



**CITY OF HARRISONBURG**  
**OFFICE OF THE**  
**CITY ATTORNEY**

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TO: Adam Fletcher, Director of Community Development, Thanh Dang, Assistant Director of Community Development  
FROM: Chris Brown, City Attorney, Wesley Russ, Assistant City Attorney  
DATE: January 12, 2023  
RE: Bluestone Town Center Proffer 4, Impact fee

MEMORANDUM

The City Attorney's Office has reviewed Proffer 4 of the Bluestone Town Center Rezoning Request Proffer statement submitted by the Harrisonburg Redevelopment & Housing Authority (HRHA) and the owners of the property subject to the rezoning request. For reasons set forth below, we believe that Proffer 4 is not legally viable and should not be accepted by City Council.

Proffer 4 (copy attached) seeks to mitigate the impact the proposed rezoning and subsequent development of the Bluestone Town Center (the Project) would have on the City's school system and surrounding communities. In essence, HRHA has proffered that the Project Developer (presumably an entity controlled by HRHA) will pay to the City \$50,000 per Rental Unit (as defined in the proffer statement) in the Project. The cash payment will be made upon a Rental Unit building receiving a certificate of occupancy for all the Rental Units contained therein. The payment is conditioned upon the City loaning back to the Developer \$40,000 of each such cash proffer payment to be used for further construction of the Project. The Developer will then make annual loan payments to the City for each such \$40,000 loan. Proffer 4 states that the City will have a subordinate security interest in the Rental Units, presumably behind other commercial lenders. Other loan payment terms are not set forth in Proffer 4. Previous versions of Proffer 4 and discussions with HRHA indicate that the repayment schedule would be 40 years at 1% interest.

While acknowledging that Proffer 4 could potentially generate a large sum of money for the City, for the reasons set forth below we believe the proffer is not permitted by law.

1. Cash proffers are not permitted by the Harrisonburg City Code. See Harrisonburg City Code Section 10-3-123. While Virginia Code Section 15.2-2298 authorizes the City to enact an ordinance permitting cash proffers, it has not done so. Cash proffers may only be accepted pursuant to the terms of a properly enacted ordinance. A cash proffer

accepted without the authority of a duly enacted City ordinance would be void and could invalidate the rezoning. This defect cannot be corrected retroactively through a subsequent amendment to City Code.

2. Even if the City had an ordinance permitting cash proffers, we believe Proffer 4 would not be acceptable. Virginia Code Section 15.2-2298 authorizes the City to adopt an ordinance permitting *reasonable conditions*, including cash proffers, if the rezoning itself gives rise to the need for the conditions, the conditions have a reasonable relation to the rezoning, and the conditions are in conformity with the comprehensive plan. Case law in Virginia prohibits cash proffers from being used as a *quid pro quo* for a rezoning. Therefore, Virginia law requires that impacts from a proposed rezoning be substantiated and documented before the planning commission and governing body in order to determine if the cash proffers have a reasonable relation to the impact of the rezoning. Proffer 4 states that its purpose is to mitigate the impact of the Project “on the school system and surrounding communities”. While obviously the Project would result in more students in Harrisonburg City Schools, HRHA has presented no analysis of how this affects existing school capacity and the cost the Project should reasonably bear for the impact on schools and surrounding communities. The cash proffer offered in Proffer 4 far surpasses the school related proffers routinely offered in other Virginia localities, even in Northern Virginia. While this appears attractive at first glance, it is could be evidence that the proffer is not reasonable.
3. If Council decided to enact an ordinance accepting cash proffers, it could elect to use the standards set out in Virginia Code Section 15.2-2303, which arguably reduce the reasonableness standards set out in Section 15.2-2298 as described above. However, Virginia Code Section 15.2-2303.4 would still apply. That section increases the standard by which proffers must relate to impacts of a proposed residential rezoning. Under this state code section, a proffer is *unreasonable unless* it addresses an impact that is specifically attributable to the proposed rezoning, the rezoning creates a need, or an identifiable portion of a need, for a public facility improvement in excess of existing capacity, and is a direct and material benefit to the proposed development. For the reasons set forth in Number 2 above, Proffer 4 may not be reasonable under Section 15.2-2303.4.
4. Proffer 4 only applies to rental units. The maximum number of units in the Project will be 900, with approximately half being rental units. Some of the rental units will be for senior living apartments, which are unlikely to generate school children. That Proffer 4 applies equally to all rental units, even those unlikely to have any impact, while excluding for-sale units that are likely to generate an impact to the schools further calls into question the reasonableness of that proffer.
5. Proffer 4 requires City Council to agree to multiple loan agreements that will last many years. The rezoning application for the Project limits buildout to 100 units per year. Council may be entering into loan agreements for the next 9 years and the City receiving repayment on those loans for decades. There are numerous issues with the loan aspect of Proffer 4:

- a. Under Virginia law, the current City Council can't bind future councils except in limited circumstances. Approval of Proffer 4 would obligate future Councils to continue the loan system it sets up for at least 9 more years.
  - b. Proffer 4 requires the City to enter into loan agreements in order to receive the cash payments. Proffers may not require the City to assume any obligations or to undertake any affirmative actions it is not otherwise required to do. Such a requirement may constitute impermissible contract zoning and/or the impermissible contracts between the City and the Developer.
  - c. Proffer 4 would not only bind the City as described above, but also the Harrisonburg Economic Development Authority. Under Virginia law the City may not make loans directly to the Developer and would have to use the EDA for such loans. While members of the EDA are appointed by City Council, the EDA is an independent body that cannot be bound by Proffer 4.
  - d. Representatives of HRHA indicated that Proffer 4's impact fees were limited to rental units and structured to include a loan obligation at below-market rates in order to increase the competitiveness of the Project's Low-Income Housing Tax Credit (LIHTC) applications. LIHTC credits can only be secured for rental properties and applications receive more favorable review when a local government provides financial support, including through loans at subsidized rates. The loan process set out in Proffer 4 makes it appear that the City is an active participant in the financing of the Project. A proffer legally must address impacts created by a rezoning and should be limited to land use related matters, not project financing.
  - e. There are numerous administrative difficulties related to the loan system set out in Proffer 4. The City's Department of Finance would have to keep track of at least 400 loans which may stretch out for 40 years or more.
6. Cash proffers for residential construction on a per-dwelling basis must be collected by the locality only after completion of the final inspection and before the issuance of the certificate of occupancy for the unit. See Virginia Code Section 15.2-2303.1:1. Failure to collect the cash proffer payment prior to the issuance of the certificate of occupancy of a unit may make the payment uncollectable. This requirement will make the administration of Proffer 4 difficult since there are more than 400 rental units. Also, the loan system set up by Proffer 4 may violate Section 15.2-2303.1:1 if the loans are challenged and found to be unlawful long term payments of cash proffers instead of loan payments.

For the reasons set forth above, we believe Proffer 4 is not legally permissible and should be rejected by Council.

If you have any questions regarding the above please contact us.

