COMMONWEALTH of VIRGINIA

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The Honorable Christopher K. Peace
Member, House of Delegates
P.O. Box 819
Mechanicsville, Virginia 23111

Dear Delegate Peace:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether newly enacted § 15.2-2303.1:1,[1] which prohibits localities from collecting conditional zoning cash proffers at any time other than after completion of the final inspection and prior to issuance of any certificate of occupancy for the subject property, applies to proffer agreements that were formed prior to July 1, 2010, the effective date of the statute. You also raise the issue of whether such retrospective application would violate the Contracts Clause of the United States or the Virginia Constitutions.

Response

It is my opinion that, as of July 1, 2010 and through July 1, 2014, a locality may *not* accept or demand payment of any uncollected cash proffer payments, including those agreed to prior to July 1, 2010, until the completion of a final inspection and prior to the issuance of a certificate of occupancy for the subject property, notwithstanding the provisions of any such proffer agreement to the contrary.[2] It is further my opinion this interpretation does not infringe the Contracts Clauses of the United States or of the Virginia Constitutions.

Background

You relate that certain Virginia localities have taken the position that the enactment of § 15.2-2303.1:1 does not apply to proffers formed prior to July 1, 2010. Thus, these localities contend that zoning applicants who entered such proffer agreements remain obligated to make payments in accordance with such proffers, notwithstanding the new provision delaying payment of uncollected cash proffers until

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[1] The Virginia Code Commission codified Chapters 549 and 613 of the 2010 Acts of Assembly as § 15.2 - 2303.1:1.

[2] For purposes of this Opinion and without reference to any specific proffer agreement, it is assumed that the legislation does not operate to impair substantially or divest any substantive rights of the zoning applicant under such proffer agreements.

completion of a final inspection. You suggest that the law is intended to help residential builders weather a difficult economic period by delaying collection of payments owed pursuant to certain cash proffers.

Applicable Law and Discussion

Section 15.2-2280 grants localities the ability to enact zoning ordinances. Sections 15.2-2296 through 15.2-2303.3 further authorize and govern the use of "conditional zoning," which entails, "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."[3] Such conditions may include the voluntary proffer by a zoning applicant of certain cash payments to the locality.[4] As you note, however, these cash proffers are now subject to the provisions of § 15.2-2303.1:1.

Section 15.2-2303.1:1 provides, in its entirety, as follows:

> A. Notwithstanding the provisions of *any* cash proffer requested, offered, or accepted pursuant to § 15.2-2298, 15.2-2303, or 15.2-2303.1 for residential construction on a per-dwelling unit or per-home basis, cash payment made pursuant to such a cash proffer shall be collected or accepted by any locality only after completion of the final inspection and prior to the time of the issuance of any certificate of occupancy for the subject property.
> B. The provisions of this section shall expire on July 1, 2014.[5]

The statute does not state explicitly whether it is limited to prospective application or if it is to be applied retrospectively as well, thereby delaying collection of proffered payments that were agreed to prior to the law's effective date of July 1, 2010.

Nonetheless, when statutory language is unambiguous, its plain and natural meaning will control.[6] Here, the language of the Act makes it applicable to "*any* cash proffer ... for residential construction on a per-dwelling unit or per-home basis." The word "any" is an unrestrictive modifier and is generally considered to apply without limitation.[7] The plain meaning of the word "any" includes, by definition, *all* proffers of the type described in the Act without limitation, including any time restrictions.[8]

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[3] VA. CODE ANN. § 15.2-2201 (2008).

[4] *See* §§ 15.2-2298; 15.2-2303; 15.2-2303.1; 15.2-2303.2; 15.2-2303.3 (2008).

[5] Section 15.2-2303.1:1 (Supp. 2010) (emphasis added).

[6] *See* Portsmouth v. Chesapeake, 205 Va. 259, 269, 136 S.E.2d 817, 825 (1964).

[7] Sussex Comm. Serv. Ass'n v. Virginia Soc. for Mentally Retarded Children, Inc., 251 Va. 240, 243-44, 467 S.E.2d 468, 469-70 (1996) (holding the plain meaning of phrase "any covenant" included all covenants described in the statute without limitation, whether such covenants were recorded before after the effective date of the legislation and, therefore, a 1991 amendment to the law applied to restrictive covenants recorded in 1975); The Supreme Court of Virginia in *Sussex* cited other cases in which it has given retroactive effect to statutes containing unrestricted modifiers such as "an, "all," and "any." *Sussex*, 251 Va. at 243, 467 S.E.2d at 469.

[8] The rule of statutory interpretation that presumes statutes to be prospective in operation applies only when the intent of the legislature is in doubt; reference to such rules is inappropriate when the terms of the statute are certain and clear. *See* Allen v. Motley Constr. Co., 160 Va. 875, 884, 170 S.E. 412, 415 (1933). Moreover, there is no requirement that any "specific word or phrase be used in order to support a finding of clear legislative intent of

Not only the text of the statute, but also its legislative history indicates that the law was intended to apply to proffers formed prior to the Act's effective date. An amendment was offered that proposed including language that would expressly except from the law's application those proffer agreements entered into prior to July 1, 2010, and specifically provided for collection of the cash payments sometime prior to final inspection. That limiting language was rejected in favor of the original text that included the word "any" and contained no words of limitation. I therefore conclude that the General Assembly intended for the legislation to apply to all proffers of the type described in the Act, including those made before July 1, 2010.

I conclude further that the application of the Act to proffers formed prior to July 1, 2010 presents no constitutional problem as it relates to the localities' interest in receiving the agreed-to proffer. The Constitution of the United States provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts[,]"[9] and the Constitution of Virginia imposes the same prohibition upon the General Assembly specifically.[10] Known as the "Contracts Clause," these similar provisions "protect against the same fundamental invasion of rights."[11]

The purpose of the Contracts Clause is to impose "*some* limits upon the state's power 'to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.'"[12] A long line of cases makes clear that the Contracts Clause does not protect a municipality from modification or abrogation of a municipality's contracts by the State.[13] Rather, the Contracts Clause operates to protect private parties from the government.

City of Portsmouth v. Virginia Railway and Power Company[14] illustrates this distinction. There, the Supreme Court of Virginia upheld the order of the State Corporation Commission ("SCC") that granted the request of the Virginia Railway and Power Company ("Virginia Railway") to discontinue operation of one of its passenger rail lines in the City of Portsmouth (the "City"). The City appealed the order, claiming that its contract with Virginia Railway "created an inviolable contract between the company and the city, which was protected by the contract clause of the Federal Constitution."[15]

The Court disagreed with the City's contention, stating that, "the municipality, being a mere agent of the State, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed, or revoked, without the impairment of any *constitutional obligation.*"[16] The Court articulated further that, "[a] municipality is merely a department

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retroactive application." *Sussex*, 251 Va. 240 at 245, 467 S.E.2d at 470 (refuting the contention that the phrase "heretofore or hereafter" must be included in a statute in order to apply that statute both retrospectively and prospectively).

[9] U.S. CONST. art. I, § 10, cl. 1.

[10] VA. CONST. art. I, § 11.

[11] The Working Waterman's Ass'n of Va., Inc. v. Seafood Harvesters, Inc., 227 Va. 101, 109, 314 S.E. 2d 159, 164 (1984) (quoting 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 203 (1974)).

[12] *Id.* at 110, 314 S.E.2d at 164 (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242 (1978)).

[13] East Hartford v. Hartford Bridge Co., 51 U.S. 511, 533-37 (1850) (municipality could not invoke Contracts Clause to preclude the State's from abrogating a contract between the municipality and a bridge company).

[14] *Portsmouth v. Virginia Ry. & Power Co.*, 141 Va. 44, 126 S.E. 366 (1925).

[15] *Id.* at 46-47, 126 S.E. at 367.

[16] *Id.* at 49, 126 S.E. at 367-68 (quoting Pawhuska v. Pawhuska Oil & Gas Co., 250 U.S. 394, 399 (1919)) (emphasis added).

of the State, and the State may withhold, grant or withdraw powers and privileges, as it sees fit. However great or small its sphere of action, it remains the creature of the State, exercising and holding powers and privileges subject to the sovereign will."[17]

The state, thus, could terminate the contract between the City and Railway, notwithstanding the terms of the contract of the City and the Railway to the contrary. In sum, where the state is exercising its police power over its agents, *e.g.*, executive agencies or as here, localities, who have only those powers delegated to it by the state, there is no unconstitutional impairment to the agent's contract rights, for "[t]he state, having authorized such contract, could revoke or modify it at its pleasure."[18] Applied to your inquiry this means that, because localities derive their zoning and conditional zoning authority from the Commonwealth,[19] that power remains subject to the reserved legislative powers of the state.[20] As such, any contracts and agreements made pursuant to such grants of authority, including cash proffer agreements, are subject to such reservation and the state therefore may modify retroactively the payment terms.[21]

Conclusion

Accordingly, to the extent the Act does not impair the contract or vested rights of the zoning applicant, it is my opinion that § 15.2-2303.1:1 applies to cash payment proffers formed before July 1, 2010 so that a locality may *not* accept or demand payment of any uncollected cash proffer payments until the completion of a final inspection and prior to the issuance of a certificate of occupancy for the subject property, notwithstanding the provisions of any such proffer agreement to the contrary. It is further my opinion this interpretation does not infringe the Contracts Clauses of the United States or of the Virginia Constitutions.

With kindest regards, I am

Very truly yours,

Kenneth T. Cuccinelli, II
Attorney General

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[17] *Id.* at 50, 126 S.E. at 368 (quoting City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923)).

[18] *Id.* at 49, 126 S.E. at 368 (quoting New Orleans v. New Orleans Waterworks Co., 142 U.S. 79, 91 (1891) (internal quotations omitted)).

[19] *See* Hurt v. Caldwell, 222 Va. 91, 96, 279 S.E.2d 138, 141 (1981).

[20] *See generally* City of Richmond v. Pace, 127 Va. 274, 286-87, 103 S.E. 647, 651 (1920) (quoting *Dillon on Municipal Corporations* in support of the proposition that localities, as creatures of the state, remain subject to the state's power and control: "[t]he legislature may give [a municipality] all the powers such a being is capable of receiving, making it a miniature State in that locality, or it may strip it of every power, leaving it a corporation in name only; and it may create or recreate these changes as often as it chooses, or itself may exercise directly within the locality any or all the powers usually committed to a municipality." (citation omitted)).

[21] This analysis is limited to a locality's interest; any impact to the rights of private parties, *i.e.* zoning applicants, would be subject to the strictures of the Contracts Clause.