Recent Virginia Land Use Laws Provide New Tools for Solar Developers

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Recent Virginia legislation, effective July 1, 2020, provides solar developers with several new tools to consider when seeking land use approval for utility-scale solar projects.

The first tool, ?siting agreements,? allows developers and localities to negotiate development impact mitigation, compensation, and other assistance beneficial to the localities for certain solar projects being sited in opportunity zones in Virginia. The second allows localities to waive the substantial accord determination (commonly known as a ?2232 Review?). Finally, new legislation gives guidance about the types of conditions a locality may approve in connection with a special exception for a solar project, including dedication of real property or substantial cash payments, so long as such conditions are reasonably related to the project.

While these new laws help solar developers address localities? concerns over solar facility development impacts, the interplay among these new laws is complex, and how they will be applied alongside a locality?s zoning process is just beginning to be considered by localities. It is important to be aware of these new laws and to consider how they can be used to help seek land use approval for solar projects in Virginia.

Siting Agreements for Solar Projects in Opportunity Zones

New Va. Code § 15.2-2316.6 *et seq.* requires solar developers who intend to locate certain solar facilities[1] in an opportunity zone to give written notice to the host locality and to request a meeting.

Under this statute, ?Opportunity zone? means a census tract in an area of the host locality *meeting the eligibility requirements* for designation as a qualified opportunity zone by the U.S. Secretary of the Treasury. Opportunity zones are low-income census tracts eligible to be designated for tax benefits under the 2017 Tax Cuts and Jobs Act (TCJA). In Virginia, there are over 900 low-income census tracts in Virginia eligible to be designated under the TCJA.

Once notice is given to the locality, the developer and the locality meet and discuss and negotiate a

siting agreement. These siting agreements may include terms and conditions, including:

1. Mitigation of any impacts of such solar facility;
2. Financial compensation to the host locality to address capital needs set out in the (a) capital improvement plan adopted by the host locality, (b) current fiscal budget of the host locality, or (c) fiscal fund balance policy adopted by the host locality; or
3. Assistance by the applicant in the deployment of broadband.

Mitigation of impacts and financial compensation are familiar concepts to land use practitioners who craft proffers associated with rezoning applications and negotiate special use permit conditions imposed by local governing bodies.

The failure of the developer and the governing body to enter into a siting agreement may be considered as a factor in the land use approval process, though it cannot be the sole reason for denial.

Notably, the new siting agreement legislation provides that approval of a siting agreement by the local governing body shall deem the solar facility to be substantially in accord with the Comprehensive Plan, satisfying Va. Code § 15.2-2232.

Waiver of Substantial Accord Determination

New Va. Code § 15.2-2232 H allows a locality to waive the substantial accord determination pursuant to Va. Code § 15.2-2232 required for projects that are not shown on the adopted Comprehensive Plan of the locality or that are permitted by right. The decision whether to waive the substantial accord determination (or to subsume the review into the special use permit review process) is solely that of the locality.

Solar-Specific Special Use Permit Conditions

Another new law, Va. Code § 15.2-2288.8, allows a locality?s governing body to approve a special exception for a solar project with conditions that include:

1. Dedication of real property of substantial value; or
2. Substantial cash payments for or construction of substantial public improvements, the need for which is not generated solely by the granting of a conditional use permit, so long as such conditions are *reasonably related* to the project.

Special use permits[2] often include conditions, which are intended to address the potential impacts of the use. Conditions must have a *reasonable relationship* to the impacts that the locality?s governing body determines will be caused by the use.[3] Further, under constitutional principles, a condition requiring the dedication of property must have a nexus to the proposed development?s impact and must be proportional to the extent of that impact.[4] Otherwise, the condition could be deemed an unconstitutional taking without compensation.

Putting it Together

You may be wondering how these new land use laws work together. Under the new special exception law for solar development (Va. Code § 15.2-2288.8), localities have the authority to impose special use permit conditions requiring dedications of property and/or cash. This authority is in addition to the localities? ability to enter into siting agreements with solar developers for projects in opportunity zones to mitigate the expected impacts of the project and to receive financial compensation. (Thus, when negotiating a siting agreement, it is important to consider whether any other conditions may be imposed by the locality in granting a special exception for the solar project.)

As mentioned above, special use permit conditions must be ?reasonably related? to the impacts caused by the use. Whether a condition is ?reasonably related? to a proposed solar project will entail the same sort of analysis that localities and developers grapple with when negotiating special use permit conditions and proffers[5] for other types of projects. Proffers statutes, local ordinances, and case law may help inform this evaluation. Though recent amendments to the proffers statutes have lifted many earlier restrictions, proffers have historically been used to address impacts specifically attributable to proposed development. Proffers for offsite work or funds have addressed the impacts of proposed residential development on public facilities ? such as schools, parks, fire/rescue, and transportation infrastructure. Such proffers may provide a helpful analogy to evaluate the reasonableness of conditions for solar facilities.

For example, approval of a special use permit for a solar facility that may have impacts on historic resources could include conditions for a contribution to a state or local historical society. A permit for a solar facility that may affect wetlands or other sensitive land could include in-kind work or funds to government agencies or nonprofits to address watershed preservation, storm water remediation work, nutrient credits, or contributions to pedestrian trails or park development. Since solar projects could require fire protection, cash or in-kind contributions towards fire or rescue departments may also be a reasonable proffer.

At the same time, if the proposed project is in an opportunity zone, a siting agreement can be used to provide cash to address capital needs regardless of impact from the proposed facility, thus bypassing the reasonable relation test when negotiating with local governments on behalf of solar projects.

If you have any questions concerning any of the new land use laws or how they might apply to your solar project in Virginia, please contact Lori Schweller, member of Williams Mullen?s Land Use Team, or Brad Nowak, co-chair of Williams Mullen?s Solar and Energy Storage Team.

[1] Va. Code § 15.2-2316.6 defines ?solar facility? as ?a commercial solar photovoltaic (electric energy) generation or storage facility, or any portion thereof.? However, the term excludes any project that is (i) described in § 56-594, 56-594.01, or 56-594.2 or Chapters 358 and 382 of the Acts of Assembly of 2013, as amended, or (ii) five megawatts or less.

[2] Local governments derive their authority to issue special exceptions[2] (the permit for which may be called a special use permit or conditional use permit, terms used interchangeably with ?special exception? in some jurisdictions) from Va. Code Section 15.2-2286. The approval of a special use permit is a legislative process, requiring proper public notice, advertising, and hearing.

[3] Cupp v. Board of Supervisors of Fairfax Co., 227 Va. 580 (1984); Board of Supervisors of James City County v. Rowe, 216 Va. 128 (1975).

[4] See Koontz v. St. Johns River Water Management District, 570 U.S. 595 (2013); Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

[5] A proffer is an applicant?s commitment to do work or give funds or property to offset the impact of its proposed development. Virginia proffer law is complex, and different localities are governed by different statutes, which provide a framework as to what proffers are permissible. All such proffer enabling legislation requires reasonableness, but how that standard is implemented depends on whether the locality is permitted to accept cash proffers and whether the proposed proffer is for onsite or offsite improvements.

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