

STATUTORY UPDATE—VA. CODE ANN. § 15.2-2208.1

I. Overview of New Statute:

Va. Code Ann. § 15.2-2208.1, which took effect on July 1, 2014 (see Exhibit A, below, for full text), provides that if a locality imposes an unconstitutional condition on a land use applicant, the applicant will be entitled to an award of compensatory damages, as well as an order directing the locality to approve or deny the application without the unconstitutional condition. In addition, the locality may have to pay the applicant's attorneys' fees and court costs. If an applicant objects in writing to a proposed unconstitutional condition, and the locality refuses to eliminate the condition, then it will be presumed that the unconstitutional condition was the controlling basis for the locality's decision.

II. Applicability:

The new law applies to development conditions that are unilaterally imposed by the Board of Supervisors on an applicant for a special exception, among other applications and permits. The statute should not apply to proffers, which are voluntary in nature, or agreed upon special exception development conditions.

III. What is an unconstitutional condition?

An unconstitutional condition: (i) does not bear a nexus to the proposed development; and/or (ii) is not roughly proportional to the impacts of the proposed development.

IV. What does "nexus" mean in this context?

The need for the condition must be substantially generated by the proposed development and not from the conditions that generally prevailed at the time the land use application was filed.

V. What does "roughly proportional" mean in this context?

A development condition is roughly proportional if an individualized determination has been made that the proposed condition is related both in

nature and extent to the anticipated impacts of the proposed development. The determination need not be proven to a mathematical certainty, but must be supported by quantifiable or measurable evidence that is based on the particular facts associated with the land use application under consideration.

VI. Examples:

It is difficult to provide bright line rules because the nexus/rough proportionality test is a highly fact specific analysis.

Traditionally, problems have arisen where road and trail dedications were required solely because they were part of the locality's master plan for the public infrastructure, and there was no evidence linking the need for the dedication to the proposed development.

If the applicant has filed a written objection or if there is uncertainty about whether the nexus/rough proportionality test has been met, the question should be referred to the County Attorney's Office.

EXHIBIT A

§ 15.2-2208.1. Damages for unconstitutional grant or denial by locality of certain permits and approvals.

A. Notwithstanding any other provision of law, general or special, any applicant aggrieved by the grant or denial by a locality of any approval or permit, however described or delineated, including a special exception, special use permit, conditional use permit, rezoning, site plan, plan of development, and subdivision plan, where such grant included, or denial was based upon, an unconstitutional condition pursuant to the United States Constitution or the Constitution of Virginia, shall be entitled to an award of compensatory damages and to an order remanding the matter to the locality with a direction to grant or issue such permits or approvals without the unconstitutional condition and may be entitled to reasonable attorney fees and court costs.

B. In any proceeding, once an unconstitutional condition has been proven by the aggrieved applicant to have been a factor in the grant or denial of the approval or

permit, the court shall presume, absent clear and convincing evidence to the contrary, that such applicant's acceptance of or refusal to accept the unconstitutional condition was the controlling basis for such impermissible grant or denial provided only that the applicant objected to the condition in writing prior to such grant or denial.

C. Any action brought pursuant to this section shall be filed with the circuit court having jurisdiction of the land affected or the greater part thereof, and the court shall hear and determine the case as soon as practical, provided that such action is filed within the time limit set forth in subsection C or D of § [15.2-2259](#), subsection D or E of § [15.2-2260](#), or subsection F of § [15.2-2285](#), as may be applicable.

(2014, cc. [671](#), [717](#).)