1 which shows their original wording along with any amended language; local governments that would become eligible; and the legislative outcome of these bills. Four out of the ten bills were enacted into law, but only two of these actually amended the eligibility language for 15.1-491(a). As I will discuss in more detail later in this section, HB 1484 set up a new conditional zoning statute (15.1-491.2:1) and HB 1485 had its proposed changes to 15.1-491(a) removed by amendment. SB 141 passed in 1988 ends up removing the language passed by HB 348 in 1983. Further, the amended language of SB 141 closely approximated the original language of HB 348.

In the end, the two bills that did amend the eligibility language of 15.1-491(a) only expanded it within the confines of the Northern Virginia region. In this case, SB 141 made sure consistency existed in the conditional zoning statutes between towns and the counties within which they reside. Builders or developers with rezoning applications in towns should not face a more restrictive conditional zoning system because their project occurs within town boundaries rather than outside in the county’s unincorporated area. Thus the eligibility bubble was not pushed farther outward from where the lines at the end of the 1970s for 15.1-491(a) were drawn, but rather any cracks that popped up from hindsight in it are being filled.

The eligibility expansion bills of the 1980s differed from the 1970s. First, none of the bills in the 1980s tried in either their original or amended language to extend the 1973 less restrictive system of conditional zoning (15.1-491(a)) statewide. Instead, the largest legislative expansion effort based eligibility on population growth rates, but even that did not cast the net that far. The lack of bills on this type of expansion can be seen as a sign of the lack of political feasibility for such an effort during this time period. Eligibility expansion can make it on the legislative agenda, but only in a limited manner. Statewide eligibility of 15.1-491(a) is a nonstarter. Second, there was a new set of individual local governments who sought the powers of 15.1-491(a). In the 1970s, Chesterfield County and Roanoke County had eligibility legislation. Their efforts were not renewed in the 1980s. For the first time, local governments in the Tidewater area of the state were involved in these expansion efforts. Plus, cities were the focus of legislation. There was still a presence of local governments from the Northern Virginia region, but these were efforts by localities that were not directly contiguous to Fairfax County. Finally, individual local governments in the 1980s sought to gain eligibility with legislative language that did not refer to them by name instead by numbers. This strategy differs greatly from the 1970s where expansion legislation directly referred to individual governments by name. For this decade, several bills
contained language with restrictive population parameters in which only one or two local governments could fit at that time, but the individual localities are never mentioned. There are multiple efforts to have eligibility extended to these counties or cities.
<table>
<thead>
<tr>
<th>Bill Number (Legislative Session)</th>
<th>Legislative Language (Original and Amended)</th>
<th>Local Government(s) Interpretation</th>
<th>Legislative Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>House Bill 348 (1983)</td>
<td>Original: or in a county contiguous to any such county and the towns therein, or in a city completely surrounded by such a contiguous county. Amended: or in a county contiguous to any such county and the towns therein, or in a city completely surrounded by such a contiguous county or in the Town of Leesburg.</td>
<td>Original: Towns of Leesburg, Hamilton, Hillsboro, Lovettsville, Middleburg, Purcellville, and Round Hill in Loudoun County; Towns of Dumfries, Haymarket, Occoquan, and Quantico in Prince William County. Amended: Leesburg in Loudoun County.</td>
<td>Approved by Governor – Chapter No. 392</td>
</tr>
<tr>
<td>House Bill 857 (1988)</td>
<td>any county with a 1980 population of more than 35,800 but less than 37,800</td>
<td>Fauquier County (1980 population: 35,889)</td>
<td>Carried over to the 1989 Session; No action taken</td>
</tr>
<tr>
<td>House Bill 1033 (1988)</td>
<td>Original: or in cities with a population of 250,000 or more. Amended:</td>
<td>Original: Cities of Norfolk (1980 population: 266,979) and Virginia Beach (1980 population: 262,199). Amended:</td>
<td>Carried over to the 1989 Session; No action taken</td>
</tr>
<tr>
<td>House Bill 1521 (1989)</td>
<td>any county with a population of more than 40,000 but less than 43,000</td>
<td>Stafford County (1980 population: 40,470)</td>
<td>Stricken from Calendar</td>
</tr>
<tr>
<td>House Bill 1980 (1989)</td>
<td>Original: any city with a population of more than 260,000 but less than 265,000; Any county with a population of more than 35,800 but less than 37,800. Amended: any city with a population of more than 260,000 but less than 265,000; Any county with a population of more than 35,800 but less than 37,800.</td>
<td>Original: City of Virginia Beach (1980 population: 262,199); Fauquier County (1980 population: 35,889). Amended: Cities of Norfolk (1980 population: 266,979) and Virginia Beach (1980 population: 262,199); Fauquier County (1980 population: 35,889).</td>
<td>Conference Committee appointed; No further action taken</td>
</tr>
<tr>
<td>House Bill 1484 (1989)</td>
<td>Original: any county or city which has had population growth of ten percent or more from the next to latest to latest decennial census year, based on population reported by the United States Bureau of the Census, or any city adjoining such city or county or town located within such county, provided that until the 1990 census is reported, any county or city instead may qualify only if it has had an estimated population growth of ten percent or more from 1980 to the most recent year for which population estimates are available from the Center for Public Service of the University of Virginia.</td>
<td>Original: 33 counties, 24 cities, 52 towns. Amended: 41 counties, 24 cities, 61 towns.</td>
<td>Approved by Governor - Chapter No. 697</td>
</tr>
<tr>
<td>House Bill 1485 (1989)</td>
<td><strong>Original:</strong> Any county, city or town to whom Article 8.1 of this chapter is applicable; This article shall apply to any county or city which has had population growth of ten percent or more from the next to latest to latest decennial census year, based on population reported by the United States Bureau of the Census. However, this measurement shall not be used until after the Bureau has reported the 1990 census. Until the 1990 census is reported, any county or city instead may qualify if it has had an estimated population growth of ten percent or more from 1980 to the most recent year for which population estimates are available from the Center for Public Service of the University of Virginia. This article shall also apply to any city adjoining such city or county, or any town located within such county.</td>
<td><strong>Amended:</strong> All language in regard to 15.1-491(a) applicability was removed; Instead set up a new section numbered 15.1-491.2:1 (i) any county or city which has had population growth of ten percent or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census, provided that until the 1990 Census is reported, any county or city instead may qualify only if it has had an estimated population growth of ten percent or more from 1980 to the most recent year for which population estimates are available from the Center for Public Service of the University of Virginia; (ii) any city adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous by land with at least three such counties, and any town located in that county.</td>
<td><strong>Approved by Governor - Chapter No. 485</strong></td>
</tr>
<tr>
<td>House Bill 1661 (1989)</td>
<td><strong>Original:</strong> in any county having a population of more than 35,800 but less than 37,800</td>
<td><strong>Amendment #1:</strong> [and in any county having a population of more than 40,000 but less than 43,000]</td>
<td><strong>Stricken from Calendar</strong></td>
</tr>
</tbody>
</table>
(ii) any city adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous by land with at least three such counties, and any town located in that county.

| Senate Bill 613 (1989) | **Original:** in any city with a population of more than 46,000 but less than 50,000, or in any city with a population of more than 110,000 but less than 120,000. Amended: All language in regard to 15.1-491(a) applicability was removed; Instead set up a new section numbered 15.1-491.2:1
(i) any county or city which has had population growth of ten percent or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census, provided that until the 1990 Census is reported, any county or city instead may qualify only if it has had an estimated population growth of ten percent or more from 1980 to the most recent year for which population estimates are available from the Center for Public Service of the University of Virginia; (ii) any city adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous by land with at least three such counties, and any town located in that county. | **Original:** Cities of Suffolk (1980 population: 47,621) and Chesapeake (1980 population: 114,486) Amended: 41 counties, 24 cities, 61 towns | Passed by |

| Senate Bill 141 (1988) | **Original:** In the town of Leesburg any town within such contiguous county if such county has a population of less than 100,000 Amended: In the town of Leesburg any town within such contiguous county if such county has a population of less than 100,000 | **Original:** Towns of Leesburg, Hamilton, Hillsboro, Lovettsville, Middleburg, Purcellville, and Round Hill in Loudoun County (1980 population: 57,427) Amended: Towns of Leesburg, Hamilton, Hillsboro, Lovettsville, Middleburg, Purcellville, and Round Hill in Loudoun County; Towns of Dumfries, Haymarket, Occoquan, and Quantico in Prince William County | Approved by Governor – Chapter No. 481 |
For the 1980s, five out of the ten non-eligibility bills were successfully enacted. Four of these five bills passed proposed statutory changes to 1978 conditional zoning statute system (15.1-491.1 to 15.1-491.6) while only one amended the 1973 conditional zoning statute system (15.1-491(a)). The 1978 conditional zoning statute system (15.1-491.1 to 15.1-491.6) actually ended only being amended three times rather than four because HB 554 (1988) was amended during the course of the legislative process with language that removed all references to 15.1-491.2. The three bills that remained amended separate subsections of the 1978 conditional zoning statute – 15.1-491.2 (Conditions as part of a rezoning or amendment to zoning map), 15.1-491.3 (Enforcement and guarantees), and 15.1-491.5 (Petition for review of decision). None of these enacted bills substantially changed the spirit of the 1978 statute instead they added clarification or refinement to how the statute should be implemented by local governments and the protections in place for rezoning applicants. The one bill that was enacted to amend 15.1-491(a), HB 438 in 1987, was the completion of an effort begun in 1984 with another bill to more stringently define the justification for the use of conditional zoning under the 1973 conditional zoning statute. While this statute was always identified with conditional zoning, it actually never used the words, “conditional zoning.” HB 438 officially put the words, conditional zoning, in the 1973 statute.

There were unsuccessful efforts made by multiple bills to expand the concept of what could be proffered under the 1978 conditional zoning statute system. In particular, HB 1021 in 1988 wanted to remove the prohibition on cash payments by allowing them if they were used for public improvements to a property’s facilities. Additional condition expansion bills looked at off-site improvements and mandatory property dedications. The eligibility bills showed a pattern for this decade where there were repeated efforts to expand the eligibility criteria of existing statutes, but with little real expansion to show. This pattern is just as applicable to the non-eligibility bills where bills that sought to expand what was an allowable conditions were legislative failures while bills that reinforced regulations were enacted.
<table>
<thead>
<tr>
<th>Bill Number (Legislative Session)</th>
<th>Patron(s)</th>
<th>Legislative Language (Original and Amended)</th>
<th>Legislative Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>House Bill 415 (1980)</td>
<td>Mitchie</td>
<td>15.1-491.2 Such proffer may include construction or improvement of any public facility, on-site or off-site, need for which is specifically generated by the proposed rezoning, if the local capital outlay program including the six-year secondary highway plan does not envision such construction or improvement prior to or at the time the need will be generated by the rezoning.</td>
<td>Carried over to 1981 Session; Passed by indefinitely</td>
</tr>
<tr>
<td>House Bill 1827 (1981)</td>
<td>McMurtrie</td>
<td>15.1-491.2 A zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to or at a public hearing before the governing body,</td>
<td>Passed by indefinitely</td>
</tr>
<tr>
<td>House Bill 273 (1982)</td>
<td></td>
<td>15.1-491.2 Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in full force and effect until a subsequent amendment changes the zoning on the property covered by such conditions; provided, however, that such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.</td>
<td>Approved by Governor – Chapter No. 293</td>
</tr>
<tr>
<td>House Bill 53 (1983)</td>
<td>Cranwell</td>
<td>Amend 15.1-491.3</td>
<td>Approved by Governor – Chapter No. 221</td>
</tr>
<tr>
<td>House Bill 644 (1984)</td>
<td>Watkins</td>
<td>15.1-430(q) “Conditional zoning” means, as part of classifying land with a governmental entity into areas and districts by legislative action, the allowing of reasonable conditions governing the use of such property, such conditions being in addition to, or modification of, the regulations provided for a particular zoning district or zone by the overall zoning ordinance. 15.1-491(a) For variations [as defined in 15.1-430(p)] in or exceptions [as defined in 15.1-430(i)] to the general regulations in any district in cases of unusual situations or to ease the transition from one district to another or for buildings, structures or uses having special requirements to be accomplished by conditional zoning [as defined in 15.1-430(q)], and, in addition to or lieu of the provisions of 15.1-491.1 et seq., for the adoption,</td>
<td>Carried over to 1985 Session; Defeated in House and Reconsideration Rejected</td>
</tr>
</tbody>
</table>
| (1986) | 15.1-430(q) “Conditional zoning” means, as part of classifying land with a governmental entity into areas and districts by legislative action, the allowing of reasonable conditions governing the use of such property, such conditions being in addition to, or modification of, the regulations provided for a particular zoning district or zone by the overall zoning ordinance. 15.1-491(a) For variations as defined in 15.1-430 in or special exceptions as defined in 15.1-430(i) to the general regulations in any district in cases of unusual other than usual and ordinary situations or to ease the transition from one district to another or for buildings, structures or uses having special requirements and for conditional zoning as defined in 15.1-430(q) and in addition to or in lieu of conditional zoning and for the adoption of \n
### Amendment
(a) For variations as defined in 15.1-430 in or special exceptions as defined in 15.1-430(ii) to the general regulations in any district in cases of unusual other than usual and ordinary situations or to ease the transition from one district to another or for buildings, structures or uses having special requirements variances as defined in 15.1-430 (i) or special exceptions as defined in 15.1-430 (i) to the general regulations in any district in cases of unusual situations or to ease the transition from one district to another, or for buildings, structures or uses having special requirements, and for conditional zoning as defined in 15.1-430 (q) and in addition to or in lieu of conditional zoning and for the adoption of \n

### Amendment
15.1-491.5. Same; petition for review of decision.—Any zoning applicant or any other person who is aggrieved by the a decision of the zoning administrator made pursuant to the provisions of 15.1-491.3 may petition the governing body for the review of the decision of the zoning administrator. All such petitions for review shall be filed with the zoning administrator and with the clerk of the governing body within thirty days from the date of the decision for which review is sought, and such petitions shall specify the grounds upon which the petitioner is aggrieved.

| House Bill 1021 (1988) | Hargrove | 15.1-491.2. Same; conditions as part of a rezoning or amendment to zoning map.—A zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map; provided that (i) the rezoning itself must give rise for the need for the conditions; (ii) such conditions shall have a reasonable relation to the rezoning; (iii) such conditions shall not include a cash contribution to the county or municipality unless such contribution is for the provision of public improvements of facilities related to the development or operation of the property; (iv) such conditions shall not include mandatory dedication of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided for in subdivision A (f) of 15.1-466; (v) such conditions shall not include payment for or construction of off-site improvements except those provided for in

Session; Approved by Governor – Chapter No. 8

Approved by Governor – Chapter No. 856

Carried over to 1989 Session; No action taken
<table>
<thead>
<tr>
<th>House Bill</th>
<th>Author</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>451 (1988)</td>
<td>Cranwell</td>
<td>15.1-491.2. Same; conditions as part of a rezoning or amendment to zoning map.—A zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map; provided however, (i) the rezoning itself must give rise for the need for the conditions; (ii) such conditions shall have a reasonable relation to the rezoning; (iii) such conditions shall not include a cash contribution to the county or municipality; (iv) such conditions shall not include mandatory dedication of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided for in subdivision A (f) of 15.1-466; (v) no condition shall be proffered that is not related to the physical development or physical operation of the property; and (vii) all such conditions shall be in conformity with the comprehensive plan as defined in 15.1-446.1. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in full-force and effect until a subsequent amendment changes the zoning on the property covered by such conditions; provided, however, that such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.</td>
</tr>
</tbody>
</table>

Carried over to 1989 Session; Stricken from docket

| 554 (1988) | Cranwell | Original 15.1-491.2. Same; conditions as part of a rezoning or amendment to zoning map.—A zoning ordinance may include and provide, as a part of a rezoning or amendment to the zoning map, for the voluntary proffering by the subdivider or developer in writing, pursuant to 15.1-491.2, of payments for or construction of reasonable and necessary road improvements located outside the property limits of the land owned or controlled by him but necessitated or required, at least in part, by the construction or improvement of his subdivision or development. . . . |

Approved by Governor – Chapter No. 735
rezoning itself must give rise for the need for the conditions; (ii) such conditions shall have a reasonable relation to the rezoning; (iii) such conditions shall not include a non-refundable cash contribution to the county or municipality; (iv) such conditions shall not include mandatory dedication of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided for in subdivision A (f) of 15.1-466; (v) such conditions shall not include payment for or construction of off-site improvements except those provided for in subdivision A (j) of 15.1-466 or in 15.1-491.2:1; (vi) no condition shall be proffered required that is not related to the physical development or physical operation of the property; and (vii) all such conditions shall be in conformity with the comprehensive plan as defined in 15.1-446.1. Once funds are advanced or proffers are made and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in full force and effect until a subsequent amendment changes the zoning on the property covered by such conditions; provided, however, that such funds are advanced or proffers are made and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in full force and effect until a subsequent amendment changes the zoning on the property covered by such conditions; provided, however, that such conditions shall, however, continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

15.1-491.2:1. Same; off-site road improvements as a part of rezoning or zoning map amendment; reimbursements to profferer by subsequent developers.—A zoning ordinance may include and provide, as a part of a rezoning or amendment to the zoning map, for the voluntary proffering by the subdivider or developer in writing, pursuant to 15.1-491.2, of payments for or construction of reasonable and necessary road improvements located outside the property limits of the land owned or controlled by him but necessitated or required, at least in part, by the construction or improvement of his subdivision or development.

15.1-491.2:2. Same; off-site road improvements as a part of rezoning or zoning map amendment; reimbursements of advances or to profferors by governing body.—If a subdivider or developer makes a voluntary advance or proffer pursuant to 15.1-491.2 and 15.1-491.2:1 of payments for or construction of reasonable and necessary road improvements located outside the property limits of the land owned or controlled by him but necessitated or required, at least in part, by the construction or improvement of his subdivision or development and such advance or proffer is accepted, the governing body may agree to reimburse the subdivider or developer for the cost of such advance or proffer, together with interest, which shall be excludable from gross income for federal income tax purposes, at a rate equal to the rate of interest on bonds most recently issued by the governing body prior to the date of acceptance of such proffer or advance, on the following terms and conditions: . . .

Amendment
Removes all statutory language in regard to 15.1-491.2 and Amends 15.1-466(1)
Besides the legislation that been carried over from the 1988 Session, there were six bills introduced in the 1989 Session to expand the number of local governments eligible to act under the 1973 conditional zoning statute. In making their way through the legislative process, the bills which were once distinct entities began to take on the characteristics of each other in their quest for passage. Out of the six bills, only two actually became chapters in the 1989 Acts of the Assembly – HB 1484 and HB 1485. Before tracing the legislative path of HB 1484 and HB 1485, it is important to know what happened to two of the other bills – SB 613 and HB 1661 – because their failure is tied up in the success of HB 1484 and HB 1485.

HB 1661 was attempt by Delegates Rollins, Guest, and Howell to extend the “old” conditional zoning statute (15.1-491(a)) to Fauquier County. The wording that would have been added to the statute was “any county having a population of more than 35,800 but less than 37,800.” After being read for the second time on the House floor, HB 1661 was amended to take on the features of prior conditional zoning expansion bills – HB 1521 and HB 1980. Delegate Howell added the language from HB 1521 on extending “old” conditional zoning to a county with a population more than 40,000, but less than 43,000. Delegate John G. Dicks III (D) of Chesterfield County amended the bill to include the restrictions that he had attached to HB 1980. These restrictions would make 15.1-491(a) operate like the 1978 conditional zoning statutes. They could have been interpreted as ways to improve the legal standing of the 1973 statute. The amendment did not impose any limits on cash contributions or land dedications. The bill passed the House, and went to the Senate where it was further amended, but still achieved passage. Since the legislative bodies had passed two different versions of HB 1661, and each insisted upon final passage of their version, a conference committee was set up with the purpose of drafting a compromise. The amended version proposed by the committee bared little resemblance either to the introduced bill or the bill that had been engrossed by the Senate. Instead, the Committee had left the 1973 statute alone while it added a new section to the state code entitled 15.1-491.2:1. This section set up eligibility requirements based on population growth rates and allowed cash proffers if certain conditions were met. This new version of HB 1661 would have essentially set up a third system of conditional zoning that was a hybrid of the “old” conditional zoning and the 1978 version. The bill was passed by both legislative bodies, but ended up being vetoed by the Governor because what it wanted to accomplish, was already embodied in another piece of legislation (HB 1484). Once the Governor vetoed the bill, it was stricken from the legislative calendar.

Despite its origin in a different legislative body, SB 613 traveled a similar path to and suffered a similar fate as HB 1661. Senator Earley, who served on the 1988 Subcommittee on Off-Site Road Improvements, introduced SB 613 which would have allowed the cities of Suffolk and Chesapeake to use “old” conditional zoning. 15.1-491(a) would be amended with language such that “any city with a population of more than 46,000 but less than 50,000, or in any city with a population of more than 110,000 but less than 120,000" would become eligible for “old” conditional zoning. Suffolk had a 1980 population of 47,621 while Chesapeake’s was 114,486.
SB 613 made it out of the Senate to the House without any additional amendments by vote of 20-16. There was, however, a “Ruling of the Chair” called for before the bill’s Senate passage on whether “S.B. 613 would, under Article VII, Section 1 (6) of the Constitution, be a ‘special act’” (Journal of the Senate 1989: 326). The ruling from the President of the Senate was that the SB 613 was a “general bill” and thus not subject to the higher vote requirement. In the House, the bill was amended so that the 1973 statute was now only applicable to the cities of Suffolk and Chesapeake, but in the restricted format that Delegate Dicks had tried to achieve with HB 1661. The House’s amendments would have stripped away the “old” conditional zoning powers of Fairfax County and its surrounding localities, as well as, Accomack and Northampton Counties on the Eastern Shore. The Senate rejected the House’s amendments by a vote of 6 to 33. Like the Senate had done with other conditional zoning bills, the House insisted on its amendments, so a conference committee was formed. The product of this committee was the exact same legislative wording that had come out of the conference committee for HB 1661. Like HB 1661, the amended version of SB 613 passed both legislative bodies. The vote in the Senate was 28-10. However, Governor Gerald L. Baliles returned SB 613 to the Senate without a signature because he objected that “it achieves the same purpose as House Bill No. 1484 which I have returned for amendments” (Journal of the Senate 1989: 1205). The decision was made to pass the bill by and hence, it died.

As the versions of HB 1661 and SB 613 that came out of Conference Committee show, the House of Delegates and Senate had found a unique design for the expansion of conditional zoning. This design could achieve passage in both legislative bodies, and receive the Governor’s signature. In becoming mirror images of each other and HB 1484, it seemed that the supporters of conditional zoning expansion were coming up with backup plans, in case HB 1484 fell through. Having the bills go through the legislative process at the same time, but with origins in different legislative bodies, they made an attempt to dilute opposition efforts. Opponents would have to fight the battle on multiple fronts rather than each bill continuously after the other. It was clear, however, that there would be no additional localities added to the 1973 statute. “Old” conditional zoning would remain a tool for only select Northern Virginia local governments and localities east of the Chesapeake Bay.

On January 23, 1989, Delegate Cranwell introduced three bills – HB 1483, HB 1484, and HB 1485 whose fates were intertwined. In the end, only two were enacted and neither bill resembled its original self. HB 1483 was a straight road impact fees bill with eligibility based on population growth rates. HB 1484 was focused solely on the expansion of “old” conditional zoning to other localities in the state by amending 15.1-491(a) with the language shown in Table 6.1. Expansion was based on the same high population growth rate criteria used in HB 1483. HB 1485 was a mirror image of the recommended legislative changes to § 15.1-491 that the 1988 Subcommittee on Off-Site Road Improvements had drafted. Road impact fees would be allowed and their
eligibility requirements would be the same requirements used to grant an extension of “old” conditional zoning to additional localities in the state – high population growth rates. HB 1485 connected the legislative fate of road impact fees and “old” conditional zoning expansion together. So expansion of the first conditional zoning system would not be granted to all localities, but rather extended to those who are dealing with high rates of growth. This rationale was justified based on the testimony and data presented to the Subcommittee during its 1988 study.

“Old” conditional zoning needed to be expanded, but only to those localities who suffered from their own growth or the growth spillovers of their neighbors rather than the entire state. This decision fit the tradition of taking things slowly in the State, and monitoring what develops rather than jumping headfirst into statewide expansion. However, what Delegate Cranwell presented and had ordered printed for consideration by both chambers in January of 1989 morphed through the interactions of various agents in the legislative process. It went from an expansion of the original conditional zoning system into a separate third regime (HB 1484) and the creation of road impact fee system with no ties to conditional zoning (HB 1485). HB 1483 was referred first to Committee on Roads and Internal Navigation and then the Committee on Counties, Cities and Towns before it was stricken from the legislative session’s docket.

A piece of legislation without any amendments would typically have had nine or fewer entries in either the House of Delegates or Senate Journal which tracks the daily activities of a legislative body during a General Assembly session. HB 1484 had 29 entries in the House of Delegates Journal and 27 in the Senate Journal. This large number of postings indicated the controversial nature of the legislation, as well as, the large effort made to ensure that some type of legislation which addressed the expansion of the ability to accept cash proffers as part of a conditional zoning system passed in the 1989 session. SB 637, which initiated the conditional zoning system in 1973 and was amended, had seven postings in the House of Delegates Journal. HB 135, which set up the second conditional zoning system in 1978, had twelve postings including two amendments. The entries associated with the effort to obtain passage of HB 1484 in 1989 took matters to a whole other level of importance and decision-making.

The plight of HB 1484 was made difficult from the beginning. Typically, a bill would be reported out of committee on a unanimous vote, but with HB 1484, the vote was 13-7 in favor. Having made it out of committee, the bill progressed to the constitutionally required three readings on separate days on the House floor. It was at this point on February 4th that two amendments were offered to the bill. One amendment offered by Delegate Clinton Miller (R) of Shenandoah County was the first attempt at the imposition of restrictions on the conditions available to be proffered under the “old” conditional zoning system. Part of his amendment read:

“[; provided that (i) all such conditions are necessitated by and attributable to the rezoning and not by any demand for public facilities which existed prior to
said rezoning; (ii) all such conditions are primarily for the benefit of the property subject to rezoning; (iii) all such conditions shall be in conformity with the comprehensive plan as defined in § 15.1-446.1; and (iv) any such conditions relating to the provision of public facilities shall not become effective until made part of the local capital improvement plan as provided by § 15.1-464”

The language of Miller’s amendment matched that of the amendments offered by Delegate Dicks to other conditional zoning bills during the Session (HB 1661 and SB 613). Furthermore, the proposed restrictions on “old” conditional zoning was what Fairfax County foresaw in 1988 as happening and had made them afraid. Yes, a locality could still receive cash proffers under the system, but in a much stricter setting. The amendment went a step further than some of the conditions under the 1978 conditional zoning system by tying the conditions to not only the comprehensive plan, but also the capital improvement plan. The amendment was written at the behest of the homebuilders lobbying group. The Richmond Times-Dispatch reported, “Miller had inserted language in Cranwell’s bill to prohibit localities from demanding proffers to pay for community services that were needed before the development. . . . Miller said later [the amendment] was written at his request by Carl F. Bowmer, lobbyist for the Homebuilders Association of Virginia” (Schapiro and Booker 1989). Additionally, the second amendment by Delegate Raymond R. Guest, Jr (R) of Warren County expanded the localities eligible under the growth rate category to include “[ , or any county contiguous by land with at least three such counties and any towns in that county]” so a locality did not necessarily have to have the experience of high growth rates itself, rather it could just be surrounded by them. HB 1484 with two amendments attached, achieved passage in the House of Delegates by a vote of 60 to 39 with one abstention and moved to the Senate for passage.

Despite its passage in the House, the February 4, 1989 debate over the addition of the amendments was quite heated. While no one rose in opposition to Delegate Guest’s amendment, there was strong opposition from Delegate Cranwell in regards to Delegate Miller’s amendment. Cranwell urged members to reject the Miller amendment, and accept the Guest amendment. In the video recording of the debate, Miller argued that his amendment was necessary to bring an element of “fairness” to this proffer system. The same philosophy that guides the legal standing of an impact fee system would be fitted to the conditional zoning system as a way of bringing rules. Cranwell contended that Miller’s amendment would be a step back because localities need the flexibility inherent in the “old” conditional zoning and that system has worked well with no evidence of abuse or litigation brought up about its improper use. Furthermore, he continued that there is a philosophical distinction between conditional zoning and impact fees. Conditional zoning is a voluntary process because the developer wants to increase the density and intensity of use. Denials of rezoning can be based on an overloading of the system. In Cranwell’s view, there was legal mischief embedded in the amendment which may lead to a situation where a local government does not have the flexibility to deny a rezoning. According to Cranwell, you “don’t fix a lawnmower in the same way that you fix a Sherman tank.”
Early on in the legislative process for HB 1484 and HB 1485, interest groups made their stances on the bills known through letters to legislators and policy memos. For example, if we analyze a January 30, 1989 letter to Delegate Mary A. Marshall, Chairman of the House Committee on Counties, Cities and Towns, by Ed Maroney, City Manager of Newport News, he expressed the support of the City Council of the City of Newport News for “legislation currently before the Virginia General Assembly granting local government authority for conditional zoning to address on-site and off-site transportation issues. The ability to use ‘old style’ conditional zoning is critical if we are to support growth and development with needed infrastructure.” Lane B. Ramsey, County Administrator of Chesterfield County sent a letter dated February 3, 1989 to Delegate John C. Watkins in which he wrote, “I would like to relay to you the unanimous support of the Board of Supervisors for Delegate Cranwell’s HB 1484 and HB 1485 . . . This support was confirmed in a poll yesterday and today with all Board members.” Letters from local governments even went to Delegates who were not their local representative. For example, L. Kimball Payne, III, County Administrator of Spotsylvania County wrote to Delegate Watkins of Chesterfield County on January 26, 1989 and stated that “[t]he legislation proposed in House Bill Nos. 1483, 1484 and 1485 has been carefully drafted to assist in growing localities while remaining sensitive to the concerns of the development community. We urge your support of this important legislation.”

Local governments were not the only interest groups to express their position on the bills to their legislators. Membership organizations also lobbied the legislature. The Thomas Jefferson Planning District Commission came out with their legislative program for 1989 which stated, “The Planning District Commission Supports Enactment of Enabling Legislation to Allow the Use of Growth Management Tools in All Localities”. They considered conditional zoning and impact fees to be growth management tools. The Citizens for Fauquier County also sent letters to Delegates that asked them to vote “YES” in support of HB 1484 and HB 1485. VACo also weighed in on the bills and gave their endorsement of them because they addressed one of the Association’s priority issues for the 1989 legislative session. The membership of VACo unanimously approved the following position:

“VACo opposes any dilution of existing local government conditional zoning enabling authority established pursuant to Virginia Code Section 15.1-491 (a), and supports extending such authority to all counties. VACo also supports allowing all counties to require that developers contribute pro rata shares or impact fees, as a condition of site plan or subdivision approval, to defray the costs of off-site public improvements necessitated by new development.”

The Hampton Roads Chamber of Commerce which covers the geographic area of Chesapeake, Norfolk, Portsmouth, Suffolk, and Virginia Beach came out against the expansion of conditional zoning, as well as, the introduction of road impact fees. Their opposition to conditional zoning was based on four reasons. First, “[c]onditional zoning will increase the costs of home ownership
and industrial development”. Second, “[c]onditional zoning will results in the double taxation of citizens who are already shouldering the largest percentage of the state and local tax burden”. Third, “[c]onditional zoning increases the likelihood of discriminatory treatment, political favoritism, and arbitrary acts”. Lastly, “[c]onditional zoning generates a relatively insignificant amount of new revenues”. The Home Builders Association of Richmond (HBAR) wrote to Delegate Watkins on January 20, 1989 to express their opposition to any piece of legislation that involved the extension of conditional zoning and impact taxes. They framed their opposition in terms of concern for housing affordability and ownership. R. Michael Pierce, President of HBAR wrote, “[w]e urge you to oppose these issues! If the General Assembly truly wishes to help local governments solve their fiscal problems, you should consider broad-based, large-revenue producing measures such as a local option gasoline tax, local option sales tax, or Governor Baliles’ proposed one percent surcharge on state income tax . . . . This way, everyone pays a fair share!”

The amendments added to HB 1484 also generated attention from interest groups, particularly the local governments in Northern Virginia. On February 7, 1989, John H. Foote, Prince William County’s County Attorney wrote a memo to the county’s Board of Supervisors in regard to Delegate Miller’s amendment. Foote warned that “[t]hese amendments may be extremely adverse to land use practices in Northern Virginia as they have been evolved to the mutual benefit of localities and landowners in the last decade. If they become law, it is my view that they can have a significant, probably adverse effect on the economic boom we have experienced in most ‘old conditional zoning’ localities.” On the opposite side, Delegate Watkins, an opponent to conditional zoning expansion and impact fees, responded to a constituent who happened to be the president of a construction firm in a February 10, 1989 letter. He wrote:

“The second issue is conditional zoning (HB 1484). We were able to place an amendment on that bill which developed specific conditions in which proffers could be requested. This amendment limits considerably the scope of conditional zoning. I supported the amendment, and the bill with the amendment included. If the amendment is removed by the Senate, I intend to oppose this bill.”

Upon reaching the Senate, the Committee on Local Government proposed its own amendments to HB 1484 in place of the House’s. The House amendments are struck from the bill and replaced with wording that expands eligibility to additional localities while also removing any restrictions on the conditional zoning regime that had existed since 1973. Eligible localities would now include, “or any city adjoining such city or county or town located within such county, or any county contiguous by land with at least three such counties and any towns in that county, for the adoption[.]” This wording change by the Senate matches wording in the House version, but the Senate rearranged its location in the eligible criteria. In regard to the wording on the conditions attached to expansion of conditional zoning powers, the Senate originally agreed to an amendment which struck those conditions imposed by the House from the legislation, but
then an amendment was offered on the Senate floor to put them back with the following wording:

```
" provided that in the counties and cities identified in (vii) above (i) all such conditions are necessitated by and attributable to the rezoning and not by any demand for public facilities which existed prior to said rezoning; (ii) all such conditions are primarily for the benefit of the property subject to the rezoning; (iii) all such conditions shall be in conformity with the comprehensive plan as defined in § 15.1-446.1; and (iv) any such conditions relating to the provision of public facilities, shall not become effective until made part of the local capital improvement plan as provided by § 15.1-464."
```

The amendment was offered by Senator William E. Fears (D) of Accomack County, as an attempt by the home building lobby to attach some amount of conditions to the expansion of conditional zoning powers. The first line of the amendment is important because it would only impose restrictions on those localities who gained eligibility to use the “old” conditional zoning regime by way of HB 1484. So localities in Northern Virginia and along the Eastern Shore would not be affected by the new restrictions. Fears defended his amendment by stating, “I’m coming down on the side of the builders, the developers, the real estate people and all other people who are going to get hurt by this kind of legislation[.]” (Martz 1989b) Fears’ amendment died on the Senate Floor and the Senate passed the amended and unrestricted version of HB 1484 by a vote of 26-14.

The debate in the House on February 20, 1989, over whether to accept the Senate’s amended version was a verbal joust between Cranwell and all takers, particularly Dicks and Miller. Cranwell encouraged House members to accept the Senate version because two of its amendments were merely attempts to put the eligibility language in the correct order. The third amendment stripped away the restrictive language out of the House amendment which had the net effect of gutting the broad conditional zoning powers of Northern Virginia had. Dicks urged the rejection of the Senate amendments on the grounds that the House in the legislative process had already essentially passed Miller’s amendments three times. Below is an example of the back and forth in the debate:

**Cranwell:** The Gentleman from Shenandoah does not have an Argument, but is draping himself in the flag of small builders. The small builders can get along fine under this proposal. Big city lawyer from Richmond drafted the amendments to have us (local governing bodies and taxpayers) subsidize the building industry. Builders ought to pay their fair share. He doesn’t want to help the taxpayer who has to bear the burden of the infrastructure.

**Miller:** If the system is really voluntary, what would keep developers from doing what they are doing now?
Cranwell: The gentlemen knows this is a Dillon’s Rule state and without the authority from the state, they can not accept cash or land dedication. Nothing prohibits cash proffer, But sets up a situation where that is going to require – First, all proffers would have to go through amendment process to the comprehensive plan. Second, amend CIP and commit itself to certain capital improvements in order to accommodate builder who wants to intensify the use of land going beyond the planning process of a locality. Wants to put the handcuffs on local governing bodies so they have to subsidize. All rezoning are going beyond the comprehensive plan.39

The majority of the House was unmoved by Cranwell’s pleas and voted 44-52 to reject the Senate version. Cranwell originally voted to approve the bill, but in a procedural move, he had the Speaker of the House change his vote to No. So the final vote count was 43-53. VACo tried to influence the final vote count. Barry R. Lawrence, Executive Director of VACo, wrote a letter on February 21, 1989, to the House of Delegates members asking them to support the Senate’s amendments. He argued that

“[t]he amendments previously added to H.B. 1484 on the House floor were rejected by the Senate because they would upset the public-private balance in development practices provided for in ‘old-style’ conditional zoning. Should H.B. 1484 pass the General Assembly with the House amendments, the proffer system as it currently exists in Northern Virginia will be effectively gutted, contributions from developers will be dramatically reduced, and pressure on the General Assembly to provide funds for local capital improvements will be dramatically intensified in future years. . . . The Virginia Association of Counties respectfully urges your support in removing the House floor amendments to H.B. 1484 and acceptance of the Senate version of this legislation as originally proposed by Delegate Cranwell.”

Dicks in a celebratory move sent a letter to members of the House on February 21, 1989 in which he thanked them for their vote of “No” against the Senate amendments and outlined the next moves for the bill. He wrote, “[b]y rejecting the Senate amendments, and holding the line on your vote, the bill will either go into conference, or more than likely, the bill will die on the calendar leaving Northern Virginia with the expanded conditional zoning under existing law. The House amendments would restrict the application of the expanded conditional zoning as it currently exists in Northern Virginia. If I move to reconsider the vote by which we rejected the Senate amendments to HB 1484, please vote NO – not to reconsider – which will prevent the bill from being reconsidered again.”

39 The selection from this debate was transcribed by the author off of video recordings. Any mistakes are my own. An official transcription of the debate was not available from the Virginia Division of Legislative Services.
The Senate insisted upon its amendments and so a conference committee composed of members from both chambers was initiated to salvage the legislation. The versions of the bill were characterized as “The House, which voted 60-39 for this measure, would have limited those ‘proffers’ to whatever portion of the public costs is directly related to development. In a 26-14 vote, the Senate opted to give the localities more flexibility, enabling them to extract fees or property according to public needs regardless of their direct connection to a particular project.” (Paust 1989b) This was when the horse-trading began between cash proffers and impact fees.

As HB 1484 was making its way through the legislative process, its “companion” bill, HB 1485 which is “A BILL to amend the Code of Virginia by adding in Chapter 11 of Title 15.1 an article numbered 8.1, consisting of sections numbered 15.1-498.1 through 15.1-498.10, relating to authorizing certain counties, cities, and towns to impose impact fees for road improvements” and also sponsored by Del Cranwell was jumping through legislative hurdles, too. In fact from the newspaper accounts, it was as if HB 1485 was providing protective cover for HB 1484 by taking the majority of the heat in committee meetings and on the assembly floors. A Richmond Times-Dispatch article from February 1, 1989 stated, “After more than three hours of testimony and debate, the House of Delegates Committee on Counties, Cities and Towns voted 13-7 to approve Cranwell’s proposal to allow localities to levy ‘impact fees’ against developers to help pay for road improvements required by growth” and then like an afterthought continues, “By the same margin, it also approved Cranwell’s bill to give localities the option of using conditional zoning to negotiate with developers for public improvements” (Martz 1989a). The Daily Press, a Newport News newspaper, echoed these sentiments when in a February 5th article, stated, “After two hours of debate, and in separate votes, the delegates passed 60-30 a bill that would allow localities to impose conditional zoning, and a 59-40 a measure that would provide localities with the alternative of levying impact fees for development. . . . Most of the debate was on the impact fee bill, which was considered first, although the same arguments applied to both measures.” (Paust 1989a)

Similar to HB 1484 which had different versions passed by each chamber, the HB 1485 legislation passed by the Senate Finance Committee would apply only to localities in Northern Virginia while the House version allowed all localities with at least a ten percent growth rate (Paust 1989c). HB 1485 also ended up in conference committee like HB 1484 when the full Senate passed the Northern Virginia only impact fee bill as opposed to the growth rate version of the House. On the next last day of the 1989 General Assembly session, a compromise was achieved between HB 1484 and HB 1485 which left some localities out in the cold. Richmond Times-Dispatch reported, “Cranwell succeeded in cutting back House amendments that would have restricted conditional zoning powers not only where they are newly granted, but also in areas that have used them for more than 15 years. The trade-off was that no localities outside of Northern Virginia would be given the power to levy impact fees. . . . Under the compromise, any locality using broad conditional zoning would have to adopt a five-year capital-improvements
program. The rezoning agreement must specify how such property is to be used. The locality wouldn’t gain the title to the property until the project was included in the capital-improvements program. . . . However, Dicks also made clear that all deals were off if Cranwell tried to expand use of impact fees outside Northern Virginia. ‘Impact fees were an important part of the overall compromise,’ he said.” (Martz 1989c) The compromise version of HB 1484 passed the House by a vote of 84-12 with four delegates not voting and in the Senate 26-14.

The passage of HB 1484 ushered in the third regime of conditional zoning for eligible localities in Virginia. Whereas the original piece of legislation and even the amended versions passed by each chamber before the conference committee compromise would have affected § 15.1-491 (a) of the State Code [the first conditional zoning regime], the legislation that arose out of the conference committee and was subsequently passed by both chambers affected the State Code by adding a new section § 15.1-491.2:1 and thus created the third regime. HB 1484 as approved by the Governor on April 5, 1989, stated:

“1. That the Code of Virginia is amended by adding a section numbered § 15.1-491.2:1 as follows:

§ 15.1-491.2:1. Same; conditions as a part of rezoning or zoning map amendment in certain localities.—Except for those localities to which § 15.1-491(a) is applicable, this section shall apply to (i) any county or city which has had population growth of ten percent or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census, provided that until the 1990 census is reported, any county or city instead may qualify only if it has had an estimated population growth of ten percent or more from 1980 to the most recent year for which population estimates are available from the Center for Public Service of the University of Virginia; (ii) any city adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous with at least three such counties, and any town located in that county.

In any such county, city, or town, notwithstanding any contrary provisions of § 15.1-491.2, a zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map, provided that (i) the rezoning itself gives rise to the need for the conditions; (ii) such conditions have a reasonable relation to the rezoning; and (iii) all such conditions are in conformity with the comprehensive plan as defined in § 15.1-446.1. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by such
conditions; however, such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

No proffer shall be accepted by a county, city, or town unless it has adopted a capital improvement program pursuant to § 15.1-464 or local charter. In the event proffered conditions include the dedication of real property or payment of cash, such property shall not transfer and such payment of cash shall not be made until the facilities for which such property is dedicated or cash is tendered are included in the capital improvement program, provided nothing herein shall prevent a county, city, or town from accepting proffered conditions which are not normally included in such capital improvement program. If proffered conditions include the dedication of real property or the payment of cash, the proffered conditions shall provide for the disposition of such property or cash payment in the event the property or cash payment is not used for the purpose for which proffered.

2. That the provisions of this act shall not apply to any application for rezoning filed prior to July 1, 1989.”

The restrictions, especially the link to the capital improvement plans, and eligibility requirements are distinguishing features of the third conditional zoning regime, but even more important is the expansion of the ability by localities to accept voluntary cash payments from developers as part of a rezoning application, that is, cash proffers.

IMPLEMENTATION

The implementation stage of the political process model is important for showing how future legislation is affected and shaped by the feedback derived from efforts at implementing state statutes at the local level. Earlier in this section, I discussed how Fairfax County’s conditional zoning policies partially reshaped the issue context of conditional zoning for the first half of the 1980s. The argument could be made that this was an example better suited to the implementation subsection. I choose to place it at the beginning of the issue context section because it was more a case of tone-setting than about a specific piece of legislation. In comparison, the hearings held by the General Assembly subcommittee and its subsequent report in 1988 are a case that illustrates how implementation at the local level and its impacts, directly shaped specific legislation in the 1989 General Assembly session. The 1988 hearings performed a role for the 1980s political process that was very similar to that of the 1977 hearings in the 1970s. The passage of HB 1484 in 1989 which arose out of the 1988 hearings changed how conditional zoning would be implemented for the remainder of the 1980s and into the 1990s.
Prior to the hearings on conditional zoning in 1988 and the subsequent legislative battle in 1989, the press coverage on conditional zoning or proffers in the electronic databases of the Washington Post and major Virginia newspapers like the Richmond Times-Dispatch was very sparse. Despite the presence of conditional zoning bills in almost every legislative session, the majority of the media reported in the articles on how localities were coping with their conditional zoning powers. For example, there was an article from 1986 on Henrico County’s struggles to determine “What is a proper proffer?” (Jones 1986). This local implementation theme continued after 1986 illustrated by two articles focusing on Prince William County; one discusses the role that conditional zoning could play in the downzoning of land to remove “stale zoning” while the other mentions the usefulness that proffers have played in obtaining school sites from developers as part of the rezoning application (Harris 1987; Digilio 1988).

Municipalities outside of Northern Virginia aimed to have the same revenue sources and legal support as their fellow NOVA localities. Prior to the 1989 legislation, Chesterfield County, for example, could accept land for a new school from a developer, but not receive any financial assistance from the developer in the construction of a new school building. In a 1988 Richmond Times-Dispatch article, the reporter wrote, “[a]lthough county officials are happy to get free land for schools, there is still the expense of building them. ‘That’s the area where we need help – in getting them (developers) to share the cost of the facilities. We don’t have the strong legal support to get them to do that,’ Jacobson (Chesterfield’s Planning Director) said” (Smith 1988).

In 1988, the General Assembly decided rather than take a definitive stand on the topic of conditional zoning expansion and cash proffers during that legislative session, it would spend time studying the topics and then bring them up for consideration in the 1989 General Assembly. Their hesitation about expanding the eligibility criteria for the 1973 conditional zoning statute (15.1-491(a)) stemmed from concerns over increasing house prices as a result of any extension of conditional zoning and cash proffers. A joint legislative subcommittee headed by Delegate Cranwell studied the issue of expansion along with other options under consideration including “impact fees, across-the-board taxes on growth typically based on traffic count or number of dwelling units stemming from the development, and transfer taxes, fees charged to record the sale of property” (Booker 1988). The subcommittee was appointed under House Joint Resolution No. 125 and charged to study “off-site road improvements, local zoning and subdivision authority, and the impact of land development on the public infrastructure” (House Document No 7 1990:1). The subcommittee was composed of a mix of Delegates, Senators, and private citizens. Besides Delegate Cranwell, the subcommittee’s chairman, the other Delegates were Thomas M. Jackson, Jr. (D) of Wythe County and Robert Tata (R) of Virginia Beach. The Senate was represented by Charles J. Colgan (D) of Prince William County and Mark L. Earley (R) of Chesapeake. The final two members of the subcommittee were local government officials – Mr. Joseph Alexander, member of the Fairfax County Board of Supervisors and Mr. Harold Heiscober, member of the Virginia Beach City Council. Alexander was also selected as the
subcommittee’s vice-chairman. Similar to the 1977 subcommittee that studied the expansion of conditional zoning, this subcommittee held a series of public hearings across the state to gauge public opinions. There were five hearings in all held beginning in July with Chesapeake followed by Abingdon, Prince William, Charlottesville, and ending in Richmond in December.

The hearings played an important role in the subcommittee’s recommendations and how the legislation was shaped in the 1989 General Assembly Session. One conclusion reached was that consequences of growth and development are not issues that affect the entire state. The subcommittee reported, “[i]t appears to the joint subcommittee, however, that the primary concern came from the groups of counties within or on the fringe of the Golden Crescent who are experiencing spillover growth from the main metropolitan areas and who would fall within the area which the joint subcommittee recommends for inclusion in its legislative recommendations” (Virginia General Assembly 1990:3). While the subcommittee could agree that “[t]he cost of expanding the public infrastructure to meet demand in the high growth areas far exceeds the capacity of local governments from existing funding sources alone,” they could not come an agreement on how to fund the necessary capital improvements (Virginia General Assembly 1990: 3). The second recommendation of the subcommittee was “[expand authority to use the ‘old’ conditional zoning]” (Virginia General Assembly 1990:8). The subcommittee saw three major benefits of the proffer system that other financing options did not possess. First, there was “[f]lexibility in resolving site specific problems which may not be easily addressed under general ‘formula’ approaches to developer contributions” (Virginia General Assembly 1990:10). Second, “[s]ignificant savings in time, as in direct land dedications or developer construction of facilities rather than public acquisition or construction” (Virginia General Assembly 1990:10). Lastly, “[s]ignificant reductions in litigation over land use and development” because conditional zoning creates the opportunity for developers to offer conditions to local governments that would mitigate issues which may otherwise result in litigation (Virginia General Assembly 1990:10). It also came out in the hearings that if local governments had to lose their conditional zoning authority in order to gain impact fee authority, they would rather retain the conditional zoning. Local government support for conditional zoning is rooted in the variety of things that these powers allow them to accomplish while impact fees are purely sources of revenue.

Not all of the testimony on conditional zoning was positive. The development community expressed their belief that “the ‘unlimited’ conditional zoning should be curtailed to bring it more in line with the newer statute” (Virginia General Assembly 1990: 10). Despite their concerns, the subcommittee did not recommend any specific changes to the 1973 statute that

---

would have imposed restrictions on the existing conditional zoning system. The lack of action stemmed from an agreement reached by a task force created by the subcommittee composed of Northern Virginia local governments, developers, and others interested parties which stated that they would resolve their differences within each individual locality rather than at the state legislature. Thus the subcommittee’s recommended change to 15.1-491(a) was the addition of another eligibility category – “or (vii) any county, city or town to whom Article 8.1 of this chapter is applicable, for the adoption” (Virginia General Assembly 1990: A-20). Article 8.1 would be a new section to the state code entitled, “Road Impact Fees” where applicability is defined as

“any county or city which has had population growth of ten percent or more from the next to latest to latest decennial census year, based on population reported by the United States Bureau of the Census. However, this measurement shall not be used until after the Bureau has reported the 1990 census. Until the 1990 census is reported, any county or city instead may qualify if it has had an estimated population growth of ten percent or more from 1980 to the most recent year for which population estimates are available from the Center for Public Service of the University of Virginia. This article shall also apply to any city adjoining such city or county, or any town located within such county” (Virginia General Assembly 1990: A22-23).

The subcommittee had now tied expansion of “old” conditional zoning authority to population growth rates and their geographic spillover rather than a blanket statewide extension. Not all of the subcommittee’s members agreed with its final recommendations. Heischober, the subcommittee member who was a Virginia Beach city councilman at the time and former mayor, wrote his own white paper entitled, The Misleading Lure of Impact Fees and Unlimited Proffer Zoning to accompany the subcommittee’s final report. His overall recommendation was that “the Committee turn its attention to a comprehensive solution involving the many different sources of revenue which have been previously identified as the way to proceed, rather than altering state law in a manner with such severe consequences” (Heischober 1989: 5). Finally, the subcommittee’s Acknowledgements section outlined the potential players in the expansion debate for the 1989 General Assembly Session. On the local government side, the organizations represented outside of individual local government and planning commissions were VML, VACo, VAPA, and the Rural Planning Caucus. For the development and business community, the subcommittee called attention to the Virginia Home Builders Association (HBAV), the Northern Virginia Building Industries Association, and the Virginia Association of Realtors. In expectation of how difficult passage would be for their legislative recommendations, Delegate Cranwell and Senator Colgan sent a joint memo on January 25, 1989 to all of the members of the General Assembly that asked for them to keep an open mind during the legislative proceedings. They wrote, “[y]ou will be contacted, if not already, by special interest groups urging you to vote against the legislation. We would appreciate it if you would (i) read the reports and (ii) not make
any commitment until you have had an opportunity to hear all the merits and demerits of the legislation.”

While the appointment of another committee to study the issue may have signaled a step forward in the multiple attempts to pass expansion legislation, not all localities rejoiced at the news. In fact, the announcement generated fear among Fairfax County officials that their current system would be heavily modified or removed in the 1989 General Assembly session. As a result they sought to develop strategies to protect the system which had brought in hundreds of millions of dollars in contributions from developers over the years (Anderson 1988). Their fear was based on the fact that “developers and other powerful groups in Richmond generally do not like conditional zoning” (Anderson 1988). The rationale behind the possible extension was that “some of Virginia’s developing jurisdictions need more money to pay for public works improvements necessitated by rapid urban growth” (Anderson 1988). This set the stage for the showdown in the 1989 General Assembly session where localities battled each other and developers fought everyone.

At the end of 1983, the number of localities eligible to use conditional zoning under the 1973 statute (15.1-491(a)) reached fifteen. Legislation passed in 1988 increased the number to twenty-five local governments ranging from counties, cities, and towns. The enactment of HB 1484 in 1989 set up a new conditional zoning system that was a hybrid of the 1973 statute and 1978 statute. By combining the number of localities who became eligible to accept cash proffers under the enactment of the 1989 statute with those of the 1973 statute, there were at the end of the 1980s, a total of one hundred and fifty eligible local governments (47 counties, 29 cities, and 74 towns). The number of localities who actually took the steps in 1989 to implement their newly bestowed authority was far below the number eligible.

Despite the authority for impact fees in HB 1485 limited to the Northern Virginia region, Chesterfield and Henrico counties were happy with the extension of conditional zoning powers under HB 1484. In March 1989, State Senator Robert E. Russell, R-Chesterfield, was quoted as saying, “This bill has enormous benefits for the county. It basically will allow the county to say to the developer, ‘You’ve got to pay your own way.’ . . . This bill is going to allow the costs of development to be allocated to the developers rather than asking residents who already live here to subsidize new development through increased real estate taxes.” (Osborn 1989) Chesterfield’s Planning Director, Thomas E. Jacobson said of the legislation, “We’ll get tremendous new tools to better pay for the public cost of development.” (Osborn 1989) Although they embraced the ability to use cash proffers, Henrico in 1989 saw their approach as more slow and cautious. Ronald J. Dahlstedt, Henrico’s Planning Director, tells the Richmond Times-Dispatch, “The county has no immediate plans to begin using the cash proffer system, although the county attorney is examining its legal aspects. ‘I think we’re taking a slower pace. . . . We’ve done very well under the old proffer system. I’m not saying we don’t have growth problems, but they’re not
to the magnitude of Chesterfield’s particularly in residential growth.’” (Sauder 1989a) In fact, Henrico would wait and see how Chesterfield developed its policies and what success they achieved with it. Chesterfield became the test case for the Richmond region, as well as, other localities over the state.

Given the mixed feelings of local governments on the legislative success of conditional zoning power expansion coupled with the failure to extend impact fees beyond Northern Virginia, one might wonder how the home builders viewed the completed 1989 General Assembly session. As mentioned earlier, the new conditional zoning power was more structured than its predecessor with the requirement of the adoption of a five year capital improvement program with any proposed proffer projects included in the program. The restructuring was the influence of the homebuilding/real estate/development lobbies. Rick Sauder for the Richmond Times-Dispatch in July 1989 writes, “Although the development industry is opposed to cash proffers in principle, it has accepted the new law as a better system than the one being used in Northern Virginia. ‘If we had to have something, this was a far better system than the open-ended system in Northern Virginia,’ said Bambi L. Barnette, legislative and political coordinator for the Home Builders Association of Richmond.” (Sauder 1989b) Localities in Northern Virginia were considered to have used their powers more broadly than intended with extracting proffers for improvements that were not a result of new development. Additionally, the legislation that was passed in late February 1989, was designed to take effect on July 1, 1989. This delay gave developers extra time to get their rezoning applications in order to evade the rising costs of development. Localities tried to implement rezoning moratoriums in order to prevent a flood of rezoning applications, but they were not effective. In Chesterfield alone, the applications totaled over 6,200 acres of virgin land amounting to more than 10,000 lots which would bring the total number of lots not subject to proffers in the county up to roughly 30,000.

Localities again looked to guidance from the Virginia Attorney General on how to navigate the multitude of conditional zoning statutes. In 1989, the county attorneys for Fauquier County, Powhatan County, Isle of Wight County, and Charles City County wrote separately to the Attorney General with questions on how to interpret the statutes in regard to different issues that would affect their county’s use of conditional zoning. Fauquier County actually twice sought the opinion of the Attorney General. Table 6.3 below summarizes the questions asked of the Attorney General by the localities, as well as, the Attorney General’s opinions. The motivations for the questions range from actual cases in the specific locality to the actions of other jurisdictions. For example, Fauquier’s first letter to the Attorney General was prompted by the county’s finding that “the authority of counties to accept gifts has been interpreted in some jurisdictions as limiting the effect of the prohibition in 15.1-491.2 against conditioning a rezoning on cash contributions by a zoning applicant” (Virginia Office of the Attorney General 1989: 91). Rather than just blindly follow the actions of other localities which may be violating state code, Fauquier sought the opinion of the Attorney General. While the Virginia Attorney
General’s opinion may be one legal interpretation out of multiple opinions, localities by proactively seeking it out are attempting to provide a firmer foundation for their conditional zoning system and discourage any attacks upon it by the development community whether through future legislation at the state level or lawsuits in the courts.
<table>
<thead>
<tr>
<th>Date of Attorney General Opinion</th>
<th>Addressee of Opinion</th>
<th>Question(s) of Attorney General asked by Addressee</th>
<th>Summary of Opinion</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 24, 1989</td>
<td>Fauquier County</td>
<td>&quot;[W]hether cash contributions may be offered by developers and accepted by a county as part of the conditional zoning process in those counties having general conditional zoning authority under 15.1-491.1 through 15.1-491.6 of the Code of Virginia?&quot;</td>
<td>&quot;15.1-491.2 expressly prohibits the voluntary written proffer of cash contributions as part of the conditional zoning process. . . . [T]he attempt to avoid this prohibition, by accepting cash gifts as a condition of rezoning, violates 15.1-491.2. In the appropriate circumstances, therefore, the acceptance of a cash contribution as a gift may call into question the validity of conditional zoning action.&quot;</td>
</tr>
<tr>
<td>February 16, 1989</td>
<td>Isle of Wight County</td>
<td>&quot;[W]hether certain proffers made by a rezoning applicant as part of the conditional zoning process for off-site improvements and impact fees are legally enforceable by a county when the proffers were made voluntarily, the proffer document includes a promise that the county will not contest the future enforcement of the proffers, and the proffers are supported by a surety bond?&quot;</td>
<td>&quot;[P]romises to pay for off-site road improvements or to pay impact fees to the County are unenforceable even voluntarily proffered as a part of the conditional rezoning process. It is further my opinion that the promise not to contest the future enforceability of prohibited proffers also would be unenforceable. . . . Finally, defenses available to the rezoning applicant to contest the enforceability of proffered conditions also would be available to a surety.&quot;</td>
</tr>
<tr>
<td>March 21, 1989</td>
<td>Fauquier County</td>
<td>&quot;[W]hether a county may amend its zoning ordinance to require that any person applying for rezoning under the conditional zoning process submit any voluntary written proffers seven days prior to the public hearing held by the board of supervisors on the application?&quot;</td>
<td>&quot;[Z]oning enabling statutes authorize a local government to adopt, as part of a zoning ordinance, reasonable procedural provisions governing the administration of the ordinance. These procedural provisions must be consistent with the express statutory requirements concerning the amendment of a zoning ordinance. . . . [A] county may amend its zoning ordinance to require that any person applying for rezoning under the conditional zoning process must submit any voluntary written proffers seven days prior to the public hearing held by the board of supervisors on the application.&quot;</td>
</tr>
</tbody>
</table>
| May 9, 1989                     | Powhatan County      | Question 1<br>"[W]hether 15.1-491(a) applies to Powhatan County?"
Question 2<br>"[W]hether 15.1-491.2:1 applies to Powhatan County?" | Answer to Question 1<br>"[T]he provisions of 15.1-491(a) authorizing a conditional zoning process do not apply to Powhatan County."
Answer to Question 2<br>"15.1-491.2:1 applies to Powhatan County." |
<table>
<thead>
<tr>
<th>Question 3</th>
<th>Answer to Question 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;[W]hether the proffered conditions authorized by 15.1-491.2:1 include the dedication of real property or the payment of cash as a part of the conditional zoning process?&quot;</td>
<td>&quot;15.1-491.2:1 authorizes proffered conditions including the dedication of real property or the payment of cash subject to the limitations provided for in the statute.&quot;</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>August 9, 1989</th>
<th>Charles City County</th>
</tr>
</thead>
<tbody>
<tr>
<td>Question 1</td>
<td>Answer to Question 1</td>
</tr>
<tr>
<td>&quot;[W]hether a property owner may limit the development of his property, other than by a conditional zoning proffer, to a density less than that allowed by its current zoning where the limitation is enforceable by the local government?&quot;</td>
<td>There are two options available outside of conditional zoning. The first is restrictive covenants, but these are “subject to private enforcement and a local government generally would not have standing to enforce the recorded development limitations.” Open-space easements are the second option whereby “[i]f a property owner chooses to donate or sell open-space easements to a local government, the resulting restrictions on the development of the property would be enforceable by the local government.”</td>
</tr>
</tbody>
</table>

| Question 2 | Answer to Question 2 |
| "[W]hether conditional zoning proffers may be submitted during a recess of a public hearing at which a rezoning application involving the property for which the proffers are submitted is being considered?" | "15.1-491.2 would not permit the rezoning applicant to submit proffers for the first time during a public hearing. . . . [P]roffers may be submitted during a recess of the public hearing, provided the amended rezoning application, including the written proffers, is properly advertised pursuant to 15.1-431 prior to the reconvening of the public hearing." |
CONCLUSION

In the eyes of the home builders, the conditional zoning legislation in Virginia progressed from being a great asset to them to a form of extortion in the span of fifteen years. Maria Osborn summarized this progression in 1989 article for the Richmond Times-Dispatch. She wrote, “Northern Virginia builders supported the implementation of conditional zoning when it was approved in the mid-1970s. For them, it was a way to bargain with local governments who were hearing calls for no more growth from their residents. Developers wanted conditional zoning ‘in order to be able to make offers to the local government that they couldn’t refuse,’ Snyder said. ‘It’s worked reasonably well.’ Yet the process has since changed – for the worse, he said. ‘The developers are being asked to pay, more and more, for what was formerly public costs. . . . Conditional zoning has evolved up here into a system of negotiated impact fees.’” (Osborn 1989)

With conditional zoning authority involving the ability to accept cash proffers expanded to the majority of localities in the state, the 1990s would be a decade of monitoring, statute tweaking, and legal challenges. University of Richmond Law Review in its 1989 summer volume alluded to what was ahead: “Both the cost and pace of real estate development in Virginia will undoubtedly foster many legislative initiatives and judicial attacks throughout the next decade” (Theobald and Rothenberg 1989: 808).

In terms of the political process, itself, I would argue that given the language of the conditional zoning bills as they were introduced in the 1980s legislative sessions and what was enacted, local governments were short-changed. While there was never a bill to extend the 1973 conditional zoning statute (15.1-491(a)) statewide, HB 1484 in its original language would have expanded this unrestricted form of conditional zoning to localities based on their growth rates. The enacted version of HB 1484 retained the growth rate eligibility language, but created a more restricted form of the 1973 statute. There was the same occurrence for the road impact fees legislation. HB 1485 went from being applicable to any jurisdiction with at least a ten percent decennial growth rate to counties with a population over 500,000. The only local governments who did not lose out in the 1980s were those in the Northern Virginia region. As an interest group, local governments did have enough influence to ensure some conditional zoning legislation was enacted. Given that enacted conditional zoning legislation was largely amended in ways that benefited the development community, I would conclude that for the 1980s their influence level at the points of agent interaction in the political process was greater than that of local governments as an interest group. Finally, conditional zoning’s identity which had been multifaceted in the 1970s becomes by the end of the 1980s dominated by cash proffers. Conditional zoning was never envisioned as a tool for revenue raising, but through the acceptance of cash proffers and the debate over who should be eligible to accept them, it becomes rebranded as such a tool.
CHAPTER 7

Unlike the 1970s and 1980s, conditional zoning did not fundamentally change during the 1990s. Instead, this was a period of adjustment for local governments and interest groups to the expanded conditional zoning powers of jurisdictions under the 1989 state statute (15.1-491.2:1). Local governments eligible to accept cash proffers increased from 6 counties, 5 cities, and 14 towns concentrated in the Northern Virginia region and the Eastern Shore to 41 counties, 24 cities, and 60 towns that stretched from the Atlantic coastline to the Blue Ridge Mountains. The focus in the state legislature was on statutory changes that affected how the systems would be run rather than issues of eligibility. Legislative efforts to expand eligibility focused on road impact fees system rather than conditional zoning. Interest groups spent more time monitoring what was taking place at the local level. Finally, following in the 1980s a period of few legal challenges, the courts reemerged during the 1990s to establish new precedent on how local governments should conduct their conditional zoning systems involving cash proffers.

ISSUE CONTEXT AND EMERGENCE

While legislation after the 1973 conditional zoning statute was aimed at correcting the perceived liberties that Fairfax County took with its conditional zoning system, the legislation of the 1990s was in a way rooted in how Chesterfield County developed and operated its “new” conditional zoning system authorized under the 1989 state statute. In October 1978, Chesterfield adopted an ordinance allowing conditional zoning in the county under the 1978 state statute (15.1-491.2). As a result, there was familiarity in the county with conditional zoning and the types of restrictions imposed on its use by the state legislature. “New” conditional zoning was set to become effective on July 1, 1989. Chesterfield had a schedule for consideration by the Board of Supervisors of an amendment to the zoning ordinance to allow for the new form of conditional zoning along with an implementation policy at a July 26, 1989 public hearing. The whole schedule for adoption was based around a series of five dates that began on June 14, 1989 with a work session of the Board of Supervisors. Chesterfield’s fast-track schedule toward adoption shows the importance and impatience held for finally being able to accept cash proffers. A June 9, 1989 memo showed that the County was going to set a “minimum reasonable proffer” level of $3,000 per dwelling unit for schools and necessary and road improvements, but that the actual proffer amount could go as high as the full public facility cost per dwelling unit (John C. Watkins Papers). Furthermore, if the proposed project was not consistent with the adopted Comprehensive Plan, then proffers in larger amount should be considered. All non-residential development involving cash proffers would be on a case-by-case basis. Underlying the county’s cash proffer policy calculations was the assumption “that residential development will occur in a planned and
orderly pattern, consistent with the adopted County Comprehensive Plan. If residential
development occurs in a leapfrog, urban sprawl pattern, the cost of constructing public capital
facilities to serve new residential development would be substantially higher” (Chesterfield
County Planning Department, June 1989, Memo, 3, John C. Watkins Papers).

Chesterfield’s Board of Supervisors adopted its ordinance allowing cash proffers on August 23,
1989. The delay in adoption from the proposed July date may have been due to the involvement
of interest groups. In a letter dated September 8, 1989, Steven L. Micas, the County Attorney,
wrote to Delegate John C. Watkins about the county’s ordinance adoption and stated, “[t]he
ordinance is virtually identical to the state enabling legislation and includes several revisions
recommended by Carl Bowmer from the Virginia Homebuilders Association” (John C. Watkins
Papers). Similar to Fairfax County’s entanglements with the development community in the
early 1980s that led to a threat by the development community of resolving things at the state
legislature, Delegate Watkins had similar words for Chesterfield in regard to elements of its
ordinance and potential proffer policy. The dispute between Watkins and Chesterfield County
centered on the disposition of cash proffers and non-cash proffers that end up not being used for
the specific capital improvement project that they were originally proffered towards. Watkins felt
that Chesterfield was not adhering to the initial intent of the legislation and thus stated in a letter
to Micas on September 21, 1989, “I feel certain that if Chesterfield County continues to pursue
this formulation of an ordinance development for proffers, the General Assembly will amend the
required statutes to insure that this is not allowed” (John C. Watkins Papers). Micas responded to
Watkins in a September 29, 1989 that indicated the County had made a wording change to its
policy which he hoped, “allays your fear that Chesterfield County intends to use proffered
property or cash for capital improvements unrelated to the underlying zoning request. I assure
you that this is not the case” (John C. Watkins Papers).

While the adoption of the ordinance that allowed cash proffers attracted minimal attention in the
press, Chesterfield’s consideration of a cash proffer policy received a full-court press of attention
from the development community and new media coverage from January 1990 to March 1990.
Part of the heavy press coverage was due to the county’s efforts to gain impact fee authorization
during the 1990 General Assembly session. Cash proffer policy and impact fee authority became
intertwined. The Home Builders Association of Richmond (HBAR) took out ads in the
newspapers that urged Chesterfield residents to contact the Board of Supervisors and attend the
public hearings to voice their opposition to cash proffers in the county (See Figure 7.1). They
introduced the argument that cash proffers were really taxes in disguise and that “mom and pop”
businesses would be endangered by them. Delegate Watkins responded to a phone call from his
constituents on their opposition to cash proffers in Chesterfield County by writing in a letter, “I
agree with your position entirely. I believe the method Chesterfield County is utilizing is not
only inappropriate but is probably illegal. I feel growth must pay for itself, but I also believe
there are no free rides on the backs of growth and development. The county needs to bring the
assessment rates up to par as well as the tax rates. Cash proffers are not the only answer” (John C. Watkins to Mr. and Mrs. Elwood Cox, January 19, 1990, John C. Watkins Papers).

Figure 7.1. 1990 Newspaper Ad from the Home Builders Association of Richmond

Small Business Threatened
By Effects Of New Tax.
If the Chesterfield Board of Supervisors has its way and enacts “cash proffers” on new homes, small business, as well as new home buyers, will be at risk.
Cash proffers are nothing but disguised taxes levied on new home buyers to help pay for roads, schools and other public facilities. They not only drive up the price of homes, but increase down payments, mortgage payments, attorney’s fees, closing costs and real estate taxes as well.
All of which means fewer people would be able to qualify for new homes in the county. And those who could, would have less disposable income. This would affect every business in the county. Large or small. Fewer people, fewer dollars. All suffer. Only the strong survive. Goodbye mom and pop operations.
Fewer New Homes Means Loss Of Money, Jobs And Opportunities.
Conservatively assuming that cash proffers would result in a drop in new construction of 1%, over $13,600,000 would be lost to the county’s economy in addition to the loss of over 100 jobs. Downturns in the economy and employment hit small business hardest.
What’s more, corporate relocators who deem affordable housing a major factor for moving people and opening offices might look elsewhere. Construction-related service industries and all retail establishments would be the losers.
Let Growth Pay For Itself.
Let’s continue to let growth pay for itself and move forward with the sound programs that have made Chesterfield County one of the most stable and productive counties in Virginia. This way a healthy economy will not be threatened and the continued success of small business will not be unjustly jeopardized.
Before the Board meets, January 25, speak out against cash proffers by writing to the Board at P.O. Box 40, Chesterfield, VA 23832. Or call the Home Builders Association at 264-2821. And attend the public hearings to follow. That way, mom and pops can stay in business.

The effort in Chesterfield County by the development industry was so widespread because Chesterfield was seen as the tipping point for the use of cash proffers in other localities. The president of the HBAR, Barry Bishop was quoted, “I think every locality will look at the opportunity to pull in some more money” (Smith 1990b). The Richmond Times-Dispatch described the scene at a hearing on January 24th, 1990, “For three hours . . . 23 speakers associated with the home building and real estate industries told the supervisors that cash proffers and impact fees would make housing unaffordable for many buyers, raise the price of all homes in the county – choking off sales – and ultimately cripple the home building industry. The speakers packed the supervisors’ meeting room and the crowd of more than 250 spilled out into the hallway. More than a dozen people marched outside of the courthouse carrying signs reading ‘Citizens Against Double Taxes’ and ‘Save Our Jobs’” (Smith 1990a).

At the February hearing, interest groups outside of the home builders shared their opposition to cash proffers. These interest groups were composed of bankers, insurance salesmen, contractors, and real estate agents. The livelihoods of these individuals depended upon a healthy residential housing market. It was summed up by commercial real estate official, “Residential drives light industrial, retail and office development . . . It’s a very delicate balance. It appears that cash proffers would have an impact on residential demand. And as you retard residential, so you retard commercial” (Smith 1990c). The decision by the Chesterfield Board of Supervisors on setting their cash proffer policy, however, was delayed in wait for passage of impact fee legislation for the county. While the county aggressively fought for the authority to accept cash proffers, their deference to impact fees showed the county’s preferred infrastructure financing tool. As one reporter wrote, “The supervisors are more interested in impact fees because that would allow them to collect fees on the 39,000 vacant home lots in the county that have either been rezoned or are contained in pending zoning requests that would escape cash proffers. . . . Several supervisors indicated they wanted to wait until the General Assembly recesses next month before taking final action on the cash proffer proposal” (Smith 1990c).

On March 14th, 1990, Board of Supervisors of Chesterfield County adopted a cash proffer policy which would allow the county to accept up to $2,000 per home lot through June 30, 1991. There would be an annual review of the amount which the Board preliminarily set to increase to $3,000 per lot on July 1, 1991 and $4,000 per lot on July 1st, 1992. The vote was 4-1. However, the adoption of the policy created mixed feelings among the supervisors. The Richmond Times-Dispatch reported, “Early in last night’s debate, Geoffrey H. Applegate, the Clover Hill District Supervisor, suggested delaying action on cash proffers for one year to wait for another shot at impact fees. ‘I don’t want to give the citizens of this county false hope that by adopting cash proffers we’re going to solve the problems. . . . If those 39,000 lots are developed, we have to way to control it.’ But [Supervisor Maurice B.] Sullivan [of Midlothian] and Harry G. Daniel, the Dale District supervisor, said Chesterfield should defray growth-related costs by using any
methods state law allows. ‘It’s not anybody’s idea of a perfect solution, but it’s a start,’ said Daniel” (Smith 1990f).

The amount of the cash proffer was smaller than what was originally proposed in 1989 ($3,000) and the figure of $4,724 calculated in 1990 by the county’s planning staff ($3,224 for municipal services and $1,500 for road improvements). Interest groups also had their varying takes on what the appropriate proffer amount should be. At one point, the Home Builders Association of Richmond in a report recommended a maximum cash proffer amount of $797 per home. Paul Tischler, a consultant, for HBAR calculated that the amount should be $1,153 per lot, but an amount up to $1,915 could be justified (Smith 1990e). Tischler admitted that the difference between his number and the county’s was the length of time that tax credits would be applied against the costs of capital facilities. He spread the credits over an additional five years (Smith 1990c).

The final amount of the cash proffer may also have been influenced by the Chesterfield Business Council weighing in two days before the vote at the hearing with its reluctant support for a cash proffer amount of $2,000 per lot. The council according to the Richmond Times Dispatch said in a statement, “‘In summary, a cash proffer is a politically expedient, though ineffectual, method for raising revenue. . . . If the Board of Supervisors feels compelled to adopt a cash proffer, the Business Council would reluctantly support a $2,000 cap’” (Smith 1990e). The Council went on to state, “[we want to] participate in the development of a long-term comprehensive funding plan, including legislation for an appropriate impact fee, which would eliminate cash proffers, a real estate tax rate that properly reflects the actual cost of services . . . and other measures that will solve the county’s budgetary problems’” (Robertson 1990).

Interest groups sought to remain involved after the initial cash proffer policy level was set. HBAR sent a letter to the Chairman of Chesterfield’s Board of Supervisors. The letter stated, “The Home Builders Association of Richmond would like to state that although we are not in total agreement with the County’s adopted Cash Proffer Policy, we would appreciate the opportunity to participate in the annual review of the proffer policy and evaluation of the amount” (Barry I. Bishop and J. Russell Parker, III, to C. F. Currin, Jr., March 27, 1990, John C. Watkins Papers).

Cash proffer policy adoption was overshadowed by Chesterfield’s failure to gain impact fees. While the bill was carried over to the 1991 General Assembly Session rather than outright killed, it can be argued that the failure was the result of the state’s adherence to Dillon’s Rule and the conservative nature of the state legislature. The conservative nature was exemplified in the state legislature’s take it slow approach to new tools. The 1990 bill for Chesterfield County would have changed the county’s charter to allow it to charge impacts fees to fund either transportation improvements or new school construction. Opposition stemmed from the fact that the impact fee
for roads in Northern Virginia approved in 1989 had not yet been put into action. The effective date of the impact fee statute (15.1-498.1 to 15.1-498.10) had been set for July 1, 1990. Delegate C. Richard Cranwell (D) who had been a leader in the fight for impact fees in 1989 opposed on the 1990 bill on the grounds, “We have no experience in how transportation impact fees even work. Now we’re fixing to take a quantum leap by applying impact fees to education” (Smith 1990d). Dillon’s Rule prevents localities from conducting their own pilot programs because they did not have the authority. Yet it creates a situation where local governments have to seek permission from the state legislature if they want to be innovative. All of this feeds into the second reason the opposition raised to Chesterfield’s impact fee as stated by Cranwell, “If you put this on for Chesterfield County, we’re going to have to do it for every single county that will come in here after that and we’ll be piecemealing it across the state” (Smith 1990d). Dillon’s Rule lends itself to a desire for standardization. The legislative debates over the years have shown that different parts of the state need tools specialized to their situation. All of which leads to conflict between local needs and the desire of state legislators who would prefer to “have ‘the infrastructure problem’ associated with rapid growth . . . addressed statewide rather than for individual localities” (Smith 1990d).

The third factor in the defeat was the power of interest groups exemplified by the development industry. A Richmond Times-Dispatch article described their efforts, “Saying that the fees place an unfair burden on their industry, Chesterfield’s home builders have fought impact fees with all their might for more than two years. They hired consultants and economists who have prophesied the disappearance of affordable housing and a countywide recession if new taxes increased home prices. They enlisted their friends in the General Assembly to stymie impact fee legislation. Last year, Russell’s impact fee bill was effectively buried by the House Committee on Counties, Cities and Towns after it passed the Senate, and a variety of parliamentary maneuvers by Russell to resurrect the bill were thwarted” (Smith 1990g).

AGENDA SETTING/ ALTERNATIVE SELECTION/ ENACTMENT

After the conditional zoning legislative milestones of the 1970s and the 1980s, the 1990s was legislatively anticlimactic. There was an absence of a true legislative turning point. The Chesterfield story showed how a jurisdiction could be torn between trying to implement the long fought for conditional zoning authority and continuing a newer fight for the power to levy impact fees. As a result, legislation could be broken into three categories – conditional zoning, impact fees, and legislative studies. The number of conditional zoning bills introduced over this time period decreased from the levels of prior decades. With three conditional zoning statutes available to different sets of localities, the focus of the conditional zoning-related bills introduced was on clarifying administrative procedures under each system. Some bills applied the same statutory changes to all three systems while others were targeted at one particular statute. Impact fee bills outnumbered conditional zoning bills. The agenda for impact fees targeted expansion of
eligible jurisdictions and impact fee applicability. Legislators authorized legislative studies to investigate claims about how localities were implementing conditional zoning, in particular, issues of abusing their authority. In addition, studies delved further as to what a more expansive use and conception of impact fees would mean for the state and localities. For the 1990s, the argument could be made that the major interactions of interest groups on the issue of conditional zoning took place outside the legislative stages of the political process model.

Legislative activity on conditional zoning in comparison to impact fees is a study of contrast for the 1990s. Impact fees legislation was introduced in more legislative sessions than conditional zoning from 1990 and 1999 as shown in Figure 7.2. In addition, there were seventeen impact fees bills introduced for the decade compared to ten for conditional zoning. However, as depicted in Figures 7.3 and 7.4, conditional zoning bills were more successful in achieving passage. The passage rate for impact fees was roughly 6 percent (1 out of 17) while conditional zoning’s was 50 percent (5 out of 10). The number of bills for each legislative session in Figures 7.3 and 7.4 do not match those shown in Figure 7.2 because of the fact that a bill can be introduced in one legislative session, but its final legislative outcome (passage or failure) can be determined in a later legislative session. This pattern of carrying over conditional zoning legislation to another year quickly increased in use for the 1980s and has continued in the 1990s and now applied to impact fees bills. Since this dissertation is about conditional zoning rather than impact fees, I do not go into detail on the navigation of impact fee bills through the legislative process.

Table 7.1 provides a synopsis of the impact fee bills that were legislative failures. I included impact fees in this discussion as a counterpoint to the legislative activity of the conditional zoning bills and as a possible explanation for why the decline in the number of bills. The bills aimed to move the existing legislative authority from solely road impact fees to impact fees for schools and public safety. Further, there was an effort to expand eligibility from the Northern Virginia region to other jurisdictions in the state. The one impact fee bill that achieved passage was HB 209 in the 1992 legislative session. As Chapter 465 in the 1992 Acts of the Assembly, HB 209 amended the impact fee statutes (15.1-498.2 to 15.1-498.10) with changes to the administration of impact fees such as the creation of an impact fee advisory committee in the jurisdiction, as well as, impact fee service area. There was no expansion of eligibility or impact fee types.
Figure 7.2. Total Number of Conditional Zoning and Impact Fee Bills Introduced by Legislative Session

Source: Author's calculations based on Journal of the House of Delegates and Journal of the Senate.
Figure 7.3. Conditional Zoning Bills by Legislative Outcome and Session

![Bar chart showing Conditional Zoning Bills by Legislative Outcome and Session with years 1990 to 1999 and bars indicating passed and failed bills.]

Source: Author’s calculations based on Journal of the House of Delegates and Journal of the Senate.

Figure 7.4. Impact Fees Bills by Legislative Outcome and Session

![Bar chart showing Impact Fees Bills by Legislative Outcome and Session with years 1990 to 1999 and bars indicating passed and failed bills.]

Source: Author’s calculations based on Journal of the House of Delegates and Journal of the Senate.
<table>
<thead>
<tr>
<th>Bill Number (Legislative Session)</th>
<th>Type of Impact Fee</th>
<th>Eligibility Language (Original and Amended)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Senate Bill 48 (1990)</td>
<td>School and Road Impact Fees</td>
<td>Chesterfield County</td>
</tr>
<tr>
<td>House Bill 1254 (1991)</td>
<td>School and Road Impact Fees</td>
<td>Chesterfield County</td>
</tr>
<tr>
<td>House Bill 166 (1992)</td>
<td>Road Impact Fees</td>
<td>Any county having a population of 500,000 or more as determined by the most recent U.S. Census, any county or city adjacent thereto, any city contiguous to such adjacent county or city, and any town within such county or adjacent county and any county having a population between 58,000 and 63,000.</td>
</tr>
<tr>
<td>House Bill 1138 (1992)</td>
<td>School Impact Fees</td>
<td>(i) any county having a population of 500,000 or more as determined by the most recent United States Census, any county or city adjacent thereto, any city contiguous to such adjacent county or city, any town within such county or adjacent county and (ii) any county or city having a population of 200,000 or more as determined by the most recent United States Census.</td>
</tr>
<tr>
<td>Senate Bill 340 (1992)</td>
<td>School Impact Fees</td>
<td>Original Any county or city (i) with a population of 80,000 or more, and (ii) which has had a population growth of twenty percent or more from the next-to-latest to latest decennial census year, base on population reported by the United States Bureau of the Census Amendment Any county with a county charter and a population in excess of 200,000</td>
</tr>
<tr>
<td>House Bill 1544 (1993)</td>
<td>School Impact fees</td>
<td>Any county having a population between 16,400 and 17,000, or between 48,000 and 50,000 .... No such ordinance shall become effective in the county until a referendum is held on the question and approved by a majority of those voting in such election.</td>
</tr>
<tr>
<td>House Bill 1780 (1993)</td>
<td>Road Impact Fees</td>
<td>Any county having a population of 500,000 or more as determined by the most recent U.S. Census, any county or city adjacent thereto, any city contiguous to such adjacent county or city, and any town within such county or adjacent county and any county having a population between 58,000 and 63,000.</td>
</tr>
<tr>
<td>House Bill 683 (1994)</td>
<td>Road, School, and Public Safety Impact Fees</td>
<td>Any county having a population of 500,000 or more as determined by the most recent U.S. Census, any county or city adjacent thereto, any city contiguous to such adjacent county or city, and any town within such county or adjacent county and any county having a population between 48,000 and 50,000</td>
</tr>
<tr>
<td>House Bill 1782 (1995)</td>
<td>Road, School, and Public Safety Impact Fees</td>
<td>Any county having a population of 500,000 or more as determined by the most recent U.S. Census, any county or city adjacent thereto, any city contiguous to such adjacent county or city, and any town within such county or adjacent county and any county having a population between 48,000 and 50,000</td>
</tr>
<tr>
<td>Bill Number</td>
<td>Impact Fees</td>
<td>Population Requirements</td>
</tr>
<tr>
<td>------------------</td>
<td>------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>House Bill 2187</td>
<td>Road Impact Fees</td>
<td>Any county having a population of 500,000 or more as determined by the most recent U.S. Census, any county or city adjacent thereto, any city contiguous to such adjacent county or city, and any town within such county or adjacent county, and any county having a population between 58,000 and 62,000</td>
</tr>
<tr>
<td>(1995)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>House Bill 2234</td>
<td>Road and School Impact Fees</td>
<td>Any county having a population of 500,000 or more as determined by the most recent U.S. Census, any county or city adjacent thereto, any city contiguous to such adjacent county or city, and any town within such county or adjacent county, and any city having a population between 140,000 and 160,000</td>
</tr>
<tr>
<td>(1995)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>House Bill 1049</td>
<td>Road Impact Fees</td>
<td>Any county having a population of 500,000 or more as determined by the most recent U.S. Census, any county or city adjacent thereto, any city contiguous to such adjacent county or city, and any town within such county or adjacent county, and any county having a population between 58,000 and 62,000</td>
</tr>
<tr>
<td>(1996)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>House Bill 1200</td>
<td>Road, School, and Public Safety Impact Fees</td>
<td>Any county having a population of 500,000 or more as determined by the most recent U.S. Census, any county or city adjacent thereto, any city contiguous to such adjacent county or city, and any town within such county or adjacent county, any county having a population between 48,000 and 50,000 and any county having a population between 6,600 and 7,000</td>
</tr>
<tr>
<td>(1996)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>House Bill 440</td>
<td>Road Impact Fees</td>
<td>(i) any county having a population of 500,000 or more as determined by the most recent U.S. Census, (ii) any county or city adjacent thereto, (iii) any city contiguous to such adjacent county or city, and (iv) any town within such county or an adjacent county and (v) any county having a population between 58,000 and 62,000</td>
</tr>
<tr>
<td>(1998)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Senate Bill 693</td>
<td>School Impact Fees</td>
<td>Original</td>
</tr>
<tr>
<td>(1998)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Amendment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Any county with a population between 80,000 and 90,000 may by ordinance, and only after approval by voter referendum</td>
</tr>
<tr>
<td>Senate Bill 1137</td>
<td>Road and School Impact Fees</td>
<td>(i) any county having a population of 500,000 or more as determined by the most recent U.S. Census, (ii) any county or city adjacent thereto to such county, (iii) any city contiguous to such adjacent county or city and (iv) any town within such county or an adjacent county.</td>
</tr>
<tr>
<td>(1999)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The dominant theme of conditional zoning legislation was minor statutory changes. Out of the ten bills introduced, eight sought to amend the existing the statutes with language on administrative concerns. The remaining two bills were eligibility expansion legislation with one applicable to the 1973 statute (15.1-491(a)) and the other to the 1989 statute (15.1-491.2:1). While I stated earlier that conditional zoning bills achieved a fifty percent passage rate for the decade, in terms of amending the conditional zoning statutes, only four of the five actually did.
This is an example of the legislative process at work. HB 2485 in 1995 was introduced as making the same proposed change to all three separate conditional zoning statutes, but in the legislative process, the language was removed by amendment and a non-conditional zoning-related statute was amended instead. The bill became Chapter 603 of the 1995 Acts of the Assembly. In total, the 1973 statute (15.1-491(a)) was successfully amended three times while the 1989 statute (15.1-491.2:1) was twice and only once for the 1978 statute (15.1-491.2). Table 7.2 below provides a summary of the ten conditional zoning bills with their original and amended language, as well as, legislative outcome.
Table 7.2 Conditional Zoning Bills in the 1990s (Amend 15.1-491(a) or 15.1-491.1 to 15.1-491.6)

<table>
<thead>
<tr>
<th>Bill Number (Legislative Session)</th>
<th>Patron(s)</th>
<th>Legislative Language (Original and Amended)</th>
<th>Legislative Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>House Bill 721 (1990)</td>
<td>Quillen</td>
<td>Original 15.1-491(a)</td>
<td>Approved by Governor—Chapter No. 868</td>
</tr>
<tr>
<td></td>
<td></td>
<td>... Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions and the zoning provisions then applicable shall continue in full force and effect until a subsequent amendment, mutually agreed to by the landowner and the governing body, changes the zoning or the conditions on the property covered by such conditions; provided, however, that such conditions and the applicable zoning provisions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>15.1-491.2</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>... Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions and the zoning provisions then applicable shall continue in full force and effect until a subsequent amendment, mutually agreed to by the landowner and the governing body, changes the zoning or the conditions on the property covered by such conditions; provided, however, that such conditions and the applicable zoning provisions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>15.1-491.2:1</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>... Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions and the zoning provisions then applicable shall continue in effect until a subsequent amendment, mutually agreed to by the landowner and the governing body, changes the zoning or the conditions on the property covered by such conditions; however, that such conditions and the applicable zoning provisions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Amendment 15.1-491(a)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>... for the adoption, in counties, or towns, therein which have planning commissions, wherein the urban county executive form of government is in effect, or in a city adjacent to or in a city adjacent to or completely surround by such a contiguous county . . . . Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in full force and effect until a subsequent amendment changes the zoning on the property covered by such conditions; provided, however, that such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(a1) In the event proffered conditions include a requirement for the dedication of real property of</td>
<td></td>
</tr>
</tbody>
</table>

169
substantial value, or substantial cash payments for or construction of substantial public improvements, the need for which is not generated solely by the rezoning itself, then no amendment to the zoning map for the property subject to such conditions, nor the conditions themselves, nor any amendments to the text of the zoning ordinance with respect to the zoning district applicable thereto initiated by the governing body, which eliminate, or materially restrict, reduce, or modify the uses, the floor area ratio, or the density of use permitted in the zoning district applicable to such property, shall be effective with respect to such property unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare.

(a2) Any landowner who has prior to July 1, 1990, proffered the dedication of real property of substantial value, or substantial cash payments for or construction of substantial public improvements, the need for which is not generated solely by the rezoning itself, but who has not substantially implemented such proffers prior to July 1, 1990, shall advise the local governing body by certified mail prior to July 1, 1991, that he intends to proceed with the implementation of such proffers. Such notice shall identify the property to be developed, the zoning district, and the proffers applicable thereto. Thereafter, any landowner giving such notice shall have until July 1, 1995, substantially to implement such proffers, or such later time as the governing body may allow. Thereafter, the landowner in good faith shall diligently pursue the completion of the development of the property. Any landowner who complies with the requirements of this subdivision shall be entitled to the protection against action initiated by the governing body affecting use, floor area ratio, and density set out in subdivision (a1), unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare, but any landowner failing to comply with the requirements of this subdivision shall acquire no rights pursuant to this section.

(a3) The provisions of subdivisions (a1) and (a2) of this section shall be effective prospectively only, and not retroactively, and shall not apply to any zoning ordinance text amendments which may have been enacted prior to March 10, 1990. Nothing contained herein shall be construed to affect or impair the authority of a governing body to:

1. Accept proffered conditions which include provisions for timing or phasing of dedications, payments, or improvements; or

2. Accept or impose valid conditions pursuant to subsection (c) of this section or other provision of law.

15.1-491.2

Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in full force and effect until a subsequent amendment changes the zoning on the property covered by such conditions; provided, however, that such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially
B. In the event proffered conditions include a requirement for the dedication of real property of substantial value or construction of substantial public improvements, the need for which is not generated solely by the rezoning itself, then no amendment to the zoning map for the property subject to such conditions, nor the conditions themselves, nor any amendments to the text of the zoning ordinance with respect to the zoning district applicable thereto initiated by the governing body, which eliminate, or materially restrict, reduce, or modify the uses, the floor area ratio, or the density of use permitted in the zoning district applicable to such property, shall be effective with respect to such property unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare.

C. Any landowner who has prior to July 1, 1990, proffered the dedication of real property of substantial value or construction of substantial public improvements, the need for which is not generated solely by the rezoning itself, but who has not substantially implemented such proffers prior to July 1, 1990, shall advise the local governing body by certified mail prior to July 1, 1991, that he intends to proceed with the implementation of such proffers. Such notice shall identify the property to be developed, the zoning district, and the proffers applicable thereto. Thereafter, any landowner giving such notice shall have until July 1, 1995, substantially to implement such proffers, or such later time as the governing body may allow. Thereafter, any landowner who complies with the requirements of this subdivision shall be entitled to the protection against action initiated by the governing body affecting use, floor area ratio, and density set out in subsection B, unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare, but any landowner failing to comply with the requirements of this subdivision shall acquire no rights pursuant to this section.

D. The provisions of subsections B and C of this section shall be effective prospectively only, and not retroactively, and shall not apply to any zoning ordinance text amendments which may have been enacted prior to March 10, 1990. Nothing contained herein shall be construed to affect any litigation pending prior to July 1, 1990, or any such litigation nonsuited and thereafter refiled. Nothing in this section shall be construed to affect or impair the authority of a governing body to: 1. Accept proffered conditions which include provisions for timing or phasing of dedications, payments, or improvements; or 2. Accept or impose valid conditions pursuant to subsection (c) of 15.1-491 or other provision of law.

15.1-491.2:1
B. In the event proffered conditions include a requirement for the dedication of real property of substantial value, or substantial cash payments for or construction of substantial public improvements, the need for which is not generated solely by the rezoning itself, then no amendment to the zoning map for the property subject to such conditions, nor the conditions themselves, nor any amendments to the text of the zoning ordinance with respect to the zoning
district applicable thereto initiated by the governing body, which eliminate, or materially restrict, 
reduce, or modify the uses, the floor area ratio, or the density of use permitted in the zoning 
district applicable to such property, shall be effective with respect to such property unless there 
has been mistake, fraud, or a change in circumstances substantially affecting the public health, 
safety, or welfare.

C. Any landowner who has prior to July 1, 1990, proffered the dedication of real property of 
substantial value, or substantial cash payments for or construction of substantial public 
 improvements, the need for which is not generated solely by the rezoning itself, but who has not 
substantially implemented such proffers prior to July 1, 1990, shall advise the local governing 
body by certified mail prior to July 1, 1991, that he intends to proceed with the implementation of 
such proffers. Such notice shall identify the property to be developed, the zoning district, and the 
proffers applicable thereto. Thereafter, any landowner giving such notice shall have until July 1, 
1995, substantially to implement such proffers, or such later time as the governing body may 
allow. Thereafter, the landowner in good faith shall diligently pursue the completion of the 
development of the property. Any landowner who complies with the requirements of this 
subsection shall be entitled to the protection against action initiated by the governing body 
affecting use, floor area ratio, and density set out in subsection B, unless there has been mistake, 
 fraud, or a change in circumstances substantially affecting the public health, safety, or welfare, 
but any landowner failing to comply with the requirements of this subdivision shall acquire no 
rights pursuant to this section.

D. The provisions of subsections B and C of this section shall be effective prospectively only, and 
not retroactively, and shall not apply to any zoning ordinance text amendments which may have 
been enacted prior to March 10, 1990. Nothing contained herein shall be construed to affect any 
litigation pending prior to July 1, 1990, or any such litigation nonsuited and thereafter refiled. 
Nothing in this section shall be construed to affect or impair the authority of a governing body to: 
1. Accept proffered conditions which include provisions for timing or phasing of dedications, 
payments, or improvements; or 
2. Accept or impose valid conditions pursuant to subsection (c) of 15.1-491 or other provision of 
law.

House Bill 1121 
(1990) Jackson and 
Hall 15.1-491(a) 
... Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions 
shall continue in full force and effect until a subsequent amendment changes the zoning on the 
property covered by such conditions; provided, however, that such conditions shall continue if the 
subsequent amendment is part of a comprehensive implementation of a new or substantially 
revised zoning ordinance and the local governing body shall not change the zoning, use, or 
density permitted at the time of the amendment to the ordinance except upon written application 
of the owner of the property.

15.1-491.2 
... Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions

No action taken
shall continue in full force and effect until a subsequent amendment changes the zoning on the property covered by such conditions; provided, however, that such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance and the local governing body shall not change the zoning, use, or density permitted at the time of the amendment to the ordinance except upon written application of the owner of the property.

15.1-491.2:1

... Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by such conditions; however, that such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance and the local governing body shall not change the zoning, use, or density permitted at the time of the amendment to the ordinance except upon written application of the owner of the property.

<table>
<thead>
<tr>
<th>Senate Bill 146</th>
<th>Russell; Delegates Cox, Martin, and Watkins</th>
<th>15.1-491(a) ... Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in full force and effect until a subsequent amendment changes the zoning on the property covered by such conditions; provided, however that. However, such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.</th>
<th>Approved by Governor—Chapter No. 672</th>
</tr>
</thead>
<tbody>
<tr>
<td>House Bill 1411</td>
<td>Miller</td>
<td>15.1-491.2:1 ... Except for those localities to which 15.1-491(a) is applicable, this section shall apply to (i) any county or, city, or town which has had population growth of ten percent or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of Census, provided that until the 1990 census is reported, any county or, city, or town instead may qualify only if it has had an estimated population growth of ten percent or more from 1980 to the most recent year for which population estimates are available from the Center for Public Service of the University of Virginia;</td>
<td>Approved by Governor—Chapter No. 233</td>
</tr>
<tr>
<td>House Bill 945</td>
<td>Cranwell, Bickley, Byrne, Callahan, Diamonstein, Giesen, Hall, Jackson, Keating, Mayer, Morgan, Puller, Smith, Van</td>
<td>Original 15.1-491(a) ... (a3) The provisions of subdivisions (a1) and (a2) of this section shall be effective prospectively only, and not retroactively, and shall not apply to any zoning ordinance text amendments which may have been enacted prior to March 10, 1990. Nothing contained herein shall be construed to affect any litigation pending prior to July 1, 1990, or any such litigation nonsuited and thereafter refiled. Nothing in this section shall be construed to affect or impair the authority of a governing body to: 1. Accept proffered conditions which include provisions for timing or phasing of dedications, payments, or improvements; or 2. Accept or impose valid conditions pursuant to subsection (c) of this section, subsection H of 15.1-466, or other provision of law.</td>
<td>Approved by Governor—Chapter No. 380</td>
</tr>
<tr>
<td>Amendment</td>
<td>This bill was further amended, but the amendments did not affect the proposed wording changes to 15.1-491(a).</td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------</td>
<td>---------------------------------------------------------------------------------------------------</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| Original | 15.1-491(a)  

...Proffered conditions affecting the affordability of housing shall be reasonably related to the scope and purpose of the comprehensive plan and the purpose of zoning ordinances as stated in 15.1-446.1 and 15.1-489, respectively. |

| 15.1-491.2 | A. ... Proffered conditions affecting the affordability of housing shall be reasonably related to the scope and purpose of the comprehensive plan and the purpose of zoning ordinances as stated in 15.1-446.1 and 15.1-489, respectively.... |

| 15.1-491.2:1 | A. ... Proffered conditions affecting the affordability of housing shall be reasonably related to the scope and purpose of the comprehensive plan and the purpose of zoning ordinances as stated in 15.1-446.1 and 15.1-489, respectively.... |

| Amendment | 15.1-491.2:1  

A. ... In any such county, city, or town, notwithstanding any contrary provisions of § 15.1-491.2, a zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map, provided that (i) the rezoning itself gives rise to the need for the conditions; (ii) such conditions have a reasonable relation to the rezoning; and (iii) all such conditions are in conformity with the comprehensive plan as defined in § 15.1-446.1. A locality shall not presume that a proffer of cash, land dedication, or construction of offsite improvements in a predetermined amount is necessary or appropriate for the approval of every rezoning throughout the locality. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by such conditions; however, such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially... |
revised zoning ordinance.

**This bill was further amended, but the amendments removed any proposed changes to 15.1-491(a), 15.1-491.2, and 15.1-491.2:1. The enacted version did not affect the conditional zoning statutes.**

| House Bill 2103 (1995) | Cranwell and Hall | Original
15.1-491(a)

... *A locality shall not presume that a proffer of cash, land dedication, or construction of offsite improvements in a predetermined amount is necessary or appropriate for the approval of every rezoning throughout the locality.*...

15.1-491.2:1

A. ... In any such county, city, or town, notwithstanding any contrary provisions of § 15.1-491.2, a zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map, provided that (i) the rezoning itself gives rise to the need for the conditions; (ii) such conditions have a reasonable relation to the rezoning; and (iii) all such conditions are in conformity with the comprehensive plan as defined in § 15.1-446.1. *A locality shall not presume that a proffer of cash, land dedication, or construction of offsite improvements in a predetermined amount is necessary or appropriate for the approval of every rezoning throughout the locality.* Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by such conditions; however, such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

Amendment

Amendment #1

Removed the language in regard to changes in the wording of 15.1-491(a)

Amendment #2

Restored the proposed changes from the introduced version of the bill to both statutes

| House Bill 2627 (1997) | Barlow and Ingram | 15.1-491.2:1

A. Except for those localities to which § 15.1-491(a) is applicable, this section shall apply to (i) any county, city, or town which has had population growth of ten percent or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census, provided that until the 1990 census is reported, any county, city, or town instead may qualify only if it has had an estimated population growth of ten percent or more from 1980 to

Left in Senate Committee

No action taken
the most recent year for which population estimates are available from the Center for Public Service of the University of Virginia; (ii) any city adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous with at least three such counties, and any town located in that county. In calculating the rate of population growth, a county may exclude any population housed on a federal military reservation.

<table>
<thead>
<tr>
<th>Act</th>
<th>Sponsor</th>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>House Bill 2657 (1997)</td>
<td>Katzen; Senators Miller, K. G. and Potts</td>
<td>15.1-491(a)</td>
<td>… for the adoption, in counties, or towns, therein which have planning commissions, wherein the urban county executive form of government is in effect, or in a city adjacent to or completely surrounded by such a county, or in a county contiguous to any such county, or in a city adjacent to or completely surrounded by such a contiguous county, or in any town within such contiguous county, or in any county contiguous to more than one county which is contiguous to a county having the urban county executive form of government, and in the counties east of the Chesapeake Bay as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body required by § 15.1-493 by the owner of the property which is the subject of the proposed zoning map amendment.</td>
</tr>
<tr>
<td>House Bill 2112 (1999)</td>
<td>Grayson</td>
<td>15.2-2303 (Previously coded as 15.1-491(a))</td>
<td>G. Notwithstanding the provisions of subsection A, upon an affirmative vote of the governing body any locality may choose to exercise the conditional zoning powers granted under this section in addition to any powers the locality may possess under §§ 15.2-2296 through 15.2-2302.</td>
</tr>
</tbody>
</table>
Of the ten conditional zoning bills introduced in the 1990s, HB 721 in 1990 had the most impact for future implementation of conditional zoning statutes. HB 721 which started out as a bill that would add roughly twenty-five words to each of the three conditional zoning statutes ends up adding three new subsections or subdivisions to each statute, as well as, expanding the eligibility criteria for the 1973 statute (15.1-491(a)). Because of the less than controversial nature of the majority of the conditional zoning legislation in the 1990s, the legislative history of HB 721 presents the best opportunity to examine the interactions of agents in the political process for this decade. Although I described the issue context of this decade using Chesterfield County, the plight of HB 721 through the legislature will show that the old guard jurisdictions of conditional zoning like Fairfax County are still very relevant to the discussion. Finally, this example illustrates how a bill (HB 721) can take on the properties of another piece of legislation (HB 1121).

House Bill 721 (HB 721), which was approved by the Governor on April 9, 1990 to become Chapter 868 of the Acts of the Assembly, expanded the number of cities eligible under “old” conditional zoning. The existing wording read as, “or in a city completely surrounded by such a county, or in a county contiguous to any such county, or in a city completely surrounded by such a contiguous county . . . .” The new wording allowed more flexibility in the location of a city. No longer was a city required to be a surrounded by a county to be eligible. With the change, a city could now be eligible by being adjacent to a county. Thus the amended statute stated, “or in a city adjacent to or completely surrounded by such a county, or in a county contiguous to any such county, or in a city adjacent to or completely surrounded by such a contiguous county . . . .” This eligibility expansion, however, was not the goal of the original legislation (HB 721), but a product, again, of the legislative process.

In the version introduced in the House of Delegates on January 23, 1990, HB 721 sponsored by Delegate Ford C. Quillen (D) of Scott County did not mention eligibility changes. The eligibility language on cities first appeared in the February 27, 1990 amendment proposed by the Senate Committee on Local Government. Quillen’s bill was aimed at addressing concerns over local governments taking legislative action to change the zoning or other land use regulations on properties with conditions and proffers in place. These properties may or may not have the project already constructed. The intent was to give these landowners a form of vested rights similar to that of other landowners involved in by-right projects. For all three conditional zoning systems, he wanted the changes shown in italics made, “Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions and the zoning provisions then applicable shall continue in full force and effect until a subsequent amendment, mutually agreed to by the landowner and governing body, changes the zoning or the conditions on the property covered by such conditions; provided, however, that such conditions and the applicable zoning provisions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.” At the same time, there was
another bill, House Bill 1121 (HB 1121), introduced in the House by Delegates Thomas M. Jackson Jr. (D) of Wythe County and Franklin P. Hall (D) of Richmond which aimed to limit what future changes that a local government could do without the consent of the property owner when conditional zoning was involved. Again, the changes would be applicable to all three systems such that “Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in full force and effect until a subsequent amendment changes the zoning on the property covered by such conditions; provided, however, that such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance and the local governing body shall not change the zoning, use, or density permitted at the time of the amendment to the ordinance except upon written application of the owner of the property.” HB 1121 died in the Committee on Counties, Cities and Towns because no action was taken on it. The greater level of specificity in HB 1121 was reflected in the amended version of HB 721 proposed by the House Committee on Counties, Cities and Towns.

Although HB 1121 did not advance past the preliminary stages of the legislative process, HB 721 tagged by the media with a new legislative partner, HB 1122. Like HB 1121, HB 1122 had Delegate Jackson as its lead sponsor, but its application was to § 15.1-491.2 rather than § 15.1-491.1 which contained the conditional zoning systems. 15.1-491.2 was the statute in the Virginia state code that generally deals with vested rights and land use. Labeled as the “Downzoning Bills” by the Washington Post, HB 721 and HB 1122 were further characterized as “two development bills . . . that would strengthen individual property rights and weaken local authority over land-use controls” (Anderson 1990). Whether intentionally aimed at Fairfax or not, these bills like those in previous decades brought the issues of Fairfax County and its land use regulations before the state legislature. The bills raised the ire of Audrey Moore, Chairman of the Fairfax County Board of Supervisors, who saw them as an attack on the actions of local governments. Her view was based on the fact that the bills came soon after Fairfax County made the decision to downzone 14,000 acres in the county. According to the Washington Post, Moore saw “the matter [as] a local one, not one to be decided at the state level” (Anderson 1990). It had been brought to the General Assembly because particular interest groups like the development community thought that they could use the state legislature to overturn or restrict the actions of local governments. Moore who was elected in 1987 on a slow-growth platform responded that “The people of Fairfax spoke, and what’s happening in the General Assembly is the developers are saying, ‘We don’t have to worry about the people of Fairfax County, because we can turn things around’ in Richmond” (Anderson 1990).

The version of HB 721 that emerged out of the House Committee on Counties, Cities and Towns was more detailed than Quillen’s original bill. Rather than adding wording to the existing language, the revised version added a new subsection or subdivision to each of the statutes on conditional zoning. The new language stated:
(a1) In the event proffered conditions include a requirement for the dedication of real property of substantial value, or substantial payments for or construction of substantial public improvements the need for which is not generated solely by the rezoning itself, then no amendment to the zoning map for the property subject to such conditions, nor the conditions themselves, nor any amendments to the text of the zoning ordinance with respect to the zoning district applicable thereto initiated by the governing body, which eliminate, or materially restrict, reduce, or modify the uses, the floor area ratio, or the density of use permitted in the zoning district applicable to such property, shall be effective with respect to such property unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare.

(a2) Any landowner who has prior to July 1, 1990, proffered the dedication of real property of substantial value, or substantial payments for or construction of substantial public improvements the need for which is not generated solely by the rezoning itself, but who has not substantially implemented such proffers prior to July 1, 1990 shall advise the local governing body by certified mail prior to July 1, 1991, that he intends to proceed with implementation of such proffers. Thereafter, any landowner giving such notice shall have until July 1, 1995, substantially to implement such proffers, or such later time as the governing body may allow. Thereafter, the landowner in good faith must pursue the completion of the project. Any landowner who complies with the requirements of this subdivision shall be entitled to the protections against legislative action affecting use, floor area ratio, and density set out in subdivision (a1), but any landowner failing to comply with the requirements of this subdivision shall acquire no rights pursuant to this section.

(a3) The provisions of subdivisions (a1) and (a2) of this section shall be effective prospectively only, and not retroactively, and shall not apply to any zoning ordinance text amendments which may have been enacted prior to March 10, 1990. Nothing contained herein shall be construed to affect any litigation pending prior to July 1, 1990, or any such litigation nonsuited and thereafter refilled.”

Essentially, the bill would prohibit downzoning in future cases where conditional zoning was involved and the proffers went above what was necessary to mitigate the rezoning change. Furthermore, HB 721 gave a five year window to properties which had received rezoning approval that involved the use of proffers, but had not yet fully complied with the agreed upon conditions to implement them. If the property remained out of compliance, then it opened itself up to the possibility of legislative action by the local government, for example being downzoned. Despite Moore’s opposition to the bills, Delegate Cranwell pointed out in the same Washington Post article that the versions of the bills that were reported out of Committee were the result of negotiations between developers and local government officials with assistance in bill drafting by Fairfax County attorneys (Anderson 1990).

Reaction by local governments to the amended House version of HB 721 was less than enthusiastic. Fairfax’s County Executive at the time, J. Hamilton Lambert, recommended that the
county suspend consideration of any rezoning applications that involved proffers until after the final fate of the bills had been decided. Going even further, Lambert indicated that if such legislative language had been in the original 1973 state statute, then Fairfax County most likely would never have implemented a proffer system. He said, “If these provisions had been in the original enabling legislation . . . , staff would have recommended against ever implementing the proffer system[. . .]. Given this, staff cannot recommend future acceptance of proffers” (Anderson 1990). HB 721 passed the House and as discussed above was further amended in the Senate. Besides the addition of the eligibility expansion to adjacent cities, the Senate amended the bill with what could be construed as more local government friendly language to the details of the House version. The Senate’s Committee on Local Government added at the end of (a3) the following wording, “Nothing in this section shall be construed to affect or impair the authority of a governing body to: 1. Accept proffered conditions which include provisions for timing or phasing of dedications, payments, or improvements; or 2. Accept or impose valid conditions pursuant to subsection (c) of this section of other provision of law.” In a repeat of the legislative process for past conditional zoning legislation, the Senate passed its amended version which the House rejected and thus a conference committee was called upon to settle the differences. In this case, the Senate version of the bill was reported out of conference; passed both legislative bodies, and signed by the Governor into law.

With three conditional zoning statutes and one impact fee statute authorized, legislators took steps in the mid-1990s to get a sense now after a period of years on how things were being implemented on the local level. A series of resolutions were passed by the House and the Senate to set up committees to investigate conditional zoning and impact fees. The claims of abuse against rezoning applicants by local governments with their conditional zoning systems was the impetus for Delegate C. Richard Cranwell (D) of Roanoke County to introduce House Joint Resolution No. 280 (HJR 280) in January 1994. In Cranwell’s original resolution, as well as, the substitute versions that were passed by the House and the Senate, there were six situations outlined where either abuses have occurred or the potential exists for them. The resolution stated:

"WHEREAS, pursuant to this authority, some jurisdictions are requiring the payment of cash, dedication of land, and/or construction of offsite facilities as a condition to rezoning without following the procedures required by statute; and

WHEREAS, in some jurisdictions proffers of cash, land, and/or offsite facilities for public purposes are required by an adopted fee schedule which bears no rational nexus or relation to the need for the proffer demand and the impact of the proposed rezoning; and

WHEREAS, rather than being voluntary concessions on the part of a landowner seeking rezoning to compensate in part for the demand for
increased services generated by the proposed project, proffers have become institutionalized demands from localities as general sources of revenue; and

WHEREAS, the proffer system as utilized in some jurisdictions forces landowners to ‘buy’ rezonings with proffers of cash, land, and/or offsite facilities for public purposes which go far beyond any need created by the proposed development; and

WHEREAS, in some jurisdictions the proffer system is being used to impose extraordinary construction requirements in excess of the Uniform Statewide Building Code; and

WHEREAS, the abuse of the proffer system by some jurisdictions unduly increases the cost of providing housing to the citizens of Virginia and impedes economic development; …”.

It is unknown whether there was a general lack of understanding among legislators about what was going on in the localities in regard to their conditional zoning systems. I raise this issue because of the comment made by Delegate Franklin P. Hall (D) of Richmond, who was one of the members serving on the subcommittee. He said, “he was amazed at how proffer procedures vary from locality to locality. ‘Our first meeting was extremely revealing because people were doing all sort of things . . . . It seems we need to revisit the existing law and make some adjustments and make sure in fact it was voluntary . . . that the spirit and intent of the law is being carried out” (Winiecki 1994). So an argument could be made for standardization in the systems across localities. This argument harkens back to one of the tensions between Dillon’s Rule and Home Rule. Home Rule would supposedly lead to every locality having their own individualized way of doing things. Dillon’s Rule would provide a level of standardization because the State can legislatively limit the amount of discretion available to localities.

The subcommittee was supposed to release a report before the 1995 General Assembly session, but it did not. Instead, the subcommittee under House Joint Resolution No. 542 (HJR 542) passed in 1995 continued its work into the 1996 session. One idea under consideration by the subcommittee was the standardization of the systems statewide. The greater push for this was motivated by the 1995 Virginia Supreme Court Case of Board of Supervisors v. Reed’s Landing Corporation which showed that at least one locality, Powhatan County, required a cash proffer of the correct amount in exchange for rezoning approval (This case is detailed in the next section). In reaction to the verdict, Delegate Hall said, “What we’re going to need to do is look at the system on a statewide basis” (Winiecki 1995). Furthermore, he hoped that the issues could be worked out in a compromise by local governments, developers, and other building industry officials. However, if that did not happen, he said, “My guess is that if they have not reached a compromise by next session, there will probably be a more formalized approach, and there may be a new look at the whole issue of proffers and establishment of guidelines” (Winiecki 1995).
The subcommittee never released its report on what amendments it recommended to be passed in order to prevent the occurrence of abuses in the conditional zoning systems.

In 1998, Senator William C. Mims (R) of Loudoun County and Delegate Joe T. May (R) of Loudoun County co-sponsored Senate Joint Resolution No. 107 (SJR 107) which aimed to establish a subcommittee to study the use of proffer zoning and impact fees. Proffer zoning is a new label attached to conditional zoning. Their resolution listed six justifications for the formation of the subcommittee. They stated,

“WHEREAS, many of Virginia’s localities are experiencing rapid population growth and a corresponding growth in school-age population; and

WHEREAS, one of the primary consequences of such growth is an increasing need for infrastructure, such as schools, transportation, and public safety facilities; and

WHEREAS, the utilization of funding mechanisms currently available to localities, such as proffer zoning, to finance the cost of such infrastructure has often proven inadequate or undesirable to fund the needs that rapid growth can create; and

WHEREAS, many rapidly-growing localities have significant areas which were zoned for residential use prior to adoption of proffer zoning and therefore are not subject to the proffer zoning process; and

WHEREAS, the three different types of proffer zoning often cause confusion and uncertainty in the rezoning process and are often portrayed by the development community unfairly and unevenly applied; and

WHEREAS, not only government officials but also the development community and the general citizenry recognize the need for localities to be able to obtain revenue to pay for infrastructure in a fair and equitable manner; and

WHEREAS, impact fees may offer an alternative to proffer zoning which is more fair and equitable and which will inject greater certainty into the development process; . . .”.

It would appear from their justification list that the resolution’s sponsors had a clear understanding of the issues involved when conditional zoning was used as a source of infrastructure financing. In the Senate Committee on Rules, SJR 107 became incorporated into another resolution – Senate Joint Resolution No. 53 (SJR 53). So the subcommittee authorized under SJR 53 to identify “approaches by which local governments can address demands for increased services and infrastructure resulting from residential growth” was also tasked with studying conditional zoning and impact fees. In particular, whether localities should be allowed
to substitute impact fees for those instances where they had previously used conditional zoning. While both resolutions made it out of the Senate, they became absorbed into another resolution that was introduced in the House – House Joint Resolution No. 195 (HJR 195).

The subcommittee for HJR 195 was comprised of 11 members – 6 from the House of Delegates appointed by the Speaker of the House and 5 from the Senate selected by the Senate Committee on Privileges and Elections. A report from the subcommittee was supposed to be ready in time for the 1999 General Assembly session. In January 1999, the subcommittee released an interim report of their activities. They did not make any specific recommendations in regard to conditional zoning and impact fees. Instead, the overall recommendation was to continue the study. However, the report did acknowledge a recommendation that emerged out of the participants at the public hearings for “[a]uthority to assess impact fees and continue to allow localities to accept cash proffers” (Virginia General Assembly 1999: A-24). This recommendation was characterized as having been recommended by “one or more environmental, planning, or citizen interests” as well as “one or more localities” (Virginia General Assembly 1999: A-24).

The subcommittee was extended for another year under House Joint Resolution No. 543 (HJR 543) in the 1999 General Assembly Session. In regard to conditional zoning, the new resolution included the wording that “concerns have been expressed about the perceived increases in exactions under the conditional zoning and proffer system in some high-growth localities”. The subcommittee was supposed to release its final report in time for the 2000 General Assembly session. However, no final report was released. Unfortunately, no reason has to be given for why this occurred. While it may have been more efficient to have all of the issues related to land development studied by one subcommittee, there is the risk of trying to do too much in a short period of time. The hope with a separate report on conditional zoning was that it would finally resolve the various claims from both sides of the issue. Unfortunately, for Virginia’s citizens, its absence only pushed the debate into another decade.

**IMPLEMENTATION**

Since there was no signature or turning point piece of legislation for the 1990s to shape the implementation stage of the political process, I examine the interactions of different agents with the legal system and what repercussions if any, there are for future implementation of conditional zoning. The agents involved in these interactions range from legislators, local jurisdictions, citizens, and members of the development community. The legal system in this discussion is composed of the opinions of the Virginia Attorney General and rulings from local, state, and federal cases. In the 1970s, the balance of rulings on land use regulations were heavily tilted towards the protection of property rights, thereby the development community. I will show below, in regard to the 1990s, that decisions have become more balanced, so that the court
system cannot be counted on always to be a friend to the development community at the expense of local governments.

In contrast to the Virginia Attorney General Opinions in the 1980s which were initiated by county attorneys from multiple jurisdictions, state legislators over this time period were the ones who inquired for legal advice. Delegate Vincent F. Callahan Jr. (R) who represented parts of Fairfax County, as well as, the City of Falls Church asked “[W]ether certain proffers of cash and off-site road improvements by a Fairfax County developer qualify for the protections of 15.1-491(al) of the Code of Virginia[?]” (Virginia Office of the Attorney General 1991: 63). Callahan’s question was from an actual case in December 1990 where the Board of Supervisors in Fairfax County approved a rezoning application for a 24-acre office development. The applicant proffered to the county off-site road improvements with an estimated cost of $3,028,000 along with a cash contribution in the amount of $500,000 which the county would apply towards other off-site improvements. The cash proffer would be paid in quarterly installments that began before the project’s site plans were submitted. The amount of the proffers was based upon a formula that the county used in its evaluation of rezoning applications, where the projected density was above the county’s Comprehensive Plan’s designated density. Given the amount of money involved in these proffers, Callahan sought a legal opinion to determine if the proffers could be viewed as a form of vested rights for the applicant, so that the project would have protection from any future actions by the county in terms of zoning or other legislative changes.

Subdivision (a1) of 15.1-491 authorized this level of protection for the rezoning applicant if the proffers met two requirements. First, the proffers had to reach a “substantial” threshold which was applicable to the value of dedication of real property, amount of cash payments, or size of public improvements constructed. The statute does not give a numeric value or formula for how to determine what constitutes “substantial”. Second, the dedications, cash payments or construction had to be motivated by something else in addition to the rezoning. Unfortunately, the Attorney General was unable to give a definitive answer to Callahan based on the facts with which he had been presented. In his August 19, 1991 opinion, the Attorney General alluded to the complicated nature of implementing and enforcing this subdivision of the statute. The Attorney General wrote, “Whether the proffered conditions are ‘substantial’ necessarily depends on an evaluation of all the relevant surrounding facts and circumstances, include the total size and total cost of the project. Similarly, whether the need for the proffered contributions for off-site road improvements is created solely by the rezoning also requires an evaluation of the attendant facts and circumstances, including other projects in the area and their likely impact on traffic volume. Expert testimony on complex urban planning and economic issues may be needed to apply these statutory tests properly” (Virginia Office of the Attorney General 1991: 65).

The second Attorney General Opinion that addressed implementation issues with conditional zoning statutes was from 1997. Delegate John C. Watkins (R) who represented parts of
Chesterfield and Powhatan counties had asked "[W]hether a locality is authorized to use a conditional zoning process in considering an applicant’s request this his property be rezoned to a residential use when residential use is 'compatible' with other uses in the zoning district?" (Virginia Office of the Attorney General 1997: 67). Due to the vagueness of the question and the lack of a specific case to illustrate Watkins’ concerns, the Attorney General based his response on a series of assumptions. He assumed that Watkins was really asking a two-part question. First, "whether when the requested use is residential, a locality would have to either permit or deny the use on the basis of traditional zoning considerations?" or secondly, "whether the locality would have the additional option of permitting the use subject to the proffer of conditions authorized under the conditional zoning method?" (Virginia Office of the Attorney General 1997: 68).

In his opinion on January 10th, the Attorney General simplified his response to a discussion of when it was appropriate to use conditional zoning which he saw as not being limited to those instances where traditional zoning fails. The only limits on its use are those “restrictions applicable to all land use regulations and the particular restrictions applicable to conditional zoning,” but otherwise, conditional zoning could be used to accomplish any of the purposes and objectives that the state code considered appropriate in a zoning ordinance (Virginia Office of the Attorney General 1997: 68). A few of the potential purposes and objectives available range from the reduction or prevention of congestion on public roads; “creation of convenient, attractive, and harmonious communit[ies];” “provision of adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, airports and other public requirements;” to “preservation of agricultural and forestal lands and other lands of significance for the protection of the natural environment” (Virginia State Code 1993). This 1997 Opinion of the Virginia Attorney General shows that conditional zoning can be used to accomplish many things and it hinders the tool to try to attach only the label of revenue raiser to it.

As the use of cash proffers spread outside of the Northern Virginia area, there were judicial challenges to rezoning application cases that involved cash proffers, as well as, local governments’ cash proffer systems. On September 16th, 1994, Judge Thomas V. Warren of the 11th Judicial Circuit of Virginia\textsuperscript{41} overturned Powhatan County Board of Supervisors’ decision to deny the rezoning request of Reed’s Landing Corporation. Warren’s ruling was based on “[i]n my opinion, the sole reason for denial of Reed’s Landing’s request was it’s failure or refusal to proffer $2439 per lot. The County is clearly imposing an impact fee not authorized by statute and which it is without power to impose” (Thomas V. Warren to Frank N. Cowan and James W. Hopper, September 16, 1994, John C. Watkins Papers). The case centered on roughly 233 acres of land that the developer wanted to rezone from agricultural (A-1) to single-family residential (R-1). The applicant filed for the zoning change on June 30, 1993. At the public hearing held on

\textsuperscript{41} This circuit court covers the jurisdictions of Amelia County, Dinwiddie County, Nottoway County, Petersburg, and Powhatan County.
August 3, 1993, there was no public opposition made to the rezoning change. Since the application met all of the requirements for the rezoning along with a lack of public outcry over it, the planning staff and the Planning Commission recommended approval of the rezoning. Powhatan County’s Board of Supervisors on August 9, 1993 adopted proffer guidelines which set a recommended proffer level of $2,439 per lot. Although Reed’s Landing Corporation’s rezoning application had been filed before the initiation of the proffer policy, it did not come before the Board of Supervisors until September 13, 1993. At the September meeting, court records state that the developer “proffered a cash payment ‘under protest’”, but the Board postponed its decision until the October meeting. There was another public hearing during the October meeting at which no public opposition was given to the case, but it “was apparent, however, that the Board would not approve the rezoning request unless the Developer agreed to pay $2,439 per lot, even though the Developer’s counsel asserted that the cash proffer demand was illegal” (Board of Supervisors of Powhatan County v. Reed’s Landing Corporation 1995). Reed’s Landing refused to proffer $2,439 per lot and the Board of Supervisors denied the rezoning application.

Warren’s ruling was seen as a victory for developers. The response from the legal community was that the prospects for cash proffers do not look good. In an October 9, 1994, Richmond-Times Dispatch article, J. Thomas O’Brien, a Richmond area land-use lawyer, was quoted, “[b]ecause there has been a successful challenge, not only will developers try to use it as a bargaining chip, the larger developers who have financial resources may bring challenges . . . .” (Winiecki 1994). At the same time, another lawyer, John V. Cogbill III, stated, “I think cash proffers are in serious trouble. . . . I think (the court ruling) has broader implications. . . . I think the General Assembly is going to have to rethink the issue of cash proffers and how they are being used by local governments” (Winiecki 1994). Frank Cowan, the lawyer for Reed’s Landing Corporation, said, “What Powhatan has done, and other jurisdictions have in essence, are backdoor impact fees. They are doing indirectly what the Virginia legislature has refused to let them do directly. ‘This is a question of the government exceeding its lawful authorities’” (Winieciki 1994).

Powhatan County reacted to the court’s ruling in two ways. First, it decided to consider changing the minimum lot size in the county from 2 acres to 5 acres. The rationale for the increase according to the Chairman of the Board of Supervisors, Robert Cosby, was “[t]he result of the court case prompted us to advertise a proposed increase in the lot size. . . . Upping the lot size would cut the problem of growing demands on county services in half or better. Existing citizens can’t weather the storm” (Winiecki 1994). Second, the county appealed the Circuit Court’s decision. On November 3, 1995, the Supreme Court of Virginia in Board of Supervisors of Powhatan County v. Reed’s Landing Corporation affirmed the Circuit Court’s decision and remanded the case back to the Circuit Court where it directed the lower court to have the
Powhatan County Board of Supervisors reconsider the rezoning application. In the case’s opinion, Justice Roscoe E. Stephenson, Jr. wrote,

“A plain reading of code § 15.1-491.2:1 in the light of the foregoing principles of law demonstrates that a county is not empowered to require a specified proffer as a condition precedent to a rezoning. The statute clearly states that proffers of conditions by zoning applicant must be made voluntarily. In the present case, the trial court found that the sole reason the Board denied the rezoning request was the Developer’s refusal to proffer $2439 per lot, a finding fully supported by the evidence. Therefore, under the facts presented, the proffer constituted a condition precedent and was not voluntary within the meaning of the statute. Consequently, we hold, as did the trial court, that the Board imposed an unlawful condition on the Developer” (Board of Supervisors of Powhatan County v. Reed’s Landing Corporation 1995).

This landmark case established a bright-line test of what a locality could not do in a rezoning case involving cash proffers. They could not deny a rezoning application simply because the applicant would not proffer the correct cash payment. As a result, in the opinion of a one lawyer quoted in the Richmond Times-Dispatch, “I think where there will be a practical effect is that counties will have to do a better job of analyzing a rezoning case in those situations where they aren’t other objective problems (with a case). . . . If a county wants to ‘require’ a cash proffer, they would have to find objective problems unrelated to the cash proffer, such as impact on adjoining roads (and) incompatibility with adjoining land uses” (Winiecki 1995b). While it ruled against the local government, Justice Stephenson did acknowledge in the opinion that the General Assembly has prevented localities from having great powers to deal with growth issues. He wrote in a comment designated with an asterisk, “[i]t is interesting to note that, since the enactment of Code § 15.1-491.2:1, the General Assembly has rejected all efforts to grant to localities greater power to charge landowners and developers with the capital costs associated with residential growth. See, e.g., S.B. 788, 1989 Sess. (no action taken); S.B. 340, 1992 Sess. (passed by Senate, but stricken from House docket by Committee on Counties, Cities and Towns in 1993); H.B. 1138, 1992 Sess. (passed by indefinitely by Committee on Counties, Cities and Towns); H.B. 2323, 1993 Sess. (passed by indefinitely by Committee on Counties, Cities and Towns)” (Board of Supervisors of Powhatan County v. Reed’s Landing Corporation 1995).

The Circuit Court’s decision in the Powhatan case created a window of opportunity for other legal challenges to cash proffers. Two cases stand out during this time period – one at the federal level and one at the state level. In May of 1995, the National Association of Home Builders of the United States (NAHB) along with the Home Builders Association of Virginia (HBAV) and the Home Builders Association of Richmond (HBAR) filed suit against Chesterfield County in the U.S. District Court for the Eastern District of Virginia on the grounds that the county’s cash proffer policy was a violation of the Fifth Amendment of the U.S. Constitution. The plaintiffs contended that the policy violated the Takings Clause because it “mandated the payment of cash
in exchange for favorable action on residential rezoning applications” (*National Association of Home Builders of the United States, et al., v. Chesterfield County* 1995). Susan Sprigg, Executive Vice President of the HBAV, released a statement at the time on the lawsuit which said, “the abuse of the voluntary cash proffer system is a problem faced by builders/developers throughout the commonwealth, which severely impacts the affordability of housing. . . . Although the abuse is practiced in other areas, Chesterfield County was identified as the target of this action due to its being one of the first jurisdictions statewide to adopt these policies” (Winiecki 1995a). Furthermore, plaintiffs alleged in their suit, “[u]nless property owners agree to pay for the construction of capital facilities in Chesterfield County — irrespective of any need created by a proposed development — Chesterfield County will use its zoning powers to delay the use of that land. In other words, these property owners are required to bear the brunt of providing the entire population of Chesterfield County with public facilities” (Winiecki 1995c).

In order to be a taking, the presiding United States District Judge, Robert R. Merhige, Jr., wrote that the policy or ordinance “does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land” (*National Association of Home Builders of the United States, et al., v. Chesterfield County* 1995). Since the policy only affects property owners when they apply for a rezoning, its mere adoption by the county did not result in the physical occupation of someone’s land or the deprivation of its economic value, thus no grounds for the second definition of a taking exist. For the advancement of legitimate state interests, there was a two part test. The policy passed the first part because no one denied that it was “designed to provide for the capital improvements required by development in the County” which is a legitimate state interest (*National Association of Home Builders of the United States, et al., v. Chesterfield County* 1995). The second part of the test revolved around the issues of nexus and rough proportionality as discussed in Chapter 2 in regard to the Nollan and Dolan U.S. Supreme Court cases. So at issue was whether the exaction, in this case, cash proffers, had a nexus with the state interest — the provision of capital improvements — as measured by a test of rough proportionality.

Judge Merhige used the definition of rough proportionality from Dolan where it is “some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development” (*National Association of Home Builders of the United States, et al., v. Chesterfield County* 1995). Chesterfield’s policy met this test for three reasons. First, the calculation of the cash proffer amount was based on “the average cost to the County of a new home” (*National Association of Home Builders of the United States, et al., v. Chesterfield County* 1995). Secondly, the policy explicitly stated that this amount was only a maximum level, so there was room for tailoring of the amount to the specific project. Finally, there was nothing in the policy that specifically said a cash proffers or any proffer for that matter was a requirement for rezoning approval. Together these reasons led Judge Merhige to conclude, “there is no reason apparent on the face of the Policy why the proffers required, if any, can not determined in an
‘individualized’ manner and fixed at an amount ‘roughly proportional’ in ‘nature and extent to the impact of the proposed development’ according to the test set out in Dolan v. Tigard” (National Association of Home Builders of the United States, et al., v. Chesterfield County 1995). Thus, the Court ruled “the Cash Proffer Policy of the County of Chesterfield is not facially violative of the Takings Clause of the Fifth Amendment to the United States Constitution” (National Association of Home Builders of the United States, et al., v. Chesterfield County 1995).

The associations appealed Judge Merhige’s decision to the United States Court of Appeals for the Fourth Circuit. In their appeal, the plaintiffs argued that “rough proportionality requires the County to make more stringent individualized determinations before calculating a cash proffer amount” (National Association of Home Builders of the United States; Home Builders Association of Virginia; Home Builders Association of Richmond v. Chesterfield County, Virginia 1996). In their July 1996 ruling, the Appeals Court rejected this line of argument because it would exceed the “roughly proportional” test to become one of “exact proportionality” (National Association of Home Builders of the United States; Home Builders Association of Virginia; Home Builders Association of Richmond v. Chesterfield County, Virginia 1996). Additionally, the Constitution does not require such exactness and its practical feasibility is questionable. In their rejection of the appellants’ arguments and the absence of error in the district court opinion, the three-judge panel unanimously affirmed the district court’s decision. Chesterfield’s reaction to the ruling was made by the Deputy County Attorney, Jeffrey L. Mincks who stated, “The board spent a lot of time developing this policy, and it’s good to have it affirmed constitutionally” (Cooper 1996).

While Chesterfield County was contending with the home building associations at the federal level in 1995, they also had a cash proffer case to deal with at the Circuit Court level. While the Powhatan case set up the bright line test for what not to do in rezoning decisions involving cash provfers, this Chesterfield case served as an example of how things should be conducted. In January 1995, the Chesterfield Board of Supervisors voted to deny the rezoning application of Oscar H. Harriss, a developer who had entered into a contract with the Gregorys, the owners of the property in question. The two parties “filed a motion for declaratory judgment in the Circuit Court of Chesterfield County, seeking a declaration that the Board’s denial of the rezoning application was, among other things, unlawful, arbitrary, and unreasonable” (James E. Gregory, Sr., et al. v. The Board of Supervisors of Chesterfield County 1999). The final rezoning application sought to rezone the 30-acre parcel of land that the Gregorys resided on from Agricultural (A) to Single-Family Residential (R-12) with an 81-lot residential subdivision of approximately 2.7 dwelling units per acre. As part of the final application, Harriss proffered cash payments of $1,500 per lot, “the dedication of an easement to permit the widening of Newbys Bridge Road[,] and the construction of off-site improvements designed to minimize the development’s impact on the surrounding area” (James E. Gregory, Sr., et al. v. The Board of Supervisors of Chesterfield County 1999). The County’s Planning Department staff
recommended approval of the rezoning subject to “the applicant addressing the impact on capital facilities and the transportation network, consistent with the Board’s policy” (James E. Gregory, Sr., et al. v. The Board of Supervisors of Chesterfield County 1999). While the county had a maximum cash proffer policy amount of $5,083 per lot, the staff’s calculation of this project’s impact on the county’s capital facilities resulted in a cash proffer amount of $5,156 per lot. The County’s Planning Commission discussed the application at two separate meetings in 1994. The end result was a recommendation of denial because of “concerns regarding the impact that the rezoning would have on traffic, drainage, schools, and fire and rescue service” (James E. Gregory, Sr., et al. v. The Board of Supervisors of Chesterfield County 1999). In January 1995, the application came before the Board of Supervisors. At the public hearing, 16 citizens spoke against the application while one citizen supported the rezoning. The county’s Assistant Director of Planning, William Poole, presented the viewpoint of the planning staff. He indicated that the change to R-12 would be consistent with the county’s Land Use Plan. Furthermore, the majority of the land in the area surrounding the parcel was zoned single-family residential. However, the parcels directly adjacent to it were still zoned agriculture. Poole reiterated the staff’s initial recommendation that the rezoning be approved only if “the Board was satisfied that the application adequately addressed the fiscal impact of the proposed development on transportation, schools, drainage, and other residential development in the area” (James E. Gregory, Sr., et al. v. The Board of Supervisors of Chesterfield County 1999). In the end, the Board voted against the rezoning the parcel and the County was sued.

Judge William R. Shelton of the Circuit Court of Chesterfield County ruled in favor of the defendants. The trial court did acknowledge that there was evidence in a persuasive amount that “full cash proffers or lack thereof played a key factor in the Board[‘s] determination” (James E. Gregory, Sr., et al. v. The Board of Supervisors of Chesterfield County 1999). The evidence showed that there was an expectation on the part of the Board to receive cash proffers. However, the trial court concluded that the evidence was not as “definitive” as it had been in the earlier decision of Board of Supervisors v. Reed’s Landing Corp., 250 Va. 397, 463 S.E.2d 668 (1995). Thus it was “fairly debatable” whether the Board’s decision based on the lack of the appropriate cash proffer amount or “the evidence of the proposed development’s impact on health, safety, and welfare” (James E. Gregory, Sr., et al. v. The Board of Supervisors of Chesterfield County 1999). If a decision is deemed “fairly debatable” then the decision of the local government must be upheld because the burden is upon the defendant to show the decision was “unreasonable”. In regard to the charges of the decision being arbitrary and capricious, the trial court held that they had no foundation because there were two land uses reasonable for the parcel. The first was its current agricultural use which was compatible with its neighbors. The second was the opportunity for the parcel to be subdivided into two or three single family residential lots. The second use was the proposed R-12. Thus, the court affirmed the decision of the Board of Supervisors and dismissed the case.
The plaintiffs appealed the Circuit Court’s decision to the Supreme Court of Virginia. On April 16, 1999, the justices affirmed the decision of the trial court. Justice Barbara Milano Keenan, author of the court’s opinion, wrote, “Based on this record, we conclude that Harriss failed to meet his evidentiary burden of demonstrating that the present zoning classification of the property was unreasonable, and that the merits of this rezoning application were fairly debatable. Under these circumstances, the trial court was not at liberty to substitute its judgment for that of the legislative body. . . . Thus, the trial court properly upheld the Board’s legislative determination” (James E. Gregory, Sr., et al. v. The Board of Supervisors of Chesterfield County 1999). In comparison with the Powhatan County case, the record in the Chesterfield case showed evidence at each stage of the rezoning process where concerns were raised about the development’s impact and opposition was indicated. So although, the decision of denial in Chesterfield was probably largely driven by the inadequate cash proffer amount per lot, there was enough proof to show that it may not have been the deciding factor. For the Powhatan case, there was no evidence of opposition from either the public or Planning Commission. So when the Board denied the rezoning application, there was nothing for the County to fall back on as its justification for the denial, other than the refusal by the applicant to proffer cash payments. Thus a bright line test from the Chesterfield County case is that a rezoning decision will be upheld if there is enough evidence in the application’s record to show that multiple factors contributed to the decision. A rezoning application must be decided on the merits of the rezoning not the amount of the cash proffer involved.

CONCLUSION

In the 1970s and 1980s, the majority of the conditional zoning legislation could be classified as at the behest and benefit of local governments. For the 1990s, it seems that jurisdictions switched their legislative priorities to impact fee legislation. Thus the conditional zoning bills introduced were slanted towards the interests of the development community. Through minor administrative language changes, the more permissive conditional zoning statutes from 1973 and 1989 begin the initial steps to becoming more restrictive in the vein of the 1978 statute. I would conclude that the development community clearly won the battle of influence in the state legislature for the 1990s as evidenced by the conditional zoning legislation discussion above and the complete legislative failure of all bills to expand impact fee eligibility or available impact fee types. The one positive sign for local governments in this decade was the rebalancing of the judicial scales on rulings to a more balanced position between local governments and the development community.
CHAPTER 8

The legislative activity of the 2000s returned to the levels of the 1980s. A series of enacted bills made fundamental changes to the conditional zoning statutes. However, the fate of the bill that would have the most significant effect on conditional zoning authority since it was enacted in 1973 remains unclear at the end of this analysis. More than thirty years after their unintentional authorization, the first bill to abolish cash proffers was introduced. With the results from the 2000 Census released in 2001, the number of jurisdictions eligible for conditional zoning with cash proffers stood at 254 localities (81 counties, 34 cities, and 139 towns). The just over doubling of local governments from 1989 to 2001 was not the only increase in eligibility expansion for this time period. At the end of this analysis, the number stands at 281 localities (88 counties, 36 cities, and 157 towns). Large eligibility numbers might give the impression that conditional zoning with cash proffers had finally achieved a level of legitimacy. The flexibility inherent in conditional zoning, however, was a life-threatening feature of the statutes. At this point in time, the development community emphasized certainty and standardization from its dealings with local governments. The legislation supported by the development community tried to force the conditional zoning statutes into a “one-size-fits-all” approach. To deal with their growth issues properly localities needed a toolbox full of a wide complement of tools not just a sledgehammer. Meanwhile, local governments still faced legal challenges to the local government decisions involving the use of conditional zoning with rezoning applications.

ISSUE CONTEXT AND EMERGENCE

From the 1970s through the 1990s, the issue context centered on the experiences of one particular locality, for example Fairfax or Chesterfield County. The 2000s break this pattern. According to a survey conducted in July of 1999 by the Virginia Chapter of the American Planning Association (VAPA), there were 17 counties and 5 cities that actively used the conditional zoning statutes which authorized cash proffers. In comparison, none of the four counties and five cities enabled to have impact fees for roads used the tool. While localities may not have used their impact fee authority, some local governments designed their conditional zoning systems so that their administration of cash proffers mimicked impact fees. There were suggested maximum cash proffer amounts per dwelling unit with annual increases in the amount voted on by Board of Supervisors or City Council. These amounts were purely suggestive, but

---

42 The counties were Loudoun, Spotsylvania, Powhatan, Stafford, Hanover, James City, Frederick, Prince William, Culpeper, Chesterfield, King William, Isle of Wight, Albemarle, Fairfax, Fauquier, Shenandoah, and Roanoke. The cities were Chesapeake, Manassas, Suffolk, Virginia Beach, and Hampton. (VAPA 1999: 41-43).
43 The counties enabled for impact fees were Loudoun, Prince William, Fairfax, and Arlington. The list of cities was Manassas Park, Manassas, Alexandria, Falls Church, and Fairfax. (VAPA 1999: 41-43).
they created an impression among the development community that voluntary no longer really meant “voluntary”. The authors of House Joint Resolution 170 (HJR 170) in 2004 pointed out this change in the use of conditional zoning. It read:

“WHEREAS, the purpose of conditional zoning is to provide more flexible and adaptable zoning methods to facilitate the orderly development of land and permit differing land uses and at the same time recognize the effects of change; and
WHEREAS, conditional zoning has evolved in many localities across the state into the development of local guidelines or policies that create an implied expectation of the volunteering of substantial conditions or the payment of cash proffers in conjunction with zoning or rezoning applications;”
(Virginia House of Delegates 2004, JR 170)

Representatives from organizations like the Home Builders Association of Virginia (HBAV) or the Home Building Association of Richmond (HBAR) made appearances at local government meetings, released press releases, and conducted mail flyer campaigns to protest the increases in the suggested cash proffer amounts.

What has built up over time was a clash in conceptions without either side wanting to lose ground. Local governments make up one side. Their aim is to protect the limited tools that they have while fighting to gain additional ones. Localities had two separate, but related issues. The first was a need to an increase in the number of state authorized tools to deal with growth matters. Second, local governments needed revenue sources to pay for public infrastructure concerns other than property tax revenues. The other side has the development community, who has historically been able to avoid paying for the infrastructure created by new development because it was funded by tax revenues or bonds, but public opinion has shifted and developers are looked upon to start paying more. Further, there has been a strong tradition of property rights protection in the state, so the development community has been able to operate in a less restrictive or regulated environment. In their annual legislative priorities for “land use/growth management tools”, VACo has consistently maintained the position:

“Authority to plan and regulate land use should remain with local governing bodies, and VACo opposes any legislation to weaken that authority. Furthermore, the General Assembly should grant localities the tools necessary to adequately meet citizens’ increasing transportation, education, public safety and other vital public infrastructure needs that are driven by rapid residential development. Such tools may include impact fees, statewide conditional zoning and transferable development rights, adequate public facilities provisions in subdivision ordinances, state funds for the purchase of development rights, and real estate transfer charges” (VACo 2006: 3).

Meanwhile, the development industry chafed under the notion that they should be held directly responsible for funding all of the infrastructure needs associated with new residential
development. In separate press releases over 2006 in regard to proposed cash proffer increases in the counties of Hanover, Powhatan, Goochland, and Lousia, the HBAR consistently stated:

"[W]e maintain our objections to the cash proffer system in general. Public infrastructure improvements benefit the entire community, and as a result, they should be funded through broad-based revenue sources such as real and personal property taxes as opposed to expecting one sector of the economy to pay for public infrastructure" (HBAR 2006: 1).

While in other states, this clash would be settled at the local level because Virginia strictly follows Dillon’s Rule, it is elevated to the state level. I argue the development community is very protective of this part of Virginia’s political structure. It allows them to be more influential in the political process than they might otherwise be. On their own website, HBAV has a statement about the significance of Dillon’s Rule to their activities:

“It is vitally important for the home building industry in Virginia to have an effective voice in the halls of the State Capitol in Richmond because Virginia is a “Dillon Rule” state, which limits the powers of local governments to those powers expressly authorized by the state legislature. Consequently, local governments cannot impose new fees or taxes on the home building industry or impose overly burdensome new provisions in their local land use ordinances unless they have been approved by the state legislature and signed into law by the governor".44

Local governments aspire for an environment where they will be able to use impact fees to finance the infrastructure needs of growth that occurs from by-right development and cash proffers to finance those that result from rezonings. This is not something shared by the development community and they can use the presence of Dillon’s Rule to delay or even kill the aspirations of local government.

Additional pressure was being asserted on this clash by the statewide expansion in the use of cash proffers. When the active users of cash proffers were restricted to a geographic area, the development community could more easily monitor and exert some control on the situation. Statewide expansion, however, meant there was the potential for more flare-ups over cash proffer use than the development community had the time or resources to put out. The development industry wanted the state to assert more control over what was going in the localities. Thus there was a push for monitoring by the state of local government cash proffer activities, as well as, state mandated standardization in cash proffer practices.

The statewide expansion in the use of cash proffers also raised the financial stakes in the debate between local governments and the development community. Millions of dollars are involved

from both sides. The amount of revenue collected statewide from cash proffers rose over this
time period. As displayed in Figure 8.1, revenues rose from just over 21 million dollars to a high
of roughly 71 million before settling back in the 60 million dollar range. While the revenues in
individual localities vary from a few thousand dollars to the millions, these numbers only apply
to rezoning activity and come from less than twenty percent of eligible local governments. One
can only imagine how much additional revenue that localities would collect if cash proffers
could apply to by-right development and there were no restrictions on eligible. That is the
scenario that the development industry hopes will never happen which is why they have used
their financial resources to influence the political process. Figure 8.2 shows that the total
contribution by the Real Estate/Construction Industry to candidates for the House of Delegates
or the state Senate has grown over time to the point where it is now at least one million dollars.
From 1996 to 2008, HBAV’s statewide Political Action Committee (PAC) alone gave out over
1.3 million dollars. Given the amount of money that each side has invested, the ability to achieve
your side’s desired outcome from the political process becomes even more critical.

---

45 The Real Estate/Construction Industry is composed of the following: General Contractors, Homebuilders,
Architectural Services/Surveyors, Building Materials/Supplies, Cement/Concrete/Asphalt, Engineers/Engineering
Firms, Manufactured Housing/Sales, Heavy Equipment Sales/Leasing, Building Trades/Subcontractors, Excavation
Contractors, Real Estate Developers, Highway Contractors, Rental/Property Management, Realtors,
Appraisers/Auctioneers, Title Companies/Settlement Agencies, Commercial Real Estate, Mortgage Lenders,
Miscellaneous Construction, and Land-Use Attorney/Consultants.
Figure 8.1. Total Statewide Cash Proffer Revenue Collected by Fiscal Year ($ in Tens of Millions)

Source: Author’s calculations based on data from the Virginia Public Access Project (VPAP).

Figure 8.2 Contributions to Candidates for House of Delegates or Senate by Real Estate/Construction Industry Donors by Year ($ in Millions)

Source: Author’s calculations based on data from the Virginia Public Access Project (VPAP).
AGENDA SETTING/ ALTERNATIVE SELECTION/ ENACTMENT

The level of conditional zoning related legislative activity was at its highest from 2000 to 2008 compared to prior decades. Besides the high number of bills introduced, there was a greater variety of proposed changes to the conditional zoning statutes. These changes are illustrated in the five bills whose legislative history I delve into later in this subsection. HB 2476 (2001) and HB 2456 (2005) are important because they added new sections to the statutes which had not undergone a substantive change since 1989. One of these sections (15.2-2303.2) ushered in state monitoring of localities’ implementation of conditional zoning with cash proffers. HB 1506 (2006) and HB 2500 (2007) impacted the eligibility and use of conditional zoning statutes. Some of the four bills benefited local governments, while others were enacted in the interests of the development community. More significantly, local governments were put in the position by development industry sponsored legislation to have to choose cash proffers or impact fees, but not the authority for both. As a result, SB 768 in 2008 had the potential for being considered the biggest legislative turning point in the conditional zoning history.

Twenty-five bills were introduced on conditional zoning during the nine years. Sixteen bills aimed to amend at least one of the existing statutes. Nine bills either proposed the addition of new sections to the statutes or amendments to those newly added sections. Figure 8.3 shows the number of bills introduced for each legislative session. Except for 2002, there was at least one conditional zoning-related bill introduced every year. The high level of legislative activity could have meant a low passage rate, but that was not the case here. Fifteen out of the twenty-five bills were enacted into law which translates into a sixty percent success rate. Figure 8.4 displays the number of bills that passed and failed for each legislative session.

As in prior time periods, the tactic of carrying bills over to the next legislative session was put into practice, but to a lesser extent than in years past. Two bills were carried over from the 2000 legislative session to the 2001 session. In addition, there was one bill (SB 768) in 2008 which was carried over to the 2009 legislative session, so any legislative decision on it is outside of my analysis. As a result, the numbers for each legislative session between Figure 8.3 and Figure 8.4 do not match. Although they are included in the passage numbers in Figure 8.4, two enacted bills (HB 2694 in 2003 and HB 128 in 2006) did not actually amend the conditional zoning statutes. The bills as introduced in their respective legislative sessions did propose actual language changes to the statutes, but in the course of the legislative process, they were amended and all references to the conditional zoning statutes were removed. Since they started out as conditional zoning bills, the numbers in Figures 8.3 and 8.4 reflect their presence.
Figure 8.3 Total Number of Conditional Zoning Bills Introduced by Legislative Session

Source: Author's calculations based on Journal of the House of Delegates and Journal of the Senate.

Figure 8.4 Conditional Zoning Bills by Legislative Outcome and Session

Source: Author's calculations based on Journal of the House of Delegates and Journal of the Senate.
In a series of three tables (Table 8.1, Table 8.2, and Table 8.3), the “true” conditional zoning-related bills are presented. First, Table 8.1 contains the bills that were enacted without any amendments. There are four in total. The remaining nine enacted conditional zoning bills can be found in Table 8.2. Because all of these bills were amended, their original or introduced statutory language is displayed, as well as, the enacted language. A comparison of the two columns shows how in course of the legislative process, all it takes is the substitution or amendment of one word in one bill to achieve passage while for other bills, whole sections need to be deleted to added. Finally, Table 8.3 lays out the nine bills that were legislative failures. Coincidentally, none of these bills were subject to any amendments and they all died while still in the committee stage of the legislative process. One bill (HB 1520 in 2006) was in a way legislatively reincarnated because it was incorporated into another bill while in committee (HB 1506) and that bill was enacted into law.

In my analysis of the 1990s, I made comparisons on the legislative activity between conditional zoning and impact fees. The argument was made that a possible explanation for the decline in conditional zoning bills was the distraction of the effort to expand the eligibility criteria and types of impact fee authority available. Given the increase in conditional zoning legislation for this time period, there might be the expectation of a decline in impact fees-related bills. In actuality, the number was even higher. There were more than twenty bills introduced over the nine years here that dealt with impact fees. Every legislative session had at least one impact fees bill introduced. Over this time span, twelve bills became chapters that amended the impact fees section of the state code. While the number of jurisdictions eligible for impact fees did slightly expand, impact fees were still restricted to road improvements. The hope for any real expansion of impact fee authority in the state became intertwined with the future of cash proffers in the 2008 legislative session with the introduction of SB 768 which I will discuss in further detail later in this subsection.
<table>
<thead>
<tr>
<th>Bill Number (Legislative Session)</th>
<th>Original and Enacted Legislative Language</th>
</tr>
</thead>
<tbody>
<tr>
<td>House Bill 417 (2004) – Chapter No. 531</td>
<td>§ 15.2-2300. Same; records. The zoning map shall show by an appropriate symbol on the map the existence of conditions attaching to the zoning on the map. The zoning administrator shall keep in his office and make available for public inspection a Conditional Zoning Index. The Index shall provide ready access to the ordinance creating conditions in addition to the regulations provided for in a particular zoning district or zone. The Index shall also provide ready access to all proffered cash payments and expenditures disclosure reports prepared by the local governing body pursuant to § 15.2-2303.2. The zoning administrator shall update the Index annually and no later than November 30 of each year.</td>
</tr>
<tr>
<td>House Bill 1073 (2006) – Chapter No. 450</td>
<td>§ 15.2-2297. Same; conditions as part of a rezoning or amendment to zoning map. A. A zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map; provided that (i) the rezoning itself must give rise for the need for the conditions; (ii) the conditions shall have a reasonable relation to the rezoning; (iii) the conditions shall not include a cash contribution to the locality; (iv) the conditions shall not include mandatory dedication of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided for in § 15.2-2241; (v) the conditions shall not include a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55 which includes an express further condition that members of a property owners' association pay an assessment for the maintenance of public facilities owned in fee by a public entity, including open space, parks, schools, fire departments and other public facilities not otherwise provided for in § 15.2-2241; however, such facilities shall not include sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Department of Transportation; (vi) the conditions shall not include payment for or construction of off-site improvements except those provided for in § 15.2-2241; (vii) no condition shall be proffered that is not related to the physical development or physical operation of the property; and (viii) all such conditions shall be in conformity with the comprehensive plan as defined in § 15.2-2223. The governing body may also accept amended proffers once the public hearing has begun if the amended proffers do not materially affect the overall proposal. Once proffered and accepted as part of an amendment to the zoning ordinance, the conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by the conditions. However, the conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.</td>
</tr>
</tbody>
</table>
| | § 15.2-2298. Same; additional conditions as a part of rezoning or zoning map amendment in certain high-growth localities. A. Except for those localities to which § 15.2-2303 is applicable, this section shall apply to (i) any locality which has had population growth of ten percent or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census; (ii) any city adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous with at least three such counties, and any town located in that county. In any such locality, notwithstanding any contrary provisions of § 15.2-2297, a zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the
ordinance, as a part of a rezoning or amendment to a zoning map, provided that (i) the rezoning itself gives rise to the need for the conditions; (ii) the conditions have a reasonable relation to the rezoning; and (iii) all conditions are in conformity with the comprehensive plan as defined in § 15.2-2223. Reasonable conditions shall not include, however, conditions that impose upon the applicant the requirement to create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55 which includes an express further condition that members of a property association pay an assessment for the maintenance of public facilities owned in fee by a public entity, including open space, parks, schools, fire departments, and other public facilities not otherwise provided for in § 15.2-2241; however, such facilities shall not include sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Department of Transportation. The governing body may also accept amended proffers once the public hearing has begun if the amended proffers do not materially affect the overall proposal. Once proffered and accepted as part of an amendment to the zoning ordinance, the conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by the conditions; however, the conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

§ 15.2-2303. Conditional zoning in certain localities.
A. A zoning ordinance may include reasonable regulations and provisions for conditional zoning as defined in § 15.2-2201 and for the adoption, in counties, or towns therein which have planning commissions, wherein the urban county executive form of government is in effect, or in a city adjacent to or completely surrounded by such a county, or in a county contiguous to any such county, or in a city adjacent to or completely surrounded by such a contiguous county, or in any town within such contiguous county, and in the counties east of the Chesapeake Bay as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body required by § 15.2-2285 by the owner of the property which is the subject of the proposed zoning map amendment. Reasonable conditions shall not include, however, conditions that impose upon the applicant the requirement to create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55 which includes an express further condition that members of a property owners' association pay an assessment for the maintenance of public facilities owned in fee by a public entity, including open space, parks, schools, fire departments, and other public facilities not otherwise provided for in § 15.2-2241; however, such facilities shall not include sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Department of Transportation. The governing body may also accept amended proffers once the public hearing has begun if the amended proffers do not materially affect the overall proposal. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by the conditions. However, such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

House Bill 2500 (2007) – Chapter No. 324

§ 15.2-2298. Same; additional conditions as a part of rezoning or zoning map amendment in certain high-growth localities.
A. Except for those localities to which § 15.2-2303 is applicable, this section shall apply to (i) any locality which has had population growth of 5% or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census; (ii) any city adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous with at least three such counties, and any town located in that county. However, any such locality

202
may by ordinance choose to utilize the conditional zoning authority granted under § 15.2-2303 rather than this section.

House Bill 2380 (2007) – Chapter No. 321

§ 15.2-2303.2. Proffered cash payments and expenditures.
C. Regardless of the date of rezoning approval, unless prohibited by the proffer agreement accepted by the governing body of a locality pursuant to § 15.2-2298, 15.2-2303, or 15.2-2303.1, a locality may utilize any cash payments proffered for any road improvement or any transportation improvement that is incorporated into the capital improvements program as its matching contribution under § 33.1-23.05. For purposes of this section, "road improvement" includes construction of new roads or improvement or expansion of existing roads as required by applicable construction standards of the Virginia Department of Transportation to meet increased demand attributable to new development. For purposes of this section, "transportation improvement" means any real or personal property acquired, constructed, improved, or used for constructing, improving, or operating any (i) public mass transit system or (ii) highway, or portion or interchange thereof, including parking facilities located within a district created pursuant to this title. Such improvements shall include, without limitation, public mass transit systems, public highways, and all buildings, structures, approaches, and facilities thereof and appurtenances thereto, rights-of-way, bridges, tunnels, stations, terminals, and all related equipment and fixtures.

Regardless of the date of rezoning approval, unless prohibited by the proffer agreement accepted by the governing body of a locality pursuant to § 15.2-2298, 15.2-2303, or 15.2-2303.1, a locality may utilize any cash payments proffered for capital improvements for alternative improvements of the same category within the locality in the vicinity of the improvements for which the cash payments were originally made. Prior to utilization of such cash payments for the alternative improvements, the governing body of the locality shall give at least 30 days' written notice of the proposed alternative improvements to the entity who paid such cash payment mailed to the last known address of such entity, or if proffer payment records no longer exist, then to the original zoning applicant, and conduct a public hearing on such proposal advertised as provided in subsection F of § 15.2-1427. The governing body of the locality prior to the use of such cash payments for alternative improvements shall, following such public hearing, find: (i) the improvements for which the cash payments were proffered cannot occur in a timely manner; (ii) the alternative improvements are within the vicinity of the proposed improvements for which the cash payments were proffered; and (iii) the alternative improvements are in the public interest. Notwithstanding the provisions of the Virginia Public Procurement Act, the governing body may negotiate and award a contract without competition to an entity that is constructing road improvements pursuant to a proffered zoning condition or special exception condition in order to expand the scope of the road improvements by utilizing cash proffers of others or other available locally generated funds. The local governing body shall adopt a resolution stating the basis for awarding the construction contract to extend the scope of the road improvements. All road improvements to be included in the state primary or secondary system of highways must conform to the adopted standards of the Virginia Department of Transportation.
Table 8.2. Conditional Zoning Bills Amended and Enacted in the 2000s

<table>
<thead>
<tr>
<th>Bill Number (Legislative Session)</th>
<th>Original Legislative Language</th>
<th>Enacted Language Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>House Bill 2476 (2001) -- Chapter No. 282</td>
<td>§ 15.2-2303.2. Disclosure of proffered cash payments and expenditures. A. The governing body of any locality accepting a cash payment voluntarily proffered pursuant to §§ 15.2-2298, 15.2-2303 or 15.2-2303.1 shall by September 30, 2001, report to the Commission on Local Government the following information for the preceding ten fiscal years: 1. The aggregate amount of proffered cash payments collected by the locality prior to the start of the preceding fiscal year, and the sources of all such payments; 2. The aggregate amount of proffered cash payments pledged to but not collected by the locality prior to the start of the preceding fiscal year, and the sources of all such pledges; and 3. The aggregate amount of proffered cash payments expended by the locality prior to the start of the preceding fiscal year, and all public improvements on which such money was expended.</td>
<td>§ 15.2-2303.2. Disclosure of proffered cash payments and expenditures. A. The governing body of any locality accepting a cash payment voluntarily proffered pursuant to §§ 15.2-2298, 15.2-2303 or § 15.2-2303.1 shall by September 30, 2001, report to the Commission on Local Government the following information for the preceding two fiscal years, concluding with fiscal year 2001: 1. The aggregate amount of proffered cash payments collected by the locality; 2. The aggregate amount of proffered cash payments that have been pledged to but not collected by the locality and which pledges are not conditioned on any event other than time; and 3. The aggregate amount of proffered cash payments expended by the locality, and an aggregate list of all public improvements on which such money was expended. B. The governing body of any locality eligible to accept any proffered cash payments pursuant to §§ 15.2-2298, 15.2-2303 or § 15.2-2303.1 but that did not accept any proffered cash payments during the preceding two fiscal years shall by September 30, 2001, so notify the Commission on Local Government. C. The governing body of any locality accepting a cash payment voluntarily proffered pursuant to §§ 15.2-2298, 15.2-2303 or 15.2-2303.1 shall within three months of the close of each fiscal year, beginning in fiscal year 2002 and for each fiscal year thereafter, report to the Commission on Local Government the following information for the preceding fiscal year: 1. The aggregate amount of proffered cash payments collected by the locality; 2. The aggregate amount of proffered cash payments that have been pledged to but not collected by the locality and which pledges are not conditioned on any event other than time; and 3. The aggregate amount of proffered cash payments expended by the locality, and an aggregate list of all public improvements on which such money was expended. D. The governing body of any locality eligible to accept any proffered cash payments pursuant to §§ 15.2-2298, 15.2-2303 or § 15.2-2303.1</td>
</tr>
</tbody>
</table>
### Senate Bill 874 (2001) -- Chapter No. 703

<table>
<thead>
<tr>
<th>Section</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>15.2-2297</td>
<td>A. A zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map; provided that (i) the rezoning itself must give rise for the need for the conditions; (ii) the conditions shall have a reasonable relation to the rezoning; (iii) the conditions shall not include a cash contribution to the locality; (iv) the conditions shall not include mandatory dedication of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided for in §15.2-2241; (v) the conditions shall not include a requirement that the applicant create a property owners' association under Chapter 26 (§55-508 et seq.) of Title 55, with a further condition that members of a property owners' association pay an assessment for publicly owned public facilities, including open space, parks, schools, fire departments and other public facilities not otherwise provided for in §15.2-2241; (vi) the conditions shall not include payment for or construction of off-site improvements except those provided for in §15.2-2241; (vii) no condition shall be proffered that is not related to the physical development or physical operation of the property; and (viii) the conditions shall not include payment for or construction of off-site improvements except those provided for in §15.2-2241.</td>
</tr>
</tbody>
</table>

D. The governing body of any locality that did not accept any proffered cash payments pursuant to §§ 15.2-2298, 15.2-2303 or 15.2-2303.1 during the preceding fiscal year shall within three months of the close of each fiscal year, beginning in 2001 and for each fiscal year thereafter, so notify the Commission on Local Government.

E. The Commission on Local Government shall, by November 30, 2001, prepare and make available to the public and the chairmen of the Senate Local Government Committee and the House Counties, Cities and Towns Committee a report containing the information made available to it pursuant to subsections A and B.

F. The Commission on Local Government shall by November 30, 2001, and by November 30 of each fiscal year thereafter, prepare and make available to the public and the chairmen of the Senate Local Government Committee and the House Counties, Cities and Towns Committee an annual report containing the information made available to it pursuant to subsections C and D.

but that did not accept any proffered cash payments during the preceding fiscal year shall within three months of the close of each fiscal year, beginning in 2001 and for each fiscal year thereafter, so notify the Commission on Local Government.

E. The Commission on Local Government shall, by November 30, 2001, prepare and make available to the public and the chairmen of the Senate Local Government Committee and the House Counties, Cities and Towns Committee a report containing the information made available to it pursuant to subsections A and B.

F. The Commission on Local Government shall by November 30, 2001, and by November 30 of each fiscal year thereafter, prepare and make available to the public and the chairmen of the Senate Local Government Committee and the House Counties, Cities and Towns Committee an annual report containing the information made available to it pursuant to subsections C and D.
all such conditions shall be in conformity with the comprehensive plan as defined in § 15.2-2223.

15.2-2298
A. Except for those localities to which § 15.2-2303 is applicable, this section shall apply to (i) any locality which has had population growth of ten percent or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census; (ii) any city adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous with at least three such counties, and any town located in that county. In any such locality, notwithstanding any contrary provisions of § 15.2-2297, a zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map, provided that (i) the rezoning itself gives rise to the need for the conditions; (ii) the conditions have a reasonable relation to the rezoning; and (iii) all conditions are in conformity with the comprehensive plan as defined in § 15.2-2223. Reasonable conditions shall not include, however, conditions that impose upon the applicant the requirement to create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55, with a further condition that members of a property association pay an assessment for publicly owned public facilities, including open space, parks, schools, fire departments, and other public facilities not otherwise provided for in § 15.2-2241.

15.2-2303
A. A zoning ordinance may include reasonable regulations and provisions for conditional zoning as defined in § 15.2-2201 and for the adoption, in counties, or towns therein which have planning commissions, wherein the urban county executive form of government is in effect, or in a city adjacent to or completely surrounded by such a county, or in a county contiguous to any such county, or in a city adjacent to or completely surrounded by such a contiguous county, or in any town within such contiguous county, and in the counties east of the Chesapeake Bay as a part of improvements except those provided for in § 15.2-2241; (vi) (vii) no condition shall be proffered that is not related to the physical development or physical operation of the property; and (viii) all such conditions shall be in conformity with the comprehensive plan as defined in § 15.2-2223.

15.2-2298
A. Except for those localities to which § 15.2-2303 is applicable, this section shall apply to (i) any locality which has had population growth of ten percent or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census; (ii) any city adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous with at least three such counties, and any town located in that county. In any such locality, notwithstanding any contrary provisions of § 15.2-2297, a zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map, provided that (i) the rezoning itself gives rise to the need for the conditions; (ii) the conditions have a reasonable relation to the rezoning; and (iii) all conditions are in conformity with the comprehensive plan as defined in § 15.2-2223. Reasonable conditions shall not include, however, conditions that impose upon the applicant the requirement to create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55 which includes an express further condition that members of a property association pay an assessment for the maintenance of public facilities owned in fee by a public entity, including open space, parks, schools, fire departments, and other public facilities not otherwise provided for in § 15.2-2241; however, such facilities shall not include sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Department of Transportation.

15.2-2303
A. A zoning ordinance may include reasonable regulations and provisions for conditional zoning as defined in § 15.2-2201 and for the adoption, in counties, or towns therein which have planning commissions, wherein the urban county executive form of
an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body required by § 15.2-2285 by the owner of the property which is the subject of the proposed zoning map amendment. Reasonable conditions shall not include, however, conditions that impose upon the applicant the requirement to create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55, with a further condition that members of a property owners' association pay an assessment for publicly owned public facilities, including open space, parks, schools, fire departments, and other public facilities not otherwise provided for in § 15.2-2241.

reasonably

government is in effect, or in a city adjacent to or completely surrounded by such a county, or in a county contiguous to any such county, or in a city adjacent to or completely surrounded by such a contiguous county, and in the counties east of the Chesapeake Bay as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body required by § 15.2-2285 by the owner of the property which is the subject of the proposed zoning map amendment. Reasonable conditions shall not include, however, conditions that impose upon the applicant the requirement to create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55 which includes an express further condition that members of a property owners' association pay an assessment for the maintenance of public facilities owned in fee by a public entity, including open space, parks, schools, fire departments, and other public facilities not otherwise provided for in § 15.2-2241; however, such facilities shall not include sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Department of Transportation.

<p>| House Bill 2600 (2003) – Chapter No. 522 | § 15.2-2303.2. Disclosure of proffered cash payments and expenditures. C. The governing body of any locality with a population in excess of 3,500 persons accepting a cash payment voluntarily proffered pursuant to §§ 15.2-2298, 15.2-2303 or § 15.2-2303.1 shall within three months of the close of each fiscal year, beginning in fiscal year 2002 and for each fiscal year thereafter, report to the Commission on Local Government the following information for the preceding fiscal year: 1. The aggregate dollar amount of proffered cash payments collected by the locality; 2. The aggregate dollar amount of proffered cash payments that have been pledged to but not collected by the locality and which pledges are not conditioned on any event other than time; and 3. The aggregate-total dollar amount of proffered cash payments expended by the locality, and an aggregate list of all public improvements on which such money was expended. | § 15.2-2303.2. Disclosure of proffered cash payments and expenditures. C. The governing body of any locality with a population in excess of 3,500 persons accepting a cash payment voluntarily proffered pursuant to §§ 15.2-2298, 15.2-2303 or § 15.2-2303.1 shall within three months of the close of each fiscal year, beginning in fiscal year 2002 and for each fiscal year thereafter, report to the Commission on Local Government the following information for the preceding fiscal year: 1. The aggregate dollar amount of proffered cash payments collected by the locality; 2. The estimated aggregate dollar amount of proffered cash payments that have been pledged to but not collected by the locality and which pledges are not conditioned on any event other than time; and 3. The aggregate-total dollar amount of proffered cash payments expended by the locality, and an aggregate list of all public improvements on which such money was expended. |</p>
<table>
<thead>
<tr>
<th>Category</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Off-site road improvements</td>
<td>$_____</td>
</tr>
<tr>
<td>Fire and Rescue/Public Safety</td>
<td>$_____</td>
</tr>
<tr>
<td>Libraries</td>
<td>$_____</td>
</tr>
<tr>
<td>Parks, Recreation, and Open Space</td>
<td>$_____</td>
</tr>
<tr>
<td>Water and Sewer Service Extension</td>
<td>$_____</td>
</tr>
<tr>
<td>Community Centers</td>
<td>$_____</td>
</tr>
<tr>
<td>Stormwater Management</td>
<td>$_____</td>
</tr>
<tr>
<td>Special Needs Housing</td>
<td>$_____</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>$_____</td>
</tr>
<tr>
<td>Total dollar amount expended</td>
<td>$_____</td>
</tr>
</tbody>
</table>

D. The governing body of any locality with a population in excess of 3,500 persons eligible to accept any proffered cash payments pursuant to §§ 15.2-2298, 15.2-2303 or § 15.2-2303.1 but that did not accept any proffered cash payments during the preceding fiscal year shall within three months of the close of each fiscal year, beginning in 2001 and for each fiscal year thereafter, so notify the Commission on Local Government.

§ 15.2-2303.2. Proffered cash payments and expenditures.
A. The governing body of any locality accepting a cash payment voluntarily proffered on or after July 1, 2005, pursuant to §§ 15.2-2298, 15.2-2303 or § 15.2-2303.1 shall by September 30, 2001, report to the Commission on Local Government the following information for the preceding two fiscal years, concluding with fiscal year 2001:
1. The aggregate amount of proffered cash payments collected by the locality;
2. The aggregate amount of proffered cash payments that have

§ 15.2-2303.2. Proffered cash payments and expenditures.
A. The governing body of any locality accepting a cash payment voluntarily proffered on or after July 1, 2005, pursuant to §§ 15.2-2298, 15.2-2303 or § 15.2-2303.1 shall, by September 30, 2001, report to the Commission on Local Government the following information for the preceding two fiscal years, concluding with fiscal year 2001:
1. The aggregate amount of proffered cash payments collected by the locality;
2. The aggregate amount of proffered cash payments that have been
been pledged to but not collected by the locality and which pledges are not conditioned on any event other than time; and
3. The aggregate amount of proffered cash payments expended by the locality, and an aggregate list of all public improvements on which such money was expended within five years of receiving such payment, begin construction, or cause construction to begin, of the improvements for which the cash payment was proffered. Unless prohibited by the proffer agreement between the owner and the locality, a locality may utilize any proffered funds in excess of funds needed for the proffered purpose in order to construct other improvements within the locality similar to and in the vicinity of those for which the cash payment was proffered. A locality that does not begin construction of the improvements for which the cash payment was proffered within five years of receipt of the proffered cash payment shall pay the amount of that proffered cash payment to the State Treasurer for deposit in the Literary Fund, such amount to be expended from the Literary Fund in the planning district, as defined in § 15.2-4202, in which the proffered cash payment was collected.

B. The governing body of any locality eligible to accept any proffered cash payments pursuant to §§ 15.2-2298, 15.2-2303 or § 15.2-2303.1 but that did not accept any proffered cash payments during the preceding two fiscal years shall by September 30, 2001, so notify the Commission on Local Government, at the end of each fiscal year beginning with the fiscal year 2005, (i) amend its capital improvement program created pursuant to § 15.2-2239 to include the amount of all proffered cash payments received during such fiscal year, and (ii) include the amount of proffered cash payments received for capital improvements in the locality's capital budget.

C. The governing body of any locality with a population in excess of 3,500 persons accepting a cash payment voluntarily proffered pursuant to §§ 15.2-2298, 15.2-2303 or §15.2-2303.1 shall within three months of the close of each fiscal year, beginning in fiscal year 2002 and for each fiscal year thereafter, report to the Commission on Local Government the following information for the preceding fiscal year:
   1. The aggregate dollar amount of proffered cash payments collected by the locality;
   2. The estimated aggregate dollar amount of proffered cash payments projected to be used for expenditures or appropriated for capital improvements in the ensuing year.

Regardless of the date of rezoning approval, unless prohibited by the proffer agreement accepted by the governing body of a locality pursuant to § 15.2-2298, 15.2-2303.1 or 15.2-2304, a locality may utilize any cash payments proffered for capital improvements for alternative improvements of the same category within the locality in the vicinity of the improvements for which the cash payments were
payments that have been pledged to the locality and which pledges are not conditioned on any event other than time; and

3. The total dollar amount of proffered cash payments expended by the locality, and the aggregate dollar amount expended in each of the following categories:
   Schools $_______
   Road and other Transportation Improvements $_______
   Fire and Rescue/Public Safety $_______
   Libraries $_______
   Parks, Recreation, and Open Space $_______
   Water and Sewer Service Extension $_______
   Community Centers $_______
   Stormwater Management $_______
   Special Needs Housing $_______
   Affordable Housing $_______
   Miscellaneous $_______
   Total dollar amount expended $_______

D. The governing body of any locality with a population in excess of 3,500 persons accepting a cash payment voluntarily proffered pursuant to §§15.2-2298, 15.2-2303 or §15.2-2303.1 shall within three months of the close of each fiscal year, beginning in fiscal year 2002 and for each fiscal year thereafter, report to the Commission on Local Government the following information for the preceding fiscal year:

1. The aggregate dollar amount of proffered cash payments collected by the locality;
2. The estimated aggregate dollar amount of proffered cash payments that have been pledged to the locality and which pledges are not conditioned on any event other than time; and
3. The total dollar amount of proffered cash payments expended by the locality, and the aggregate dollar amount expended in each of the following categories:
   Schools $_______
   Road and other Transportation Improvements $_______
   Fire and Rescue/Public Safety $_______
   Libraries $_______
   Parks, Recreation, and Open Space $_______
   Water and Sewer Service Extension $_______
   Community Centers $_______
   Stormwater Management $_______
   Special Needs Housing $_______
   Affordable Housing $_______

originally made. Prior to utilization of such cash payments for the alternative improvements, the governing body of the locality shall give at least 30 days' written notice of the proposed alternative improvements to the entity who paid such cash payment mailed to the last known address of such entity, or if proffer payment records no longer exist, then to the original zoning applicant, and conduct a public hearing on such proposal advertised as provided in subsection F of §15.2-1427. The governing body of the locality prior to the use of such cash payments for alternative improvements shall, following such public hearing, find: (i) the improvements for which the cash payments were proffered cannot occur in a timely manner; (ii) the alternative improvements are within the vicinity of the proposed improvements for which the cash payments were proffered; and (iii) the alternative improvements are in the public interest.

D. The governing body of any locality with a population in excess of 3,500 persons accepting a cash payment voluntarily proffered pursuant to §§15.2-2298, 15.2-2303 or §15.2-2303.1 shall within three months of the close of each fiscal year, beginning in fiscal year 2002 and for each fiscal year thereafter, report to the Commission on Local Government the following information for the preceding fiscal year:

1. The aggregate dollar amount of proffered cash payments collected by the locality;
2. The estimated aggregate dollar amount of proffered cash payments that have been pledged to the locality and which pledges are not conditioned on any event other than time; and
3. The total dollar amount of proffered cash payments expended by the locality, and the aggregate dollar amount expended in each of the following categories:
| House Bill 2456 (2005) – Chapter No. 552 | § 15.2-2303.3. Cash proffers requested or accepted by a locality.  
A. No locality shall seek or accept payment of a cash proffer prior to payment of any fees for the issuance of a building permit for construction on the property that is the subject of the rezoning or development agreement.  
B. No locality shall either request or accept a cash proffer whose amount is scheduled to increase annually, from the time of proffer until tender of payment, by a percentage greater than the annual rate of inflation, as calculated by referring to the Consumer Price Index published by the United States Department of Labor, Bureau of Labor Statistics. |
| § 15.2-2303.3. Cash proffers requested or accepted by a locality.  
A. No locality shall require payment of a cash proffer prior to payment of any fees for the issuance of a building permit for construction on property that is the subject of a rezoning. However, a landowner petitioning for a zoning change may voluntarily agree to an earlier payment, pursuant to §§ 15.2-2298, 15.2-2303 or § 15.2-2303.1 but that did not accept any proffered cash payments during the preceding fiscal year shall within three months of the close of each fiscal year, beginning in 2001 and for each fiscal year thereafter, so notify the Commission on Local Government.  
B. No locality shall either request or accept a cash proffer whose amount is scheduled to increase annually, from the time of proffer until tender of payment, by a percentage greater than the annual rate of inflation, as calculated by referring to the Consumer Price Index published by the United States Department of Labor, Bureau of Labor Statistics or the Marshall and Swift Building Cost Index.  
2. That the provisions of subsection B of this act shall not apply to any rezoning application filed prior to July 1, 2005.  
3. That the provisions of subsection A are declarative of existing law. |
§ 15.2-2298. Same; additional conditions as a part of rezoning or zoning map amendment in certain high-growth localities.
A. Except for those localities to which § 15.2-2303 is applicable, this section shall apply to (i) any locality which has had population growth of ten percent or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census; (ii) any city adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous with at least three such counties, and any town located in that county.
In any such locality, notwithstanding any contrary provisions of § 15.2-2297, a zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map, provided that (i) the rezoning itself gives rise to the need for the conditions; (ii) the conditions have a reasonable relation to the rezoning; and (iii) all conditions are in conformity with the comprehensive plan as defined in § 15.2-2223. Reasonable conditions shall include the payment of cash for any off-site road improvement, as defined in § 15.2-2318, or any off-site transportation improvement, as defined in § 33.1-430, that is adopted as an amendment to the required comprehensive plan and incorporated into the capital improvements program. Reasonable conditions shall not include, however, conditions that impose upon the applicant the requirement to create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55 which includes an express further condition that members of a property association pay an assessment for the maintenance of public facilities owned in fee by a public entity, including open space, parks, schools, fire departments, and other public facilities not otherwise provided for in § 15.2-2241; however, such facilities shall not include sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Department of Transportation. Once proffered and accepted as part of an amendment to the zoning ordinance, the conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by the conditions; however, the conditions shall continue if the subsequent amendment is part of a

§ 15.2-2298. Same; additional conditions as a part of rezoning or zoning map amendment in certain high-growth localities.
A. Except for those localities to which § 15.2-2303 is applicable, this section shall apply to (i) any locality which has had population growth of ten percent or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census; (ii) any city adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous with at least three such counties, and any town located in that county.
In any such locality, notwithstanding any contrary provisions of § 15.2-2297, a zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map, provided that (i) the rezoning itself gives rise to the need for the conditions; (ii) the conditions have a reasonable relation to the rezoning; and (iii) all conditions are in conformity with the comprehensive plan as defined in § 15.2-2223. Reasonable conditions may include the payment of cash for any off-site road improvement or any off-site transportation improvement that is adopted as an amendment to the required comprehensive plan and incorporated into the capital improvements program, provided that nothing herein shall prevent a locality from accepting proffered conditions which are not normally included in a capital improvement program. For purposes of this section, "road improvement" includes construction of new roads or improvement or expansion of existing roads as required by applicable construction standards of the Virginia Department of Transportation to meet increased demand attributable to new development. For purposes of this section, "transportation improvement" means any real or personal property acquired, constructed, improved, or used for constructing, improving, or operating any (i) public mass transit system or (ii) highway, or portion or interchange thereof, including parking facilities located within a district created pursuant to this title. Such improvements shall include, without limitation, public mass transit systems, public highways, and all buildings, structures, approaches, and facilities thereof and appurtenances thereto, rights-of-way, bridges, tunnels, stations, terminals, and all related equipment and fixtures.
comprehensive implementation of a new or substantially revised zoning ordinance.

§ 15.2-2303.2. Proffered cash payments and expenditures.
C. Regardless of the date of rezoning approval, unless prohibited by the proffer agreement accepted by the governing body of a locality pursuant to § 15.2-2298, 15.2-2303 or 15.2-2303.1, a locality may utilize any cash payments proffered for any road improvement, as defined in § 15.2-2318, or any transportation improvement, as defined in § 33.1-430, that is incorporated into the capital improvements program as its matching contribution under § 33.1-2305.

For purposes of this section, "road improvement" includes construction of new roads or improvement or expansion of existing roads as required by applicable construction standards of the Virginia Department of Transportation to meet increased demand attributable to new development. For purposes of this section, "transportation improvement" means any real or personal property acquired, constructed, improved, or used for constructing, improving, or operating any (i) public mass transit system or (ii) highway, or portion or interchange thereof, including parking facilities located within a district created pursuant to this title. Such improvements shall include, without limitation, public mass transit systems, public highways, and all buildings, structures, approaches, and facilities thereof and appurtenances thereto, rights-of-way, bridges, tunnels, stations, terminals, and all related equipment and fixtures.

Regardless of the date of rezoning approval, unless prohibited by the proffer agreement accepted by the governing body of a locality pursuant to § 15.2-2298, 15.2-2303 or 15.2-2303.1-5-2-2304, a locality may utilize any cash payments proffered for capital improvements for alternative improvements of the same category within the locality in the vicinity of the improvements for which the cash payments were originally made. Prior to utilization of such cash payments for the alternative improvements, the governing body of the locality shall give at least 30 days' written notice of the proposed alternative improvements to the entity who paid such cash payment.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>C. Regardless of the date of rezoning approval, unless prohibited by the proffer agreement accepted by the governing body of a locality pursuant to § 15.2-2298, 15.2-2303 or 15.2-2304, a locality may utilize any cash payments proffered for capital improvements for alternative improvements of the same category within the locality in the vicinity of the improvements for which the cash payments were originally made. Prior to utilization of such cash payments for the alternative improvements, the governing body of the locality shall give at least 30 days' written notice of the proposed alternative improvements to the entity who paid such cash payment.</td>
<td>C. Regardless of the date of rezoning approval, unless prohibited by the proffer agreement accepted by the governing body of a locality pursuant to § 15.2-2298, 15.2-2303 or 15.2-2303.1-5-2-2304, a locality may utilize any cash payments proffered for capital improvements for alternative improvements of the same category within the locality in the vicinity of the improvements for which the cash payments were originally made. Prior to utilization of such cash payments for the alternative improvements, the governing body of the locality shall give at least 30 days' written notice of the proposed alternative improvements to the entity who paid such cash payment.</td>
<td></td>
</tr>
</tbody>
</table>
paid such cash payment mailed to the last known address of such entity, or if proffer payment records no longer exist, then to the original zoning applicant, and conduct a public hearing on such proposal advertised as provided in subsection F of § 15.2-1427. The governing body of the locality prior to the use of such cash payments for alternative improvements shall, following such public hearing, find: (i) the improvements for which the cash payments were proffered cannot occur in a timely manner; (ii) the alternative improvements are within the vicinity of the proposed improvements for which the cash payments were proffered; and (iii) the alternative improvements are in the public interest. 

Notwithstanding any other provisions of law to the contrary, the governing body may negotiate and award a contract without competition to an entity that is constructing road improvements pursuant to a proffered zoning condition in order to expand the scope of the road improvements by utilizing cash proffers of others as well as other available funds. The local governing body shall adopt a resolution stating the basis for awarding the construction contract to extend the scope of the road improvements. All road improvements to be included in the state primary or secondary system of highways must conform to the adopted standards of the Virginia Department of Transportation.

Senate Bill 681 (2006) – Chapter No. 583

§ 15.2-2303.2. Proffered cash payments and expenditures. 
C. Regardless of the date of rezoning approval, unless prohibited by the proffer agreement accepted by the governing body of a locality pursuant to § 15.2-2298, 15.2-2303.1, or 15.2-2304, a locality may utilize any cash payments proffered for capital improvements for alternative improvements of the same category within the locality in the vicinity of the improvements for which the cash payments were originally made. Prior to utilization of such cash payments for the alternative improvements, the governing body of the locality shall give at least 30 days' written notice of the proposed alternative improvements to the entity who paid such cash payment mailed to the last known address of such entity, or if proffer payment records no longer exist, then to the original zoning applicant, and conduct a public hearing on such proposal advertised as provided in subsection F of § 15.2-1427. The governing body of the locality prior to the use of such cash payments for alternative improvements shall, following such public hearing, find: (i) the improvements for which the cash payments were proffered cannot occur in a timely manner; (ii) the alternative improvements are within the vicinity of the proposed improvements for which the cash payments were proffered; and (iii) the alternative improvements are in the public interest.
| alternative improvements are within the vicinity of the proposed improvements for which the cash payments were proffered; and (iii) the alternative improvements are in the public interest. Notwithstanding any other provisions of law to the contrary, the governing body may award a contract to an entity that is providing cash proffers, that is already mobilized in the area, and that is willing to construct a more extensive road improvement utilizing cash proffers of others as well as other available funds, upon a written determination by the governing body stating the basis for awarding one construction contract to extend the limits of the road improvement. |

| proposed improvements for which the cash payments were proffered; and (iii) the alternative improvements are in the public interest. Notwithstanding the provisions of the Virginia Public Procurement Act, the governing body may negotiate and award a contract without competition to an entity that is constructing road improvements pursuant to a proffered zoning condition in order to expand the scope of the road improvements by utilizing cash proffers of others or other available locally generated funds. The local governing body shall adopt a resolution stating the basis for awarding the construction contract to extend the scope of the road improvements. All road improvements to be included in the state primary or secondary system of highways must conform to the adopted standards of the Virginia Department of Transportation. |

| House Bill 1084 (2008) – Chapter No. 7333 § 15.2-2303. Conditional zoning in certain localities. F. In any instance in which a locality has accepted proffered conditions that include pedestrian improvements, and the Virginia Department of Transportation has reviewed and not objected to the rezoning, the Virginia Department of Transportation shall allow the proffered improvements to be constructed, except when such improvements will violate local, state, or federal laws, regulations, or mandated engineering and safety standards. |

| § 15.2-2303. Conditional zoning in certain localities. F. In any instance in which a locality has accepted proffered conditions that include pedestrian improvements, and the Virginia Department of Transportation has reviewed and not objected to the proposed pedestrian improvements during the processing of the rezoning, the Virginia Department of Transportation shall allow the proffered improvements to be constructed, except when such improvements will violate local, state, or federal laws, regulations, or mandated engineering and safety standards. |
Table 8.3. Conditional Zoning Bills Failed Legislation for 2000s (None were amended)

<table>
<thead>
<tr>
<th>Bill Number (Legislative Session)</th>
<th>Patron(s)</th>
<th>Legislative Language</th>
<th>Legislative Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>House Bill 1129 (2000)</td>
<td>Cranwell, Bryant Jr., Diamonstein, Hamilton, Jones, Suit, and Watts</td>
<td>§ 15.2-2297. Same; conditions as part of a rezoning or amendment to zoning map. A. A zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map; provided that (i) the rezoning itself must give rise for the need for the conditions; (ii) the conditions shall have a reasonable relation to the rezoning; (iii) the conditions shall not include a cash contribution to the locality; (iv) the conditions shall not include mandatory dedication of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided for in § 15.2-2241; (v) the conditions shall not include a requirement that the applicant create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55, with a further condition that members of a property owners' association pay an assessment for open space, parks, schools, fire departments or other public facilities not otherwise provided for in § 15.2-2241; (vi) the conditions shall not include payment for or construction of off-site improvements except those provided for in § 15.2-2241; (vi)(vii) no condition shall be proffered that is not related to the physical development or physical operation of the property; and (vii)(viii) all such conditions shall be in conformity with the comprehensive plan as defined in § 15.2-2223. Once proffered and accepted as part of an amendment to the zoning ordinance, the conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by the conditions. However, the conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance. § 15.2-2298. Same; additional conditions as a part of rezoning or zoning map amendment in certain high-growth localities. A. Except for those localities to which § 15.2-2303 is applicable, this section shall apply to (i) any locality which has had population growth of ten percent or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census; (ii) any city adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous with at least three such counties, and any town located in that county. In any such locality, notwithstanding any contrary provisions of § 15.2-2297, a zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map, provided that (i) the rezoning itself gives rise to the need for the conditions; (ii) the conditions have a reasonable relation to the rezoning; and (iii) all conditions are in Continued to 2001 Session; Stricken at request of Patron</td>
<td></td>
</tr>
</tbody>
</table>
conformity with the comprehensive plan as defined in § 15.2-2223. *Reasonable conditions shall not include, however, conditions that impose upon the applicant the requirement to create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55, with a further condition that members of a property owners' association pay an assessment for open space, parks, schools, fire departments or other public facilities not otherwise provided for in § 15.2-2241.* Once proffered and accepted as part of an amendment to the zoning ordinance, the conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by the conditions; however, the conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

§ 15.2-2303. Conditional zoning in certain localities.
A. A zoning ordinance may include reasonable regulations and provisions for conditional zoning as defined in § 15.2-2201 and for the adoption, in counties, or towns therein which have planning commissions, wherein the urban county executive form of government is in effect, or in a city adjacent to or completely surrounded by such a county, or in a county contiguous to any such county, or in a city adjacent to or completely surrounded by such a contiguous county, or in any town within such contiguous county, and in the counties east of the Chesapeake Bay as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body required by § 15.2-2285 by the owner of the property which is the subject of the proposed zoning map amendment. *Reasonable conditions shall not include, however, conditions that impose upon the applicant the requirement to create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55, with a further condition that members of a property owners' association pay an assessment for open space, parks, schools, fire departments or other public facilities not otherwise provided for in § 15.2-2241.* Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by such conditions. However, such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 15.2-2297. Same; conditions as part of a rezoning or amendment to zoning map.</td>
<td></td>
</tr>
<tr>
<td>A. A zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map; provided that (i) the rezoning itself must give rise for the need for the conditions; (ii) the conditions shall have a reasonable relation to the rezoning; (iii) the conditions shall not include a cash contribution to the locality; (iv) the conditions shall not include mandatory dedication of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided for in § 15.2-2241; (v) the</td>
<td></td>
</tr>
</tbody>
</table>

Continued to 2001 Session; Failed to report out of committee
conditions shall not include a requirement that the applicant create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55, with a further condition that members of a property owners' association pay an assessment for open space, parks, schools, fire departments or other public facilities not otherwise provided for in § 15.2-2241; (vi) the conditions shall not include payment for or construction of off-site improvements except those provided for in § 15.2-2241; (vi)(vii) no condition shall be proffered that is not related to the physical development or physical operation of the property; and (vii)(viii) all such conditions shall be in conformity with the comprehensive plan as defined in § 15.2-2223. Once proffered and accepted as part of an amendment to the zoning ordinance, the conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by the conditions. However, the conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

§ 15.2-2298. Same; additional conditions as a part of rezoning or zoning map amendment in certain high-growth localities.
A. Except for those localities to which § 15.2-2303 is applicable, this section shall apply to (i) any locality which has had population growth of ten percent or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census; (ii) any city adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous with at least three such counties, and any town located in that county.

In any such locality, notwithstanding any contrary provisions of § 15.2-2297, a zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map, provided that (i) the rezoning itself gives rise to the need for the conditions; (ii) the conditions have a reasonable relation to the rezoning; and (iii) all conditions are in conformity with the comprehensive plan as defined in § 15.2-2223. Reasonable conditions shall not include, however, conditions that impose upon the applicant the requirement to create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55, with a further condition that members of a property owners' association pay an assessment for open space, parks, schools, fire departments or other public facilities not otherwise provided for in § 15.2-2241. Once proffered and accepted as part of an amendment to the zoning ordinance, the conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by the conditions; however, the conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

§ 15.2-2303. Conditional zoning in certain localities.
A. A zoning ordinance may include reasonable regulations and provisions for conditional zoning
as defined in § 15.2-2201 and for the adoption, in counties, or towns therein which have planning commissions, wherein the urban county executive form of government is in effect, or in a city adjacent to or completely surrounded by such a county, or in a county contiguous to any such county, or in a city adjacent to or completely surrounded by such a contiguous county, or in any town within such contiguous county, and in the counties east of the Chesapeake Bay as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body required by § 15.2-2285 by the owner of the property which is the subject of the proposed zoning map amendment. Reasonable conditions shall not include, however, conditions that impose upon the applicant the requirement to create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55, with a further condition that members of a property owners' association pay an assessment for open space, parks, schools, fire departments or other public facilities not otherwise provided for in § 15.2-2241. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by such conditions. However, such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

| House Bill 2479 (2005) | May and Athey Jr. | § 15.2-2298. Same; additional conditions as a part of rezoning or zoning map amendment in certain high-growth localities.  
F. In addition to other powers granted by this section, cash proffers accepted for transportation purposes may be used for alternative transportation purposes that are in reasonable proximity to the development. Prior to the transfer of funds, the governing body shall conduct a public hearing and make a determination that (i) the cash proffers cannot be used in a timely manner for their original purpose, and (ii) the transfer of funds will improve transportation conditions within reasonable proximity to the development.  
§ 15.2-2303. Conditional zoning in certain localities.  
G. In addition to other powers granted by this section, cash proffers accepted for transportation purposes may be used for alternative transportation purposes that are in reasonable proximity to the development. Prior to the transfer of funds, the governing body shall conduct a public hearing and make a determination that (i) the cash proffers cannot be used in a timely manner for their original purpose, and (ii) the transfer of funds will improve transportation conditions within reasonable proximity to the development. | Tabled in committee |
| House Bill 1520 (2006) | Marshall | § 15.2-2298. Same; additional conditions as a part of rezoning or zoning map amendment in certain high-growth localities.  
A. Except for those localities to which § 15.2-2303 is applicable, this section shall apply to (i) any locality which has had population growth of ten percent 5% or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census; (ii) any city adjoining such city or county; (iii) any towns located within such county; | Incorporated by committee into another bill (HB 1506) |
and (iv) any county contiguous with at least three such counties, and any town located in that county.

In any such locality, notwithstanding any contrary provisions of § 15.2-2297, a zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map, provided that (i) the rezoning itself gives rise to the need for the conditions; (ii) the conditions have a reasonable relation to the rezoning; and (iii) all conditions are in conformity with the comprehensive plan as defined in § 15.2-2223. Reasonable conditions shall include the payment of cash for any off-site road improvement, as defined in § 15.2-2318, or any off-site transportation improvement, as defined in § 33.1-430, that is adopted as an amendment to the required comprehensive plan and incorporated into the capital improvements program.

Reasonable conditions shall not include, however, conditions that impose upon the applicant the requirement to create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55 which includes an express further condition that members of a property association pay an assessment for the maintenance of public facilities owned in fee by a public entity, including open space, parks, schools, fire departments, and other public facilities not otherwise provided for in § 15.2-2241; however, such facilities shall not include sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Department of Transportation. Once proffered and accepted as part of an amendment to the zoning ordinance, the conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by the conditions; however, the conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

§ 15.2-2303.2. Proffered cash payments and expenditures.

C. Regardless of the date of rezoning approval, unless prohibited by the proffer agreement accepted by the governing body of a locality pursuant to § 15.2-2298, a locality may utilize any cash payments proffered for any road improvement, as defined in § 15.2-2318, or any transportation improvement, as defined in § 33.1-430, that is incorporated into the capital improvements program as its matching contribution under § 33.1-75.1.

House Bill 5048 (2006 ss1)  Lingamfelter and Frederick

§ 15.2-2303.2. Proffered cash payments and expenditures.

A. The governing body of any locality accepting cash payments voluntarily proffered on or after July 1, 2005, pursuant to § 15.2-2298, 15.2-2303 or 15.2-2303.1 shall, within seven years of receiving full payment of all cash proffered pursuant to an approved rezoning application, begin, or cause to begin (i) construction, (ii) site work, (iii) engineering, (iv) right-of-way acquisition, (v) surveying, or (vi) utility relocation on the improvements for which the cash payments were proffered. A locality that does not comply with the above requirement, or does not begin alternative improvements as provided for in subsection C, shall forward the amount of the proffered cash payments to the Commonwealth Transportation Board no later than December 31.
following the fiscal year in which such forfeiture occurred for direct allocation to the secondary system construction program or the urban system construction program for the locality in which the proffered cash payments were collected. The funds to which any locality may be entitled under the provisions of Title 33.1 for construction, improvement, or maintenance of primary, secondary, or urban roads shall not be diminished by reason of any funds remitted pursuant to this subsection by such locality, regardless of whether such contributions are matched by state or federal funds.

C. Regardless of the date of rezoning approval, unless prohibited by the proffer agreement accepted by the governing body of a locality pursuant to § 15.2-2298, 15.2-2303, or 15.2-2303.1, a locality may utilize any cash payments proffered for any road improvement or any transportation improvement that is incorporated into the capital improvements program as its matching contribution under § 33.1-23.05. For purposes of this section, "road improvement" includes construction of new roads or improvement or expansion of existing roads as required by applicable construction standards of the Virginia Department of Transportation to meet increased demand attributable to new development. For purposes of this section, "transportation improvement" means any real or personal property acquired, constructed, improved, or used for constructing, improving, or operating any (i) public mass transit system or (ii) highway, or portion or interchange thereof, including parking facilities located within a district created pursuant to this title. Such improvements shall include, without limitation, public mass transit systems, public highways, and all buildings, structures, approaches, and facilities thereof and appurtenances thereto, rights-of-way, bridges, tunnels, stations, terminals, and all related equipment and fixtures.

Regardless of the date of rezoning approval, unless prohibited by the proffer agreement accepted by the governing body of a locality pursuant to § 15.2-2298, 15.2-2303, or 15.2-2303.1, a locality may utilize any cash payments proffered for capital improvements for alternative improvements of the same category within the locality in the vicinity of the improvements for which the cash payments were originally made. Prior to utilization of such cash payments for the alternative improvements, the governing body of the locality shall give at least 30 days' written notice of the proposed alternative improvements to the entity who paid such cash payment mailed to the last known address of such entity, or if proffer payment records no longer exist, then to the original zoning applicant, and conduct a public hearing on such proposal advertised as provided in subsection F of § 15.2-1427. The governing body of the locality prior to the use of such cash payments for alternative improvements shall, following such public hearing, find: (i) the improvements for which the cash payments were proffered cannot occur in a timely manner; (ii) the alternative improvements are within the vicinity of the proposed improvements for which the cash payments were proffered; and (iii) the alternative improvements are in the public interest. Notwithstanding the provisions of the Virginia Public Procurement Act, the governing body may negotiate and award a contract without competition to an entity that is constructing road improvements pursuant to a proffered zoning condition in order to expand the scope of the
road improvements by utilizing cash proffers of others or other available locally generated funds. The local governing body shall adopt a resolution stating the basis for awarding the construction contract to extend the scope of the road improvements. All road improvements to be included in the state primary or a county's secondary highway system of highways must conform to the adopted standards of the Virginia Department of Transportation.

<table>
<thead>
<tr>
<th>House Bill 2986 (2007)</th>
<th>Ingram and Hall</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 15.2-2296. Conditional zoning; declaration of legislative policy and findings; purpose. It is the general policy of the Commonwealth in accordance with the provisions of § 15.2-2283 to provide for the orderly development of land, for all purposes, through zoning and other land development legislation. Frequently, where competing and incompatible uses conflict, traditional zoning methods and procedures are inadequate. In these cases, more flexible and adaptable zoning methods are needed to permit differing land uses and the same time to recognize effects of change. It is the purpose of §§ 15.2-2296 through 15.2-2300 conditional zoning to provide a more flexible and adaptable zoning method to cope with situations found in such zones through conditional zoning, whereby a zoning reclassification may be allowed subject to certain conditions proffered by the zoning applicant for the protection of the community that are not generally applicable to land similarly zoned. The exercise of authority granted pursuant to §§ 15.2-2296 through 15.2-2302 shall not be construed to limit or restrict powers otherwise granted to any locality, nor to affect the validity of any ordinance adopted by any such locality which would be valid without regard to this section. The provisions of this section and the following six sections shall not be used for the purpose of discrimination in housing.</td>
<td></td>
</tr>
<tr>
<td>§ 15.2-2297. Same; conditions as part of a rezoning or amendment to zoning map. A. A zoning ordinance in any locality may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to or modification of the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map; provided that (i) the rezoning itself must give rise for the need for the conditions; (ii) the conditions shall have a reasonable relation to the rezoning; (iii) the such conditions shall not include a cash contribution to the locality; (iv) the conditions shall not include mandatory dedication of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided for in § 15.2-2241; (v) and (iv) the conditions shall not include a requirement that the applicant create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55 which includes an express further condition that members of a property owners' association pay an assessment for the maintenance of public facilities owned in fee by a public entity, including open space, parks, schools, fire departments and other public facilities not otherwise provided for in § 15.2-2241; however, such facilities shall not include sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Department of Transportation; (vi) the conditions shall not include payment for or construction of off-site improvements except those provided for in § 15.2-2241; (vii) no condition shall be proffered that is not related to the physical development or physical operation of the property; and (viii) all...</td>
<td>Tabled in committee</td>
</tr>
</tbody>
</table>
such conditions shall be in conformity with the comprehensive plan as defined in § 15.2-2223. The governing body may also accept amended proffers once the public hearing has begun if the amended proffers do not materially affect the overall proposal. Once proffered and accepted as part of an amendment to the zoning ordinance, the conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by the conditions. However, the conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance. There shall be no amendment or variation of conditions created pursuant to provisions hereof until after a public hearing before the governing body advertised pursuant to the provisions of § 15.2-2204.

B. In the event proffered conditions include the dedication of real property of substantial value or construction of substantial public improvements, the need for which is not generated solely by the rezoning itself, then no amendments to the zoning map for the property subject to such conditions, nor the conditions themselves, nor any amendments to the text of the zoning ordinance with respect to the zoning district applicable thereto initiated by the governing body, which eliminate, or materially restrict, reduce, or modify the uses, the floor area ratio, or the density of use permitted in the zoning district applicable to such property, shall be effective with respect to such property unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare.

E. In addition to the powers granted by the preceding subsections, a zoning ordinance may include reasonable provisions to implement, in whole or in part, the provisions hereof.

§ 15.2-2300. Same; records.
The zoning map shall show by an appropriate symbol on the map the existence of conditions attaching to the zoning on the map. The zoning administrator shall keep in his office and make available for public inspection a Conditional Zoning Index. The Index shall provide ready access to the ordinance creating conditions in addition to the regulations provided for in a particular zoning district or zone. The Index shall also provide ready access to all proffered cash payments and expenditures disclosure reports prepared by the local governing body pursuant to § 15.2-2303.2. The zoning administrator shall update the Index annually and no later than November 30 of each year.

§ 15.2-2303.2. Cash payments and expenditures.
A. The governing body of any locality accepting cash payments voluntarily proffered on or after July 1, 2005, pursuant to § 15.2-2298, 15.2-2303 or 15.2-2303.1 or as part of a development agreement pursuant to § 15.2-2303.1 shall, within seven years of receiving full payment of all such cash proffered pursuant to an approved rezoning application, begin, or cause to begin (i) construction, (ii) site work, (iii) engineering, (iv) right-of-way acquisition, (v) surveying, or (vi) utility relocation on the improvements for which the cash payments were proffered. A locality that does not comply with the above requirement, or does not begin alternative improvements as provided for in subsection C, shall forward the amount of the proffered cash payments to the
Commonwealth Transportation Board no later than December 31 following the fiscal year in which such forfeiture occurred for direct allocation to the secondary system construction program or the urban system construction program for the locality in which the proffered cash payments were collected. The funds to which any locality may be entitled under the provisions of Title 33.1 for construction, improvement, or maintenance of primary, secondary, or urban roads shall not be diminished by reason of any funds remitted pursuant to this subsection by such locality, regardless of whether such contributions are matched by state or federal funds.

B. The governing body of any locality eligible to accept any proffered cash payments pursuant to § 15.2-2298, 15.2-2303 or 15.2-2303.1 shall, for each fiscal year beginning with the fiscal year 2007, (i) include in its capital improvement program created pursuant to § 15.2-2239, or as an appendix thereto, the amount of all proffered cash payments received during the most recent fiscal year for which a report has been filed pursuant to subsection D, and (ii) include in its annual capital budget the amount of proffered cash payments projected to be used for expenditures or appropriated for capital improvements in the ensuing year. All proffered cash payments shall be reported regardless of whether such payment is only to be made upon the occurrence of a future condition, such as, but not limited to, the issuance of a building permit.

D. The governing body of any locality with a population in excess of 3,500 persons accepting a cash payment voluntarily proffered pursuant to § 15.2-2298, 15.2-2303 or 15.2-2303.1, or pursuant to a development agreement, shall within three months of the close of each fiscal year, beginning in fiscal year 2002 and for each fiscal year thereafter, report to the Commission on Local Government the following information for the preceding fiscal year:

1. The aggregate dollar amount of proffered cash payments collected by the locality;
2. The estimated aggregate dollar amount of proffered cash payments that have been pledged to the locality and which pledges are not conditioned on any event other than time; and
3. The total dollar amount of proffered cash payments expended by the locality, and the aggregate dollar amount expended in each of the following categories:

   - Schools
   - Road and other Transportation Improvements
   - Fire and Rescue/Public Safety
   - Libraries
   - Parks, Recreation, and Open Space
   - Water and Sewer Service Extension
   - Community Centers
   - Stormwater Management
   - Special Needs Housing
   - Affordable Housing
   - Miscellaneous
   - Total dollar amount expended

E. The governing body of any locality with a population in excess of 3,500 persons eligible to accept any proffered cash payments pursuant to § 15.2-2298, 15.2-2303 or 15.2-2303.1, or
payments pursuant to a development agreement, but that did not accept any proffered cash such payments during the preceding fiscal year shall within three months of the close of each fiscal year, beginning in 2001 and for each fiscal year thereafter, so notify the Commission on Local Government.

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 15.2-2303.2. Proffered cash payments and expenditures.</td>
<td>Stricken from docket</td>
</tr>
<tr>
<td>C. Regardless of the date of rezoning approval, unless prohibited by the proffer agreement accepted by the governing body of a locality pursuant to § 15.2-2298, 15.2-2303, or 15.2-2303.1, a locality may utilize any cash payments proffered for any road improvement or any transportation improvement that is incorporated into the capital improvements program as its matching contribution under § 33.1-23.05. For purposes of this section, &quot;road improvement&quot; means any real or personal property acquired, constructed, improved, or used for constructing, improving, or operating any (i) public mass-transit system or (ii) highway, or portion or interchange thereof, including parking facilities located within a district created pursuant to this title. Such improvements shall include, without limitation, public mass-transit systems, public highways, and all buildings, structures, approaches, and facilities thereof and appurtenances thereto, rights of way, bridges, tunnels, stations, terminals, and all related equipment and fixtures. Regardless of the date of rezoning approval, unless prohibited by the proffer agreement accepted by the governing body of a locality pursuant to § 15.2-2298, 15.2-2303, or 15.2-2303.1, a locality may utilize any cash payments proffered for capital improvements for alternative improvements of the same category within the locality in the vicinity of the improvements for which the cash payments were originally made. Prior to utilization of such cash payments for the alternative improvements, the governing body of the locality shall give at least 30 days' written notice of the proposed alternative improvements to the entity who paid such cash payment mailed to the last known address of such entity, or if proffer payment records no longer exist, then to the original zoning applicant, and conduct a public hearing on such proposal advertised as provided in subsection F of § 15.2-1427. The governing body of the locality prior to the use of such cash payments for alternative improvements shall, following such public hearing, find: (i) the improvements for which the cash payments were proffered cannot occur in a timely manner; (ii) the alternative improvements are within the vicinity of the proposed improvements for which the cash payments were proffered; and (iii) the alternative improvements are in the public interest. Notwithstanding the provisions of the Virginia Public Procurement Act, the governing body may negotiate and award a contract without competition to an entity that is constructing road improvements pursuant to a proffered zoning condition in order to expand the scope of the road improvements by utilizing cash proffers of others or other available locally generated funds. The local governing body shall adopt a resolution stating the basis for awarding the construction contract to extend the scope of the road improvements. All road improvements to be included in...</td>
<td></td>
</tr>
</tbody>
</table>
the state primary or secondary system of highways must conform to the adopted standards of the Virginia Department of Transportation.

| House Bill 954 (2008) | Scott, Athey Jr., Cole, Gilbert, Lingamfelter, Miller, and Sherwood | § 15.2-2303. Conditional zoning in certain localities. A. A zoning ordinance may include reasonable regulations and provisions for conditional zoning as defined in § 15.2-2201 and for the adoption, in counties, or towns therein which have planning commissions, wherein the urban county executive form of government is in effect, or in a city adjacent to or completely surrounded by such a county, or in a county contiguous to any such county, or in a city adjacent to or completely surrounded by such a contiguous county, or in any town within such contiguous county, and in the counties east of the Chesapeake Bay as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body required by § 15.2-2285 by the owner of the property which is the subject of the proposed zoning map amendment.

*Reasonable conditions may include the acceptance of cash proffers for the purchase of development rights to preserve farmland or open space.* Reasonable conditions shall not include, however, conditions that impose upon the applicant the requirement to create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55 which includes an express further condition that members of a property owners' association pay an assessment for the maintenance of public facilities owned in fee by a public entity, including open space, parks, schools, fire departments, and other public facilities not otherwise provided for in § 15.2-2241; however, such facilities shall not include sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Department of Transportation. The governing body may also accept amended proffers once the public hearing has begun if the amended proffers do not materially affect the overall proposal. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by such conditions. However, such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance. | Left in committee |

| House Bill 726 (2008) | Scott | 15.2-2303. Conditional zoning in certain localities. A. A zoning ordinance may include reasonable regulations and provisions for conditional zoning as defined in § 15.2-2201 and for the adoption, in counties, or towns therein which have planning commissions, wherein the urban county executive form of government is in effect, or in a city adjacent to or completely surrounded by such a county, or in a county contiguous to any such county, or in a city adjacent to or completely surrounded by such a contiguous county, or in any town within such contiguous county, and in the counties east of the Chesapeake Bay as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body required by § 15.2-2285 by the owner of the property which is the subject of the proposed zoning map amendment.

*Reasonable conditions may include the acceptance of cash proffers for the purchase of development rights to preserve farmland or open space.* Reasonable conditions shall not include, however, conditions that impose upon the applicant the requirement to create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55 which includes an express further condition that members of a property owners' association pay an assessment for the maintenance of public facilities owned in fee by a public entity, including open space, parks, schools, fire departments, and other public facilities not otherwise provided for in § 15.2-2241; however, such facilities shall not include sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Department of Transportation. The governing body may also accept amended proffers once the public hearing has begun if the amended proffers do not materially affect the overall proposal. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by such conditions. However, such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance. | Stricken from docket |
Development rights to preserve open space. Reasonable conditions shall not include, however, conditions that impose upon the applicant the requirement to create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55 which includes an express further condition that members of a property owners' association pay an assessment for the maintenance of public facilities owned in fee by a public entity, including open space, parks, schools, fire departments, and other public facilities not otherwise provided for in § 15.2-2241; however, such facilities shall not include sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Department of Transportation. The governing body may also accept amended proffers once the public hearing has begun if the amended proffers do not materially affect the overall proposal. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by such conditions. However, such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.
While the state legislature since the 1970s had held hearings on the issues related to conditional zoning, the 2001 legislative session was the first time that the idea of state monitoring was proposed. Labeled as “Proffer Accountability” legislation, HB 2476 required localities to begin disclosing to the Commission on Local Government their proffered cash payments and expenditures. The impetus for the legislation was that the use of cash proffers had become more expansive than legislators ever imagined. In the legislative draft file for HB 2600 which amends HB 2476 in 2003, Delegate Franklin P. Hall (D) wrote of his rationale behind the 2001 legislation,

“The measure was introduced as a result of the evolution in the proffer system in Virginia over the past twenty years. At the time of enactment, no one envisioned that the cash proffer legislation, introduced to foster commercial development in Northern Virginia, would evolve into a system that would result in the publishing of cash proffer guidelines by localities in many regions of the state. This system essentially requires a payment to the locality for the construction of almost every new home in a new housing development that has been the subject of a rezoning, or that the voluntary (required) payments would exceed $20,000 for each new home constructed. Yet, that is exactly what the proffer system has evolved into over the past two decades, and, of course, the additional cost is passed on to the new homebuyer” (Virginia General Assembly 2002: 2).

Besides the history that results in the bill being introduced, Hall admitted that the bill was spurred on by the development community. He wrote of their involvement, “The housing industry, which makes the proffered cash payments to the localities, believed the evolution of the proffer system dictated that such a proffer disclosure requirement to be imposed to ensure a reasonable level of accountability. Simply put, the measure was designed to determine how much localities were collecting through the proffer system and to determine what they were doing with the proceeds” (Virginia General Assembly 2002: 2). While Hall was the chief patron of the bill, 15 other delegates and nine senators signed on as patrons when the bill was introduced on January 10, 2001.

Despite the unusually large number of patrons, HB 2476 was not safe from being amended during the legislative process. The changes to HB 2476 may have stemmed from the Fiscal Impact Statement that was done on the bill by the State’s Department of Planning and Budget. While the bill was found not to have any fiscal impact on the state budget, the Statement did note that there were fiscal implications for the Commission, as well as, local governments. The start-up costs were estimated to be roughly $7,000 and thereafter $4,500 annually.

The Fiscal Impact Statement did not estimate the costs for local governments, but it raised concerns over two issues. The first was that the legislation asked for data from the previous ten fiscal years which the Statement advised “may be expensive, depending on how the data is to be collected and reported” (Virginia Department of Planning and Budget 2001a: 1). The second
issue focused on the use of language in regard to the data being reported. They wrote, “[t]here is some concern that the definition of ‘cash proffers’ may be to broad and include things such as developer installed sidewalks and other similar public facilities for which there is limited accounting information in any year” (Virginia Department of Planning and Budget 2001a: 1). Possibly, motivated by the concerns of the State Department of Planning and Budget, the Committee on Counties, Cities and Towns came up with a substitute version of the bill that asked for data on the previous two fiscal years rather than ten; only localities eligible to accept cash proffers had to let the Commission know of the lack of cash proffer activity in their jurisdictions as opposed to all localities regardless of eligibility status; and the requested type of data was refined, for example “The aggregate amount of proffered cash payments collected by the locality prior to the start of the preceding fiscal year, and the sources of all such payments” became “The aggregate amount of proffered cash payments collected by the locality.”

The full list of changes between the versions can be seen in Table 8.2. The substitute bill went through another round of fiscal impact analysis. While all the changes were looked upon approvingly, the analysis pointed out that “[t]he substitute may reduce slightly the fiscal impact on this the Commission[,]” however, “[t]hese changes will not significantly reduce the fiscal impact estimates provided previously by the Commission” (Virginia Department of Planning and Budget 2001b: 2). HB 2476 (15.2-2303.2) in its substitute version passed both legislative bodies and was approved by the Governor on March 15, 2001. Localities were required to disclose their data by September 30, 2001 with the first summary report on jurisdictions due to the public and General Assembly by November 30, 2001.

After two years of reports, Delegate Hall proposed more changes to 15.2-2303.2 under the heading of “Proffer Accountability Simplification Act”. There were three things that HB 2600 introduced in the 2003 legislative session hoped to accomplish. First, the initial reports showed that with the existing language inconsistencies showed up among the localities in how they interpreted the language. HB 2600 would attempt to correct those inconsistencies with clarifications that removed any ambiguity in what the localities were supposed to report to the Commission. Second, the number of localities surveyed would be reduced, so that efforts would concentrate on those localities who had a proffer ordinance or had a high probability of adopting one in the future. As a result, HB 2600 proposed to eliminate any jurisdiction with a population of less than 3500 from the requirement of having to report any cash proffer activity. Although worded as “any jurisdiction,” it was meant for towns. Finally, in an effort to gather more useful data rather than having the localities continue to check boxes next to the different public facility categories for which cash proffer revenues had been expended for, respondents would have to report the aggregate dollar amount expended for each category.

Hall envisioned that with these three key changes, “[t]he proposed legislation would make the 2001 Proffer Accountability legislation much more valuable to analysts, state legislators, local
elected officials and the public in their effort to comprehend the positive or negative impacts of
the proffer system on community development and housing in Virginia” (Virginia General
Assembly 2002: 2). HB 2600 passed both legislative bodies without a single “No” vote and its
changes to 15.2-2303.2 went enacted into law on March 16, 2003. Since the Commission
released two reports (FY1999-00 and FY2000-01) in November of 2001, there has been an
annual report with a response rate of 100 percent of jurisdictions. While the reports do not
provide any evidence to address questions of cash proffer abuse or how the different localities
implement their systems, the legislature now has a reliable statewide source on the level of
revenues coming into a locality from cash proffers and how much is being spent and generally,
on what.

The second key enacted piece of conditional zoning legislation was HB 2456 in 2005 which
added 15.2-2303.3 Cash proffers requested or accepted by a locality to the existing conditional
zoning statutes. The bill’s patron was Delegate Terri L. Suit (R) who represented the Virginia
Beach area. HB 2456 was drafted at the behest of the development community. Suit was a
member of the Commission on Growth and Economic Development. This Commission was
originally set up in 2000 by HJR 671 and then continued over the years through an additional
series of joint resolutions like HJR 170 in 2004. One of the Commission’s tasks in 2004 “was
review of conditional zoning to determine its effect on residential development patterns, the
availability and cost of housing in the Commonwealth, and the construction and improvements
of public infrastructure” (HJR 170). The reason that the Commission examined conditional
zoning in the first place was because according to an October 22, 2004 newsletter from the
Virginia Municipal League (VML), “at the urging of the Home Builders Association of Virginia”
(VML 2004: 1). At the October 13, 2004, meeting of the Commission which featured
presentations from Chesterfield, Stafford, and Prince William counties on the operating of their
conditional zoning systems, Delegate Hall made the statement that there would be legislation
which altered the “rules for cash proffers” introduced during the 2005 General Assembly Session
(VML 2004: 2). Hall’s statement was followed by a representative from a home builders
association who “identified two specific areas the organization would like to see changed: the
time of the payment—moving the payment to the time building permits are issued; and indexing
issues…. The home builders maintain that some localities use non-standard criteria for indexing
increases in the cash proffers that result in unfair increases in the actual amount to be paid in the
future” (VML 2004: 2). These are the exact two issues that HB 2456 proposed to address
through the addition of 15.2-2303.3 to the State Code.

Despite having the support of the development community behind it, HB 2456’s path to
enactment was not a swift one. Its legislative history had 42 entries which was significantly
above the usual level. Perhaps a sign of its tortured path came in a December 6, 2004 letter from
Prince William County to the Commission in response to questions raised about the use of cash
proffers in the county. At the end of the letter, there was the statement, “Any changes in the
enabling legislation that restrict the County’s ability to set and collect cash proffer contributions will have a negative impact upon the Board’s ability to address the infrastructure demands of a growing community” (Fenton 2004: 4). The bill’s original language and enacted language can be compared in Table 8.2. In between the original and the final, there was one amendment from the Committee for Counties, Cities and Towns, two separate amendments from the floor of the house (one of which was rejected), a substitute bill from the Senate’s Committee on Local Government (which was rejected), and finally, a substitute bill from the floor of the Senate. HB 2456 almost never made it out of the House because the vote to engross the bill after the series of House amendments ended in a tie of 45 to 45. Only after some parliamentary maneuvers did the amended bill pass the House in a vote of 61 to 35. The final vote in the House on the Senate’s amended version was closer, but still not unanimous – 85 to 12. If HB 2456 was drafted at the instigation of the development community, the enacted statute did give local governments a little bit of leeway that did not exist in the original version, so they may have exerted some influence during the process. For example, they have a choice of two indices to use rather than just one. At the same time, HB 2456 represented another step by the development community in the push towards standardization of cash proffers across the state through the state legislature. It is as if the development community wants to remove any local variation from the administration of cash proffers, so that it becomes a quasi-state program run by the state legislature. Thus the only role for local governments is to make a decision on the rezoning applications and then collect any cash proffers revenue and spend them on the designated project.

Given the documented difficulties that prior bills that proposed eligibility expansion faced in the legislative history of conditional zoning, the ease with which HB 1506 was enacted into law in 2006 was quite surprising. Although the bill was reported from the Committee on Counties, Cities and Towns in a substitute version and the Governor had recommendations for the bill’s language after its passage, the language in regard to eligibility expansion was never changed from its introductory version. HB 1506 sought to lower the population growth rate that classified jurisdictions as “high growth” and determined their eligibility to accept cash proffers under 15.2-2298 from the ten percent set in 1989 to five percent. By lowering this value, twenty-seven additional jurisdictions would become eligible to accept cash proffers on July 1, 2006. The bill passed the House in a block vote of 100-0 where it was passed with numerous other bills all at once. The Senate voted 33-4 to pass HB 1506. After the Governor’s recommendations were made, the House vote was very supportive at 97-1 while the Senate was not unanimous at 38-0.

It is unclear why this eligibility expansion bill’s vote for passage was so much easier than others. Compared to previous bills which usually had one patron, HB 1506 had twenty patrons, so there were more legislators invested in seeing it succeed and could be used to muster support for the bill’s passage. Second, HB 1506 was not just an eligibility expansion bill. It also contained language specifying the rules under which cash payments for off-site road improvements and off-site transportation improvements could be used as a condition in a rezoning application.
There was also wording on the use of cash proffers as a matching revenue source for highway revenue-sharing programs. Any amendments to the original bill were made in regard to these transportation funding issues. Perhaps, this additional language attracted attention away from the change in the growth rate. Finally, HB 1506’s ease of passage may be due to the fact that the eligibility expansion was for the 1989 statute as opposed to the 1973 statute. The 1989 statute (15.2-2298) is a much more restricted system, so the legislators may have been more comfortable with its expansion and there was no outcry from the development community.

The passage of HB 1506 seemed to signify the beginnings of new attitude by the General Assembly in regard to eligibility expansion of conditional zoning. This conjecture is based on the fact that in the 2007 legislative session HB 2500 passed even easier than HB 1506 and HB 2500 opened up the 1973 conditional zoning statute (15.2-2303) to any locality eligible under the 1989 statute (15.2-2298). No longer was the more permissive 1973 statute restricted to the Northern Virginia Region and the counties on the Eastern Shore. In order to take advantage of the 1973 statute, a locality would just have to pass an ordinance changing the statutory authority under which its conditional zoning system operated. The bill was sponsored by Delegate Robert D. Orrock, Sr. (R) of Spotsylvania County. HB 2500 reported out of the Committee on Counties, Cities and Towns on a unanimous vote of 22-0 and passed the House on in block vote 99-0. Its passage through the Senate was also on a series of unanimous votes. The question arises why not just take the eligibility language of HB 2500 and apply it to the 1973 statute and then in the same bill or a separate one retract the 1989 statute. Because as it stands with the passage of HB 2500, why would any local government choose to continue to operate under the 1989 statute when a more flexible option is available.

Before the 2007 legislative session, there were three distinct conditional zoning statutes with their own eligibility criteria. Certain local governments could choose among two combinations. The first combination was the 1973 or 1978 statute and the second was 1989 or 1978 statute. Some local governments were only eligible for 1978. At the end of the 2007 legislative session, a third combination was available to select local governments – 1973 or 1989 or 1978 statute. HB 2500 was not an eligibility expansion bill in the traditional sense of increasing the number of localities authorized to accept cash proffers, but it did allow more local governments to have greater flexibility in the structure of their conditional zoning system.

The introduction of SB 768 in 2008 was a complete shock to local governments. The passage of HB 1506 in 2006 and HB 2500 in 2007 gave the appearance that conditional zoning and cash proffers had finally gained acceptance in the development community and state legislature. As proposed, SB 768 granted localities the authority to impose impact fees for a range of public facilities, but in return, they had to give up the ability to accept cash proffers and off-site proffers as conditions to a rezoning application on and after January 1, 2009. While local governments determined the type of impact fees and the applicable geographic area, the state legislature
through statutes established the formula for how to determine the appropriate impact fee amount and set maximum levels for those amounts. I argue that the introduced version of SB 768 was evidence of the lack of trust that the development community had towards local governments on land use matters. Developers were willing to subject themselves to impact fees which are applicable to new development not just rezonings and imposed by a local government rather than voluntarily offered, but only if the role of the locality in determining those fee amounts was minimized by the state legislature. Their experience with how local governments implemented cash proffer policies created a sense of distrust among the development community in whether localities could fairly implement an impact fee system. The way to deal with this distrust and address impact fee authority was to draft legislation in such a way that state statutes were put in place that minimized the opportunities for and amount of local government discretion and variation. SB 768 was a bill clearly written in the interests of the development community and this was reflected in its path through the 2008 General Assembly legislative session.

The first hint of an overhaul to the conditional zoning system came through the news media in December 2007. An article in the *The Virginian-Pilot* indicated that the Home Builders Association of Virginia (HBAV) had disseminated a position paper that proposed to eliminate cash provfiers and off-site provfiers with an impact fee on new homes, as well as, a new tax on existing home sales (Walker 2007). The rationale behind their proposal was that “cash provfiers have become ‘an unbridled tax on new housing in virtually every modest growth area of the Commonwealth’.... [and adoption of their] proposal would increase affordable housing options by spreading infrastructure costs among more property transactions” (Walker 2007). According to the article, the proposal was short on details, but sides were already being drawn in the debate. Ted McCormack, the Director of Governmental Affairs for the Virginia Association of Counties (VACo), response was that “We’d be reluctant to give up cash provfiers unless we feel like the impact fee system would offer flexibility. . . . A one-size-fits-all approach is probably not something that’s going to work across 95 counties” (Walker 2007).

While realtors could normally be counted on to support the interests of the homebuilders, the proposal as it stood at the end of 2007 was troublesome for the real estate industry. The article reported that “The Virginia Association of Realtors supports an overhaul of the cash provfer system but not a new tax on home sales. ‘Given the market, right now is not a good time to be asking sellers of residential or commercial real estate to come up with more money,’ said Martin Johnson, director of governmental relations for the Realtors group” (Walker 2007). For legislators, they were surprised that home builders were in support of impact fees considering that they had adamantly opposed the issue in prior sessions. Senator Harry Blevins (R) who represented the City of Chesapeake was quoted, “It’s interesting to hear they’re advocating what they have been opposed to.... Through the process we could very easily come up with a better situation than we have” (Walker 2007). When the 2008 Session of the General Assembly convened on January 9th, Legislative Services did not have any record of a bill being prefiled.
VACo’s legislative bulletin, *Capitol Contact*, for January 10th alluded that a bill was in the works with VACo monitoring the situation because it possibly contained two of their legislative priorities – expansion of impact fee authority and preservation of current land use tools (VACo 2008a). The deadline to introduce bills for the 2008 session was January 18th.

Whether it was a form of stagecraft or a sign of the difficulty in the drafting and gathering of support for the bill, SB 768 was not introduced until January 18, 2008. Senator John C. Watkins (R) of Powhatan County who previously served in the House of Delegates was the chief patron of the bill along with Delegate Franklin P. Hall (D) of the city of Richmond and Delegate Robert D. Hull (D) of city of Falls Church in Fairfax County as patrons. The hand of the development community was actively involved in the introduced version of SB 768. HBAV’s Legislative Bulletin for January 18th stated, “[t]he measure was crafted by a Special Subcommittee of the HBAV Legislative Committee that was chaired by HBAV 2nd Vice President Michael Newsome of the Tidewater Builders Association. It was approved for introduction to the state legislature by the full HBAV Legislative Committee that is chaired by Charlottesville homebuilder Jamie Spence” (HBAV 2008a: 1). The president of HBAV, Henry Stephens, made the following statement at a press conference for the bill’s introduction:

“The time has come for Virginia to abandon its very unique cash proffer system that is out of control, lacks accountability and is impacting the ability of many Virginians to own a home of their own. It is time to adopt a more predictable and more structured system for the private sector to contribute to public infrastructure costs created by growth. It is time to establish a system that will allow all builders and all developers, not just those that have been the subject of recent rezoning, to contribute to local growth costs. It is also time for new residents who purchase homes in existing neighborhoods that have long-term capital improvement debt attached to neighborhood schools, to also help pay their fair share for growth costs. I am very pleased that HBAV took on the challenge this past summer to gain statewide support from residential land developers and home builders for this alternative. Let it be clear that we are ‘stepping up to the plate,’ and not ‘running from our responsibility,’ by our support for the measure” (HBAV 2008a: 1).

At the same press conference, Senator Watkins made a statement about SB768 which was labeled “Alternative Local Infrastructure Funding Legislation” or the “Watkins Proffer Reform Bill” by HBAV. In his statement, Watkins highlighted the significance of the development community’s involvement with SB 768. He said, “I am pleased to announce, that after three decades of opposition to impact fee legislation, the measure is supported by the Home Builders Association of Virginia…. In the past, by-right residential and by-right commercial developers were exempt from having to make contributions for public infrastructure created, in part, by their development projects. I commend the Association for its support of the bill” (Watkins 2008: 1).

There were four major facets to SB 768:

(1) “Eliminate cash from the current Proffer System in Virginia”;
(2) “Retain, but reform, the non-cash Proffer System”;
(3) “Enact an Impact Fee Statute in Virginia for Public Roads, public School Buildings and Public Safety Buildings (fire, rescue and police)”; and
(4) “Require high-growth localities, located outside the Northern Virginia Transportation Authority and located outside the Hampton Roads Transportation Authority, that enact an impact fee ordinance to impose a Real Property Tax Relief Fee” (HBAV 2008a: 2).

As the list above shows, the introduced version of SB 768 was composed of multiple controversial parts which were put together in effort to create revenue sources that at a minimum would offset the loss of revenues from the elimination of cash proffers.

The path of SB 768 through the legislative process attracted attention from the development community and local governments, as well as, interest groups new to the legislative history of conditional zoning. Lobbyists in Virginia file disclosure reports to the Office of the Secretary of the Commonwealth which indicate the specific bills that they lobbied to have pass or fail. For SB 768, there were six groups that disclosed they had sought to influence the outcome of the bill in 2008. Three were local governments – Fairfax County, Frederick County, and Stafford County. Two were the state chapters of national membership association – the Sierra Club and the American Planning Association. The final group was a private construction and real estate development firm located in Rockville, Maryland – Ellis Denning Construction and Development. Stafford County, which employed one lobbyist, reported expenses of $7,382 which covered entertainment ($1,808), communications ($432), compensation ($3,792), and other ($1,350). The reported expenses for Ellis Denning Construction and Development totaled $3,600 -- $3,550 in compensation and $50 in registration. The Virginia Chapter of the American Planning Association which had two registered lobbyists spent $1,666 in compensation and $100 in registration for total of $1,766. The other three groups tracked other legislation during the session, so it is not possible to determine how much money they spent on lobbying activities in regard to SB 768.

Although they were not registered as lobbyists to track SB 768, the Piedmont Environmental Council (PEC), Coalition for Smarter Growth, Virginia League of Conservation Voters, Virginia Conservation Network, and the Virginia Chapter of the Sierra Club came together in opposition to SB 768. This was the first example of interest groups involved in the fight over conditional zoning issues extending outside of local governments and the development community. The mix of regional and statewide environmental and smart growth advocates also represented new and old interest groups in the state. PEC was organized in 1972 while the Coalition for Smarter Growth did not form until 1997 and the Virginia League of Conservation Voters was started in 2000.

Besides lobbying legislators in person at the Capital, interest groups had their members and other interested individuals use other means of communication to show their support for either side of
the bill. PEC set up a webpage on their website where individuals could add their personal information to an email message which PEC would then send to the appropriate state senator. The email’s subject heading was “Don’t Raise My Taxes – Oppose SB768” and it read:

“Dear [Decision Maker],

As a taxpayer in the Commonwealth of Virginia I am writing to urge you to oppose SB768 which would result in property tax increases in our community.

As you know, this legislative scheme is being strongly backed by the home building industry. If approved, this legislation would:

* End the proffer system by which developers make contributions for rezonings, replacing it with very low impact fees. The impact fees will be capped at $5000 for most of Virginia and $8000 in Northern Virginia.
* The impact fees would not be paid until building permits are issued, requiring taxpayers to spend tax dollars upfront in order to prepare the necessary infrastructure.

This legislation further transfers the burden of new residential development from the builder onto the taxpayer. It is unfair to homeowners and business owners and should be defeated immediately.

Vote no on higher property taxes. Say no to what can only be termed as ‘welfare for the developer.

Sincerely,
[Your name]
[Your address]”

In their weekly legislative bulletins, HBAV issued “Action Alerts” which urged members to either email or call their state legislators. They would provide the names of the legislators along with their contact information. Members were told to leave their name and address, so that legislators would know that it was a constituent who had expressed support for SB 768. HBAV gave its members four talking points to stress in their messages:

“(1) benefit local governments with a more consistent source of revenue for local schools, local roads and local public safety facilities from the private sector (residential and commercial developers); (2) will create more predictability of those costs and certainty for home builders and their buyers; (3) will benefit existing residents, since local governments will have a new consistent source of revenue for growth-related local public infrastructure; and (4) will help make housing more affordable for hard-working Virginians” (HBAV 2008b: 1).
The first test in the legislative process for SB 768 was whether the bill made it out of committee and in what form. When the bill was introduced on January 18th, it was referred to the Senate’s Committee on Local Government. On January 29th, the committee made two moves that surprised the bill’s supporters. First, they crafted a substitute version of the bill which removed the “Real Property Tax Relief Fee” section as known as the grantors tax from the bill. This first part of the section read:

“A. Any locality not enumerated in 15.2-4831 or 33.1-391.7 that adopts an impact fee ordinance under the provisions of Article 8 (15.2-2317 et seq.) of Chapter 22 of Title 15.2 shall impose a fee, delineated as the ‘Real Property Tax Relief Fee’ on each deed, instrument, or writing by which lands, tenements, or other realty located in any county or city is sold and granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser or any person, by purchaser’s direction. The rate of the fee, when the consideration or value of the interest, whichever is greater, equals or exceeds $100, shall be $0.20 for each $100 or fraction thereof, exclusive of the value of any lien or encumbrance remaining thereon at the time of the sale, whether such lien is assumed or the reality is sold subject to such lien or encumbrance. The fee imposed by this section shall be paid by the grantor, or other person who signs on behalf of the grantor, of any deed, instrument, or writing subject to the fee imposed by this section....”

The grantors tax section was put in the bill as a source of revenue to assist impact fees in offsetting the loss of revenues from the abolishment of cash proffers. Its inclusion also allowed the impact fees to be capped at levels lower than would normally occur if impact fees were the lone source of revenue. The removal of the grantors tax section was evidence that a more influential agent than the home builders was involved in the legislative process. The Virginia Association of Realtors (VAR) opposed the grantors tax on the grounds according to its lobbyist, John G. Dicks III who used to be a member of the House of Delegates, “Sellers are consumers, too, and sometimes sellers are turned upside down, as they are in this market. A seller would have to bring more money to the table” (Schapiro 2008). Since they had the support of the realtors, the Committee on Local Government felt comfortable enough to have removed the grantors tax section from SB 768. They made this decision over the objections of the bill’s chief patron, Senator Watkins who indicated that because of its removal, the home builders may have him eliminate the bill from the legislative calendar. The news media characterized the debate as “pit[ting] two influential lobbying organizations against each other: the Virginia Association of Realtors and the Home Builders Association of Virginia. Caught in the crossfire are local governments looking for ways to bankroll services, the demand for which is driven by development” (Schapiro 2008). Those who testified in opposition to SB 768 at the committee hearing were the Virginia Municipal League (VML), Coalition of High Growth Communities, VACo, and some individual counties. Their opposition was summarized as “while local governments support broad impact fee authority, the proposed legislation was a major policy change that required further study” (VACo 2008b). The Committee on Local Government passed
the substitute version of SB 768 by a vote of 10-3-2, but its second surprise move was to refer the bill to the Committee on Finance of which Watkins was a member rather than send it directly to the Senate floor.

Although there was early organized opposition to SB 768 from multiple groups, I argue there was still a sense that the bill would not progress far in the legislative process. First, because of how revolutionary it was in its changes. Second, the state legislature historically has shown a reluctance to embrace large-scale change. The fact that SB 768 successfully reported out of the Committee on Local Government was a signal to local governments that the bill could actually be enacted into law. Thus in the days prior to SB 768’s hearing before the Senate Committee on Finance, the news media had a series of articles on the implications of the bill’s passage for individual local governments where the governing bodies of these localities expressed their opposition to the bill. On February 1st, the Board of Supervisors of Chesterfield County voted unanimously to oppose SB 768 (Hester 2008). This vote was evidence of the fact that state legislators did not always propose legislation that was supported by the local governments of the jurisdictions they represented. Part of Watkins’ senatorial district included Chesterfield County. Further, it was Watkins during his time in the House of Delegates who led a failed legislative effort to gain impact fee authority for Chesterfield. Chesterfield’s maximum cash proffer amount per dwelling unit at the time was $15,600. Under SB 768, an impact fee in Chesterfield would be capped at $5,000 per residence. Chesterfield had estimated that for roads alone, it would need an impact fee of $5,820 (Hester 2008). Further, the property tax rate would have to be raised by $0.50 to offset the loss in cash proffer revenues from its level at the time of $0.97 per $100 of assessed value (Hester 2008). Supervisors also lamented the loss of flexibility if the bill was enacted.

The reactions to SB 768 from local governments in the Northern Virginia region were much more inflammatory. On February 5th, Loudoun County’s Board of Supervisors voted unanimously to oppose SB 768. At the meeting, one supervisor, Jim Burton (I) of the county’s Blue Ridge district, warned members of the Northern Virginia Building Industry Association (NVBIA) that there would be consequences for them if the bill was enacted. He said, “I can ensure you that if this bill passes, the NVBIA will never see another residential rezoning in this county.... NVIB is going to rue the day this bill passes” (Loudoun Times-Mirror 2008). The suggested cash proffer amount per single family home in Loudoun at the time was $47,000, but tended to be negotiated lower. Under SB 768, the maximum impact fee per single family residential unit was capped at $8,000 for select localities in the Northern Virginia region. Fairfax County echoed Loudoun’s warning of a halt to development if SB 768 was enacted. The Washington Post reported, “supervisors and administrators said that if the county were unable to use proffers to negotiate with developers for public improvements, they would be forced to sharply curtail approval of rezonings....County Executive Anthony H. Griffin … suggested sending a letter to lawmakers threatening a moratorium on rezonings if the Watkins bill passes”
(Turque 2008). Fairfax’s proffer level in early 2008 was approximately $15,000 per single-family home. Prince William County shared the sentiments of Loudoun and Fairfax. The Chairman of the Board of Supervisors in Prince William, Corey A. Stewart (R) cautioned the development community, “Be careful what you wish for…. [SB 768] will shut down residential development all over the county. I will make sure it shuts down residential development in Prince William” (Hanley 2008). Prince William’s proffer level was $38,000 per home at the time.

The general message to legislators from the local governments was to take things slowly and spend a year developing a more reasonable proposal because if not, localities would be forced to take drastic measures. Passage of SB 768 would then bring the history of conditional zoning full circle in a return to the contentious environment between local governments and the development community that had preceded the passage of the first conditional zoning statute in 1973. This time, I argue, the environment would be even worse because it would not be restricted to Fairfax County alone.

The Committee on Finance reported out SB 768 without any amendments to the substitute version from the Committee on Local Government. Despite the vocal opposition of local governments, the vote on February 6th was 12-2-2. A vote for passage by the full Senate was now up against the legislature’s crossover deadline which is the date by which each legislative body must advance the bills that originate in their chamber to the other body for their consideration. If a bill fails to advance to the other legislative body by this date, then it is effectively killed. The 2008 legislative session’s deadline was February 12th. On February 11th, the substitute version of SB 768 was rejected on the floor of the Senate. At the same time, Watkins offered a new substitute which the full Senate agreed to consider. Final vote was set for February 12th.

Watkins made several key changes to his new version of SB 768 in an effort to garner more votes for its passage. Besides the addition of new subsections to existing sections, he amended the language on three key provisions shown below in Table 8.4. Special exemption language was added to the bill that specifically applied to Fairfax County and was done to gain votes from the Fairfax County delegation. The language read, “That the provisions of his act amending 15.2-2297, 15.2-2298, 15.2-2303, and 15.2-2303.1 of the Code of Virginia shall not apply to any urban development area created prior to July 1, 2009, pursuant to 15.2-2223.1 of the Code of Virginia by any county having the urban county executive form of government”. Since local governments appeared to be acting as a united front of opposition to SB 768, one strategy to lessen their impact was to fragment them into smaller conflicting groups. The Washington Post reported, “By exempting Tysons Corner and part of the Reston Town Center from the so-called impact fees, the development industry was trying to placate Fairfax County, which opposes the bill…. Tysons and Reston, which are slated for urban-style redevelopment projects, would remain under the current system, which would allow county officials to negotiate contributions, called
proffers, from developers” (Somashekhar and Kumar 2008). Unfortunately, Fairfax’s government leaders considered it a good move, but too late in the process to garner their support. Gerald E. Connelly (D), Chairman of the Board of Supervisors, said, “That still leaves huge swaths of land that wouldn’t qualify….While it was a respectful attempt to try to mollify our concerns, it doesn’t get there. Frankly, this underscores why this bill needs to be in a study for the next year while we take a breath and look at it more closely” (Somashekhar and Kumar 2008).
Table 8.4 Key Differences in the Substitute Versions of SB 768

<table>
<thead>
<tr>
<th>Legislation Feature</th>
<th>Local Government Committee Substitute Version</th>
<th>Watkins Substitute Version</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary Proffer of Conditions</td>
<td>reasonable non-cash, on-site conditions necessitated by and attributable to the new development resulting from the rezoning</td>
<td>(i) non-cash proffers for on-site conditions for the new development</td>
</tr>
<tr>
<td>shall be limited to:</td>
<td></td>
<td>(ii) non-cash off-site proffers for a public facility that is not subject of a public facilities improvements plan pursuant to 15.2-2321, or any other proffered condition that is necessitated by and attributable to the new development, as a condition for rezoning for residential development or the residential portion of any mixed-use development</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(iii) conditions to implement incentive zoning as defined in 15.2-2201</td>
</tr>
<tr>
<td>Applicability of Public Safety</td>
<td>Any city, any county enumerated in 15.2-4831 or 33.1-391.7 and any town therein, and any county that has adopted zoning pursuant to Article 7 (15.2-2280 et seq.) of Chapter 22 of Title 15.2 and that (i) has a population of at least 20,000 and has a population growth rate of at least 5 percent or (ii) has population growth of at least 5 percent and to any town within such county.</td>
<td>Any city, any county enumerated in 15.2-4831 or 33.1-391.7 and any town within such county, any county that had the authority to accept proffers prior to July 1, 2009, and to any county that has adopted zoning pursuant to Article 7 (15.2-2280 et seq.) of Chapter 22 of Title 15.2 and that has a population growth rate of at least 5 percent, and to any town within such county.</td>
</tr>
<tr>
<td>Impact Fees</td>
<td>In the localities enumerated in 15.2-4381 and subject to this article pursuant to 15.2-2317, the maximum impact fee for public facility improvement shall be $8,000 per single-family detached dwelling unit, two-thirds of such maximum per single-family attached dwelling unit, and one-half of such maximum per multifamily dwelling unit.</td>
<td>In the localities enumerated in 15.2-4381 and subject to this article pursuant to 15.2-2317, the maximum impact fee for public facility improvement shall be $12,500 per single-family detached dwelling unit, two-thirds of such maximum per single-family attached dwelling unit, and one-half of such maximum per multifamily dwelling unit.</td>
</tr>
<tr>
<td>Maximum impact fees to be imposed</td>
<td>In other localities subject to this article pursuant to 15.2-2317, the maximum impact fee for public facility improvement shall be $5,000 per single-family detached dwelling unit, two-thirds of such maximum per single-family attached dwelling unit, and one-half of such maximum per multifamily dwelling unit.</td>
<td>In other localities subject to this article pursuant to 15.2-2317, the maximum impact fee for public facility improvement shall be $7,500 per single-family detached dwelling unit, two-thirds of such maximum per single-family attached dwelling unit, and one-half of such maximum per multifamily dwelling unit.</td>
</tr>
<tr>
<td>by localities on residential</td>
<td></td>
<td></td>
</tr>
<tr>
<td>development</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

On the day of the final vote, floor amendments were proposed by different legislators as ways to secure their vote for the bill's passage. Some efforts at horse-trading were more successful than others. Senator Mark Herring (D) of Loudoun County, the leader of the opposition movement in the Senate, made two unsuccessful attempts to attach an amendment to SB 768 which would have removed Fairfax County's urban development area exemption and replaced it with an exemption for the counties and cities of the Northern Virginia Transportation Authority and the
Hampton Roads Transportation Authority. Loudoun was a member of the Northern Virginia Transportation Authority. This effort failed because it would have exempted the very localities that the home builders regarded as the biggest abusers of cash proffers. The next amendment was by Senator Mary Margaret Whipple (D) of Arlington County. Her amendment would not apply the changes to the conditional zoning statutes to “any development on sites containing five acres or less, or five parcels or less.” Whipple proposed this amendment because Arlington County was the most urban and densest county in the state with few large-scale greenspace development opportunities available. Approval of this amendment would essentially exempt the majority of Arlington from the changes to the conditional zoning statutes. Watkins agreed to support the amendment because of its applicability to urban development areas. Thus a new version of the bill with Whipple’s amendment was engrossed for final vote. Senator Herring made a last minute motion to have the bill carried over to Committee on Local Government for reconsideration in next year’s legislative session. He argued that decisions on the bill kept being made under pressure of a deadline. For example, the bill was introduced on the last possible day that bills for the session could be introduced on. Further, its hearing before the Committee on Local Government occurred at the committee’s last meeting. He also had concerns that the “hand of developer [was] around [the] scribner’s pen of this bill.” Watkins urged rejection of the motion to recommit the bill to committee because if a legislator did not like the bill, then they should not vote to pass the bill. In his words, it was “time for [the] Senate of Virginia to make a policy decision.” Herring’s motion failed and SB 768 passed the Senate by a vote of 21 to 19. If the vote had been tied 20-20, then Lieutenant Governor Bill Bolling (R) who acts as President of the Senate would have been called upon to cast the tie-breaking vote. In its weekly legislative bulletin, HBAV stated that Bolling would have voted to kill the bill.

SB 768’s Senate passage can be contributed to a successful division of the Fairfax Senate delegation. Nine senators represented districts which contained at least a portion of Fairfax County. Out of the nine senators, three voted in support of SB 768 – Howell (D), Saslaw (D), and Whipple (D). Howell’s district included Reston Town Center which was exempted from the bill and Whipple’s district as mentioned above included Arlington County. According to the news media, Saslaw, who was the Senate Majority Leader, voted for the bill’s passage because of his ties to the development community. Based on data collected by the Virginia Public Access Project, the real estate/construction industry contributed over $73,952 in 2008 to Saslaw. It was the top contributing industry. These three senators were the only senators from the Northern Virginia Region to vote for the passage of SB 768.

Opponents of SB 768 viewed the tight Senate vote as a sign of the difficult struggle that the bill would have in its attempts to gain passage in the House. In a press release after the Senate’s vote,

---
46 The Northern Virginia Transportation Authority is composed of Arlington County, Fairfax County, Loudoun County, Prince William County, Alexandria, Fairfax City, Falls Church, Manassas, and Manassas Park. The Hampton Roads Transportation Authority consists of Isle of Wight County, James City County, York County, Chesapeake, Hampton, Newport News, Norfolk, Poquoson, Portsmouth, Suffolk, Virginia Beach, and Williamsburg.
Lisa Guthrie, Executive Director of the Virginia League of Conservation Voters said, “The significant division in the Senate vote on SB768 today demonstrates the serious problems with this bill. . . . Had the bill not been filed at the last minute and had there been even a couple more days for all legislators to realize the damaging fiscal impacts, this bill would not have passed”. There was evidence to support Guthrie’s contention because HBAV spotlighted six senators who voted in their committees to have the bill move to the Senate floor, but then voted against its final passage. Thus the development community got its desired outcome, SB 768 passage, but its influence was not powerful enough to maintain all of its supporters’ votes. Another indicator of the bill’s potential struggle in the House was the fact that it was assigned to the Committee on Rules. Typically, issues involving local governments, particularly on land use, had been assigned to the Committee on Counties, Cities and Towns. This was the committee that had dealt with prior conditional zoning legislation over the years.

The assignment of SB 768 to Rules was a surprise to the development community and local governments. It was an illustration of how one agent could take control of the legislative process away from other agents who had previously been dominant. Speaker of the House, William J. Howell (R) who represented the City of Fredericksburg and Stafford County, was head of the Committee on Rules and he assigned SB 768 to this committee because it was where he placed bills that held a particular interest to him. HBAV had some reservations about the assignment because as they stated in their weekly bulletin, “[s]ome have advanced to the full 100 member House and others have died at the hand of the House Speaker” (HBAV 2008c: 2). SB 768 entered the committee on February 14th and the House had until March 3rd to come to a decision on Senate bills. On February 28th, the committee by a unanimous voice vote decided to carry SB 768 over to the 2009 legislative session. During the time between the 14th and the 28th, there were negotiations between the two sides on the development of compromise bill.

As part of the decision to carryover the bill, there was a “gentleman’s agreement” made between the development industry and local governments. First, home builders would halt their plans to have the state legislature in the 2008 session put a “legislative cap” on cash proffers. In exchange, local governments would allow the home builders to have legislation that would push back the authority for localities to adopt road impact fees which had been authorized in 2007’s HB 3202. The one-year freeze on road impact fees adoption would begin on July 1st, 2008. The freeze would be done through an amendment to HB 111. The Speaker of the House agreed to draft a letter to be sent to representatives from both sides that encouraged them to continue their negotiations in good faith. There was also the possibility that in the letter the Speaker would request local governments not to amend their cash proffer policies while the negotiations were on-going. In another surprise move to both sides, the Speaker ruled on March 5th the Senate

47 The senators were Ken T. Cuccinelli III (R) of Fairfax County, R. Edward Houck (D) of Spotsylvania County, Mark D. Obenshain (R) of City of Harrisonburg, Linda T. Puller of Prince William County (D), Frederick M. Quayle (R) of City of Suffolk, and Richard H. Stuart (R) of Stafford County.
amendment that had the language on the impact fee adoption freeze was not germane to the original purpose and subject of the bill that it amended. The Speaker’s ruling was prompted by a point of order question from another legislator. HB 111 had already passed the Senate with the impact fee freeze amendment. As a result of the Speaker’s actions, no impact fees freeze was legislatively enacted.

After the end of the 2008 General Assembly session, the two sides began negotiations to come to a final resolution. The interests of local governments were represented by VACo, VML, Coalition of High Growth Communities, Chesterfield County, and Loudoun County. The development community had representation from HBAV, VAR, and Commercial Builders. Between March and mid-September 2008, the two sides held two meetings, but no agreed upon bill resulted. At the first meeting, there was agreement between the parties that they needed to start from a blank canvas. After the second meeting, Senator Watkins asked each side to draft their own version of the ideal impact fee legislation keeping in mind three facets – general authorization for development agreements; infrastructure impact fee; and general authorization for commercial cash and non-cash proffers. Watkins wanted the two sides to have a finished product by November 1st. There were no more meetings in 2008 and hence, no final piece of legislation for the 2009 General Assembly session. SB 768 still resided in the Committee on Rules.

The downturn in the housing market has killed any interest by the development community in further pursuing impact fees. The issues raised in the debate over SB 768, however, are not ones that will go away with time. Localities will continue to face growth pressure, most likely on a smaller scale, and there will be a demand for new public infrastructure. Because of Dillon’s Rule, local governments are unable to create on their own the innovative tools necessary to deal with their own individual growth issues. SB 768 was an attempt by the development industry to apply a ‘one-size fits all’ approach to the problem. While this legislation would not have forced localities to adopt impact fees, it granted the authority for one power by taking away another power. Ideally, local governments should be given both powers as well as a variety of other land use tools by the state legislature. That is what had been proposed in the first bill that asked for conditional zoning authority along with other land use powers from the state back in 1968. Each local government can then choose which tools best suit their needs, so localities that are looking purely for a source of revenue would adopt an impact fee ordinance while jurisdictions seeking flexibility would stick with conditional zoning.

IMPLEMENTATION

Legal challenges to the use of cash proffers as part of a local government’s conditional zoning system continued into this time period from the 1990s. There were two rulings that deserve attention. The first is the 2000 decision in Patrick v. McHale from the Circuit Court of
Chesterfield County. The second is the 2008 decision in *David J. Sowers v. Powhatan County, Virginia et al.* out of the United States District Court for the Eastern District of Virginia, Richmond Division. As in the first conditional zoning cases discussed in the 1990s section, plaintiffs took their claims against local governments to both local and federal courts. The rulings, however, in both cases reinforced the actions of local governments. In the eyes of the court, localities are operating their conditional zoning systems in a reasonable manner.

In *Patrick v. McHale*, Chesterfield County Board of Supervisors voted to deny a rezoning application that involved the use of cash proffers. McHale refers to Jack McHale, a member of the Board of Supervisors. In October of 1996, the plaintiff filed a motion for a declaratory judgment which is where the court decides “the rights of the parties to a dispute, but does not order or coerce any performance relative to those rights” (Brann 1997: 123). Patrick sought to have 48.5 acres rezoned from Agricultural to the residential use of R-9. He originally applied for a rezoning in 1995, but later revised the application to seek R-12 in 1996. Judge Herbert C. Gill, Jr. examined the case from five different entry points to see if Patrick’s challenge to the denial of the rezoning application had any legal standing to be further pursued. Decisions on rezoning applications are a legislative act of the Board of the Supervisors and therefore are assumed to be reasonable, so Gill first had to determine whether the denial was an unreasonable action. If reasonability was confirmed, then the focus shifted to a question of its debatable nature. The burden was upon the plaintiff to provide evidence that the decision was not reasonable or fairly debatable. Gill found that the county’s decision could be upheld because all the land uses involved in the case (Agricultural, R-9, and R-12) were appropriate for Patrick’s property given that they were all in use on surrounding and neighboring properties.

The third entry point for a claim against the county was Patrick’s contention that the county required from him either a cash proffer or a dedication of public facilities as a condition in order to gain approval for the rezoning. Patrick, however, was unable to provide any evidence that showed the county had actually mandated these conditions to him or that every county rezoning approval involved cash proffers or a dedication. Thus Gill could not substantiate this claim. The fourth entry point focused on whether the denial constituted a taking by the county. In order for there to be a taking, Patrick needed to show that the rejection of the rezoning had deprived the plaintiff of all economically viable use of his property. Gill found that the county’s decision did not constitute a taking because although Patrick could not develop the property as he had planned, he could still build a residence on it by obtaining a variance or it could be used for farming or timber cultivation. While a residential zoning would have brought him more money, under the current agricultural zoning, the property still had value. The fifth and final entry point by Patrick was under an equal protection claim where he contended that the county’s decision had been arbitrary and capricious and thus unconstitutional. Patrick asserted that he had been treated differently from the other property owners who were all part of the county’s Central Area Plan. These property owners were allowed to have residential zoning while he was not. Because
the Court was not able to substantiate Patrick’s other claims, these provided evidence against the violation of equal protection claim. Further, Gill found that the county did have a rational basis to reject the rezoning on “health, safety, and welfare concerns” (Patrick v. McHale 2000). A Lexis-Nexis search did not turn up any other cases associated with this decision, so the plaintiff must have accepted the Circuit Court’s decision rather than seeking out an appeal. For future legal challenges, the judge in this case laid out a framework that plaintiffs need to meet if they want to overturn a county’s decision. This ruling provided further substantiation to how Chesterfield County conducted its conditional zoning system. Combined with the cases from the 1990s that involved Chesterfield, every legal challenge to the county’s conditional zoning system has been upheld in favor of the county.

The second case, David J. Sowers v. Powhatan County, Virginia, et al., was argued in Federal court where rulings are limited to violations of the U.S. Constitution or a federal statute. Sowers alleged three claims against the county such that there had been violations of the equal protection clause (14th Amendment) and the due process clause (5th Amendment). These claims were related to two different sets of action. One set of actions was related to an application for rezoning filed by Sowers. The second set of actions involved approvals for his development plans for the tract that was being rezoned. The Court ruled that the plaintiff never presented enough evidence to support his claims, so that no reasonable jury would be able to find in his favor. I do not go through the court’s rationale for its ruling because unlike prior cases, Sowers never alleged any improper actions by the county involving cash proffers. I bring the case up because its facts provide an illustration of a county’s rezoning process involving proffers.

Sowers sought to rezone 250.9 acres in Powhatan County from A-1 (Agricultural) to R-5 (Residential). At the time of his rezoning application in June 2004, Sowers actually proffered the county’s minimum suggested proffer amount of $3,530 per lot. Within weeks of the submission of Sowers’ application, the county raised the amount to $6,395 per lot. In meetings with citizens who lived in the area that would be affected by the development, concerns were raised and Sowers decided to address some of them through non-cash proffers. Suggestions were also made to him that he should increase the amount of his cash proffers, but he never did. These suggestions came from citizens, as well as, Planning Commission members in private meetings. Before his public hearing with the Planning Commission, Sowers amended his noncash proffers, but the county had a rule that required proffers to be submitted at least seven business days before the public hearing on the application. Sowers’ amended proffers violated this rule, but the Planning Commission waived the rule and included the latest version of the proffers in the evidence on which it based its recommendation. After the Planning Commission hearing where the Commission recommended denial of the application and before the Board of Supervisors hearing, Sowers revised his noncash proffers again. Powhatan’s rule for the Board of Supervisors hearing was that proffers had to be submitted at least 10 days before the hearing’s date. Sowers missed this deadline, too, and unlike the Planning Commission, the Board rejected Sowers’
motion to waive the deadline and so the revised proffers were not considered as part of his application. The Board of Supervisors ended up denying his rezoning application. Sowers took the County to state court to overturn the actions of the Board. Before a decision in the case was reached, Powhatan’s County Attorney said Sowers would be allowed to refile his rezoning application without any of the fees or associated deadlines. Sowers turned down the offer, but the Board decided to reconsider his application after all. After another review by the Planning Commission and the Board of Supervisors, the Board voted to grant the rezoning in May of 2006. Thus almost two years after the application was filed, Sowers gained approval for his rezoning, but only after court proceedings began.

With cash proffers, conditional zoning became relabeled as a tool for infrastructure financing. In this time period, localities questioned whether conditional zoning could be morphed to assume an additional identity – enforcer of an adequate facilities policy. As in prior decades, localities sought the legal opinion of Virginia’s Attorney General on the feasibility. City Attorney for the City of Chesapeake had asked the Attorney General “whether the City of Chesapeake may adopt a proffer policy as part of the city’s comprehensive plan to encourage rezoning applicants to proffer to develop rezoning property only when public facilities are deemed adequate to support the public needs that will be generated by the proposed development?” (Virginia Office of the Attorney General 2002: 86). Chesapeake sent the Attorney General a copy of the proposed policy, but he did not use it in his legal opinion because the Attorney General’s Office has a policy of restricting their opinion to federal or state laws, rules, and regulations. His answer to Chesapeake’s question was limited to whether the locality had statutory authority to adopt a hypothetical policy. Relying on state statutes and Supreme Court cases, the Attorney General came up with a list of criteria that a locality could use for reviewing rezoning applications in regard to adequate public facilities:

“1. the impact of the proposed new development on public facilities;
2. the protection against undue density of population with respect to the public facilities in existence to service the proposed new development;
3. the planning by the locality for the provision of public facilities consonant with the efficient and economical use of public funds to service the proposed new development; and
4. the locality’s interpretation and application of its comprehensive plan concerning the timing of the development as determined by reasonably objective criteria” (Virginia Office of the Attorney General 2002: 89).

A local government could then adopt a proffer policy that included this criteria and the policy could be part of its comprehensive plan.

In the 2002, the Attorney General made no mention of whether lack of adequate public facilities alone was enough of a justification to deny a rezoning application. The absence of any language on this triggered another letter to the Attorney General in 2003, but this time, it was from state
Senator John C. Watkins (R). He asked, “whether statutory authority is required for a local governing body to deny rezoning request solely on the basis of the lack of adequate public facilities and services to meet the needs generated by development of rezoned property?” (Opinion of Virginia Attorney General 03-109 2003: 42) In addition to the 2002 Opinion of the Attorney General, Watkins’ question was motivated by the fact that the General Assembly was considering legislation on the authority of local governments to adopt adequate public facility ordinances. Watkins saw a conflict between the opinion which appeared to him to indicate that localities could require adequate public facilities in place before development was allowed and state statutes which either did not make them a requirement or only allowed them to be one of multiple facets considered in a decision. The Attorney General responded that “[t]here is … no express statutory authorization that expressly grants to localities an ability to specifically require developers to provide adequate public facilities or to defer development until such services are provided” (Virginia Office of the Attorney General 2003: 44). Since the authority did not explicitly exist in the current statutes combined with Virginia’s strict adherence to Dillon’s Rule, the Attorney Opinion concluded “[s]tatutory authorization [was] clearly required to permit a local governing body to deny a rezoning request based solely on the lack of adequate public facilities to serve any development of rezoned property” (Virginia Office of the Attorney General 2003: 44). If local governments wanted the power to base rezoning decisions on adequate public facilities alone, then they needed to lobby the General Assembly to pass the necessary statute.

Together, the 2002 and 2003 Virginia Attorney General Opinions illustrate how the state’s political structure constrains attempts by local governments to innovate their land use regulations. Conditional zoning can be a very flexible tool because of the wide range of potential conditions available depending on the particular statute. These conditions, however, must be voluntarily offered by the applicant or property owner. This defining feature of Virginia’s conditional zoning system limits its effectiveness. Certain applicants may be very open to an adequate public facilities provision being a suggested condition to their rezoning application while others might reject it outright. As the court cases involving proffers have shown just because a property owner does not proffer all of the conditions that a local government may think is appropriate that is not grounds to deny a rezoning.
CONCLUSION

The conclusion might be drawn that the lack of a clear political outcome on SB 768 such as passage/enactment or outright failure in 2008 was a signal that the influence of the development community had waned. I would argue instead that local governments finally effectively harnessed their influence combined with the assistance of new agents in the form of environmental and smart growth interest groups. The development industry could have had Watkins kill the bill after the grantors tax section was removed, but they continued to fight for the bill. After being left out of the drafting of the bill, local governments earned themselves a seat at the negotiating table for future versions. Without a resolution to the issues raised by SB 768, legislative activity related to conditional zoning will return to efforts by the development community to make the statutes more restrictive in applicability and increase the level of standardization and oversight. Given the downturn of the housing market and the economy that occurred towards the end of 2008, concerns over growth management may have disappeared, but the question of how to fund infrastructure needs remains. Further, Dillon’s Rule will require local governments still to seek out authority from the state legislature for tools to deal with this new economic environment.

Now that the conditional zoning’s legislative history has been laid out, the next two chapters will delve into what its authorization has really meant for local governments. First, I will attempt to understand why all of the counties eligible to accept cash proffers are not accepting them. Chapter 9 will serve to provide insights into who adopts a conditional zoning ordinance and who does not. Plus, I look at how counties are administering their cash proffer systems in terms of approach and revenue collection. Chapter 10 will attempt to address the concerns raised by the development community that cash proffers have a negative impact on the housing industry. My analysis looks at their effect on the housing supply.
Over the past thirty years, a contentious political fight has been waged over the existence of conditional zoning with cash proffers. Thus it is important to understand who is using this tool and how it is being implemented. Interest groups like the Home Builders Association of Virginia (HBVA) have repeatedly raised concerns about the lack of standardization in local cash proffer authority implementation. In reality, not all of the eligible localities have taken even the step of amending their zoning ordinance, yet alone, actually collecting cash proffer revenues. With this setting in mind, this chapter has two aims. First, I seek to understand why there is a lack of cash proffer acceptance and whether there is something distinctive about cash proffer accepting localities that explains this occurrence. Second, I look at the implementation practices among the cash proffer accepting localities to see if variation exists and to what extent. The dimensions examined include administrative approach, rezoning activity, revenue collection, and expenditure purpose. I attempt to answer these questions by shifting the focus in this chapter to the actual use of cash proffers at the local level rather than the debate between interest groups at the state level. I rely upon local level data from two main sources—survey results and government reports.

Regardless of whether a locality has actually collected cash proffer revenues, one would expect to have all eligible localities at least have taken the step of amending their ordinance to allow for the acceptance of cash proffers. Early adoption of the zoning amendment would indicate foresight in being prepared for future development activity. The lack of adoption may stem from perceptions of high administrative costs. Either way, I would expect the level of growth pressure that a locality is under to be correlated with its decision to take the steps to accept cash proffers. These expectations will be tested through the use of different measures of development activity and administrative costs.

In regard to implementation, I do not have a set of priors to guide this descriptive analysis. Localities are free to design their own administrative systems. State monitoring exists only in terms of revenue and expenditure reporting. Further, Virginia is the only state that uses cash proffers so I cannot look at administrative models in other states. Finally, the revenue amounts and funded projects are subject to a locality’s approved rezoning applications. Thus these can be as varied as the development activity in a locality itself. Implementation will be explored through the different elements of a cash proffer system from the amount proffered per building permit to the purpose upon which the collected revenues are spent.
METHODOLOGY AND DATA COLLECTION

This chapter’s descriptive analysis is based on the use of survey data as well as annual fiscal year reports that the state legislature requires all local governments to submit to the Commission on Local Government (CLG). Counties are the unit of analysis. Cities, counties, and towns are authorized to use conditional zoning and accept cash proffers. I have narrowed the analysis to counties because their large land area presents developers with a choice of developing in greenfields (fringe) or brownfields (infill). This dichotomy in land selection is at the heart of growth management efforts which seek to redirect development away from the fringe. There are ninety-five counties in Virginia of which eighty-eight have been enabled (i.e. eligible) to accept cash proffers as of the fiscal year 2008.

For my acceptance and administration analysis, I rely on the results from a survey that I conducted during the summer of 2008. While I will illustrate the survey findings with examples from various counties, this chapter does not go into detail on the specific implementation policies of every county that has accepted cash proffers. A survey of counties was necessary because CLG only collects information on cash proffer revenue collections and expenditures. While their data has become more detailed over time, their focus is solely on monies and their monitoring did not begin until fiscal year 2000. My research did not reveal the existence of any comprehensive source of information on the history and practices of counties across the state in regard to cash proffers. This absence necessitated my conducting a statewide survey. I developed two surveys. A county’s eligibility status to accept cash proffers determined which version they were asked to complete. The seven counties who were not eligible as of 2006-07 Fiscal Year to accept cash proffers received one version of the survey which sought to determine whether they would be interested in accepting cash proffers if eligible. The remaining eighty-eight counties were given a version of the survey designed to distinguish those eligible counties who had adopted cash proffers from those that did not.

Before the survey was put out into the field, the questions were pre-tested by a retired Planning Director, the former head of one county’s cash proffer program, and a representative from the Virginia Association of Counties who had previously supervised the state’s involvement in cash proffers through the Local Government Committee. The survey was conducted through both Internet and the mail. A survey was mailed to the respective head of the Planning, Zoning, or Community Development departments of each county. If none of these departments existed in the county, then the survey was sent to the attention of the county administrator. Each survey was accompanied by a cover letter which gave a website address where the survey could be accessed and completed online. The surveys were sent out in early May 2008 with a return date of mid-June. Counties had roughly six weeks to fill-out the survey. Individual email reminders were sent out to respondents. For those non-respondents, follow-ups were conducted in person, over the phone, and via email. In total, there were ninety counties that officially submitted a
survey questionnaire either by mail, email, or online. The discussion that follows will only focus on a select number of the questions from either survey. Both survey instruments can be found in the Appendix.

While my survey response rate was over ninety percent, the quality of these responses was quite varied. Some counties answered every applicable question completely while others only filled-out a select few. A major issue for respondents was the time span of the survey. Eligibility for cash proffer acceptance began as early as 1973, so certain localities were required to look far back into their archival records. This was a task easier for certain counties. The time and cost involved in searches for dates, dollar values, permit numbers, and housing unit totals by local government officials meant that these questions were the most likely to go unanswered. Further, how researchers conceive of data being reported is not always how local governments, themselves, collect the data. The quantitative data questions were designed to ask for things which I believed were readily available, but the quality of answers suggests that this was not the case. Perhaps, the information may have been more easily obtained through site visits to each county, but given time and financial constraints, this method was not used. Of course, there was no guarantee that the information could be gathered completely in one visit to each county. While some respondents did admit that their lack of answers to certain questions stemmed from their newness to the particular county, for the most part, the surveys were completed by individuals who were in the best position to answer them. The position for the majority of respondents was a county’s Planning Director or Director of Planning. Other positions reported by respondents included Zoning Administrator, County Administrator, Assistant County Administrator, Proffer Administrator, Senior Planner, Principal Planner, Community Development Director, Assistant Director of Budget and Management, and Finance Director.

Out of the ninety-five surveys, there were five counties that declined to participate for various reasons. These non-respondents were not concentrated in one part of the state, so there does not appear to be any geographic bias to the survey’s results. All of these counties were enabled to accept cash proffers through conditional zoning. Franklin and Rockingham counties became eligible immediately with the 1989 legislation. Buckingham, Grayson, and Northumberland counties achieved eligibility in 2001 when decennial population changes between 1990 and 2000 were calculated. Since the Commission on Local Government began tracking cash proffer revenues and expenditures, only one of the five counties, Rockingham, reported any cash proffer-related activity. Rockingham, however, has not yet officially collected any cash proffer revenue nor expended any because its reported activity falls in the category of “Total Pledged But Payment Conditioned Only On Time” for both the 2007 and 2008 Fiscal Years. While these counties declined to answer the full survey, they did answer via email key questions on the existence of cash proffer activity in the respective counties. Using the county websites, I tried to answer the remaining survey questions.
For my analysis of usage, I focus on the dollar amount and frequency of cash proffer revenues collected by or pledged to counties. The sources of my data are the CLG reports on cash proffer revenue collections and expenditures. CLG sends a survey annually to the chief administrative officer of each locality that is required by state law to report its acceptance of cash proffers asking for information in regard to the prior fiscal year’s activity. CLG works to ensure that they have a final combined jurisdictional response rate of 100 percent. The final report is required to be sent to the Chairmen of the Senate Committee on Local Government and the House Committee on Counties, Cities and Towns by November 30th each year. The time period of my analysis is from fiscal years 1999-00 to 2007-08. I look at the general pattern of usage across all eligible counties in the state.

WHO IS ACCEPTING CASH PROFFERS

The majority of counties in the state do not accept cash proffers. Based on 2008 survey results, thirty-seven out of Virginia’s ninety-five (38.9 percent) responded that they had amended their zoning ordinance to allow for the acceptance of voluntary cash proffers under Virginia State Code (§15.2-2303, §15.2-2298, or §15.2-2303.1). This represents approximately 42 percent of counties who were eligible as of 2007 Fiscal Year to accept cash proffers.

Socioeconomic Measures

On the surface, accepting counties appear to be distinctly different from non-accepting counties along several socioeconomic and land use measures. As shown in Table 9.1 below, “Accepting” counties exceed “Non-Accepting” counties for every feature except for the proportion of a county’s land acreage that is dedicated to farming. This would lead one to conclude that accepting counties are wealthier, built more densely, have larger populations, less farmland, and higher decennial growth rates. Not all of the numerical differences in the means for the variables shown in Table 9.1, however, are statistically significant. Based on results from difference of means t-tests between the two groups, I fail to reject the null hypothesis of no difference at a confidence level of 95 percent for 1997 Proportion of Land Area (Acres) in Farms.49 So the difference between “Non-Accepting” and “Accepting” counties in terms of their 1997 proportion of farm land is not statistically significant. I would add, however, that several “Non-Accepting” counties in their survey responses brought up the rural and agricultural nature of their localities and that it was not an acceptable practice for this type of development. The test results were

48 Originally, all localities were required to report their activity but state statute was amended in 2003 so that localities with a resident population of less than 3,500 are exempt from reporting.

49 For 1997 Proportion of Land Area (Acres) in Farms, the t-statistic 1.6605 for a test with equal variances and 1.6340 for unequal variances.
mixed for the 2000 Total Population measure. When the means t-test is conducted under the assumption of equal variances, there is a statistically significant difference between the two county types for this indicator at a confidence level of 95 percent. With an assumption of unequal variances, the difference in the means is not statistically significant at the 95 percent level.

---

50 For 2000 Total Population, the t-statistic was -2.0255 for a test with equal variances and -1.9423 for unequal variances.
### Table 9.1 Socioeconomic Measure Comparison between Counties by Cash Proffer Acceptance Status

<table>
<thead>
<tr>
<th></th>
<th>Accepting (n=37)</th>
<th>Non-Accepting (n=41)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1980-1990 Percentage Change in Population (%)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average</td>
<td>21.17</td>
<td>2.08 ***</td>
</tr>
<tr>
<td>Standard Deviation</td>
<td>0.18</td>
<td>0.10</td>
</tr>
<tr>
<td>Minimum</td>
<td>-6.31</td>
<td>-20.85</td>
</tr>
<tr>
<td>Maximum</td>
<td>66.70</td>
<td>30.72</td>
</tr>
<tr>
<td><strong>1990-2000 Percentage Change in Population (%)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average</td>
<td>22.46</td>
<td>13.36 **</td>
</tr>
<tr>
<td>Standard Deviation</td>
<td>0.13</td>
<td>0.11</td>
</tr>
<tr>
<td>Minimum</td>
<td>0.39</td>
<td>-1.9</td>
</tr>
<tr>
<td>Maximum</td>
<td>57.47</td>
<td>61.29</td>
</tr>
<tr>
<td><strong>2000 Total Population</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average</td>
<td>50,972</td>
<td>27,739</td>
</tr>
<tr>
<td>Standard Deviation</td>
<td>69,482</td>
<td>22,731</td>
</tr>
<tr>
<td>Minimum</td>
<td>6,630</td>
<td>5,048</td>
</tr>
<tr>
<td>Maximum</td>
<td>280,813</td>
<td>85,778</td>
</tr>
<tr>
<td><strong>2000 Median Household Income ($)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average</td>
<td>48,315</td>
<td>36,590 ***</td>
</tr>
<tr>
<td>Standard Deviation</td>
<td>10,197</td>
<td>5,859</td>
</tr>
<tr>
<td>Minimum</td>
<td>31,110</td>
<td>28,405</td>
</tr>
<tr>
<td>Maximum</td>
<td>68,819</td>
<td>51,055</td>
</tr>
<tr>
<td><strong>2000 Housing Density (Housing Units per Square Mile)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average</td>
<td>68.52</td>
<td>28.87 *</td>
</tr>
<tr>
<td>Standard Deviation</td>
<td>92.63</td>
<td>24.55</td>
</tr>
<tr>
<td>Minimum</td>
<td>9.48</td>
<td>5.45</td>
</tr>
<tr>
<td>Maximum</td>
<td>472.86</td>
<td>143.98</td>
</tr>
<tr>
<td><strong>1997 Proportion of Land Area (Acres) in Farms</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average</td>
<td>28.96</td>
<td>33.46</td>
</tr>
<tr>
<td>Standard Deviation</td>
<td>13.80</td>
<td>10.02</td>
</tr>
<tr>
<td>Minimum</td>
<td>2.90</td>
<td>10.90</td>
</tr>
<tr>
<td>Maximum</td>
<td>63.20</td>
<td>49.40</td>
</tr>
</tbody>
</table>

*Key: *p<0.10; **p<0.05; ***p<0.01; ****p<0.001
Source: Author's calculations based on Survey Results and U.S. Census Bureau data.
**Building Activity**

There are greater levels of building activity in accepting counties compared to other counties. While cash proffers are only applicable in cases involving a rezoning, building permits may be a proxy for the level of development pressure that a county is facing. Heightened development pressure may lead a county to accept cash proffers to assist in the costs of proving public services to the new development. For each fiscal year in Figure 9.1, the average number of single-family building permits in “Accepting” counties is at least double the level of activity in “Non-Accepting” counties. With an assumption of unequal variances, the t-test results on the difference of means between the two groups were statistically significant at the 95 percent confidence level for every fiscal year. Residential development regardless of whether it stems from a rezoning is higher in the “Accepting” counties. Several “Non-Accepting” counties in their survey responses justified their lack of adoption of a cash proffer acceptance amendment because there was very limited growth activity to support its use.

![Figure 9.1 Average Single-Family Building Permits by Acceptance Status, FY99-FY07](image)

Source: Author’s calculations based on Survey Results and U.S. Census Bureau data.

---

51 Under the assumption of equal variances, the t-test results were not statistically significant at the 95 percent confidence level for any fiscal year. At the 90 percent level, every fiscal year except for 1999-00 does show a statistically significant difference in the means between the two groups.
**Geography**

Geographic location distinguishes “Accepting” counties from all other counties. As seen in Map 9.1, the thirty-seven “Accepting” counties shown in purple are concentrated in the eastern half of the state. “Accepting” counties form a geographic block that flows along the majority of the eastern half of the state from the border with Washington, D.C. and Maryland to the North Carolina border. While Arlington, Fairfax, and Loudoun Counties are shaded in green at the top of the map based on their missing survey responses, they do accept cash proffers according to CLG’s reports. There are a few “Non-Accepting” counties in the eastern half of the state, but the bulk of these counties are in the western half of the state. By default, the eligible counties that lack a zoning ordinance (i.e. counties shaded brown on the map) could be considered “Non-Accepting” since you need to have a zoning ordinance in order to accept cash proffers. Based on their survey responses, some “Non-Accepting” counties look towards the actions of their neighboring counties to determine whether they should accept cash proffers. In the words of one county, “No localities in our area accept them; they are viewed as more trouble than they are worth in many cases.”

*Map 9.1 Counties by Eligibility Status and Acceptance Status According to Survey Question 11*
Eligibility Timing

Currently “Accepting” counties typically became eligible to accept cash proffers under state law at earlier points in time. Figure 9.2 below shows the majority of “Accepting” counties achieving eligibility in 1989 compared to 2001 for “Non-Accepting” counties. Lack of acceptance for the majority of “Non-Accepting” counties could be explained by their later arrival to eligibility. Further, a large number of these counties achieved eligibility either through lower growth rate standards or based on their geographic proximity to more rapidly growing localities. Table 9.2 displays the count of responding counties for each eligibility reason according to reports from CLG by acceptance category. The counts for prior to the 2000 Census reinforce the information depicted in Map 9.2 that more than half of the “Non-Accepting” counties achieved their eligibility after the 2000 Census results were released. Second, more “Non-Accepting” counties owe their eligibility to geographic proximity than “Accepting” counties. Third, it is only through a relaxation of the required growth level in 2006 that allowed there to be more high-growth “Non-Accepting” than “Accepting” counties. For the most part, this was a switch of counties being eligible through geographic proximity to decennial population growth rate. Thus the “Accepting” counties are likely high-growth counties as compared to “Non-Accepting” counties.

Figure 9.2 Survey Respondents by Acceptance Level and Eligibility Year

Source: Author’s calculations based on Survey Results and state statutes.
### Table 9.2 Reason for Cash Proffer Acceptance Eligibility by Cash Proffer Acceptance Status

<table>
<thead>
<tr>
<th>Reason for Cash Proffer Acceptance Eligibility</th>
<th>Accepting Counties (n=37)</th>
<th>Non-Accepting Counties (n=41)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Prior to 2000 Census</td>
<td></td>
<td></td>
</tr>
<tr>
<td>High Growth (10%) – 1980 to 1990</td>
<td>26</td>
<td>70%</td>
</tr>
<tr>
<td>Contiguous to three High Growth Locality</td>
<td>3</td>
<td>8%</td>
</tr>
<tr>
<td>County East of Chesapeake Bay</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Urban County Executive (UCE) Form of Government</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>County Contiguous to UCE Locality</td>
<td>1</td>
<td>3%</td>
</tr>
<tr>
<td>Ineligible</td>
<td>7</td>
<td>19%</td>
</tr>
<tr>
<td>Post 2000 Census</td>
<td></td>
<td></td>
</tr>
<tr>
<td>High Growth (10%) – 1990 to 2000</td>
<td>31</td>
<td>84%</td>
</tr>
<tr>
<td>Contiguous to three High Growth Locality</td>
<td>5</td>
<td>14%</td>
</tr>
<tr>
<td>County East of Chesapeake Bay</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Urban County Executive (UCE) Form of Government</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>County Contiguous to UCE Locality</td>
<td>1</td>
<td>3%</td>
</tr>
<tr>
<td>Ineligible</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Post 2006 Statutory Change</td>
<td></td>
<td></td>
</tr>
<tr>
<td>High Growth (5%) – 1990 to 2000</td>
<td>33</td>
<td>89%</td>
</tr>
<tr>
<td>Contiguous to three High Growth Locality</td>
<td>3</td>
<td>8%</td>
</tr>
<tr>
<td>County East of Chesapeake Bay</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Urban County Executive (UCE) Form of Government</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>County Contiguous to UCE Locality</td>
<td>1</td>
<td>3%</td>
</tr>
<tr>
<td>Ineligible</td>
<td>0</td>
<td>0%</td>
</tr>
</tbody>
</table>

Source: Author’s calculations based on CLG Reports and Survey Results.

### Readiness

Acceptance readiness is not a barrier preventing counties from taking the step of accepting cash proffers. My key measures of readiness are whether a county has in place the administrative regulations required by state statutes, as well as, experience with general conditional zoning. Eligible counties must have adopted a zoning ordinance, comprehensive plan, and capital improvement plan before they can accept cash proffers. Based on survey results, the majority of the “Non-Accepting” counties are “ready” by these measures to accept cash proffers. All of them have a zoning ordinance while only one county lacks a comprehensive plan. Just under half have adopted a capital improvement plan. Further, more than half of “Non-Accepting” counties have allowed for general conditional zoning in their zoning ordinances. Of these counties, the majority have dealt with conditional zoning in at least ½ or more of their rezoning applications. The “Non-Accepting” counties have a greater level of experience with general conditional zoning than you would expect given their lack of accepting cash proffers. Outside of amending the zoning ordinance to allow for the acceptance of cash proffers, less than half (49 percent) of “Non-Accepting” counties have to complete at least one other step before being able to accept cash proffers.
"Accepting" and "Non-Accepting" counties share similar perceptions of cash proffers and other growth management tools. Contrary to expectations, both groups of counties were almost split fifty-fifty on their answers to the question of "Does your county view voluntary cash proffers as a growth management tool?" Within the "Accepting" counties, there were seventeen "YES"s and sixteen "NO"s compared to fifteen and fourteen, respectively, for the "Non-Accepting" counties. In terms of other growth management tools, the majority of counties in both groups sought the authority for impact fees.52 "Non-Accepting" counties saw impact fees as more beneficial for two reasons. First, impact fees can be assessed on by-right development unlike cash proffers which are tied solely to rezonings. Second, they are flexible so that counties could charge different rates depending upon where development is located within its borders. While "Accepting" counties would like to have the additional power of impact fees, they did not want to lose their existing right to collect cash proffers. There was also shared interest regardless of acceptance status in taking advantage of tools already enabled by the state such as Transferable Development Rights (TDRs) and Purchase Development Rights (PDRs). The failure by "Non-Accepting" counties to amend their zoning ordinances to allow for the acceptance of cash proffers was clearly not done as a sign of distrust in land use tools given their appeals for the use of other land use tools. These "Non-Accepting" counties would rather pass on cash proffers and wait for a more optimal land use tool to address their perceived needs.

A county’s decision to take the necessary steps to accept cash proffers is function of growth. To deal with the ramifications of an increasing population, "Accepting" counties have responded by amending their zoning ordinance to allow for the collection of cash proffers through conditional zoning. While the process to accept cash proffers is not onerous, "Non-Accepting" counties appear to prefer to wait until they have enough growth to justify taking action. The influence of growth is seen in how "Accepting" counties are wealthier and denser than "Non-Accepting" counties. There are growth differences between the two county types in terms of population and residential construction. "Accepting" counties are higher for both measures. "Accepting" counties are spatially concentrated in the "Golden Crescent" region of the state. This area has become the driving force behind the state’s economy.

Now that we know more about who is accepting cash proffers, I turn next to examining how counties are administering their cash proffer programs and what the revenues are spent on. Cash proffers are generated solely by approved rezoning applications and rezoning activity happens with uncertain frequency. Thus an understanding of how counties administer and use cash proffers is an important step in any analysis of whether the acceptance of cash proffers impacts the rate of development/growth in an area.

52 Impact fees are the most popular form of exactions and represent the cash payment element of the exaction family. Localities use them to fund new or expanded public facilities and services that directly arise from new development.
HOW CASH PROFFERS ARE ADMINISTERED

There are two major approaches to how cash proffers are administered across the state. The first is the “Case-by-Case” approach whereby every rezoning applicant can proffer whatever amount they would like to the county on an individual basis. For example, some could proffer $1,000 per housing unit while another is at $5,000. In addition, an applicant could proffer a lump sum amount, for example, one million dollars for the entire rezoning. Either a portion or the full proffered amount is payable to the county whenever the developer applies for any building permits tied to the approved rezoning during the course of the construction. So if the cash proffer amount was approved at $2,500 per housing unit and the developer applies for ten building permits at one time, then they must pay the county $25,000 at that point in time. Based on the survey results, thirteen out of the thirty-seven accepting counties (35 percent) follow a pure “Case-by-Case” approach. The second approach is what is called “Policy-Based”. With this approach, the administration of a county’s cash proffer program is more like an impact fee program whereby the county sets up guidelines on what it is looking for in the typical cash proffer amount. Chapter 7 described Chesterfield County’s path toward the development of a “Policy-Based” approach. Twenty-four counties identified their cash proffer program as a “Policy-Based” approach.

Revenue Generation

At first glance, a “Policy-Based” approach appears to generate on average more cash proffer revenue per housing unit than a “Case-by-Case” approach. For fourteen out of the seventeen years shown in Table 9.3, the average cash proffer amount for the “Policy-Based” approach exceeded that of the “Case-by-Case” approach. It would have most likely exceeded it in the other years as well except for several outlier amounts in the “Case-by-Case” counties. This shows the greater level of revenue variability with the “Case-by-Case” approach. However, for those years where there were enough observations in each group to conduct a t-test on the difference in means, none of the results showed any statistical significance at the 95 percent confidence level. The lack of a true statistical difference in revenue generation between them raises a question about the level of discretion in each approach. Inherently, I would argue each approach has the same amount because cash proffers are statutorily a voluntary offering by the rezoning applicant. So they are allowed to offer whatever amount they choose to and the locality cannot base their rezoning approval decision on that dollar figure. The advantage to the “Policy-Based” approach is that it tells the rezoning applicant how much the locality is looking to receive. Thus they can then evaluate whether to offer the suggested amount or a different amount, typically lower, which may lead to potentially costly negotiations with the locality. These costs could range from work absences, legal fees to development delays.

---

53 The fiscal years with test results are 2000-01 to 2006-07. These results apply to both assumptions about the variances – equal and unequal.
### Table 9.3 Average Cash Proffer Amount by Approach Type for Accepting Counties, FY91-FY07

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Policy-Based Approach</th>
<th>Case-by-Case Approach</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>Average</td>
</tr>
<tr>
<td>1990-91</td>
<td>3</td>
<td>2,400</td>
</tr>
<tr>
<td>1991-92</td>
<td>3</td>
<td>2,263</td>
</tr>
<tr>
<td>1992-93</td>
<td>3</td>
<td>2,040</td>
</tr>
<tr>
<td>1993-94</td>
<td>4</td>
<td>3,793</td>
</tr>
<tr>
<td>1994-95</td>
<td>4</td>
<td>3,801</td>
</tr>
<tr>
<td>1995-96</td>
<td>4</td>
<td>4,322</td>
</tr>
<tr>
<td>1996-97</td>
<td>4</td>
<td>4,415</td>
</tr>
<tr>
<td>1997-98</td>
<td>3</td>
<td>4,411</td>
</tr>
<tr>
<td>1998-99</td>
<td>4</td>
<td>5,300</td>
</tr>
<tr>
<td>1999-00</td>
<td>6</td>
<td>5,962</td>
</tr>
<tr>
<td>2000-01</td>
<td>7</td>
<td>5,532</td>
</tr>
<tr>
<td>2001-02</td>
<td>6</td>
<td>8,154</td>
</tr>
<tr>
<td>2002-03</td>
<td>7</td>
<td>9,240</td>
</tr>
<tr>
<td>2003-04</td>
<td>7</td>
<td>10,178</td>
</tr>
<tr>
<td>2004-05</td>
<td>10</td>
<td>9,379</td>
</tr>
<tr>
<td>2005-06</td>
<td>10</td>
<td>12,331</td>
</tr>
<tr>
<td>2006-07</td>
<td>14</td>
<td>11,720</td>
</tr>
</tbody>
</table>

Source: Author’s calculations based on Survey Results.

### Rezoning Activity

It is possible for a county to have very few rezoning applications (total or approved), but a large number of approved housing units attributable to a single rezoning. Conversely, a county could have a one-to-one ratio between total applications, approvals, and housing units, so that four applications lead to four approvals and four houses. So counties with a “Case-by-Case” approach may have a smaller number of applications and approvals than the “Policy-Based” approach, but a greater volume of approved housing units. However, this is not the case. On the surface, “Policy-Based” approach counties are localities with a greater amount of rezoning activity. One possible explanation is that developers seek out localities that provide them a degree of certainty in the development process. Thus, one might expect that counties who have laid out their guidelines in a “Policy-Based” approach would attract more development. Looking at Table 9.4 below, “Policy-Based” counties exceeded the development activity (total number of rezoning applications; total approved; and total housing units for those applications involving cash proffers) of the “Case-by-Case” counties for each of the years displayed. While there may appear to be differences between the two approaches, there were only three years where the difference was statistically significant at the 95 confidence level with an assumption of unequal variance –
1998-99 (total rezoning applications), 2000-01 (total approved rezoning applications), and 2005-06 (total rezoning applications and total approved rezoning applications).

Table 9.4 Summary of Rezoning Activity involving Cash Proffers by Approach Type for Accepting Counties, FY99-FY07

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Policy-Based Approach</th>
<th></th>
<th>Case-by-Case Approach</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>Average</td>
<td>MIN</td>
<td>MAX</td>
</tr>
<tr>
<td><strong>Total Rezoning Applications</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1998-99</td>
<td>7</td>
<td>1.14</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>1999-00</td>
<td>6</td>
<td>0.83</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>2000-01</td>
<td>6</td>
<td>1.67</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>2001-02</td>
<td>8</td>
<td>1.88</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>2002-03</td>
<td>10</td>
<td>3.60</td>
<td>0</td>
<td>11</td>
</tr>
<tr>
<td>2003-04</td>
<td>11</td>
<td>2.55</td>
<td>0</td>
<td>9</td>
</tr>
<tr>
<td>2004-05</td>
<td>10</td>
<td>2.60</td>
<td>0</td>
<td>12</td>
</tr>
<tr>
<td>2005-06</td>
<td>13</td>
<td>3.15</td>
<td>0</td>
<td>9</td>
</tr>
<tr>
<td>2006-07</td>
<td>13</td>
<td>3.77</td>
<td>0</td>
<td>14</td>
</tr>
<tr>
<td><strong>Total Approved Rezoning Applications</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1998-99</td>
<td>6</td>
<td>1.17</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>1999-00</td>
<td>7</td>
<td>0.86</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>2000-01</td>
<td>8</td>
<td>3.25</td>
<td>0</td>
<td>9</td>
</tr>
<tr>
<td>2001-02</td>
<td>9</td>
<td>4.00</td>
<td>0</td>
<td>18</td>
</tr>
<tr>
<td>2002-03</td>
<td>10</td>
<td>3.70</td>
<td>0</td>
<td>18</td>
</tr>
<tr>
<td>2003-04</td>
<td>11</td>
<td>4.09</td>
<td>0</td>
<td>20</td>
</tr>
<tr>
<td>2004-05</td>
<td>10</td>
<td>6.30</td>
<td>0</td>
<td>35</td>
</tr>
<tr>
<td>2005-06</td>
<td>14</td>
<td>5.07</td>
<td>0</td>
<td>30</td>
</tr>
<tr>
<td>2006-07</td>
<td>12</td>
<td>5.00</td>
<td>0</td>
<td>33</td>
</tr>
<tr>
<td><strong>Total Number of Housing Units Approved</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1998-99</td>
<td>7</td>
<td>658.72</td>
<td>0</td>
<td>4000</td>
</tr>
<tr>
<td>1999-00</td>
<td>7</td>
<td>308.14</td>
<td>0</td>
<td>1,190</td>
</tr>
<tr>
<td>2000-01</td>
<td>7</td>
<td>1,125.14</td>
<td>0</td>
<td>3,330</td>
</tr>
<tr>
<td>2001-02</td>
<td>9</td>
<td>277.78</td>
<td>0</td>
<td>1,883</td>
</tr>
<tr>
<td>2002-03</td>
<td>11</td>
<td>1,021.00</td>
<td>0</td>
<td>6,900</td>
</tr>
<tr>
<td>2003-04</td>
<td>12</td>
<td>598.83</td>
<td>0</td>
<td>5,143</td>
</tr>
<tr>
<td>2004-05</td>
<td>11</td>
<td>520.00</td>
<td>0</td>
<td>3,996</td>
</tr>
<tr>
<td>2005-06</td>
<td>14</td>
<td>416.14</td>
<td>0</td>
<td>3,697</td>
</tr>
<tr>
<td>2006-07</td>
<td>14</td>
<td>617.29</td>
<td>0</td>
<td>6,751</td>
</tr>
</tbody>
</table>

Note: The discrepancies between the number of observations for the two groups results from a lack of complete information by survey respondents.
Source: Author's calculations based on Survey Results.
Bid for More Certainty

Over time, counties have sought to bring more certainty to their administrative approaches. They have moved towards a more “Policy-Based” approach away from the “Case-by-Case” approach. There are also counties who have gone straight to a “Policy-Based” approach. These have typically been more recent adopters, adopting in 2003 or later. Looking at the survey results, we see evidence of this change in approach for counties where the year their zoning ordinance was amended to allow for the acceptance of cash proffers does not match the year their “Policy-Based” approach was adopted.

The switch in approaches could have resulted from a higher level of rezoning activity which necessitated a more formal system to reduce the administrative burden on the county. Another reason may be competition with neighboring localities. If as I discussed earlier, developers are attracted to counties with more certainty and standardization in their approach, then a county may be more likely to adopt a “Policy-Based” approach. This likelihood would increase if the other localities in their region have already adopted a “Policy-Based” approach. The development activity numbers in Table 9.4 provide evidence to support the need for a more standardized approach to cash proffers. At this time, I cannot determine the causal relationship between more certainty in a cash proffer system and the level of rezoning activity. Future research could look into whether more certainty attracts more activity or vice versa.

Rise of the Maximum Cash Proffer Policy

“Maximum cash proffer policy” is the dominant policy taken by those counties who pursue a “Policy-Based” approach. Three-quarters of the “Policy-Based” counties in the survey identified themselves as following a “maximum cash proffer policy.” While the amount of the cash proffer according to state statute is voluntarily determined and offered by the rezoning applicant, counties with a “maximum cash proffer policy” determine an upper bound to these payments usually based on a formula that takes into consideration the public facilities and infrastructure associated with new development like schools, roads, public safety, libraries, etc. Over time, these “maximum cash proffer” amounts have become viewed as the suggested cash proffer amount in a locality. Although some counties have a single amount recommended for all housing types, over fifty percent have differing amounts by housing type. The most common breakdown is to distinguish between single family and multi-family housing with a further a refinement between detached and attached single family. There was no dominant pattern across the counties as to whether the single family amount was more than multi-family or vice-versa. The use of a “maximum cash proffer” is another effort by localities to remove potentially suspect discretion from a cash proffer system. This raises a question of how much flexibility cash proffer systems should have to deal with exceptions. The property tax reform effort in California which culminated in Proposition 13 illustrates the unintended consequences when discretion is reduced.
Revenue Variability

Revenue variability exists even with a defined policy. While some rezoning applicants may perceive the maximum cash proffer amount as the suggested amount, Table 9.5 shows that the actual amount the locality receives which is represented by the “average cash proffer amount” columns is often less than the suggested cash proffer in the “maximum cash proffer amount” columns despite differences in the number of responding counties. Rezoning applicants can always proffer any amount that they want. At the same time, the minimum and maximum values for the maximum cash proffer amount category show a wide difference across counties in these suggested amounts. For example, the 2006-07 Fiscal Year has counties with maximum amounts in the range of roughly $2,000 up to close to $30,000 per housing unit. This may reflect the wide variation in the costs of capital improvement projects across localities.

Each locality has the ability to design the specific methodology behind their maximum amount. When it amended its cash proffer policy in December 2005, Fauquier County, located in the Washington, DC MSA, set a maximum of $28,503 for a single-family detached unit. This amount was based on six types of public facilities that would be affected by an approved rezoning. Schools were the largest component at $21,424 followed by emergency services ($3,003), parks and recreation ($2,260), libraries ($707), landfill ($641), and sheriff ($468). Roads were left as an undetermined amount subject to traffic impact analysis and consistency with the comprehensive plan. Roughly seven months later (July 2006), Goochland County, located in the Richmond, VA MSA, adopted a cash proffer policy amount of $15,803. Like Fauquier, schools are the largest component in their calculation at $10,849. However, Goochland does calculate a dollar value for roads at $3,779. The other components of Goochland’s cash proffer calculation are fire/rescue ($269), libraries ($443), and parks ($463). The different maximum amounts between the counties may be a reflection of differences in their public facilities and services. Goochland with a population of 20,048 in 2006 and a land area of 281.42 square miles is smaller in size than Fauquier (pop: 64,261; land area: 647.45). So even though the same type of public facilities and services are used in the cash proffer calculation, Goochland provides them to fewer people and across a smaller distance. Thus it has a lower maximum amount.

---


Finally, there has also been a clear pattern of increasing values for the maximum values in both categories which reflects the increasing costs of the provision of public infrastructure and facilities.

**Table 9.5 Maximum Cash Proffer Amount v. Average Cash Proffer Amount for Accepting Counties, FY91-FY07**

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Maximum Cash Proffer Amount</th>
<th>Average Cash Proffer Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>N</td>
<td>Average</td>
<td>MIN</td>
</tr>
<tr>
<td>1990-91</td>
<td>2</td>
<td>1,939</td>
</tr>
<tr>
<td>1991-92</td>
<td>2</td>
<td>2,493</td>
</tr>
<tr>
<td>1992-93</td>
<td>2</td>
<td>3,035</td>
</tr>
<tr>
<td>1993-94</td>
<td>3</td>
<td>4,655</td>
</tr>
<tr>
<td>1994-95</td>
<td>3</td>
<td>4,732</td>
</tr>
<tr>
<td>1995-96</td>
<td>3</td>
<td>4,812</td>
</tr>
<tr>
<td>1996-97</td>
<td>3</td>
<td>5,115</td>
</tr>
<tr>
<td>1997-98</td>
<td>3</td>
<td>5,533</td>
</tr>
<tr>
<td>1998-99</td>
<td>3</td>
<td>5,800</td>
</tr>
<tr>
<td>1999-00</td>
<td>3</td>
<td>5,971</td>
</tr>
<tr>
<td>2000-01</td>
<td>4</td>
<td>5,273</td>
</tr>
<tr>
<td>2001-02</td>
<td>5</td>
<td>5,060</td>
</tr>
<tr>
<td>2002-03</td>
<td>7</td>
<td>7,831</td>
</tr>
<tr>
<td>2003-04</td>
<td>8</td>
<td>8,044</td>
</tr>
<tr>
<td>2004-05</td>
<td>10</td>
<td>8,948</td>
</tr>
<tr>
<td>2005-06</td>
<td>10</td>
<td>12,333</td>
</tr>
<tr>
<td>2006-07</td>
<td>14</td>
<td>11,928</td>
</tr>
</tbody>
</table>

Source: Author’s calculations based on Survey Results.

**HOW CASH PROFFERS ARE USED**

Great variation exists in the number of counties who report annual cash proffer revenues to the state as well as their reported collected revenues. Since the first year of reporting in 1999-00, the count has fluctuated from a low of fifteen (1999-00) to a high of 31 (2006-07) as seen in Table 9.6 below. There have only been fifteen counties in the state that have reported cash proffer revenue collections to CLG for each year of its reporting to the General Assembly as of the
2007-08 Fiscal Year. These fifteen counties were all eligible to accept cash proffer under the 1989 or earlier conditional zoning statutes. The average population growth in this group for 1980 to 1990 and 1990 to 2000 was 33 percent. In comparison, the state’s county population growth average was 9.34 percent and 16.41 percent from 1980 to 1990 and 1990 to 2000, respectively. These fifteen counties were driving population growth in the state.

There are large differences among the counties in their collected revenue dollar amounts from the thousands to tens of millions. For example, Warren County collected $3,600 in cash proffers for the 2001-02 Fiscal Year compared to over $8.6 million in Loudoun County. Across all counties that have collected cash proffer revenues, the average amount of revenue generated has stayed within the range of $1.4 million to $3.1 million.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>N</th>
<th>Percent of Eligible Counties (%)</th>
<th>Average</th>
<th>Minimum</th>
<th>Maximum</th>
<th>Std Dev</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999-00</td>
<td>15</td>
<td>32</td>
<td>1,415,182</td>
<td>10,000</td>
<td>8,329,776</td>
<td>2,448,131</td>
</tr>
<tr>
<td>2000-01</td>
<td>17</td>
<td>36</td>
<td>1,532,590</td>
<td>3,000</td>
<td>9,155,774</td>
<td>2,753,142</td>
</tr>
<tr>
<td>2001-02</td>
<td>19</td>
<td>23</td>
<td>1,501,654</td>
<td>3,600</td>
<td>8,753,717</td>
<td>2,778,103</td>
</tr>
<tr>
<td>2002-03</td>
<td>20</td>
<td>25</td>
<td>1,796,574</td>
<td>3,500</td>
<td>10,396,500</td>
<td>3,180,956</td>
</tr>
<tr>
<td>2003-04</td>
<td>21</td>
<td>26</td>
<td>2,271,482</td>
<td>4,919</td>
<td>15,430,408</td>
<td>4,274,470</td>
</tr>
<tr>
<td>2004-05</td>
<td>22</td>
<td>27</td>
<td>3,085,036</td>
<td>14,900</td>
<td>23,135,471</td>
<td>6,162,346</td>
</tr>
<tr>
<td>2005-06</td>
<td>24</td>
<td>30</td>
<td>2,689,514</td>
<td>3,000</td>
<td>25,170,900</td>
<td>5,759,864</td>
</tr>
<tr>
<td>2006-07</td>
<td>31</td>
<td>35</td>
<td>1,807,119</td>
<td>3,907</td>
<td>18,930,554</td>
<td>4,248,073</td>
</tr>
<tr>
<td>2007-08</td>
<td>29</td>
<td>33</td>
<td>1,909,489</td>
<td>1,728</td>
<td>18,157,785</td>
<td>4,471,910</td>
</tr>
</tbody>
</table>

Note: According to CLG Reports, there were forty-seven eligible counties for the 2000 and 2001 Fiscal Years; eighty-one eligible counties for the 2002 through 2006 Fiscal Years; and eighty-eight eligible counties for the 2007 and 2008 Fiscal Years.

Source: Author's calculations based on CLG Reports.

57 The fifteen counties are Albemarle (Charlottesville MSA), Caroline (Richmond MSA), Chesterfield (Richmond MSA), Fairfax (Washington MSA), Fauquier (Washington MSA), Frederick (Winchester MSA), Hanover (Richmond MSA), Isle of Wight (Virginia Beach MSA), King William (Richmond MSA), Loudoun (Washington MSA), New Kent (Richmond MSA), Powhatan (Richmond MSA), Prince William (Washington MSA), Spotsylvania (Washington MSA) and Stafford (Washington MSA).
58 The decennial population growth rates were calculated using "Historic Census Counts for Virginia Localities, 1790-2000" from U.S. Census of Population, 1790-2000 and prepared by Weldon Cooper Center for Public Service.
Geography

Cash proffer revenue collections show a clear geographic concentration. From the top image to the bottom image in Map 9.2, there has been an expansion of cash proffer revenue collection westward and south over the years from the Northern Virginia region that has connected with the Richmond region and started an eastern and southern expansion to the Virginia Beach region.59 The western half of the state has a clear absence of actual cash proffer activity. This geographic concentration reflects a similar pattern to that of the “Accepting” counties discussed earlier. This pattern, however, is not solely due to the counties following the actions of their neighboring localities. The thirty-nine counties color shared purple or green in Map 9.2 were where the overwhelming majority of residential construction from 1999 to 2008 took place in the state. Together, these counties made up at least 72 percent of the state’s single family building permits each year over these ten years.60 Localities cannot collect cash proffer revenues without building activity.

59 There are counties on Map 9.2 who show up as cash proffer revenue collectors, but identified themselves through my survey results as “Non-Accepting” counties, so they show up on earlier maps as “Non-Accepting.” This is the case for three counties. One of these counties reported only pledged amounts rather than actual revenue collection. Additionally, Map 9.1 shows three counties that were labeled as “Zoning, Missing Answer” on earlier maps because they failed to answer the accepting/non-accepting question. Two of these counties have actually received cash proffer revenues while the other county reported only pledged amount activity.

Payment Timing

Timing represents an additional source of variability to the true revenue generating capacity of cash proffers. The issue of time manifests itself when you compare "total collected cash proffer revenue" versus "total pledged but payment conditioned only on time." For example, Albemarle County's collected cash proffers were $262,743 in the 2007-08 Fiscal Year compared to a
pledged amount of $44,169,723. Localities have no guarantee that they will receive the entire pledged amount or even an indication of how much they will receive each year because payment is tied to the issuance of building permits which are largely determined by conditions in the housing market. In their 2001-02 report, CLG did ask counties to report how much of that year’s pledged amount was actually not collected that same year.61 Hanover County reported approximately $3.3 million in pledged cash proffers of which roughly $1.3 million was collected (40 percent). In comparison, Spotsylvania had $73,741 pledged in cash proffers and did not collect any of this amount that year.

For many counties, the pledged amount far exceeds the collected amount in a given fiscal year. For example, Prince William County had a pledged amount of $29.2 million in 2000-01 with roughly $5.2 million in collected revenues but then in 2004-05, its collected revenues increased to slightly over $23.1 million. Unless, those actualized revenues were associated with different rezoning approvals, a county could see a four year delay in the receipt of revenues as in the case with Prince William or even longer as with Goochland where its 2001-02 conditioned payments were still not fully collected as of 2007-08. As a result, some counties still have large dollar values of pledged payments in the pipeline. Table 9.7 shows the imbalance that exists in counties between their cumulative pledged and collected amounts. As of the 2007-08 report, Gloucester County has built up roughly $6.4 million in pledged cash proffers while it has actually only collected $19,000 in cash proffer revenues. However, it is not possible to determine from the CLG data whether that $19,000 was actually part of any pledged amount. Counties like Chesterfield and Frederick in the minority among cash proffer accepting counties because according to the CLG reports, they have never had any pledged revenues. The pledged amounts only reinforce the image of cash proffers as a variable and hence unreliable source of revenue.

---

61 The 2001-02 Fiscal Year report was the only year that CLG asked counties to report how much of the total amount of cash proffers pledged in FY2001-02 and whose payment was conditioned only on time was not collected in FY2001-02. This question was most likely not asked in subsequent reports because of the number of counties who did not answer the question correctly. For example, King William reported $663,600 in pledged amounts but that zero dollars were not collected in 2001-02. However, their reported collected cash proffer revenue was only $38,654 for the year.
Table 9.7 Cumulative Pledged, Collected, and Expended Cash Proffer Revenue Amounts by County, FY99-00 to FY07-08

<table>
<thead>
<tr>
<th>County</th>
<th>Total Pledged But Payment Conditioned Only on Time</th>
<th>Total Cash Proffer Revenue Collected</th>
<th>Total Cash Proffer Revenue Expended</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accomack</td>
<td>362,000</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Albemarle</td>
<td>53,106,085</td>
<td>2,557,403</td>
<td>2,672,650</td>
</tr>
<tr>
<td>Amelia</td>
<td>20,860</td>
<td>226,690</td>
<td>-</td>
</tr>
<tr>
<td>Arlington</td>
<td>534,000</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Caroline</td>
<td>335,015</td>
<td>2,640,398</td>
<td>631,408</td>
</tr>
<tr>
<td>Charles City</td>
<td>-</td>
<td>4,919</td>
<td>4,919</td>
</tr>
<tr>
<td>Chesterfield</td>
<td>-</td>
<td>43,986,865</td>
<td>35,768,199</td>
</tr>
<tr>
<td>Clarke</td>
<td>-</td>
<td>45,415</td>
<td>64,000</td>
</tr>
<tr>
<td>Culpeper</td>
<td>7,298,000</td>
<td>1,439,724</td>
<td>-</td>
</tr>
<tr>
<td>Dinwiddie</td>
<td>962,559</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Fairfax</td>
<td>53,087,448</td>
<td>58,084,649</td>
<td>50,886,226</td>
</tr>
<tr>
<td>Fauquier</td>
<td>-</td>
<td>2,471,217</td>
<td>279,571</td>
</tr>
<tr>
<td>Fluvanna</td>
<td>116,000</td>
<td>33,000</td>
<td>-</td>
</tr>
<tr>
<td>Frederick</td>
<td>-</td>
<td>5,273,004</td>
<td>3,130,311</td>
</tr>
<tr>
<td>Gloucester</td>
<td>6,353,000</td>
<td>19,000</td>
<td>-</td>
</tr>
<tr>
<td>Goochland</td>
<td>57,552</td>
<td>1,170,108</td>
<td>375,157</td>
</tr>
<tr>
<td>Greene</td>
<td>3,009,240</td>
<td>253,782</td>
<td>51,282</td>
</tr>
<tr>
<td>Hanover</td>
<td>19,030,913</td>
<td>15,938,451</td>
<td>16,270,575</td>
</tr>
<tr>
<td>Henrico</td>
<td>250,000</td>
<td>250,000</td>
<td>-</td>
</tr>
<tr>
<td>Isle of Wight</td>
<td>693,405</td>
<td>2,943,390</td>
<td>2,542,355</td>
</tr>
<tr>
<td>James City</td>
<td>-</td>
<td>7,503,103</td>
<td>7,503,103</td>
</tr>
<tr>
<td>King &amp; Queen</td>
<td>-</td>
<td>47,698</td>
<td>-</td>
</tr>
<tr>
<td>King George</td>
<td>-</td>
<td>200,000</td>
<td>200,000</td>
</tr>
<tr>
<td>King William</td>
<td>5,776,752</td>
<td>1,064,758</td>
<td>153,722</td>
</tr>
<tr>
<td>Loudoun</td>
<td>3,120,818</td>
<td>108,558,332</td>
<td>52,168,695</td>
</tr>
<tr>
<td>Louisa</td>
<td>1,643,818</td>
<td>98,800</td>
<td>76,080</td>
</tr>
<tr>
<td>Middlesex</td>
<td>-</td>
<td>48,848</td>
<td>-</td>
</tr>
<tr>
<td>New Kent</td>
<td>-</td>
<td>1,474,899</td>
<td>702,785</td>
</tr>
<tr>
<td>Orange</td>
<td>8,878,729</td>
<td>1,055,921</td>
<td>689,266</td>
</tr>
<tr>
<td>Powhatan</td>
<td>628,974</td>
<td>3,679,983</td>
<td>3,877,735</td>
</tr>
<tr>
<td>Prince George</td>
<td>2,616,343</td>
<td>74,808</td>
<td>-</td>
</tr>
<tr>
<td>Prince William</td>
<td>39,363,162</td>
<td>126,636,658</td>
<td>99,583,480</td>
</tr>
<tr>
<td>Rockingham</td>
<td>1,201,700</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Shenandoah</td>
<td>649,327</td>
<td>66,512</td>
<td>-</td>
</tr>
<tr>
<td>Southampton</td>
<td>58,377</td>
<td>5,635</td>
<td>1,728</td>
</tr>
<tr>
<td>Spotsylvania</td>
<td>1,075,076</td>
<td>8,130,603</td>
<td>5,534,807</td>
</tr>
<tr>
<td>Stafford</td>
<td>7,320,991</td>
<td>6,727,166</td>
<td>5,326,993</td>
</tr>
<tr>
<td>Warren</td>
<td>1,861,392</td>
<td>549,078</td>
<td>3,500</td>
</tr>
<tr>
<td>York</td>
<td>300,000</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>219,349,536</td>
<td>403,260,817</td>
<td>288,498,547</td>
</tr>
</tbody>
</table>

Source: Author’s calculations based on CLG Reports.
The fluctuations in a county’s collected cash proffer revenues is the result of its direct tie to rezoning activity. While counties can set suggested cash proffer amount per housing unit (See Table 9.5) at higher and higher levels, cash proffers are still supposed to be offered voluntarily by the rezoning applicant at whatever amount he or she deems appropriate. Further, they are shaped by the capital improvement needs and impacts of the new development which may range from a new turning lane or a new fire truck or new school construction. Table 9.8 shows the total cash proffer revenue collected by year for a selection of counties from across the state. This yearly variability is important to understand for any influence that it may have when it comes to examining whether cash proffer activity has any impact on the level of housing development in a community.
Table 9.8 Total Cash Proffer Revenue Collected by Fiscal Year for a Sample of Counties, Fiscal Year 2000 – 2008

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Ablemarle</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Caroline</td>
<td>5,523,415</td>
<td>6,620,812</td>
<td>4,204,831</td>
<td>6,761,874</td>
<td>7,815,029</td>
<td>5,455,536</td>
<td>8,281,108</td>
<td>7,989,115</td>
<td>5,432,929</td>
</tr>
<tr>
<td>Fairfax</td>
<td>1,403,386</td>
<td>1,801,641</td>
<td>1,330,914</td>
<td>2,234,215</td>
<td>1,933,288</td>
<td>1,809,191</td>
<td>1,809,191</td>
<td>202,500</td>
<td></td>
</tr>
<tr>
<td>Greene</td>
<td>12,208</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hanover</td>
<td>283,600</td>
<td>284,759</td>
<td>41,400</td>
<td>1,189,183</td>
<td>262,743</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Henrico</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>250,000</td>
</tr>
<tr>
<td>Isle of Wight</td>
<td>172,650</td>
<td>179,650</td>
<td>149,500</td>
<td>302,800</td>
<td>255,500</td>
<td>737,974</td>
<td>875,747</td>
<td>185,907</td>
<td>83,662</td>
</tr>
<tr>
<td>King William</td>
<td>19,366</td>
<td>10,000</td>
<td>38,654</td>
<td>50,596</td>
<td>95,568</td>
<td>241,440</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Loudoun</td>
<td>9,155,774</td>
<td>8,623,863</td>
<td>10,396,500</td>
<td>9,937,015</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Louisa</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>13,446,612</td>
<td>15,915,512</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Powhatan</td>
<td>373,115</td>
<td>303,997</td>
<td>334,828</td>
<td>431,564</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prince William</td>
<td>3,059,400</td>
<td>5,180,942</td>
<td>8,817,481</td>
<td>23,135,471</td>
<td>25,170,900</td>
<td>18,930,554</td>
<td>18,157,785</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Spotsylvania</td>
<td>72,430</td>
<td>117,564</td>
<td>801,335</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stafford</td>
<td>394,849</td>
<td>6,000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Warren</td>
<td>3,600</td>
<td>6,000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Author’s calculations based on CLG Reports.
Expenditures

Cash proffer revenues are expended on a timely basis and for a variety of purposes. Out of the thirty-four counties with at least one year of cash proffer revenue collections through 2007-08, nine have yet to spend their collected monies (see Table 9.7). There are instances where all of the revenue collected in a fiscal year is expended that same year, but for the most part, the amount spent in a fiscal year is smaller than the collected revenues. In Table 9.7, only three counties (Charles City, James City, and King George) have managed to spend all of the cash proffer revenues that they have accumulated over the study’s time period.

Schools and transportation-related improvements are typically the top expenditure purposes out of the eleven purposes tracked by CLG. In a fiscal year, a county may have all of its expenditures directed to one purpose. Neighboring counties, Clarke and Frederick, expended $20,000 and $665,701, respectively, all on schools in the 2007 Fiscal Year. The difference in the dollar amounts illustrates how varied the impacts of rezoning may be on a locality. The more typical pattern is a county expending funds across multiple categories in varying amounts. In 2005-06, Chesterfield County spent $3,125,800 (schools); $2,227,714 (roads); $303,500 (public safety); $150,000 (library); and $703,900 (parks) for a total expenditure of $6,510,914. It cannot be determined from the CLG data whether those expenditures were to take care of the impacts of one large project or to address the needs of several different projects.

While the reliability of cash proffers as a source of funding for impacts of residential growth is questionable, the impacts from an approved rezoning cannot be ignored and must be funded in some way. Cash proffers as a source of revenue constitute approximately three percent of Chesterfield County’s FY2008 County CIP and Schools CIP. Without cash proffers, counties like Chesterfield would be forced to turn to other revenue sources like the General Fund which is largely comprised of local tax revenues or financing through debt in the form of bonds. These substitute funding sources would be spreading the burden of paying for the impacts of the rezonings from those who created them to the entire locality.

CONCLUSION

Only traditionally higher growth counties seem to accept cash proffers. “Accepting” counties are wealthier and more populous than “Non-Accepting” counties. They have also seen their population grow faster with more building activity. While there is no statistical difference

---

62 The purposes given as options to the counties for their expenditures are schools; road and other transportation improvements; fire, rescue, and public safety; library; parks, recreation, and open space; water and sewer service extension; community centers; stormwater management; special needs housing; affordable housing; and miscellaneous.
between the counties types in terms of farmland, “Accepting” counties do have a higher housing
density. More “Accepting” counties became eligible earlier than “Non-Accepting” counties to
amend their zoning ordinance to allow for cash proffer collection. “Accepting” counties are
geographically concentrated in the eastern half of the state. The acceptance of cash proffers
would appear to be positively correlated with the pressures of population growth. This pressure
can manifest itself through higher incomes, less farmland, newer housing, geographic spillovers,
and time. Future research may pinpoint what is the exact adoption trigger.

Administrative hurdles do not appear to be high in the “Non-Accepting” counties. There was a
lack of major differences between the groups for measures of readiness and perception. One
potential factor that could not be fully explored through my survey results is the role that local
politics plays in the adoption decision. There does seem to be a general sense among the “Non-
Accepting” counties that amending the zoning ordinance to allow the acceptance of cash proffers
when a county is not undergoing high growth rates would create more problems rather than give
the county an advantage in dealing with possible future land use issues.

There is a trend toward more policy-based approaches with suggested cash proffer amounts in
order to reduce uncertainty in administration. The voluntary nature of the tool does not allow for
the complete elimination of uncertainty. Counties with high levels of development activity have
moved towards the more complex and standardized approach.

The cash flow stream from cash proffers is highly variable. Suggested cash proffer amounts have
increased over the years to better maximize revenues. The disparities in the monies collected and
spent exist despite the geographic concentration of who actually collects them. This variability
gives anti-cash proffer groups more ammunition to use in their fight for the elimination of cash
proffer acceptance authority. An area for future research is whether any of the pledged cash
proffer amounts are ever renegotiated given the long time delays between when they were first
pledged and finally collected.

Over time the number of counties with actual cash proffer activity has increased along with the
amounts of revenue raised, so my analysis of cash proffers cannot be complete without an
examination of their impact on the rate of development/growth in an area. This is the focus of
next chapter.
In this chapter, I tackle the issue of how cash proffers affect housing development. I offer insights to this question through a quantitative analysis of whether cash proffers affect the rate of growth in a locality as measured by single family building permits. Drawing upon the work of Mayer and Somerville (2000a) and Burge and Ihlanfeldt (2006), I use a short panel dataset to see whether the use of cash proffers in the prior year are related to changes in the supply of single family houses in the subsequent year. In other words, is it a tool that hinders or encourages housing development?

An empirical evaluation of the relationship between growth, as measured by single family building permits, and cash proffer activity is complicated. Recall some localities have been eligible to accept cash payments through conditional zoning since 1973 while the majority of Virginia’s localities were not granted the authority until 1989. In addition, there has been a shift in attitude among the development community in regards to cash proffers since the original statutes were authorized and additional statutes enacted through the years which may reflect changes in how the cash proffer system has been implemented over time.

Data collection on cash proffer levels and revenues was historically hindered by the haphazard nature of the tool’s creation. Since conditional zoning was never conceived as a tool for revenue-raising, the early acceptance of cash proffers was not implemented in an organized manner across the state, as one would expect with an impact fee system, for example. In some ways, the lack of clear record-keeping on cash proffer revenues prior to the 2000 fiscal year is a product of the voluntary nature of the tool, itself. Is it possible to standardize something which is supposed to be voluntarily given? If the answer is yes, then it becomes a question of what should be standardized. For example, there is an argument that the conditions, themselves, should be exempt because they are supposed to be unique to each rezoning application. This is part of the inherent difficulties of trying to describe cash proffers and complicates any data analysis of the tool’s effectiveness.

Depending on the circumstances, cash proffers could exert either a positive or negative influence on growth. If they are used as a growth management tool, then they may result in a reduction in growth. Conversely, cash proffers might facilitate growth by generating revenue to pay for the infrastructure needs of that growth. Therefore eligible localities that accept cash proffers could have a negative or positive association between measures of cash proffer activity and single family building permits.

Impact fees are typically assessed on any by-right residential development in a locality. Thus they have a wider based from which to draw revenue as opposed to cash proffers which are restricted to rezonings.
LITERATURE REVIEW

While their placement among growth management tools is debatable, cash proffers are part of the land use regulation family. They are ensured this place because they are one of the conditions acceptable through conditional zoning. From a planner’s perspective, land use regulations are adopted for three major reasons: “maintaining residential property values, shaping a compact urban form, and promoting efficient public service provision” (Carruthers 2002: 396). Land use regulations have far-reaching impacts. For example, the decision to zone part of a community as large-lot residential rather than high-density residential has ramifications on the environment and its natural resources, public infrastructure and services, traffic flow patterns, community demographics, as well as, economic growth. The impacts extend well beyond the borders of that single jurisdiction because labor and capital can be footloose. A potential cost of regulation may be to restrict housing supply and supply elasticity which may translate into higher housing prices and more volatile housing markets (Glaeser, Gyourko, and Saks 2005).

To look at the connection between cash proffers and residential development, there are two relevant bodies of literature – effects of land use regulations on building activity and the determinants of housing supply. Typically, one would examine the prior work done on cash proffers as guidance, but there is a lack of significant research on cash proffers. The one peer-reviewed article on cash proffers is by Raymond E. Owens and Pierre-Daniel G. Sarte (2004), economists at the Federal Reserve Bank in Richmond, Virginia. Owens and Sarte use Loudoun County, VA as their case study for the examination of three responses to the costs of population growth - “zoning, raising the tax rate on real property, and using unrestricted proffers” (Owens and Sarte 2004: 35). Their aim is to see whether any or all of the policies are efficient “in an economic sense” where efficiency is defined in terms of the distribution of individuals across an area and the amount of housing services consumed by a person. The work is grounded in the theory of agglomeration economics.

Owens and Sarte find that if the policies operate in isolation, i.e. community only has one policy in effect, then “[u]sing a simple model of locational choice . . . local officials could best balance population and infrastructure through a lump-sum proffer fee on developers” (49). Changes in real property tax rates can also be effective, but they introduce “distortions into individuals’ consumption decisions,” so that they consume fewer housing services than under a lump-sum proffer fee (Owens and Sarte 2004: 49). The authors acknowledge the role that politics and legal statutes have played in handicapping the effectiveness of new tools like cash proffers. They conclude, “[W]e find that legal and political restrictions on county officials’ use of proffers and real property taxes have led them to the use of zoning in practice . . . [Z]oning remains an inefficient means to address localities’ infrastructure and population issues. A more efficient solution would be to lessen restrictions on localities’ use of proffers and their ability to raise revenue more generally” (Owens and Sarte 2004: 49). Given this gap in the literature and the
efforts made by localities to fashion their cash proffer programs like impact fees, as well as, the legislative proposal to replace cash proffer authority with impact fee authority, the body of empirical literature on impact fees will be used to shape my analysis.

Since impact fees are viewed as a growth management tool, it is important to see whether they have an effect upon the level of growth, i.e. residential development, itself. Skidmore and Peddle use the 29 municipalities in DuPage County, IL to answer the question—do development impact fees reduce the rate of residential development (Skidmore and Peddle 1998)? Skidmore and Peddle (1998) estimate a fixed effects model where residential development rates (number of new homes built in a municipality in a year) are a function of impact fee use, per household municipal revenues, per household property tax revenues, per household sales tax revenues, and average assessed value of property. They also control for regional demand and supply factors. The authors found that over their 16-year time period, impact fees reduced the rate of residential development by more than 25 percent (Skidmore and Peddle 1998). While this study has not been replicated on other municipalities that use impact fees, it does “suggest that the traditional cost-sharing methods of infrastructure finance have led to excessive residential growth rates, and that impact fees only reduce development rates to a more efficient growth path” (Skidmore and Peddle 1998: 394).

Mayer and Somerville (2000a) and Burge and Ihlanfeldt (2006) are the most current pieces of empirical literature out of the impact fee field that are relevant to this dissertation’s research questions. The paper by Mayer and Somerville (2000a) examines the relationship between land use regulation and new housing construction in forty-four metropolitan statistical areas (MSAs) in the United States between 1985 and 1996. Impact fees or “development fees” as the authors refer to them are included as one of the growth management techniques bundled together as an explanatory variable, as well as, by itself as a categorical or dummy variable indicating the use of development fees. The dependent variable is the log of single family permits. The important facet of Mayer and Somerville’s model is the inclusion of housing price changes as an explanatory variable which acknowledges the role that demand has on the supply-side of the market. Additionally, they recognize that the housing market is not a static entity, but one that changes over time, so dynamic effects of the regulations are estimated.

Mayer and Somerville also address the issues of endogeneity that are inherent in dealing with land use regulations and construction. Sometimes it is difficult to determine which came first the change in building permits or the land use regulation or who caused whom, i.e. land use regulations were implemented because of changes in building permits or vice versa. The authors try to correct for any endogeneity issues by using instrumental variables in place of the land use regulation variables in a two-stage regression estimation. Their instrumental variables are “the number of jurisdictions with land use control ..., Reagan’s share of the MSAs 1984 U.S. presidential vote, an index of traffic congestion, MSA 1975 per capita income, the percentage of
adult population with only high school degrees, 1980 population, and whether the state has citizen referendums” (Mayer and Somerville 2000a: 654). With the endogeneity corrections, the authors still find that “the negative effect of regulation on housing starts is not an artifact of endogeneity but of a real impact on builder behavior” (Mayer and Somerville 2000a: 654).

As they predicted, Mayer and Somerville do find that the number of months to receive subdivision approval, number of growth management techniques in use, and the use of development fees have a negative relationship with the construction of new housing. Despite having a negative impact on the supply of new housing, the coefficient on the impact fees dummy variable was not statistically different from zero, so it is not statistically significant and thus cannot reject the hypothesis that impact fees have no affect on building permits. The authors do state that it may be a case of measurement error since they were using a categorical variable which equaled one if cities in the MSA assessed impact fees rather than the amount of the actual fee. One aim of the estimation of the empirical models for this dissertation is to provide further evidence either to support or refute this claim by using the cash proffer levels.

Burge and Ihlanfeldt (2006) build on the work of Skidmore and Peddle (1998) and Mayer and Somerville (2000a) by using the actual amount of the impact fee as the key explanatory variable in their models as opposed to the categorical variable found in the other papers. They focus on the use of impact fees in the counties of Florida over a ten year period (1993-2003), so it is a panel dataset. Although there are sixty-seven counties in Florida, their sample includes only those counties who have ever used impact fees and do not have missing data for other variables which leaves them with forty-one counties. In their model, they also make a distinction between uses that the impact fees will be applied to – sewer/water fees versus non-sewer/water fees which may mean funds going towards schools, funds, etc. Another difference from earlier papers is the use of annual completions rather than building permits as the dependent variable. Completions may be a more accurate measure of housing supply because the number is derived from the property tax rolls of each county which indicates when a house was built while building permits may be filed in one year and the work is finished in the next or never completed. The availability of data can determine which is used in a study. Burge and Ihlanfeldt are also interested in whether the effect of impact fees on new single family houses varies by geographic location (inner suburbs v. outer suburbs) and the size of the house (small, medium, and large) where the size break downs are 600-1500 square feet, 1501-2000 square feet, and 2201-5000 square feet, respectively. Unlike Mayer and Somerville (2000a), housing prices are not an explicit part of the model rather prices are embedded in a construction cost and land cost variables, but these are used as indices for assessing within-area changes for the supply side models.

In terms of results, Burge and Ihlanfeldt find a positive relationship between non-water/sewer impact fees (levels and changes) and the completion of new single family homes in the inner suburb counties while the results are more mixed for the outer suburban counties. The positive
relationship holds for the small and medium sized house types in the inner suburbs while a mix of positive and negative results appear for the large houses in the inner suburbs and across all house sizes in the outer suburbs. The results are mixed regardless of geographic location or housing size for the water/sewer impact fees. For the majority of the models, the regression coefficients on the level of non-water/sewer impact fee variables are statistically significant. Burge and Ihlanfeldt explain their findings by stating, “that impact fees, in addition to increasing the total fees that developer must pay, also increase the demand for housing, reduce project approval costs, and increase the percentage of projects that annually receive approval from local government” (305). They view impact fees as a tool against exclusionary housing policies in suburban areas because “impact fees decrease the fiscal deficit imposed on existing residents by new development, allowing more affordable homes to be built within suburban areas” (305). This paper offers up a new perspective that impact fees do not slow down growth, but reallocate it by shifting families who could only afford a new home on the outer edges of suburbia, i.e. sprawl, back into the inner suburban areas.

Local governments do not operate inside a bubble, so it is important to consider whether spatial interactions play a role in how land use regulations may influence growth. A locality could adopt a certain land use regulation because all of its neighboring localities are adoptees or it could decide to go against the tide and not adopt the regulation. The locality may want to be the receptor for the residential growth that other localities are turning away. The spatial econometrics literature provides a framework for how to handle spatial interactions in the data. Brueckner (1998) uses a spatial error and a spatial lag model to look at whether evidence of policy interdependence exists among cities in California in their adoption of growth control measures. The coefficients from spatial lag model indicate how a responsive a city is to the stringency of the growth controls in nearby localities. Brueckner’s sample consists of 173 cities who were surveyed in 1988 about the types of growth controls that they had in place at the time. A series of city characteristics from 1990 are then used as explanatory variables to understand the growth control decisions over the 1980s. Brueckner uses three different distance weighting schemes (50, 100, and 150 miles) to gauge the influence of neighboring localities. The factors that are positively associated with a city’s decision to adopt controls include population, education and skills level, liberal political stance, and house prices. Density, income, and one-person households are negatively associated with the adoption of controls. While Brueckner finds evidence of strategic interaction, however, he points out that it cannot be determined with his model whether the reason a city’s growth controls looks like its neighbors is because of a strategic decision on the part of city officials.

MODEL

The question examined in this chapter is whether cash proffers influence the development activity in a county. I begin with the framework of the Mayer and Somerville (2000a) model in
which new housing construction, i.e. changes in housing supply, is a function of changes in	house prices, as well as, changes in housing costs, specifically, cost of capital and construction.
Land use regulations are then incorporated as an additional input to this function. So I have:

\[ \Delta HS_{it} = f(\Delta HD_{it}, \Delta HC_{it}, LUREG_{it}) \]

where \( \Delta HS_{it} \) is the supply of new housing, \( \Delta HD_{it} \) is the change in demand for housing, \( \Delta HC_{it} \) is
the change in housing costs, and \( LUREG_{it} \) is any land use regulations in locality \( (i) \) at time \( (t) \)
which is expected to influence the responsiveness of new housing supply to changes in demand.
The time period for housing price and cost changes is a reflection of how far back in time that
you think past economic conditions and the length of the negotiation process for building
approvals and subdivision permitting takes. This means that the measures of housing price and
cost changes could reflect current \( (t) \) as well as past changes \( (t-1) \).

In my models, the new housing supply is represented by building permits per acre \( (b) \); change in
demand for housing is composed of MSA house price changes \( (\Delta HPC_{it}) \) and land use
regulations are replaced by the amount of actual collected cash proffer revenue per building
permit \( (P) \). My basic model also includes an indicator of whether the county is eligible to accept
cash profferers \( (E) \). Eligibility without any cash proffer activity may be enough of a signal to the
development community about how that county will respond to the future development. Change
in housing costs is captured by time fixed effects. The change in the prime rate has been used in
the literature as one of the measures of changes in housing costs. The prime rate is measured at
the national level, so it varies over time, but not by geography. So any national variation will be
absorbed by the dummy variables for each period. Other measures of construction costs like
material indices have been shown to not produce statistically significant or robust coefficients
when included in the models (Mayer and Somerville: 2000a). The basic model conception for
county \( i \) at time \( t \) is:

\[ b_{it} = \beta_0 + \beta_1 \Delta HPC_{it} + \beta_2 P_{it} + \beta_3 E_{it} + \beta_4 Y_2 + \cdots + \beta_{10} Y_8 + \varepsilon_{it} \]

In moving from this basic equation to more specific equations that test whether cash proffers
positively or negatively affect the level of residential development in a locality, there are two
overarching modeling issues that must be addressed: endogeneity and omitted variable bias.
Endogeneity stems from concern over whether variables are mutually determined, i.e. the
chicken-egg issue. More specifically, it is important that all of the explanatory variables are
uncorrelated with the error term. If one or more explanatory variables is not, then these measures
are now endogenous rather than the preferred exogenous. Typically, endogeneity arises from
omitted variables, measurement error, or simultaneity. The major concern with my model is

\[ For \ \text{additional} \ \text{information} \ \text{on} \ \text{the} \ \text{appropriate} \ \text{number} \ \text{of} \ \text{lags}, \ \text{see} \ Mayer, \ Christopher \ J. \ \text{and} \ C. \ \text{Tsuriel} \ \text{Somerville}, \ (2000b), \ "Residential \ Construction: \ Using \ the \ Urban \ Growth \ Model \ to \ Estimate \ Housing \ Supply" \ Journal \ of \ Urban \ Economics, \ 48, \ 85-109. \]
whether the measures of cash proffer activity are truly exogenous. A developer pays the approved rezoning’s cash proffer amounts when they apply to the locality for a building permit. Given the size of the proposed housing development approved through the rezoning, this may mean a developer applies for a single permit or multiple permits in a year which affects the amount of cash proffer revenues collected in a year. So any cash proffer revenues collected in a year are directly linked to that year’s approved building permits. In addition, cash proffer activity in a particular period may actually be determined by the level of development activity in a locality rather than the reverse. The more residential development there is in a county, the more likely government officials may be to decide to adopt a cash proffer policy or increase the suggested cash proffer level in order to help them manage the repercussions of residential growth. This is a case of simultaneity.

My proposed solution to deal with endogeneity resulting from simultaneity is the use of lags on the right-hand side of the model. There is obvious endogeneity between cash proffer revenue collections and single family building permits. Therefore cash proffer activity variable will have a lag of one year \((t - 1)\) from the dependent variable’s time \((t)\). The lag on cash proffer activity puts the focus on a locality’s past cash proffer revenue collections as a proxy for the county’s use of the cash proffer system. The new specification of the model for county \(i\) at time \(t\) is:

\[
b_{it} = \beta_0 + \beta_1 HPchng_{i(t-1)} + \beta_2 P_{i(t-1)} + \beta_3 E_{it} + \beta_4 Y_2 + \cdots + \beta_{10} Y_6 + \varepsilon_{it}
\]

Omitted variable bias is an issue with the model because of its potential to affect my main variable of interest — cash proffer activity. By not including certain variables in the model, the effect would be a biased coefficient which would lessen the accuracy of my results by either understating or overstating the effect of prior cash proffer activity on future development activity, if an effect exists. The difficulty is that it is not always clear which variables have been left out of the model. In addition, there is the temptation to just keep adding variables to the model in order to address the problem but this may only create additional issues of multicollinearity, etc. I think any omitted variables primarily stem from a lack of complete and measurable data on the development process and activity in a locality.

My proposed solution to deal with the omitted variable bias is to estimate the model using county- and time-specific effects. This is especially useful because house price changes are measured at the MSA level representing a common factor over, usually, several counties. This solution uses the variation found within each county from year-to-year to cancel out the effects of many omitted variables that might be fixed over time, but specific to a county. I make the assumption that the county dummy variables will pick up the relative characteristics of the counties like population level and other land use regulations that are relatively invariant over time. The inclusion of the county and year dummy variables through a fixed effects model must be done in awareness of some of the issues that this type of model generates. First, there is a balance between the number of dummy variables added to the model and the loss of degrees of
freedom from the addition of too many. Second, a lot of dummy variables also increases the likelihood for multicollinearity with larger standard errors as a result. Third, the assumption of normally distributed and homogenous residuals could be violated with county-specific heteroskedasticity or autocorrelation related to time effects. The new specification of the model for county $i$ at time $t$ is:

$$b_{it} = \beta_0 + \beta_1 \text{HPchn}g_{i(t-1)} + \beta_2 P_{i(t-1)} + \beta_3 E_{it} + \beta_4 C_2 + \cdots + \beta_8 Y_2 + \cdots + \beta_9 Y_8 + \varepsilon_{it}$$

where $C_i$ is a dummy variable for county $i$ ($i = 2$ to 82) and $Y_t$ is a dummy variable for year $t$ ($t = 2$ to 8).

The incorporation of spatial dependence is another modification that I make to the basic model. From the history of cash proffers detailed in earlier chapters, there was evidence of how counties who were not eligible to accept cash proffers lobbied to be granted the power that other counties had. They wanted the same powers of their neighboring counties. At the same time, the development community wanted to see standardization in cash proffer policies across counties. For example, the suggested maximum cash proffer amount per building permit should be the same in neighboring counties A and B. This historical background suggests that there may be spatial dependence component to the impact of cash proffer activity on housing development. If cash proffers are a deterrent to further growth because they raise the costs of development, then I would expect to see differences in the impact of an increase in cash proffers in a given county based on the cash proffer activity of their neighboring counties. The impact should decline as the number of active cash proffer-using neighboring counties increases.

My model deals with spatial dependence in two ways. First, I include a spatial lag of the dependent variable on the right hand side of the model. This new variable measures the direct effect that the level of building permit activity in neighboring counties has on building permits in the subject county. I define neighboring counties as those counties who directly touch the border of the subject county. For my dataset, the number of neighbors that a county has ranges from one to eight. So this variable is a function of how many neighbors a county has as well as the level of development activity in those counties. Second, I allow for spatial dependence in the error term.

The error term is split into two components. One of which is spatially uncorrelated while the other is spatially weighted. The inclusion of a spatially lagged dependent variable model with the spatial error model is known as a spatial-autoregressive model with spatial-autoregressive disturbance (SARAR). I estimate this model using maximum likelihood (ML) estimator. The final model specification for county $i$ at time $t$ is:

$$b_{it} = \beta_0 + \beta_1 \text{HPchn}g_{i(t-1)} + \beta_2 P_{i(t-1)} + \beta_3 E_{it} + \beta_4 C_2 + \cdots + \beta_8 Y_2 + \cdots + \beta_9 Y_8 + \lambda \sum_{j \neq i} w_{ij} b_{jt} + \varepsilon_{it}$$

$$\varepsilon_{it} = \rho \sum_{j \neq i} w_{ij} \varepsilon_{it} + \mu$$

284
where $\lambda$ is the spatial autoregressive coefficient for the spatial lag, $w$ is an element of the spatial-weighting matrix which reflects the connectivity between county $i$ and county $j$, and $p$ is the spatial autoregressive coefficient for the error term.

**Dataset**

*Building the Dataset*

Construction of the dataset began with the ninety-five counties in Virginia. This follows the unit of analysis that I used in Chapter 9. Although cities and towns are also eligible to accept cash proffers, I focus on counties because their large land area presents developers with a choice of developing in greenfields (fringe) or brownfields (infill). This dichotomy in land selection is at the heart of growth management efforts which seek to redirect development away from the fringe. The possibility of cash proffers as a condition to the rezoning of a greenfield area may deter its development. However, the final dataset consists of fewer counties because of data limitations. The first requirement in order to be in the dataset was that the county had to be located in a Metropolitan Statistical Area (MSA). 65 There are eleven MSAs that contain at least one Virginia county. Location in a MSA was critical because the Housing Price Index (HPI) is collected at the MSA level. As a result, every county in the same MSA has the same value for their measure of the HPI. Fifty-one counties out of the ninety-five are part of a MSA. Thirty-one counties were added to the dataset based on their proximity to MSAs. Given how close these counties were to existing MSAs, the assumption was made that they were most likely in the same real estate market as the MSA counties and thus could receive the same value for the housing demand variable. Although these counties are not part of a MSA directly, they were assigned to a MSA if they shared a border with a county in an MSA. Those counties who share a border with two or more MSAs were assigned to the MSA with the larger population. The table below shows the breakdown of the number of counties by MSA for the dataset.

---

65 A metropolitan statistical area (MSA) as defined by the Office of Management and Budget (OMB) consists of a “core urban area of 50,000 or more population” as well as “one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.” Last accessed April 14, 2012, [http://www.census.gov/population/metro/](http://www.census.gov/population/metro/).
Table 10.1 MSA County Count by Assignment Status

<table>
<thead>
<tr>
<th>MSA</th>
<th>Defined Counties</th>
<th>Assigned Counties</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Blacksburg-Christiansburg-Radford, VA</td>
<td>3</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>Charlottesville, VA</td>
<td>4</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>Danville, VA</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Harrisonburg, VA</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Kingsport-Bristol-Bristol, TN-VA</td>
<td>2</td>
<td>5</td>
<td>7</td>
</tr>
<tr>
<td>Lynchburg, VA</td>
<td>4</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>Richmond, VA</td>
<td>16</td>
<td>6</td>
<td>22</td>
</tr>
<tr>
<td>Roanoke, VA</td>
<td>4</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td>Virginia Beach-Norfolk-Newport News, VA-NC</td>
<td>6</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>Washington-Arlington-Alexandria, DC-VA-MD-WV</td>
<td>9</td>
<td>6</td>
<td>15</td>
</tr>
<tr>
<td>Winchester, VA-WV</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>51</strong></td>
<td><strong>31</strong></td>
<td><strong>82</strong></td>
</tr>
</tbody>
</table>

Source: Author's calculations.

The final dataset consists of eighty-two counties. In the map below, the counties shown with a striped pattern make up the final dataset. The sample is composed of counties from all regions of the state.

Map 10.1 Composition of Final County Dataset

![Map of Virginia showing sample counties, nonsample counties, and cities](image)

Source: Author's calculations.

---

66 The independent cities of Virginia are shown in yellow on the map.
**Time Period**

The time period of the dataset shaped by the key variables – building permits, housing price changes, and cash proffer activity. In the case of building permits, annual data is available beginning with 1984 for all of the counties. Housing price changes based on the Office of Federal Housing Enterprise Oversight (OFHEO)’s Housing Price Index is measured on a quarterly basis, so additional data is not necessary for calculating annual or fiscal year changes. For the eleven MSAs where the 82 counties are located or have been assigned to, the quarterly data is available across all MSAs beginning with first quarter of 1992. When I ignore measures of cash proffer activity and focused on housing supply and demand variables, then an annual dataset can start with 1992.

I had hoped to obtain through my survey accurate measures of cash proffer activity such as a county’s maximum cash proffer amount per single family housing unit for a fiscal year or the average amount. Unfortunately, I was not able to obtain this information for all eligible counties in the dataset. The Local Government Commission for the Commonwealth of Virginia began requiring localities to report their cash proffer activity to the state with 2000 Fiscal Year. These reports provide the data that is used to construct measures of cash proffer activity. Although the information is submitted in terms of fiscal years, I use it as calendar year based on the second year of the fiscal time period. For example, the 1999-00 Fiscal Year is represented as the 2000 calendar year.

The resulting time period based on all three key variables is measured at the calendar year level beginning with 2000. The last year of the time period is 2008 which corresponds to the last year of the qualitative analysis conducted in earlier chapters. So there are nine years of data for each county. Because of the desire to include lagged variables in the regression analysis, only eight years of data will be used. For example, current year variables will cover 2001 to 2008 while lagged variables range from 2000 to 2007. It is important to note that the tail end of my time period includes the beginning of the Great Recession which saw a significant downturn in new residential development as well as housing prices across the country.

**The Final Dataset**

The final dataset consists of eighty-two counties followed over eight calendar years for a total of 656 observations. I treat the data as a pooled cross-sectional dataset.

---


68 A fiscal year runs from July 1st of a year to June 30th of the following year or the third quarter of one year through the second quarter of the second year.

69 According to the National Bureau of Economic Research (NBER), the peak of the most recent recession was in December 2007. Last accessed April 13, 2012, [http://www.nber.org/cycles/cyclesmain.html](http://www.nber.org/cycles/cyclesmain.html).
Variables

The dependent variable is total number of single family building permits per acre at the end of the year from 2001 to 2008 for eighty-two counties in the Commonwealth of Virginia. This variable represents the (expected) change to housing supply. The data on single family building permits is from the U.S. Department of Housing and Urban Development’s (HUD) State of the Cities Data System’s Building Permits Database. Each year of permits was divided by the approximate land area of the county as measured in acres as of 1997. The land area measure comes from the U.S. Department of Agriculture’s (USDA) 1997 Census of Agriculture. This calculation was made in an attempt to account for the intensity of development activity given differences in the size of the counties. For example, county A may have 100 permits per year while county B has 1,000 permits per year. This may seem like a huge difference between them but if county A is 10,000 acres in size and county B is 100,000 acres in size, then the number of permits per acre is 0.01 for both counties.

In the regressions, I use the natural log form of the dependent variable:

\[ BP \text{ per ACRE (ln)} = \text{natural log of the total number of single family building permits per acre, 2001-2008} \]

The mean value across all counties and eight years is -7.15 as shown in Table 10.2. The highest number of single family building permits occurred in Loudoun County in 2003 with 5,678. The lowest number of permits across the sample also occurred in 2003 with Grayson County reporting zero single family building permits.\(^{70}\) When the land area of the county is taken into consideration, the highest proportion of permits to acres took place in 2004 in Prince William County at 0.025. The smallest was in Sussex County in 2003 at 0.00003.\(^{71}\)

The key explanatory variable of interest is total amount of cash proffer revenues collected per single family building permit from 2000 to 2007. This variable represents cash proffer activity. The data on cash proffer revenue collections is from the Commonwealth of Virginia’s Commission on Local Government’s Report on Proffered Cash Payments and Expenditures by Virginia Counties, Cities, and Towns for the fiscal years 1999-00 to 2007-08. Each year of revenue collections was divided by that year’s number of single family building permits. This calculation was conducted because cash proffer amounts are typically paid at the time of issuance of building permit. Ideally, I would like to have had a county’s maximum cash proffer amount per single family housing unit for a fiscal year or the average amount proffered. This

\(^{70}\) In order to keep Grayson in the sample for estimation, its 2003 value for single family building permits per acre was imputed to 1 which generated a value of 0 when the natural log was taken rather than a missing value without imputation.

\(^{71}\) Technically, the smallest value was actually in Grayson County since it did not have any single family building permit activity in 2003.
would provide me with figures similar to how impact fee levels are modeled in the impact fee literature. However, my survey results did not provide this data for all of the counties in my dataset, so I am using this alternative measure. In the regressions, this variable is:

\[
\text{CPR per BP (lagged)} = \text{total amount of cash proffer revenues collected per single family building permit, 2000-2007}
\]

There are a couple of issues with this measure. First, the denominator is larger than the number of building permits resulting from rezoning for all counties because it includes building permits that involve cash proffers and those that do not. So the resulting value is not a measure of actual cash proffer revenue per building permit that results from a rezoning, but rather a measure of total cash proffer revenue relative to all building permits. Second, cash proffer revenues collected in a fiscal year may not represent the full amount of cash proffer revenue promised for an entire development. One new development may take multiple years to have its houses built while another may be completed within a year. My measure only reflects the cash proffer revenue collected for the number of houses authorized via approved building permits in a given year. Third, there are counties who have never collected any actual cash proffer revenues, but they may actually have established a suggested cash proffer amount policy. This effect – that of the potential to collect cash proffers – is partially captured by a dummy variable for eligibility.

The sample’s mean value for collected cash proffer revenue per single family building permit is $316.75 (see Table 10.2). The average value for counties with positive cash proffer collections is higher at $1,229.52. Slightly over 74 percent of the sample has a value of zero for this variable. The remaining values range from a low of $4.95 in Culpeper County in 2004 to a high of $8,370.77 in Prince William County in 2007. Illustrating the first issue that I raised about this measure (i.e. resulting value being actually smaller than it normally would be), the 2007 average (i.e. typical) cash proffer amount per single-family housing unit for an approved rezoning with cash proffers attached was $37,719 in Prince William County. In comparison, fifteen counties in Maryland for the 2007 fiscal year had development impact fees that ranged from a low of $3,671 (Dorchester) to a high of $19,361 (Prince George’s) per single family detached dwelling.

---

72 These values are actually for 2003 and 2006, respectively, because I am using one-year lags in the regressions the values are reported for 2004 and 2007.
Changes in housing demand are represented in the model by the annual rate of change in housing price index from 2000 to 2007. It is lagged by one year from the dependent variable’s time period. In the regressions, this variable is:

\[ HPI\, CHNG \, (\text{lagged}) = \text{percentage change in house prices, 2000-2007} \]

It is calculated by taking the fourth quarter index value for one year and dividing it by the fourth quarter index value for the preceding year then subtracting the resulting value from 1 and multiplying by 100 for ease of interpretation. This variable is measured at the MSA level, so every county in the same MSA has the same value for a particular year. The data comes from the Office of Federal Housing Enterprise Oversight’s (OFHEO) House Price Index (HPI).

The average annual growth in house prices across all counties and eight years is 8.62 percent as shown in Table 10.2. The largest lagged growth in prices (23.4 percent) occurred in the Washington-Arlington-Alexandria, DC-VA-MD-WV MSA and is reported in 2006, representing growth from 2004 to 2005. Fifteen counties share this value. The lowest lagged growth rate occurred in the Winchester, VA-WV MSA for 2008 where prices actually declined by slightly over 5 percent. Only one county from this dataset is included in this MSA. While price growth rates did decline over this time period, there is only one other point in time where a negative lagged growth rate is observed. This occurred in the Washington-Arlington-Alexandria, DC-VA-MD-WV MSA for 2008 at -3.7 percent.

The final explanatory variable in the model is the eligibility status of a county to accept cash proffers over the time period, 2001 to 2008. This dummy variable measures any effect that eligibility status has on development activity. The cash proffer acceptance eligibility variable is:

\[ ELIGIBLE = 1 \, \text{if a county is eligible to acceptance cash proffers in a given year, otherwise 0} \]

The data was obtained from the Commonwealth of Virginia’s Commission on Local Government’s Report on Proffered Cash Payments and Expenditures by Virginia Counties, Cities, and Towns for the fiscal years 1999-00 to 2007-08 which has an annual listing of eligible localities. From 2001 to 2005, there were nine counties out of the eighty-two (11 percent) in the sample that were ineligible. Number of ineligibles dropped to three counties (4 percent) for 2006 to 2008. In the more fully specified models, this variable acts in more of a control capacity because of the very little variation that exists in it.
Table 10.2. Descriptive Analysis of the outcome variable (BP per ACRE (ln)) and possible predictors (CPR per BP (lagged), HPI CHNG (lagged), ELIGIBLE, dummy variables for county and year). (N=82 counties in 11 MSAs across 8 years, 2001 to 2008)

<table>
<thead>
<tr>
<th></th>
<th>N</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Min</th>
<th>Max</th>
</tr>
</thead>
<tbody>
<tr>
<td>BP per ACRE (ln)</td>
<td>656</td>
<td>-7.15</td>
<td>1.27</td>
<td>-10.46</td>
<td>0.00</td>
</tr>
<tr>
<td>CPR per BP (lagged)</td>
<td>656</td>
<td>$316.75</td>
<td>$917.41</td>
<td>$0.00</td>
<td>$8370.77</td>
</tr>
<tr>
<td>HPI CHNG (lagged)</td>
<td>656</td>
<td>8.62%</td>
<td>5.55%</td>
<td>-5.01%</td>
<td>23.36%</td>
</tr>
<tr>
<td>ELIGIBLE</td>
<td>656</td>
<td>0.92</td>
<td>0.28</td>
<td>0.00</td>
<td>1.00</td>
</tr>
<tr>
<td>County Dummy</td>
<td>656</td>
<td>0.01</td>
<td>0.11</td>
<td>0.00</td>
<td>1.00</td>
</tr>
<tr>
<td>Year Dummy</td>
<td>656</td>
<td>0.13</td>
<td>0.33</td>
<td>0.00</td>
<td>1.00</td>
</tr>
</tbody>
</table>

Source: Author's calculations.

While the regression results discussed in the next section will attempt to ascertain whether there is a causal relationship between past cash proffer activity and future housing development, looking at the correlations between the dependent variable and the explanatory variables provides an early indication of such relationships. All three explanatory variables are moderately correlated with the dependent variable in a statistically significant and positive manner. This finding suggests that lagged cash proffer revenues are positively related to development activity in a county. The one issue of concern in the correlation results presented in Table 10.3 is the finding that the cash proffer eligibility variable is slightly correlated at a statistically significant level with the other two explanatory variables. This finding suggests that there is the potential for multicollinearity with the model, so the appropriate tests need to be conducted.

Table 10.3. Correlation Analysis of the outcome variable (BP per ACRE (ln)) and possible predictors (CPR per BP (lagged), HPI CHNG (lagged), ELIGIBLE)

<table>
<thead>
<tr>
<th></th>
<th>Natural Log of Building Permit per Acre</th>
<th>Lag of Collected Cash Proffer Revenues per Building Permit</th>
<th>Lag of House Price Index Change</th>
<th>Eligible to Accept Cash Proffer Dummy</th>
</tr>
</thead>
<tbody>
<tr>
<td>BP per ACRE (ln)</td>
<td>1.00</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CPR per BP (lagged)</td>
<td>0.39 ***</td>
<td>1.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>HPI CHNG (lagged)</td>
<td>0.33 ***</td>
<td>0.04</td>
<td>1.00</td>
<td></td>
</tr>
<tr>
<td>ELIGIBLE</td>
<td>0.31 ***</td>
<td>0.10 **</td>
<td>0.18 ***</td>
<td>1.00</td>
</tr>
</tbody>
</table>

Key: *p<0.10; **p<0.05; ***p<0.01
Source: Author's calculations.

In the time period construction section, I mentioned that the beginning of the most recent economic recession occurred in the tail end of my time period. A characteristic of this recession unlike past recessions has been the downturn in the housing market in particular a slowdown in new construction and a decline in housing prices. Figure 10.1 shows the average cash proffer revenue collected per building permit and the average change in house price index for my sample from 2000 to 2008. While both data series were on an upward trajectory, the cash proffer revenue series is the only one that continued to increase through the last year of observation. The sharp drop in house price index after 2005 and its continual decline suggests there may actually
be two distinct time windows – 2000 to 2005 and 2006 to 2008 – influencing whether past cash proffer activity affects future housing development. This phenomenon can be explored by running the final model specification separately for the two time periods. Because of the lagged variables in my dataset, the two time periods would be 2001-2005 and 2006-2008. It is unclear what drove the continual increase in cash proffer revenues per building permit. There could have been relatively more rezonings as the housing cycle progressed or an increase in the amount of financial payment proffered per rezoning building permit.

Figure 10.1 Average Cash Proffer Revenue Collection per Building Permit and House Price Change by Year (N=82 counties)

![Figure 10.1](image)

Source: Author’s calculations.

**REGRESSION RESULTS**

Five separate specifications were estimated using ordinary least squares (OLS) with time fixed effects, OLS with time and county fixed effects and spatial-autoregressive model with spatial-autoregressive disturbances and fixed effects via maximum likelihood estimation (MLE). The dependent variable in each of these equations is the natural log of the number of single family building permits per acre. Regressions 1-3 were estimated on a dataset composed of eighty-two counties in Virginia from 2001 to 2008 for a total of 656 observations. Regression 4 was limited to observations from 2001 to 2005 (n=410) while Regression 5 covered 2006 to 2008 (n=246). The results from the five specifications are shown in Table 10.4.
The three major explanatory variables \((CPR\ per\ BP\ \text{lagged})\), \(HPI\ CHNG\ \text{lagged})\), \(ELIGIBLE\) were each tested for multicollinearity and the results showed that their individual’s variances were at least 95 percent independent of each other. So multicollinearity should not affect any of the regression results. All three equations were estimated with a relaxation of the independent-errors assumption, so that I could obtain robust standard error estimates given the presence of county clusters in the data.

Diagnostic tests were conducted on the residuals from the two non-spatial OLS fixed effects specifications to assess for the presence of spatial dependence and whether it arises from spatial lag, spatial error or both. The results from the two Lagrange Multiplier (LM) tests for spatial lag \((\lambda)\) allow us to reject the null hypothesis that \(\lambda = 0\). The results for spatial error \((\rho)\) also present a clear picture of spatial dependence. The value for the Moran’s I is 1.74 which is statistically significant at the 10 percent level and marginally rejects the null hypothesis of no spatial dependence. The two LM tests for spatial error lead to a more definitive conclusion on the presence of spatial dependence in the error term via lower significant levels (0.1 percent and 5 percent). Altogether, these diagnostic test results show that a non-spatial OLS model will produce inaccurate coefficient estimates especially for any variable that spatially groups. I err on the side of caution by specifying both spatial lag and error in Regression 3. The presence of spatial dependence suggests that Regression 3 may provide the best insight into how past cash proffer activity influences new housing construction.

Regression 1 is an OLS specification with fixed effects around time. The inclusion of the dummy variables for time allows for the omission of a prime rate variable that would have varied by time, but not by county. The coefficients on all of the explanatory variables were found to be positive and highly significant. However, their power of magnitude is small in size. A one percent increase in house prices in the prior year results in a 0.10 percent increase in new single family housing construction in the next year. Unsurprisingly, a county’s eligibility status distinguishes among counties with higher growth since a county’s decennial population growth is an eligibility determination factor. At the same time, eligibility could be capturing something else in the model given the overwhelming number of observations in the dataset that are cash proffer eligible (over 80 percent).

The results from Regression 1 show that the prior year’s amount of cash proffer revenue collected per single family building permit is positively associated with the following year’s single family housing construction. A one standard deviation increase in the amount of cash proffer revenues collected per single family building permit in the previous year results is associated with a 46 percent increase in a county’s single family building permits for the next year. Thus the presence of cash proffer activity in a county appears positively related to development activity in a county controlling for changes in house prices, eligibility to collect cash proffers, and within year variation, but little else. This confirms the positive and significant
correlation found between the dependent variable and the cash proffer activity variable (see Table 10.3).

Regression 2 addresses the concern about bias in Regression 1’s results due to omitted variables. When individual county characteristics are taken into consideration, the overall R² improved from 36 percent to 90 percent. House price changes are still statistically significant but now by themselves lead to only a 0.02 percent increase in new single family housing construction in the next year when there is a one percent increase in house prices in the prior year. A county’s current year eligibility status remained positive, but no longer statistically significant. This is an expected result given that only a few counties obtain eligibility during the sample’s timeframe. The coefficient on a prior year’s amount of cash proffer revenue collected per single family building permit in the fixed effects model is negative and smaller in magnitude. A one standard deviation increase in the amount of cash proffer revenues collected per single family building permit in the previous year results is associated with a 7 percent decline in a county’s single family building permits for the next year. This result suggests that after controlling for a variety of county invariant characteristics, a greater level of cash proffer activity is negatively related to growth.

One drawback to this approach is that the county dummies may actually be picking up on the lumpiness of the cash proffer activity measure. Cash proffer revenues are derived from building permits tied to an approved rezoning project. While rezoning building permits are typically not the largest share of a county’s annual total building permits, there may be a year in a county’s development history where they constitute a larger share and as a result, the county collects more cash proffer revenue that year and has an abnormal increase in building permits. This may occur in the early years of a new housing development as it attracts home buyers. Then in subsequent years, the county might see fewer building permits if there are not subsequent rezonings approved. The lumpiness of rezonings could induce the negative correlation between lagged cash proffer revenue collected per building permit and current building permits. 74

The inclusion of the dependent variable spatial lag in Regression 3 means that the coefficients cannot be interpreted as easily as with the OLS and fixed effects models since they are determined simultaneously. The values shown in Regression 3 of Table 10.4 can be interpreted as the impact of increases in the explanatory variables on the dependent variable prior to the implementation of spatial dynamics. So these are the direct effects. At this time, the calculation of the indirect effect, i.e. how a county’s building permits are affected by its neighbors, has not been determined. In comparison to Regression 2, the coefficients have identical signs, but are slightly larger in size as well as statistical significance. The repeated presence of the negative

74 To verify whether this inducement could be true, the lag of building permits per acre was regressed on building permits per acre. The results show a positive association between the two variables which is expected if rezonings are not a major component of total building activity. Therefore, it is more likely that an upward swing in building permits is directing the cash proffer activity results.
sign on the coefficient of the cash proffer activity variable provides more support for the contention that cash proffers are a negative influence on growth.

In the spatial model, the estimated $\lambda$ is negative and statistically significant which indicates moderate spatial-autoregressive dependence in the number of building permits per acre. This means that new single family housing construction in a given county is negatively related to the contemporaneous development activity in neighboring counties. Except for a directional difference, the measure of spatial-autoregressive dependence in the error term ($\rho$) closely approximates the spatial lag. It is moderately positive and statistically significant. So an unexpected and independent event, i.e. a shock, in one county will positively impact the residential construction in neighboring counties.

In light of the sharp drop in the housing price changes variable after 2005, I estimated the spatial specification for two separate time periods. Regression 4 and Regression 5 cover 2001 to 2005 and 2006 to 2008, respectively. The eligibility variable was dropped from both specifications since none of the counties changed their eligibility status in the new time periods. Their time invariant eligibility status is picked up by the county dummy variables. Regressions 4 and 5 are best viewed as robustness checks for the results found in Regression 3.

The results for Regressions 4 and 5 in Table 10.4 show distinct differences between the two time periods. The measures of spatial dependence in both specifications are no longer statistically significant. Although the coefficient on cash proffer activity is not statistically significant during either time period, there is a difference in the sign and magnitude. Regression 4’s value is $-0.0001$ compared to $0.00003$ in Regression 5.

The sign and value for Regression 4 matches exactly what was estimated in Regression 3. These results suggest that the 2001-2005 time period is driving the results for the full 2001-2008 time period in Regression 3. One might expect that the negative sign would actually come from the later time period under the rationale that high values for suggested cash proffer amounts in a county’s proffer policy might slow down development faster in a downturn. The rezoning process already has an element of risk to it because it is subject to county approval combining the inherent risk with an economic downturn and potential high cash proffers would make it even more risky and costly. A future step would be to extend the last time period to cover the 2010 fiscal year, so that there would be an equal number of years in each time span as well as adding more years that were affected by the recession. If the coefficient’s sign in the later time period changes to negative, then this reinforces the finding that cash proffer activity is negatively associated with growth. If the positive sign is upheld, then there was something distinctive happening in the cash proffer collecting counties during these two time periods that leads to a negative association for 2001-2005 and a positive association for 2006-2008 (or 2006-2010). A future qualitative study may be able to better determine what was occurring in the counties.
Table 10.4. Regression Results for the outcome variable (BP per ACRE (ln)) and possible predictors (CPR per BP (lagged), HPI CHNG (lagged), ELIGIBLE, dummy variables for county and year). (N=82 counties in 11 MSAs across 8 years, 2001 to 2008)

<table>
<thead>
<tr>
<th>Regression 1</th>
<th>Regression 2</th>
<th>Regression 3</th>
<th>Regression 4</th>
<th>Regression 5</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>OLS with Time Fixed Effects, 01-08</td>
<td>OLS with Time and County Fixed Effects, 01-08</td>
<td>Spatial AR Lag and Error (MLE) with County and Time Fixed Effects, 01-08</td>
<td>Spatial AR Lag and Error (MLE) with County and Time Fixed Effects, 01-05</td>
</tr>
<tr>
<td>Intercept</td>
<td>-8.72 ***</td>
<td>-7.03 ***</td>
<td>-9.82 ***</td>
<td>-4.56 **</td>
</tr>
<tr>
<td>HPI CHNG (lagged)</td>
<td>0.10 ***</td>
<td>0.02 ***</td>
<td>0.03 ***</td>
<td>0.02 ~</td>
</tr>
<tr>
<td>CPR per BP (lagged)</td>
<td>0.0005 ***</td>
<td>-0.0001 *</td>
<td>-0.0001 **</td>
<td>-0.0001</td>
</tr>
<tr>
<td>ELIGIBLE</td>
<td>1.02 ***</td>
<td>0.15 *</td>
<td>0.24 ~</td>
<td>0.36</td>
</tr>
<tr>
<td>Year2002</td>
<td>-0.14 *</td>
<td>-0.01 ~</td>
<td>-0.004 ~</td>
<td>-0.004</td>
</tr>
<tr>
<td>Year2003</td>
<td>0.02</td>
<td>0.11</td>
<td>0.16</td>
<td>0.08</td>
</tr>
<tr>
<td>Year2004</td>
<td>-0.07 *</td>
<td>0.15 **</td>
<td>0.22 *</td>
<td>0.11</td>
</tr>
<tr>
<td>Year2005</td>
<td>-0.53 ***</td>
<td>0.09</td>
<td>0.15</td>
<td>0.07</td>
</tr>
<tr>
<td>Year2006</td>
<td>-1.12 ***</td>
<td>-0.08 ~</td>
<td>-0.07 ~</td>
<td>-0.07 ~</td>
</tr>
<tr>
<td>Year2007</td>
<td>-0.63 ***</td>
<td>-0.10 ~</td>
<td>-0.14 ~</td>
<td>-0.14 ~</td>
</tr>
<tr>
<td>Year2008</td>
<td>-0.49 ***</td>
<td>-0.35 ***</td>
<td>-0.54 ***</td>
<td>-0.54 ***</td>
</tr>
<tr>
<td>Moran’s I (p)</td>
<td>1.74 ~</td>
<td>0.58</td>
<td>0.32</td>
<td>0.32</td>
</tr>
<tr>
<td>Lagrange Multiplier (p)</td>
<td>76.15 ***</td>
<td>0.05</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Robust Lagrange Multiplier (p)</td>
<td>3.94 *</td>
<td>0.78</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lagrange Multiplier (λ)</td>
<td>121.02 ***</td>
<td>0.01</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Robust Lagrange Multiplier (λ)</td>
<td>48.81 ***</td>
<td>0.74</td>
<td></td>
<td></td>
</tr>
<tr>
<td>AIC</td>
<td>876.36</td>
<td>656.60</td>
<td>16.18</td>
<td></td>
</tr>
<tr>
<td>λ</td>
<td>-0.38 ~</td>
<td>0.32</td>
<td>0.16</td>
<td></td>
</tr>
<tr>
<td>ρ</td>
<td>0.36 *</td>
<td>-0.40 ~</td>
<td>0.17</td>
<td></td>
</tr>
<tr>
<td>σ²</td>
<td>0.16 ***</td>
<td>0.18 ***</td>
<td>0.03 ***</td>
<td></td>
</tr>
<tr>
<td>R²</td>
<td>0.36</td>
<td>0.90</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>656</td>
<td>656</td>
<td>656</td>
<td>410</td>
</tr>
</tbody>
</table>

Note: The coefficient-estimates for the county dummies are suppressed to conserve space. The spatial lags are generated with a binary contiguity weighting matrix. All the spatial weights matrices are row-standardized. Key: ~p<0.10; *p<0.05; **p<0.01; ***p<0.001

296
**ALTERNATE LEVEL OF ANALYSIS**

This chapter has focused on investigating whether there is any connection between cash proffers activity and housing development at the county level. The regression results from the previous section showed a negative association between cash proffers activity and housing development across counties. While county-level data was the best data available, this level of aggregation may actually not reflect where cash proffers have their biggest impact – within counties. This impact would be reflected in the shape of development patterns within counties rather than across counties.

I see three major ways in which this proposed impact could be assessed. The three are the location of a cash proffer rezoning, the requested zoning change, and the approved project, itself. In this speculative alternate investigation, the focus would be at the parcel level in a county. Within this dissertation, I am unable to prove any of my speculations, so the purpose of this discussion is to bring awareness to these possibilities. Using data gathered from an earlier research project, I can provide some examples to illustrate potential impacts.

In looking at the locations of cash proffer rezonings, I would start with where all approved rezonings are located in the locality. Do we see them distributed evenly across the locality or concentrated in certain areas? How close are these new developments to existing public facilities such as fire stations and schools? I would then categorize the rezonings by those with cash proffers and those without. This leads to question of are there locational differences between rezonings with cash proffers and those without them. One might think that the approved rezonings with cash proffers are more likely to be situated further away from existing public infrastructure than those without cash proffers since the developer is contributing to the cost of new or expanded public services. There is also a question of whether the locational pattern of cash proffer rezonings has changed over time. Have the number of rezonings with cash proffers declined or are they concentrated in different parts of the county compared to a number of years ago? This pattern change might or might not reflect the cash proffer influence. For example, the changing pattern might be a function of increasing infrastructure costs or homebuyer location preferences or a locality’s attitude.

Map 10.1 serves as a preliminary example of how the location analysis could be started. It displays the location of the 135 approved rezoning cases with cash proffers attached to them in Chesterfield County from January 24, 1990 to June 18, 2003. Cash proffer cases of varying sizes can be found in all five of the County’s supervisor/magisterial districts. Matoaca District which is largely rural has primarily large rezoning cases while Clover Hill and Dale are more urbanized areas with small sized cases. The map shows that at least for this time period that there were very few cash proffer cases in the “deferred” growth area. This observation might lead one to conclude that Chesterfield had successfully directed growth away from this area. However, such
a conclusion cannot be made without mapping the location of cases not involving cash proffers. This comparison allows one to see whether cash proffers may be used to influence the location of development projects within a county. Alternatively, the county may, for example, have a general policy that limits all development in the deferred growth areas, so there was nothing strategic about the placement of the cash proffer cases.

*Map 10.1. Cash Proffer Cases by Growth Areas in Chesterfield County, 1990-2003*

The second facet to examining the influence of cash proffers on the shape of a locality’s development patterns is the land that is being rezoned. Are cash proffers primarily attached to rezoning cases that involve changing a parcel’s zoning from agricultural use to residential use? Or do we see them increasing the allowable density in previously zoned residential parcels? Using the Chesterfield data again, I show in Table 10.5 the zoning changes for the cash proffer cases displayed in *Map 10.1*. The majority of cases (65.9 percent) involved land that was originally zoned for agricultural use. Over 75 percent of the cases are rezoned to residential use with R-12 (minimum lot area of 12,000 square feet) as the most popular option. The next step would be to see the distribution of zoning changes that did not involve cash proffers. Comparing the cases with and without cash proffers would allow conclusions to be drawn about whether cash proffers may be used to influence the initial type of land that is being rezoned.
Table 10.5. Zoning Codes Involved in Rezoning Cases in Chesterfield County, 1990-2003, (n=135)

<table>
<thead>
<tr>
<th>Original Zoning:</th>
<th>Number of Cases</th>
<th>Percentage of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture Only (A)</td>
<td>89</td>
<td>65.9%</td>
</tr>
<tr>
<td>Agriculture (A) w/ another code</td>
<td>17</td>
<td>12.6%</td>
</tr>
<tr>
<td>Others</td>
<td>29</td>
<td>21.5%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Rezoning To:</th>
<th>Number of Cases</th>
<th>Percentage of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>R-9 Only</td>
<td>13</td>
<td>9.6%</td>
</tr>
<tr>
<td>R-12 Only</td>
<td>43</td>
<td>31.9%</td>
</tr>
<tr>
<td>R-15 Only</td>
<td>16</td>
<td>11.9%</td>
</tr>
<tr>
<td>R-25 Only</td>
<td>14</td>
<td>10.4%</td>
</tr>
<tr>
<td>R-40 Only</td>
<td>1</td>
<td>0.7%</td>
</tr>
<tr>
<td>R-88 Only</td>
<td>5</td>
<td>3.7%</td>
</tr>
<tr>
<td>R-TH Only</td>
<td>3</td>
<td>2.2%</td>
</tr>
<tr>
<td>R-MF Only</td>
<td>7</td>
<td>5.2%</td>
</tr>
<tr>
<td>Others</td>
<td>33</td>
<td>24.4%</td>
</tr>
</tbody>
</table>

Source: Author’s calculations based on data from Chesterfield County, Department of Planning, 2004.

The final proposed aspect in looking at the shape of development patterns is the approved development project. Are there commonalities between all cash proffer projects excluding location and the cash proffer? Furthermore, are cash proffer developments distinctly different from non-cash proffer developments? For example, two projects are built at the same time and adjacent to each other, but one involved cash proffers and the other did not. Are there obvious differences in the design of the development because one project had to pay cash proffers? The differences could be in the size of the development, house types, amenities, etc.

The sole purpose of cash proffers is supposed to be revenue generation. Thus it would be very interesting to see whether the speculation about its influence on development patterns in a locality bear out. The importance of this finding would increase in significance if the pattern of influence is found in different localities across the state. A new conception of cash proffers would be needed that accounts for all of its impacts.

CONCLUSION

In this chapter, I present a simple framework to examine the relationship between a particular land use tool, cash proffers, and new housing development and provide empirical estimates using annual data on a panel of 82 counties in Virginia from 2001 to 2008. The most basic model specification shows that past cash proffer activity is positively associated with new single family building permits, however, this result does not hold once changes are made to the model to account for omitted variable bias and spatial dependence. As a result, increases in cash proffer
revenue collection per building permit are more likely negatively associated with new
development activity. Without taking into account the indirect effect of neighboring counties, the
direct effect may be as large as a 7 percent decline. Prior house price changes have a consistent
statistically significant positive effect upon future single family building permits. Being eligible
to accept cash proffers in a given year acts as expected in distinguishing among counties with
higher growth. The small number of counties who became eligible during the course of the
study, however, reduces the role of eligibility status to that of a control variable in later
specifications. Finally, development activity in a given county is negatively affected by the new
housing construction in its border counties and at the same time, an exogenous shock in one
county will positively impact housing development in the neighboring counties.

The finding of a negative association between cash proffer activity and housing development
does not mean that counties who want to deter growth should go out and implement a cash
proffer system right away. Or that the home building industry should take this as evidence to
advocate to the state legislators for the repeal of the state statutes that allow for the acceptance of
cash proffers. While the later model specifications did try to address the concerns about
endogeneity and omitted variable bias, they are most likely still present.

At their core, cash proffers are a way for localities to share the financial burden of the demand
for public services like roads, libraries, schools, fire and police from unplanned growth with
those who created the growth (i.e. housing developers). Even though localities may no longer see
the high rates of new residential construction that characterized the 1990s and 2000s due in part
to the most recent economic recession and foreclosure crisis, they will still need additional
sources of revenue to cover the provision of public services. If a locality faced what its true level
of development activity would be without the deterrence influence of cash proffers, residents
may see higher property tax rates or a decline in the quality of public services or a reduction in
provided services in order to finance the capital needs of the growth. This suggests another issue
which is when development does not have to pay for itself, localities may experience more
growth than they can handle. So we need further study to understand how revenues were used.

These results lay a foundation upon which future research can build. Future efforts should start
by gathering more accurate data on measures of cash proffer activity. This may help address the
issue of lumpiness that came with the fixed effects model specification. With better data, a more
complete picture of the relationship between cash proffers and new housing development could
be determined. This research can also be extended to the demand side of housing, i.e. prices, and
what is the association between housing affordability and cash proffers. There is a question of
whether the cost of paying for the cash proffer is shifted away from the housing developer on to
the consumer in the price of the new house and what impact this has on the taxes and price of
houses outside of the rezoning housing development.
CHAPTER 11

This dissertation examined cash proffers from their origination to local implementation to association with housing development. I utilized a framework of interest group politics at the state level, and considered land use regulations implementation at the local level. Despite a contentious legislative history, localities have been able to use cash proffers to bring in revenue for the financing of the public infrastructure needs of unplanned growth. However, interest groups have fashioned cash proffers into a tool that is far from ideal for covering the capital costs of development.

I answered three key questions in this dissertation. First, how and why did the cash proffer tool come into existence? Through tracing the history of cash proffers in Chapters 5 through 8, I showed that cash proffers were an unintended practice resulting from the implementation of state-approved conditional zoning at the local level of the political process. The action of a developer offering money to go towards school construction during a rezoning hearing in the early 1970s and Fairfax County officials later approving the rezoning was one of the early precedent-setting cases of cash proffers. At that one point in time, a local government held the edge in the power balance between localities and the development community over growth. Subsequent legislative battles have pitted the two sides against each other in a fight over eligibility expansion and potential proffer categories. The courts and the state’s Office of the Attorney General have been used to gain clarity on how localities may implement their cash proffer systems, as well as, providing an arena for opponents to get the system overturned.

While cash proffers may have arisen from a spur of the moment decision, their continued use was not because of a lack of knowledge about other growth management tools. By 1989 when the use of cash proffers expanded based on decennial growth rates, localities wanted to keep using them to raise revenue despite the availability of other tools within the land use regulatory universe. The development industry interest group very effectively used their power in the political process to tie together the fates of cash proffers and any substitute tool like impact fees. As a result, localities were pitted against one another on whether to do a one for one substitution of the tools or fight to have all possible tools available. In the end, localities were able to get both tools but the statute behind impact fees constructed them in such a way that they were limited in functionality, revenue capability and onerous to administer. Alas, this was a design that favored the interests of the development community over local governments.

Currently, Dillon’s Rule still matters in Virginia. It would appear that the development community as an interest group prefers state oversight and standardization rather than the local government discretion. Recent rhetoric suggests they would be willing to substitute impact fees for cash proffers but only if the design of impact fees is strongly directed by the state legislature.
To answer the question of how cash proffers are implemented, I first had to consider who had actually taken the step to allow for their acceptance. Despite the political furor, the fact is few local governments at the time of my survey had taken the minimum step of amending their zoning ordinance to allow for the potential acceptance of cash proffers. I had expected that local governments would proactively adopt the zoning ordinance amendment to allow for cash proffers before growth pressures emerged. In actuality, localities were already dealing with high levels of growth when they adopted their cash proffer zoning ordinance amendment. My analysis in Chapter 9 showed that the counties who accept cash proffers are different from non-accepting eligible counterparts. They have higher rates of growth, larger populations, and wealthier, denser localities. The pattern of actual cash proffer revenue collections is a function of growth.

In terms of implementation, I found that there are two major cash proffer approaches – case-by-case and policy-based. While there was a lack of statistical differences between counties using these two approaches, the trend among accepting counties has been away from case-by-case towards a more policy-based approach. This shift may be an attempt by localities to bring more funding certainty to how they implement their cash proffer system. Policy-based approaches also have the potential to reduce developer concerns about abuse of discretion in a case-by-case approach.

Finally, at least among counties, I found negative association between cash proffer activity and future housing development. My regression results suggest that an increase in the amount of the cash proffer revenues collected in a year may lead to a decline in the volume of building permits in the following year. This would be evidence to support the contention that cash proffers are a growth management tool because they have the potential to control the amount of development in a locality. If a locality’s policy to control growth is through a reduction in its amount, then cash proffers may be a method to do this.

In regard to the replication of a cash proffer system in other states, I think cash proffers are a byproduct of a certain time and place. In an atmosphere that is very friendly to property rights and hesitant about expansion of powers to local governments, cash proffers have been made to work through conditional zoning. If a state already has impact fees, I do not see what cash proffers would gain them in terms of revenue raising. If a state is seeking a way to bring flexibility to zoning and ensure certain promises are followed through on, then I would suggest they consider the adoption of conditional zoning. Depending on whether it is a Dillon Rule state, the state legislature or local governing body could determine exactly what they would allow as potential conditions to a rezoning.

Unlike the federal government, local governments are not allowed to run budget deficits. They have to find a way to balance their budget each year or take the risk of declaring bankruptcy. At the same time, they presumably cannot have high tax rates and fees which would discourage
individuals and families from moving to or remaining in their locality. The provision of new or expanded public services and infrastructure that arises from residential growth is an expensive enterprise. Federal and state funding sources have become more limited. The recent economic recession has left the financial sector more cautious in dealing with any new bond issuances by local governments. In addition, localities are now facing having to figure out how to pay for the replacement of aging infrastructure. A tool like cash proffers which shifts part or all of the cost for new or expanded public facilities that service new development to the private sector would free up a portion of public sector revenues that could be redirected to other capital improvement projects in the locality.

POLICY IMPLICATIONS

My analysis has demonstrated the role that political compromise at the state level played in the shape of current cash proffer statutes and their implementation on the ground. The result has been a solution that does not completely satisfy either developers or local governments. To understand the full potential of cash proffers, it is important to examine the tool without concern for what is politically feasible. The first step is to be clear on the problem for which we are seeking a solution. I would argue that the problem in Virginia has evolved away from enforcement of rezoning conditions and timely review of zoning applications to a question of how to pay for new or expanded public facilities needed to serve new residential development. Any policy solution for the latter problem should be considered separately from the power to use conditional zoning whose goal is to interject flexibility into the existing zoning ordinance.

In evaluating policy solutions to this revenue problem, I suggest there are five objectives upon which to conduct the evaluation: expediency, equity, economic efficiency, ease of administration, and political acceptability (National Association of Home Builders 2008). Setting aside political acceptability for the moment, I focus on the first four areas. In Chapter 2, I gave a brief history of infrastructure financing in the United States with its reliance on the conventional tools of municipal bonds, tax revenues and assessments. Rather than conduct a comparison of cash proffers in relation to all of the existing infrastructure tools, I will focus on cash proffers and impact fees. These revenue-related solutions both operate under the assumption that new residential development compared to local government should fund a greater share if not all of the cost for the new or expanded public facilities that they give rise to.

Expediency is the ability of the local government to provide the new or expanded public facilities prior to or concurrent with new development. With the correct timing, a local government can avoid having new demand crowd existing facilities and infrastructure. This means that the local government would want a policy solution that brings in revenue streams before or concurrent with construction. The timing of when cash proffers and impact fees are paid by the developer is flexible. This flexibility may hinder the expediency of either tool.
Currently, cash proffers are paid when a building permit is applied for which may be too late to have the new or expanded infrastructure finished. As a result, new demand may start to stress existing public facilities. However, there is nothing which would preclude a developer from paying the cash proffer prior to the building permit stage. Impact fees are also typically paid at the time of applying for a building permit. The recent movement to push the payment time to later in the development process, for example, applying for certificate of occupancy, would make either tool less expedient.

In looking at efficient infrastructure financing tools, there are two components. First, expansion of public facilities should occur up to the point where marginal cost equals the service price. Ideally, you want to stop expansion when the costs to construct/provide the additional facilities/infrastructure/services cannot be covered by the price that an additional new user would pay to access the expansion. Second, any tool should also aim to support an efficient housing market and development pattern. Building on the assumption that the residential housing market is competitively produced, infrastructure financing should not lead to large-scale distortions in the houses that individuals buy or developers construct. In regard to development pattern, the efficient solution is that new development should be located as close as possible to existing public facilities, so that the cost of service expansion is minimized. This is the preferred pattern if locating close to existing development offers the same housing stock and amenities as farther out locations. Exurban development becomes efficient if the person who wants to live away from existing development is willing to pay for the additional cost of being provided with public facilities and services and is properly billed for it.

Cash proffers and impact fees do possess some elements of efficiency. On the one hand, both tools have those who are directly causing the need for new or expanded infrastructure or benefiting the most from it paying a price in the form of the impact fee or cash proffer. They differ in that cash proffers are applicable to rezonings, i.e. unplanned growth. Impact fees are assessed on all growth. Inefficiencies can arise in how that price is determined. For example, a locality could decide to set a standard impact fee or suggested cash proffer amount. There may be instances where this predetermined dollar amount does not reflect the actual cost of providing the new or expanded public services to the new development. As a result, the local government is making it easier for development to take place further away from existing public infrastructure. Alternatively, cash proffers and impact fees can be designed so that the dollar amount increases the farther a project is sited from existing infrastructure. The higher dollar amounts in these growth sensitive areas may redirect developers to areas closer to existing infrastructure or where no new infrastructure is needed.

At least with impact fees, two new housing developments adjacent to each other would both be paying impact fees towards new or expanded public facilities. The voluntary nature of cash proffers, however, means that only one of those two new neighboring developments may be
making cash payments to the locality even though both developments are contributing to the increased demand on existing services. While cash proffers are typically determined per housing unit, impact fees have been known to be designed around elements of a housing unit, for example, the number of bedrooms. In an effort to minimize the amount of the impact fees that must be paid, developers could react by changing the style of the houses they construct. So rather than let the consumers determine what they want in a house, the developer is letting the impact fee dictate.

Equity refers to the balance between who pays for a public service and who uses it. Under the benefits principle, everyone who uses a service should pay for its cost. This rationale works best for those public services that are not a basic need, as well as, those which are in limited supply. Further, the cost for these services can be directly charged to the user. The alternative principle is to assess individuals based on their ability to pay. This framework is used for services that are a basic need, as well as, those where it is not possible to charge the user directly. Typically, it operates through a progressive charge system in which those who have a higher income pay more for the service than individuals with lower incomes. Then there are some services like public education which could charge tuition to families with enrolled students rather than spreading the cost across all property owners in a locality through their property taxes.

To some extent, the voluntary nature of cash proffers does make it more equitable than impact fees. If a rezoning applicant does not want to proffer cash payments with their rezoning application, then there is nothing the locality can do to force the applicant to volunteer them. The lack of cash proffers may be an inability to afford them. A rezoning application cannot be denied on the basis of failure to offer cash proffers. If the rezoning is approved, then the locality must either deal with oversubscribed public services or fund the needed new or expanded facilities with another revenue source. Impact fees cannot be avoided and are applicable to all development. There are no allowances made for the income levels of the residents in the new development. This most likely means that homeowners with lower incomes will pay a greater share of their income towards the impact fee than a wealthier household would for the use of the same public facilities. But you can also see how cash proffers can be less equitable if one developer pays and another (who can afford to pay) simply refuses to do so.

The public administration of an infrastructure financing tool is affected by decisions made about the other goals of the tool. A local government could have a tool that meets the goals of being expedient, economically efficient, equitable and politically acceptable, but it may be such a burden to administer that it becomes impractical. At the same time, another tool could be an ease to implement, but it sacrifices other elements like equity and efficiency.

Either tool could be designed to be complicated or easy to administer. While it would certainly be fine for a locality to bring in consultants to help them develop their cash proffer or impact fee...
system, however, after the initial implementation, the system should have been designed in such a way that the locality can make changes to the system over time without having to bring the consultants back in every time. Further, given the turnover in staff at the local level, it should be simple enough that a new staffer could hit the ground running in the administration of the system. Simplicity also allows for greater transparency so that the development community and residents can see where the collected revenues are going. Because it affects all development, impact fees may have a heavier administrative burden of tracking payments, etc.

Any solution should seek to minimize the transaction costs on the private actors in the system. With the “case-by-case” approach to cash proffers, the likelihood exists for each rezoning to have its own unique (optimal) solution, but the private bargaining that may be required to achieve this outcome may be too costly. Alternatively, a more systematic process to make these decisions like a schedule of maximum cash proffer amounts or impact fees may result in a tradeoff between the costs of negotiation and the total surplus achieved from the project. At the same time, one must recognize that the importance or potential impact of different transactions costs varies across places, so different institutional arrangements will be more “efficient” in different places because each locality has its own specific set of issues to consider. The development landscape can be a place of uncertainty, so any solution that reduces uncertainty and allows for planning is appreciated.

Based on the elements discussed above, neither cash proffers nor impact fees are without their faults. If given a choice between the two, I would argue for impact fees over cash proffers because of their greater revenue generating capacity. Localities could expand the potential base of cash proffers by taking the step of downzoning all undeveloped land in the locality regardless of location, so any more intensive use would be subject to a cash proffer amount and generate revenue. This strategy, however, would most likely subject the locality to an onslaught of lawsuits from irate property owners. The inherent features of cash proffers like voluntary offering and applicable to only a rezoning handicap its revenue raising capacity. For those current local government users of impact fees, I see no reason to switch to a cash proffer system. If a local government is looking to shift some of the burden for financing new public facilities to the private sector but does not want to go the full distance of impact fees then cash proffer system may be a way for them to get their feet wet. Later, the cash proffer system could be transitioned into an impact fee system with a similar structure but wider base.

**Future Research**

This dissertation has laid a foundation upon which additional cash proffer research may be built. While I have presented preliminary evidence about the association between cash proffer activity and future housing development, there is still room for additional confirmation of the results. This may involve different measures of cash proffer activity, as well as, model specifications.
While I have largely focused on the revenue side of cash proffers as well as their impact on the level of development, there still remains the question of their impact on the development pattern in a locality. Do we see different development patterns, for example, more land preservation in their presence? Are there differences in the scale and location of development in approved rezoning applications which include cash proffers versus those that do not? This exploration would expand the growth management assessment of cash proffers into two key facets – type and location of development.

Another arena for examination is the extent of negotiation between developers and local governments over cash proffers. While a cash proffer is supposed to be a voluntary offering by the rezoning applicant, the development community has actually called them, “about as voluntary as Don Corleone’s horse-head negotiations.”⁷⁵ There is a question of whether the use of “voluntary” in the statutory language actually creates a false expectation about their avoidance among the development community. Local governments are looking for revenue to fund new infrastructure, so they will try to obtain cash proffers whenever possible. Thus, it is worthwhile to gain a better understanding of how much negotiation actually exists within the cash proffer system. Does a rezoning applicant end up proffering more money per building permit in the approved application compared to what was originally proposed? Or is it less? Are other conditions attached? Has this pattern changed over time? Are there certain localities which appear to be more developer-friendly in their final form of the proffers? This investigation would have relevance for other tools in the planning arena like development agreements which involve the use of negotiation between the two parties. The ability to renegotiate and how much is changed during periods of economic downturn may be even more important to understand given the post-recession struggling housing market that we have today.

Future research could extend to the impact of cash proffers on the composition of the development community. In my analysis of the origins of cash proffers, the development community was seen as one almost homogenous interest group. It would be interesting to see whether the presence of cash proffers has had any influence on who are the developers in the counties which actively use them. Given that they are only found in Virginia, does this uniqueness deter regional or national developers who are not familiar with the phenomenon of cash proffers and might be hesitant to expend resources learning about them? As a result, do we see evidence of local developers held captive by cash proffers because they do not have the resources to develop in a different locality.

In Chapter 3, I discussed how Fairfax County developed its first zoning ordinance in the early 1940s without the guidance of a comprehensive plan which set the county up for a decades long

struggle over the level and type of development occurring in the county. The zoning ordinance at
the time was not flexible enough to deal with the new suburban development model that the
housing industry was constructing in response to consumer demand. The innovation of
conditional zoning brought a level of flexibility to the zoning ordinance. This flexibility came in
the form of conditions to accompany the change in rezoning. Conditional zoning and cash
proffers are now more than thirty years old. There are still counties in Virginia without basic
zoning but their lack of adoption has more to do with local attitudes towards the relationship
between government and property rights.

Since the 1970s enactment of conditional zoning in Fairfax County, other land use regulatory
tools around flexibility in zoning have been developed in communities across the U.S. While
conditional zoning deals with rezoning, tools like overlay districts, floating zones, and flexible
zoning districts try to bring flexibility to by-right development. This flexibility typically occurs
through the relaxation of underlying zoning restrictions. The relaxation may take the form of
higher densities, different design standards as well as permitted uses. All of these tools from
conditional zoning to flexible zoning districts share the common trait of trying to work within the
historic Euclidean zoning framework.

Within the last few years, a counter movement to Euclidean zoning has arisen that calls into
question the longevity of land use regulatory tools like conditional zoning and its cash proffer
byproduct. If a community no longer has a zoning ordinance, then how can it raise revenues with
cash proffers through rezoning? Communities across the U.S. have been experimenting with
eliminating zoning and replacing it with a form-based code system. Traditionally, zoning
regulations have focused on how a piece of land is used, i.e. residential or commercial, and have
tried to keep certain land uses that could be considered nuisances to other property owners like
industrial to residential away from each other. Form-based codes are a departure from zoning
because their emphasis is on design rather than use. For example, a form-based code system
would layout through illustrations how an apartment building or grocery store should look in
terms of various exterior design elements. Zoning tries to convey a sense of place by regulating
what land uses may occur next to each other. Form-based codes have the same aim but through
the use of aesthetics. Different areas of a community may be subject to different design elements.

Despite the attention that form-based codes have received, their implementation hinges upon
local governments giving up the power to regulate land use. Under a form-based code system,
developers would work through the marketplace to determine what uses would occur on which
pieces of property in a community. The local government’s input would then come in the form of
the design of those uses. Given the limited tools that Virginia’s localities have to control
development within their borders, as well as, the influence of Dillon’s Law in the state, I cannot
see localities willingly trading away their zoning ordinances for a form-based code system. It is
still an open question of which is more important to the development industry – the power to
dictate land uses versus the power to control aesthetics. I would argue that no matter which direction land use regulations move at this point there is still going to be this inherent battle between local governments and the development industry over flexibility and exceptions to the rule.


Reed's Landing Corporation v. Powhatan County Board of Supervisors. 1994. Circuit Court of Powhatan County. Case No. CH93-000-097-00.


Watkins, John C., Papers. 1979-1999. Special Collections and Archives, James Branch Cabell Library, Richmond, VA.


LOCALITY SURVEY:  
Implementation of Conditional Zoning and Voluntary Cash Proffers

This survey is being conducted as part of my doctoral dissertation research. It is designed to capture information related to the adoption, planning, and use of conditional zoning and voluntary cash proffers in counties across the Commonwealth of Virginia. The questions being asked in this survey instrument are directed towards those counties that are eligible to accept voluntary cash proffers as of or prior to FY2007 according to the Commission on Local Government’s annual *Report on Proffered Cash Payments and Expenditures by Virginia’s Counties, Cities and Towns*.

Participation in this survey is voluntary. A respondent may decline to answer any or all questions. Additionally, a respondent may decline further participation, at any time, without adverse consequences. Confidentiality and/or anonymity of a respondent outside of locality name will be assured.

<table>
<thead>
<tr>
<th>Respondent Information: (person completing this form)</th>
<th>Please update the address below if incorrect:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name: _______________________________________________</td>
<td>Please return completed survey by <strong>June 16, 2008</strong> to:</td>
</tr>
<tr>
<td>Last Name</td>
<td>Attention: Shannon A. McKay</td>
</tr>
<tr>
<td>First Name</td>
<td>1736 Flank Road</td>
</tr>
<tr>
<td>Title: ________________________________________________</td>
<td>Petersburg, VA 23805</td>
</tr>
<tr>
<td>Email Address: _________________________________________</td>
<td>Shannon A. McKay</td>
</tr>
<tr>
<td>Phone Number: (____) ____________________</td>
<td>Phone: (804) 586-5111</td>
</tr>
<tr>
<td>If necessary, would you be willing to participate in a follow-up telephone interview (lasting less than 15 minutes) for purposes of clarification?</td>
<td>Email: <a href="mailto:mckay@mit.edu">mckay@mit.edu</a></td>
</tr>
<tr>
<td>□ Yes □ No</td>
<td></td>
</tr>
</tbody>
</table>

If you have any questions, please contact:

Shannon A. McKay  
1736 Flank Road  
Petersburg, VA 23805  
Phone: (804) 586-5111  
Email: mckay@mit.edu
KEY DEFINITIONS AND STATE CODE REFERENCES

Key Definitions

"[Conditional zoning]: as part of classifying land within a locality into areas and districts by legislative action, the allowing of reasonable conditions governing the use of such property, such conditions being in addition to, or modification of the regulations provided for a particular zoning district or zone by the overall zoning ordinance. (Code 1950, § 15-961.3; 1962, c. 407, § 15.1-430; 1964, c. 547; 1966, c. 344; 1975, c. 641; 1976, c. 642; 1977, c. 566; 1978, c. 320; 1987, c. 8; 1989, c. 384; 1990, c. 685; 1993, c. 770; 1995, c. 603; 1997, c. 587.)"76

"[Cash Proffer]: (i) any money voluntary proffered in a writing signed by the owner of property subject to rezoning, submitted as part of a rezoning application and accepted by a locality pursuant to the authority granted by Va. Code Ann. § 15.2-2303, or § 15.2-2298, or (ii) any payment of money made pursuant to a development agreement entered into under authority granted by Va. Code Ann. § 15.2-2303.1.

Cash Proffer Revenue Collected [$15.2-2303.2(D)(1), Code of Virginia]: Total dollar amount of revenue collected from cash proffers in the specified fiscal year regardless of the fiscal year in which the cash proffer was accepted. Unaudited figures are acceptable."77

Single-Family Housing: “All new privately-owned attached and detached single-family houses. Include attached single-family houses known commonly as townhouses or row houses where (1) each unit is separated from adjoining units by a wall that extends from ground to roof, (2) no unit is above or below another unit, and (3) each unit has separate heating and separate utility meters.”78

State Code References

§ 15.2-2297. Same; conditions as part of a rezoning or amendment to zoning map.

A. A zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map; provided that (i) the rezoning itself must give rise for the need for the conditions; (ii) the conditions shall have a reasonable relation to the rezoning; (iii) the conditions shall not include a cash contribution to the locality; (iv) the conditions shall not include mandatory dedication of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided for in § 15.2-2241; (v) the conditions shall not include a requirement that the applicant create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55 which includes an express further condition that members of a property owners' association pay an assessment for the maintenance of public facilities owned in fee by a public entity, including open space, parks, schools, fire departments and other public facilities not otherwise provided for in § 15.2-2241; however, such facilities shall not include sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Department of Transportation; (vi) the conditions shall not include payment for or construction of off-site improvements except those provided for in § 15.2-2241; (vii) no condition shall be proffered that is not related to the physical development or physical operation of the property; and (viii) all such conditions shall be in conformity with the comprehensive plan as defined in § 15.2-2223. The governing body may also accept amended proffers once the public hearing has begun if the amended proffers do not materially affect the overall proposal. Once proffered and

76 Virginia State Code (§15.2-2201)
accepted as part of an amendment to the zoning ordinance, the conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by the conditions. However, the conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance. (1978, c. 320, § 15.1-491.2; 1982, c. 293; 1990, c. 868; 1997, c. 587; 2001, c. 703; 2006, c. 450.)

§ 15.2-2303. Conditional zoning in certain localities.

A. A zoning ordinance may include reasonable regulations and provisions for conditional zoning as defined in § 15.2-2201 and for the adoption, in counties, or towns therein which have planning commissions, wherein the urban county executive form of government is in effect, or in a city adjacent to or completely surrounded by such a county, or in a county contiguous to any such county, or in a city adjacent to or completely surrounded by such a contiguous county, or in any town within such contiguous county, and in the counties east of the Chesapeake Bay as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body required by § 15.2-2285 by the owner of the property which is the subject of the proposed zoning map amendment. Reasonable conditions shall not include, however, conditions that impose upon the applicant the requirement to create a property owners' association under Chapter 55 which includes an express further condition that members of a property owners' association pay an assessment for the maintenance of public facilities owned in fee by a public entity, including open space, parks, schools, fire departments, and other public facilities not otherwise provided for in § 15.2-2241; however, such facilities shall not include sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Department of Transportation. The governing body may also accept amended proffers once the public hearing has begun if the amended proffers do not materially affect the overall proposal. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by such conditions. However, such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance. (Code 1950, § 15-968.5; 1962, c. 407, § 15.1-491; 1964, c. 564; 1966, c. 455; 1968, cc. 543, 595; 1973, c. 286; 1974, c. 547; 1975, cc. 9, 575, 579, 582, 641; 1976, cc. 71, 409, 470, 683; 1977, c. 177; 1978, c. 543; 1979, c. 182; 1982, c. 44; 1983, c. 392; 1984, c. 238; 1987, c. 8; 1988, cc. 481, 856; 1989, cc. 359, 384; 1990, cc. 672, 868; 1992, c. 380; 1993, c. 672; 1994, c. 802; 1995, cc. 351, 475, 584, 603; 1996, c. 451; 1997, c. 587; 2001, c. 703; 2006, c. 450.)

§ 15.2-2303.1. Development agreements in certain counties.

A. In order to promote the public health, safety and welfare and to encourage economic development consistent with careful planning, New Kent County may include in its zoning ordinance provisions for the governing body to enter into binding development agreements with any persons owning legal or equitable interests in real property in the county if the property to be developed contains at least one thousand acres. (1997, c. 738, § 15.1-491.001; 2007, c. 813.)

§ 15.2-2298. Same; additional conditions as a part of rezoning or zoning map amendment in certain high-growth localities.

A. Except for those localities to which § 15.2-2303 is applicable, this section shall apply to (i) any locality which has had population growth of 5% or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census; (ii) any city adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous with at least three such counties, and any town located in that county. However, any such locality may by ordinance choose to utilize the conditional zoning authority granted under § 15.2-2303 rather than this section. (1989, c. 697, § 15.1-492.2; 1990, c. 868; 1991, c. 233; 1997, c. 587; 2001, c. 703; 2006, cc. 450, 882; 2007, c. 324.)
BACKGROUND

The series of questions that follow in this section are concerned with the overall regulations of planning and zoning in your locality.

1. Does your locality have a comprehensive land use plan?

☐ YES  (Answer Question 2)

☐ NO  (Go to Question 3)

2. What year was the comprehensive land use plan last updated? ____________ (year)

3. Has your locality adopted a capital improvement plan (CIP)?

☐ YES  (Answer Question 4)

☐ NO  (Go to Question 5)

4. What year was the CIP first adopted? ______________ (year)

5. Does your locality have a zoning ordinance?

☐ YES  (Answer Question 6)

☐ NO  (Go to Question 25)

6. What year was the zoning ordinance last updated? ______________ (year)
CONDITIONAL ZONING IN GENERAL

Attention: Skip this section if there is no county zoning ordinance – Go to Question 25

7. Has your locality amended its zoning ordinance to allow conditional zoning under Virginia State Code (§15.2-2297)? (i.e. non cash proffers)

☐ YES (Answer Question 8)

☐ NO (Go to Question 11)

8. What year was the zoning ordinance amended to allow conditional zoning under Virginia State Code (§15.2-2297)? ____________ (year)

9. Estimate the fraction of rezoning applications that involve conditional zoning in your county on an annual basis. (i.e. non cash proffers)

☐ All (Answer Question 10)

☐ More than 3/4 of rezoning applications (Answer Question 10)

☐ About 1/2 of rezoning applications (Answer Question 10)

☐ Less than 1/4 of rezoning applications (Answer Question 10)

☐ None (Go to Question 11)
10. What is typically proffered by an applicant? (i.e. non cash proffers)

CASH PROFFER ADOPTION

Attention: Skip this section if there is no county zoning ordinance – Go to Question 25

11. Has your locality amended its zoning ordinance to allow the acceptance of voluntary cash proffers under Virginia State Code (§15.2-2303, §15.2-2298, or §15.2-2303.1)?

☐ YES (Answer Question 12)

☐ NO (Go to Question 13)

12. What year was the zoning ordinance amended to allow the acceptance of voluntary cash proffers? [Go to Question 14 after answering] ____________ (year)
13. Given your eligibility under Virginia State Code (§15.2-2303, §15.2-2298, or §15.2-2303.1), why has the locality not amended its zoning ordinance to accept voluntary cash proffers? Please explain below. [Skip to Question 25 after answering]

CASH PROFFER PROGRAMS

Attention: Skip this section if there is no county zoning ordinance – Go to Question 25

14. How would you characterize your county's cash proffer program?

☐ “Case-by-Case” Approach  (Answer Question 15)

☐ “Policy-Based” Approach  (Answer Question 15)
15. How does your county determine the suggested amount of a voluntary cash proffer? Be as specific as possible.

Attention: Skip Questions 16-20 if the county does not use a “Policy-Based” Approach for its voluntary cash proffer program – Go to Question 22

16. What year was the “Policy-Based” Approach established? ______________ (year)

17. What type of “Policy-Based” Approach does your county’s cash proffer program use?

☐ Maximum Cash Proffer Policy (Go to Question 19)

☐ Other (Answer Question 18)
18. Please explain the structure of the “Other” policy below. [Skip to Question 22 after answering]

19. Does your county have separate policy established maximum cash proffer amounts for different housing types? (i.e. single-family, age-restricted, multifamily, etc.)

☐ YES (Answer Question 20)

☐ NO (Go to Question 21)

20. Please list below the housing types that have their own policy established maximum cash proffer amounts and how they relate to each other in terms of dollar value. (i.e. single-family S > age-restricted S > multi-family $)
Attention: Skip this question if there is no county “Maximum Cash Proffer” policy – Go to Question 22

21. Starting with the first year that your county enacted its “Maximum Cash Proffer” policy, complete the line next to each fiscal year with the policy established maximum cash proffer amount per single-family housing unit for a given fiscal year.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Policy Established Maximum Cash Proffer Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972-73</td>
<td></td>
</tr>
<tr>
<td>1973-74</td>
<td></td>
</tr>
<tr>
<td>1974-75</td>
<td></td>
</tr>
<tr>
<td>1975-76</td>
<td></td>
</tr>
<tr>
<td>1976-77</td>
<td></td>
</tr>
<tr>
<td>1977-78</td>
<td></td>
</tr>
<tr>
<td>1978-79</td>
<td></td>
</tr>
<tr>
<td>1979-80</td>
<td></td>
</tr>
<tr>
<td>1980-81</td>
<td></td>
</tr>
<tr>
<td>1981-82</td>
<td></td>
</tr>
<tr>
<td>1982-83</td>
<td></td>
</tr>
<tr>
<td>1983-84</td>
<td></td>
</tr>
<tr>
<td>1984-85</td>
<td></td>
</tr>
<tr>
<td>1985-86</td>
<td></td>
</tr>
<tr>
<td>1986-87</td>
<td></td>
</tr>
<tr>
<td>1987-88</td>
<td></td>
</tr>
<tr>
<td>1988-89</td>
<td></td>
</tr>
<tr>
<td>1989-90</td>
<td></td>
</tr>
</tbody>
</table>
22. Starting with the first year that your county accepted cash proffers, complete the line next to each fiscal year with the average (i.e. typical) cash proffer amount per single-family housing unit for a given fiscal year’s approved rezonings.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Average Cash Proffer Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972-73</td>
<td></td>
</tr>
<tr>
<td>1973-74</td>
<td></td>
</tr>
<tr>
<td>1974-75</td>
<td></td>
</tr>
<tr>
<td>1975-76</td>
<td></td>
</tr>
<tr>
<td>1976-77</td>
<td></td>
</tr>
<tr>
<td>1977-78</td>
<td></td>
</tr>
<tr>
<td>1978-79</td>
<td></td>
</tr>
<tr>
<td>1979-80</td>
<td></td>
</tr>
<tr>
<td>1980-81</td>
<td></td>
</tr>
<tr>
<td>1981-82</td>
<td></td>
</tr>
<tr>
<td>1982-83</td>
<td></td>
</tr>
<tr>
<td>1983-84</td>
<td></td>
</tr>
<tr>
<td>1984-85</td>
<td></td>
</tr>
<tr>
<td>1985-86</td>
<td></td>
</tr>
<tr>
<td>1986-87</td>
<td></td>
</tr>
<tr>
<td>1987-88</td>
<td></td>
</tr>
<tr>
<td>1988-89</td>
<td></td>
</tr>
<tr>
<td>1989-90</td>
<td></td>
</tr>
</tbody>
</table>
CASH PROFFER IMPLEMENTATION

Attention: Skip this section if there is no county zoning ordinance – Go to Question 25

23. Did your county begin collecting cash proffer revenues prior to the 1999-00 fiscal year?

☐ YES

☐ NO (Go to Question 25)

24. Beginning with the first fiscal year that your county accepted cash proffers, provide the total amount of cash proffer revenues collected annually for each fiscal year listed below.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Amount Collect</th>
<th>Fiscal Year</th>
<th>Amount Collect</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972-73</td>
<td></td>
<td>1986-87</td>
<td></td>
</tr>
<tr>
<td>1973-74</td>
<td></td>
<td>1987-88</td>
<td></td>
</tr>
<tr>
<td>1974-75</td>
<td></td>
<td>1988-89</td>
<td></td>
</tr>
<tr>
<td>1975-76</td>
<td></td>
<td>1989-90</td>
<td></td>
</tr>
<tr>
<td>1976-77</td>
<td></td>
<td>1990-91</td>
<td></td>
</tr>
<tr>
<td>1977-78</td>
<td></td>
<td>1991-92</td>
<td></td>
</tr>
<tr>
<td>1978-79</td>
<td></td>
<td>1992-93</td>
<td></td>
</tr>
<tr>
<td>1979-80</td>
<td></td>
<td>1993-94</td>
<td></td>
</tr>
<tr>
<td>1980-81</td>
<td></td>
<td>1994-95</td>
<td></td>
</tr>
<tr>
<td>1981-82</td>
<td></td>
<td>1995-96</td>
<td></td>
</tr>
<tr>
<td>1982-83</td>
<td></td>
<td>1996-97</td>
<td></td>
</tr>
<tr>
<td>1983-84</td>
<td></td>
<td>1997-98</td>
<td></td>
</tr>
<tr>
<td>1984-85</td>
<td></td>
<td>1998-99</td>
<td></td>
</tr>
<tr>
<td>1985-86</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
GROWTH ENVIRONMENT

This section will help us to understand the development context in your locality.

25. Does your county view cash proffers as a growth management tool?

☐ YES (Answer Question 26)

☐ NO (Answer Question 26)

26. Is there another tool or power that you would like to see your locality have to deal with the ramifications of growth? [Indicate for example, whether this tool/power is already enabled by state statutes, but has not been adopted by the local governing body.]
Attention: Skip Questions 27 and 28 if there is no county zoning ordinance – Go to Question 29

27. For the most recent housing cycle (1999-2007), fill in the blank spaces beside each fiscal year with the requested information. For all questions, please only count applications or units with single-family housing as a proposed use(s), for each year. [If the locality has never accepted a cash proffer, leave the last three columns blank.]

<table>
<thead>
<tr>
<th>Year</th>
<th>All Rezoning Applications</th>
<th>Rezoning Applications with Cash Proffers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total Applications</td>
<td>Total Approved</td>
</tr>
<tr>
<td>1998-99</td>
<td>__________</td>
<td>__________</td>
</tr>
<tr>
<td>1999-00</td>
<td>__________</td>
<td>__________</td>
</tr>
<tr>
<td>2000-01</td>
<td>__________</td>
<td>__________</td>
</tr>
<tr>
<td>2001-02</td>
<td>__________</td>
<td>__________</td>
</tr>
<tr>
<td>2002-03</td>
<td>__________</td>
<td>__________</td>
</tr>
<tr>
<td>2003-04</td>
<td>__________</td>
<td>__________</td>
</tr>
<tr>
<td>2004-05</td>
<td>__________</td>
<td>__________</td>
</tr>
<tr>
<td>2005-06</td>
<td>__________</td>
<td>__________</td>
</tr>
<tr>
<td>2006-07</td>
<td>__________</td>
<td>__________</td>
</tr>
</tbody>
</table>

**ADDITIONAL INFORMATION**

28. Who is the best person to contact in your office or another county department for an interview on the institutional history of cash proffers in the county? [If the locality has never accepted a cash proffer, skip to Question 29.]
29. Please use the space below for any answer clarifications or general feedback on the survey questions.

**** Thank you for your assistance! ****
This survey is being conducted as part of my doctoral dissertation research. It is designed to capture information related to the adoption, planning, and use of conditional zoning and voluntary cash proffers in counties across the Commonwealth of Virginia. The questions being asked in this survey instrument are directed towards those counties that are ineligible to accept voluntary cash proffers as of FY2007 according to the Commission on Local Government’s annual Report on Proffered Cash Payments and Expenditures by Virginia’s Counties, Cities and Towns.

Participation in this survey is voluntary. A respondent may decline to answer any or all questions. Additionally, a respondent may decline further participation, at any time, without adverse consequences. Confidentiality and/or anonymity of a respondent outside of locality name will be assured.

<table>
<thead>
<tr>
<th>Respondent Information: (person completing this form)</th>
<th>Please update the address below if incorrect:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name:</td>
<td>Please return completed survey by June 16, 2008 to:</td>
</tr>
<tr>
<td>Last Name</td>
<td>Attention: Shannon A. McKay</td>
</tr>
<tr>
<td>First Name</td>
<td>1736 Flank Road</td>
</tr>
<tr>
<td>Title:</td>
<td>Petersburg, VA 23805</td>
</tr>
<tr>
<td>Email Address:</td>
<td>Shannon A. McKay</td>
</tr>
<tr>
<td>Phone Number: ( )</td>
<td>Phone: (804) 586-5111</td>
</tr>
</tbody>
</table>

If necessary, would you be willing to participate in a follow-up telephone interview (lasting less than 15 minutes) for purposes of clarification?

☐ Yes  ☐ No

If you have any questions, please contact:

Shannon A. McKay
Phone: (804) 586-5111
Email: mckay@mit.edu
KEY DEFINITIONS AND STATE CODE REFERENCES

Key Definitions

“[Conditional zoning]: as part of classifying land within a locality into areas and districts by legislative action, the allowing of reasonable conditions governing the use of such property, such conditions being in addition to, or modification of the regulations provided for a particular zoning district or zone by the overall zoning ordinance. (Code 1950, § 15-961.3; 1962, c. 407, § 15.1-430; 1964, c. 547; 1966, c. 344; 1975, c. 641; 1976, c. 642; 1977, c. 566; 1978, c. 320; 1987, c. 8; 1989, c. 384; 1990, c. 685; 1993, c. 770; 1995, c. 603; 1997, c. 587.)”

“[Cash Proffer]: (i) any money voluntary proffered in a writing signed by the owner of property subject to rezoning, submitted as part of a rezoning application and accepted by a locality pursuant to the authority granted by Va. Code Ann. § 15.2-2303, or § 15.2-2298, or (ii) any payment of money made pursuant to a development agreement entered into under authority granted by Va. Code Ann. § 15.2-2303.1.”

Single-Family Housing: “All new privately-owned attached and detached single-family houses. Include attached single-family houses known commonly as townhouses or row houses where (1) each unit is separated from adjoining units by a wall that extends from ground to roof, (2) no unit is above or below another unit, and (3) each unit has separate heating and separate utility meters.”

State Code References

§ 15.2-2297. Same; conditions as part of a rezoning or amendment to zoning map.

A. A zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map; provided that (i) the rezoning itself must give rise for the need for the conditions; (ii) the conditions shall have a reasonable relation to the rezoning; (iii) the conditions shall not include a cash contribution to the locality; (iv) the conditions shall not include mandatory dedication of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided for in § 15.2-2241; (v) the conditions shall not include a requirement that the applicant create a property owners' association under Chapter 26 (§ 55-508 et seq.) of Title 55 which includes an express further condition that members of a property owners' association pay an assessment for the maintenance of public facilities owned in fee by a public entity, including open space, parks, schools, fire departments and other public facilities not otherwise provided for in § 15.2-2241; however, such facilities shall not include sidewalks, special street signs or markers, or special street lighting in public rights-of-way not maintained by the Department of Transportation; (vi) the conditions shall not include payment for or construction of off-site improvements except those provided for in § 15.2-2241; (vii) no condition shall be proffered that is not related to the physical development or physical operation of the property; and (viii) all such conditions shall be in conformity with the comprehensive plan as defined in § 15.2-2223. The governing body may also accept amended proffers once the public hearing has begun if the amended proffers do not materially affect the overall proposal. Once proffered and accepted as part of an amendment to the zoning ordinance, the conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by the conditions. However, the conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance. (1978, c. 320, § 15.1-491.2; 1982, c. 293; 1990, c. 868; 1997, c. 587; 2001, c. 703; 2006, c. 450.)

79 Virginia State Code (§15.2-2201)
BACKGROUND

The series of questions that follow in this section are concerned with the overall regulations of planning and zoning in your locality.

1. Does your locality have a comprehensive land use plan?
   
   □ YES  
   (Answer Question 2)

   □ NO  
   (Go to Question 3)

2. What year was the comprehensive land use plan last updated? _____________ (year)

3. Has your locality adopted a capital improvement plan (CIP)?
   
   □ YES  
   (Answer Question 4)

   □ NO  
   (Go to Question 5)

4. What year was the CIP first adopted? _____________ (year)

5. Does your locality have a zoning ordinance?
   
   □ YES  
   (Answer Question 6)

   □ NO  
   (Go to Question 11)

6. What year was the zoning ordinance last updated? _____________ (year)
CONDITIONAL ZONING IN GENERAL

Attention: Skip this section if there is no county zoning ordinance – Go to Question 11

7. Has your locality amended its zoning ordinance to allow conditional zoning under Virginia State Code (§15.2-2297)? (i.e. non cash proffers)

☐ YES (Answer Question 8)

☐ NO (Go to Question 11)

8. What year was the zoning ordinance amended to allow conditional zoning under Virginia State Code (§15.2-2297)? _____________ (year)

9. Estimate the fraction of rezoning applications that involve conditional zoning in your county on an annual basis. (i.e. non cash proffers)

☐ All (Answer Question 10)

☐ More than ¾ of rezoning applications (Answer Question 10)

☐ About ½ of rezoning applications (Answer Question 10)

☐ Less than ¼ of rezoning applications (Answer Question 10)

☐ None (Go to Question 11)
10. What is typically proffered by an applicant? (i.e. non cash proffers)

VOLUNTARY CASH PROFFER ELIGIBILITY

11. Would your locality benefit from being eligible to accept voluntary cash proffers?

☐ YES (Answer Question 12)

☐ NO (Answer Question 12)

12. Please state the reason(s) for your answer to the prior question.
GROWTH ENVIRONMENT

These questions will help us to understand the development context in your locality.

13. Does your county view voluntary cash proffers as a growth management tool?

☐ YES (Answer Question 14)

☐ NO (Answer Question 14)

14. Is there another tool or power that you would like to see your locality have to deal with the ramifications of growth? [Indicate for example, whether this tool/power is already enabled by state statutes, but has not been adopted by the local governing body.]
Attention: Skip Question 15 if there is no county zoning ordinance – Go to Question 16

15. For the most recent housing cycle (1999-2007), fill in the blank spaces beside each fiscal year with the requested information. For all questions, please only count applications or units with single-family housing as a proposed use(s), for each year.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Applications</th>
<th>Total Approved</th>
<th>Number of Housing Units Approved</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998-99</td>
<td>_________</td>
<td>_________</td>
<td>_________</td>
</tr>
<tr>
<td>1999-00</td>
<td>_________</td>
<td>_________</td>
<td>_________</td>
</tr>
<tr>
<td>2000-01</td>
<td>_________</td>
<td>_________</td>
<td>_________</td>
</tr>
<tr>
<td>2001-02</td>
<td>_________</td>
<td>_________</td>
<td>_________</td>
</tr>
<tr>
<td>2002-03</td>
<td>_________</td>
<td>_________</td>
<td>_________</td>
</tr>
<tr>
<td>2003-04</td>
<td>_________</td>
<td>_________</td>
<td>_________</td>
</tr>
<tr>
<td>2004-05</td>
<td>_________</td>
<td>_________</td>
<td>_________</td>
</tr>
<tr>
<td>2005-06</td>
<td>_________</td>
<td>_________</td>
<td>_________</td>
</tr>
<tr>
<td>2006-07</td>
<td>_________</td>
<td>_________</td>
<td>_________</td>
</tr>
</tbody>
</table>
ADDITIONAL INFORMATION

16. Please use the space below for any answer clarifications or general feedback on the survey questions.

**** Thank you for your assistance! ****
ACKNOWLEDGEMENTS

A word of thanks is extended to my committee members – Lynn, Frank, and Eran – for always being there to answer my questions and offer their guidance over the years and distance. Terry Szold’s feedback in the early stages of this dissertation was very helpful. I would be amiss without acknowledging the support of my colleagues at the Federal Reserve Bank of Richmond. I must also thank all of the various county government officials who completed my surveys, as well as, my interviewees. This dissertation would not be the same without their contribution. In addition, I am grateful to the special collections and archives staff at the various libraries across Virginia, in particular the Library of Virginia. Their assistance in finding and pulling boxes of archival materials made it easier for me to conduct my research. Finally, I am grateful to my parents, family, and friends whose encouragement instilled in me the perseverance to complete this work.