

ASSEMBLY, No. 4716

STATE OF NEW JERSEY 216th LEGISLATURE

INTRODUCED NOVEMBER 16, 2015

Sponsored by:

Assemblyman GORDON M. JOHNSON

District 37 (Bergen)

SYNOPSIS

Modifies performance and maintenance guarantee requirements under "Municipal Land Use Law."

CURRENT VERSION OF TEXT

As introduced.



1 AN ACT concerning performance and maintenance guarantees under
2 the "Municipal Land Use Law" and amending P.L.1975, c.291.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6

7 1. Section 41 of P.L.1975, c.291 (C.40:55D-53) is amended to
8 read as follows:

9 41. Guarantees required; surety; release. a. Before **【recording】**
10 filing of final subdivision plats or recording of minor subdivision
11 deeds or as a condition of final site plan approval or as a condition
12 to the issuance of a zoning permit pursuant to subsection d. of
13 section 52 of P.L.1975, c.291 (C.40:55D-65), the **【approving**
14 **authority】** municipality may require and shall accept in accordance
15 with the standards adopted by ordinance and regulations adopted
16 pursuant to section 1 of P.L.1999, c.68 (C.40:55D-53a) for the
17 purpose of assuring the installation and maintenance of certain on-
18 tract improvements, the furnishing of a performance guarantee, and
19 provision for a maintenance guarantee in accordance with
20 paragraphs (1) and (2) of this subsection. If a municipality has
21 adopted an ordinance requiring a successor developer to furnish a
22 replacement performance guarantee, as a condition to the approval
23 of a permit update under the State Uniform Construction Code, for
24 the purpose of updating the name and address of the owner of
25 property on a construction permit, the governing body may require
26 and shall accept in accordance with the standards adopted by
27 ordinance and regulations adopted pursuant to section 1 of
28 P.L.1999, c.68 (C.40:55D-53a) for the purpose of assuring the
29 installation and maintenance of on-tract improvements, the
30 furnishing of a performance guarantee, and provision for a
31 maintenance guarantee, in accordance with paragraphs (1) and (2)
32 of this subsection.

33 (1) (a) **【The furnishing of】** If required, the developer shall
34 furnish a performance guarantee in favor of the municipality in an
35 amount not to exceed 120% of the cost of installation of only those
36 improvements required by the approval or developer's agreement,
37 ordinance, or regulation to be dedicated to the public entity, and
38 that have not yet been installed, which cost shall be determined by
39 the municipal engineer, according to the method of calculation set
40 forth in section 15 of P.L.1991, c.256 (C.40:55D-53.4), for the
41 following improvements **【which the approving authority may deem**
42 **necessary or appropriate including】** as shown on the approved plans
43 or plat: streets, **【grading,】** pavement, gutters, curbs, sidewalks,
44 street lighting, **【shade】** street trees, surveyor's monuments, as
45 shown on the final map and required by "the map filing law,"

EXPLANATION – Matter enclosed in bold-faced brackets **【thus】** in the above bill is
not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 P.L.1960, c.141 (C.46:23-9.9 et seq.; repealed by section 2 of
2 P.L.2011, c.217) or N.J.S.46:26B-1 through N.J.S.46:26B-8, water
3 mains, **[culverts, storm sewers,] sanitary sewers [or other means of**
4 **sewage disposal], community septic systems, drainage structures,**
5 **[erosion control and sedimentation control devices,] public**
6 **improvements of open space, and [, in the case of site plans only,**
7 **other on-site improvements and landscaping] any grading**
8 **necessitated by the preceding improvements.**

9 The municipal engineer shall prepare an itemized cost estimate
10 of the improvements covered by the performance guarantee, which
11 itemized cost estimate shall be appended to each performance
12 guarantee posted by the obligor.

13 (b) A municipality may also require a performance guarantee to
14 include, within an approved phase or section of a development:

15 (i) privately-owned perimeter buffer landscaping;

16 (ii) privately-owned stormwater management facilities to be
17 connected to a public drainage system; and

18 (iii) top course paving on privately-owned streets as necessary
19 to provide access to the nearest public street as shown on an
20 approved plat or plan, at the time the developer requests the first
21 certificate of occupancy in the phase or section wherein the private
22 street is located.

23 At the developer's option, a separate performance guarantee may
24 be posted for the privately-owned perimeter buffer landscaping,
25 privately-owned stormwater management facilities to be connected
26 to a public drainage system, and, at the time the first certificate of
27 occupancy is requested, the top course paving on privately-owned
28 streets.

29 (c) In the event that the developer shall seek a temporary
30 certificate of occupancy for a development, unit, building, or phase
31 of development, as a condition of the issuance thereof, the
32 developer shall, if required by an ordinance adopted by the
33 municipality, furnish a separate performance guarantee, referred to
34 herein as a "temporary certificate of occupancy bond," in favor of
35 the municipality in an amount equal to 100% of the cost of
36 installation of only those improvements or items which remain to be
37 completed or installed under the terms of the temporary certificate
38 of occupancy and which are required to be installed or completed as
39 a condition precedent to the issuance of the permanent certificate of
40 occupancy for the development, unit, building or phase of
41 development. Upon posting of a "temporary certificate of
42 occupancy bond," all sums remaining under a performance
43 guaranty, required pursuant to subparagraph (a) of this paragraph,
44 which relate to the development, unit, building, or phase of
45 development for which the temporary certificate of occupancy is
46 sought, shall be released. At no time may a municipality hold more

1 than one performance guarantee of any type with respect to the
2 same improvement or item.

3 (d) In addition to a performance guarantee required pursuant to
4 subparagraph (a) of this paragraph, a developer shall, if required by
5 an ordinance adopted by the municipality, furnish to the
6 municipality a separate guarantee, referred to herein as a “safety
7 and stabilization bond,” in favor of the municipality, to be available
8 to the municipality solely for the purpose of returning property that
9 has been disturbed to a safe and stable condition or otherwise
10 implementing measures to protect the public from access to an
11 unsafe or unstable condition, only in the circumstance that:

12 (i) an approved development has been commenced (as
13 evidenced by the issuance of construction permits and site
14 disturbance) and all work on the development has ceased for a
15 period of at least 90 days for reasons other than force majeure, and

16 (ii) work has not recommenced within 30 days following the
17 provision of written notice by the municipality to the developer of
18 the municipality’s intent to claim payment under the bond. A
19 municipality shall not provide notice of its intent to claim payment
20 under a “safety and stabilization bond” until a period of at least 90
21 days has elapsed during which all work on the development has
22 ceased for reasons other than force majeure. A municipality shall
23 provide written notice to a developer by certified mail or other form
24 of delivery providing evidence of receipt.

25 The amount of a “safety and stabilization bond” shall be
26 calculated as a percentage of the bonded improvement costs of the
27 development or phase of development as follows:

28 five percent of the first \$100,000 of bonded improvement costs;

29 two and a half percent of bonded improvement costs in excess of
30 \$100,000 up to \$1,000,000; and

31 one percent of bonded improvement costs in excess of
32 \$1,000,000.

33 (2) **【Provision for】** If required, the developer shall post with
34 the municipality, upon the release of the performance guarantee, a
35 maintenance guarantee **【to be posted with the governing body】** for
36 **【a period not to exceed two years after final acceptance of】** the
37 **【improvement】** improvements, in an amount not to exceed 15% of
38 the cost of the **【improvement】** installation of improvements, which
39 cost shall be determined **【by the municipal engineer】** according to
40 the method of calculation set forth in section 15 of P.L.1991, c.256
41 (C.40:55D-53.4). The term of the maintenance guarantee shall be
42 for a period not to exceed two years and shall automatically expire
43 at the end of the established term.

44 (3) In the event that other governmental agencies or public
45 utilities automatically will own the utilities to be installed or the
46 improvements are covered by a performance or maintenance
47 guarantee to another governmental agency, no performance or

1 maintenance guarantee, as the case may be, shall be required by the
2 municipality for such utilities or improvements.

3 b. The time allowed for installation of the improvements for
4 which the performance guarantee has been provided may be
5 extended by the governing body by resolution. As a condition or as
6 part of any such extension, the amount of any performance
7 guarantee shall be increased or reduced, as the case may be, to an
8 amount not to exceed 120% of the cost of the installation, which
9 cost shall be determined by the municipal engineer according to the
10 method of calculation set forth in section 15 of P.L.1991, c.256
11 (C.40:55D-53.4) as of the time of the passage of the resolution.

12 c. If the required improvements are not completed or corrected
13 in accordance with the performance guarantee, the obligor and
14 surety, if any, shall be liable thereon to the municipality for the
15 reasonable cost of the improvements not completed or corrected and
16 the municipality may either prior to or after the receipt of the
17 proceeds thereof complete such improvements. Such completion or
18 correction of improvements shall be subject to the public bidding
19 requirements of the "Local Public Contracts Law," P.L.1971, c.198
20 (C.40A:11-1 et seq.).

21 d. (1) Upon substantial completion of all required street
22 improvements (except for the top course) and appurtenant utility
23 improvements, and the connection of same to the public system, the
24 obligor may request of the governing body in writing, by certified
25 mail addressed in care of the municipal clerk, that the municipal
26 engineer prepare, in accordance with the itemized cost estimate
27 prepared by the municipal engineer and appended to the
28 performance guarantee pursuant to subsection a. of this section, a
29 list of all uncompleted or unsatisfactory completed improvements.
30 If such a request is made, the obligor shall send a copy of the
31 request to the municipal engineer. The request shall indicate which
32 improvements have been completed and which improvements
33 remain uncompleted in the judgment of the obligor. Thereupon the
34 municipal engineer shall inspect all improvements covered by
35 obligor's request and shall file a detailed list and report, in writing,
36 with the governing body, and shall simultaneously send a copy
37 thereof to the obligor not later than 45 days after receipt of the
38 obligor's request.

39 (2) The list prepared by the municipal engineer shall state, in
40 detail, with respect to each improvement determined to be
41 incomplete or unsatisfactory, the nature and extent of the
42 incompleteness of each incomplete improvement or the nature and
43 extent of, and remedy for, the unsatisfactory state of each
44 completed improvement determined to be unsatisfactory. The
45 report prepared by the municipal engineer shall identify each
46 improvement determined to be complete and satisfactory together
47 with a recommendation as to the amount of reduction to be made in
48 the performance guarantee relating to the completed and

1 satisfactory improvement, in accordance with the itemized cost
2 estimate prepared by the municipal engineer and appended to the
3 performance guarantee pursuant to subsection a. of this section.

4 e. (1) The governing body, by resolution, shall either approve the
5 improvements determined to be complete and satisfactory by the
6 municipal engineer, or reject any or all of these improvements upon
7 the establishment in the resolution of cause for rejection, and shall
8 approve and authorize the amount of reduction to be made in the
9 performance guarantee and the "safety and stabilization bond"
10 relating to the improvements accepted, in accordance with the
11 itemized cost estimate prepared by the municipal engineer and
12 appended to the performance guarantee pursuant to subsection a. of
13 this section. This resolution shall be adopted not later than 45 days
14 after receipt of the list and report prepared by the municipal
15 engineer. Upon adoption of the resolution by the governing body,
16 the obligor shall be released from all liability pursuant to its
17 performance guarantee and "safety and stabilization bond," with
18 respect to those approved improvements, except for that portion
19 adequately sufficient to secure completion or correction of the
20 improvements not yet approved; provided that 30% of the amount
21 of the total performance guarantee and "safety and stabilization
22 bond" posted may be retained to ensure completion and
23 acceptability of all improvements.

24 For the purpose of releasing the obligor from liability pursuant to
25 its performance guarantee and "safety and stabilization bond," the
26 amount of the performance guarantee and "safety and stabilization
27 bond" attributable to each approved improvement shall be reduced
28 by the total amount for each such improvement, in accordance with
29 the itemized cost estimate prepared by the municipal engineer and
30 appended to the performance guarantee pursuant to subsection a. of
31 this section, including any contingency factor applied to the cost of
32 installation. If the sum of the approved improvements would
33 exceed 70 percent of the total amount of the performance guarantee,
34 then the municipality may retain 30 percent of the amount of the
35 total performance guarantee and "safety and stabilization bond" to
36 ensure completion and acceptability of all improvements, as
37 provided above.

38 (2) If the municipal engineer fails to send or provide the list and
39 report as requested by the obligor pursuant to subsection d. of this
40 section within 45 days from receipt of the request, the obligor may
41 apply to the court in a summary manner for an order compelling the
42 municipal engineer to provide the list and report within a stated
43 time and the cost of applying to the court, including reasonable
44 attorney's fees, may be awarded to the prevailing party.

45 If the governing body fails to approve or reject the improvements
46 determined by the municipal engineer to be complete and
47 satisfactory or reduce the performance guarantee for the complete
48 and satisfactory improvements within 45 days from the receipt of

1 the municipal engineer's list and report, the obligor may apply to
2 the court in a summary manner for an order compelling, within a
3 stated time, approval of the complete and satisfactory improvements
4 and approval of a reduction in the performance guarantee for the
5 approvable complete and satisfactory improvements in accordance
6 with the itemized cost estimate prepared by the municipal engineer
7 and appended to the performance guarantee pursuant to subsection
8 a. of this section; and the cost of applying to the court, including
9 reasonable attorney's fees, may be awarded to the prevailing party.

10 (3) In the event that the obligor has made a cash deposit with the
11 municipality or approving authority as part of the performance
12 guarantee, then any partial reduction granted in the performance
13 guarantee pursuant to this subsection shall be applied to the cash
14 deposit in the same proportion as the original cash deposit bears to
15 the full amount of the performance guarantee.

16 f. If any portion of the required improvements is rejected, the
17 approving authority may require the obligor to complete or correct
18 such improvements and, upon completion or correction, the same
19 procedure of notification, as set forth in this section shall be
20 followed.

21 g. Nothing herein, however, shall be construed to limit the right
22 of the obligor to contest by legal proceedings any determination of
23 the governing body or the municipal engineer.

24 h. The obligor shall reimburse the municipality for all
25 reasonable inspection fees paid to the municipal engineer for the
26 foregoing inspection of improvements; provided that the
27 municipality may require of the developer a deposit for the
28 inspection fees in an amount not to exceed, except for extraordinary
29 circumstances, the greater of \$500 or 5% of the cost of
30 improvements, which cost shall be determined pursuant to section
31 15 of P.L.1991, c.256 (C.40:55D-53.4). For those developments for
32 which the inspection fees are less than \$10,000, fees may, at the
33 option of the developer, be paid in two installments. The initial
34 amount deposited by a developer shall be 50% of the inspection
35 fees. When the balance on deposit drops to 10% of the inspection
36 fees because the amount deposited by the developer has been
37 reduced by the amount paid to the municipal engineer for
38 inspection, the developer shall deposit the remaining 50% of the
39 inspection fees. For those developments for which the inspection
40 fees are \$10,000 or greater, fees may, at the option of the developer,
41 be paid in four installments. The initial amount deposited by a
42 developer shall be 25% of the inspection fees. When the balance on
43 deposit drops to 10% of the inspection fees because the amount
44 deposited by the developer has been reduced by the amount paid to
45 the municipal engineer for inspection, the developer shall make
46 additional deposits of 25% of the inspection fees. The municipal
47 engineer shall not perform any inspection if sufficient funds to pay
48 for those inspections are not on deposit.

1 i. In the event that final approval is by stages or sections of
2 development pursuant to subsection a. of section 29 of P.L.1975,
3 c.291 (C.40:55D-38), the provisions of this section shall be applied
4 by stage or section.

5 j. To the extent that any of the improvements have been
6 dedicated to the municipality on the subdivision plat or site plan,
7 the municipal governing body shall be deemed, upon the release of
8 any performance guarantee required pursuant to subsection a. of
9 this section, to accept dedication for public use of streets or roads
10 and any other improvements made thereon according to site plans
11 and subdivision plats approved by the approving authority, provided
12 that such improvements have been inspected and have received
13 final approval by the municipal engineer.

14 (cf: P.L.2013, c.123, s.3)

15

16 2. This act shall take effect immediately.

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18

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STATEMENT

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21 This bill would modify the requirements for furnishing
22 performance and maintenance guarantees under the "Municipal
23 Land Use Law." Performance and maintenance guarantees ensure
24 that improvements required to be made by a developer under a
25 development approval are completed and maintained.

26 Under current law, performance guarantees may be required to
27 ensure the completion of certain types of improvements and may
28 include improvements that are not being dedicated to a public
29 entity. The bill provides that guarantees would only cover
30 improvements that are being dedicated to a public entity.

31 Current law lists types of improvements that may be subject to a
32 performance guarantee requirement. The bill eliminates the
33 following types of improvements from the list: culverts, storm
34 sewers, erosion control and sedimentation control devices, other on-
35 site improvements, and landscaping. The bill allows a municipality
36 to require a performance guarantee for privately-owned perimeter
37 buffer landscaping and stormwater management facilities if the
38 facilities are being connected to a public drainage system. The bill
39 allows a developer to opt to post a separate performance guarantee
40 for these items.

41 The bill modifies some of the types of improvements that may
42 currently be subject to a performance guarantee requirement. The
43 bill eliminates reference to "means of sewage disposal" (other than
44 sanitary sewers) from the current list of improvements, but adds
45 "community septic systems" to the list. The bill provides that
46 grading costs can be part of a performance bond only if grading is a
47 necessary part of an improvement that is subject to a performance
48 guarantee requirement.

1 The bill authorizes municipalities to require two additional types
2 of guarantees: a “temporary certificate of occupancy bond,” and a
3 “safety and stabilization bond.”

4 Under the bill, if a developer seeks a temporary certificate of
5 occupancy for a development, unit, building, or phase of
6 development, a municipality may require the developer to furnish a
7 “temporary certificate of occupancy bond” in favor of the
8 municipality in an amount equal to 100% of the cost of installation
9 of improvements which remain to be completed and which are
10 required to be completed prior to the issuance of the permanent
11 certificate of occupancy. Upon posting a “temporary certificate of
12 occupancy bond,” all sums remaining under a performance guaranty
13 would be released because the new bond would adequately ensure
14 completion of the improvements.

15 In addition, the bill authorizes a municipality to require a
16 developer to furnish a “safety and stabilization bond,” which would
17 provide the municipality a source of funding to return property to a
18 safe and stable condition or to implement measures to protect the
19 public from access to an unsafe or unstable condition in case the
20 developer commences construction but then ceases all work on the
21 development for more than 90 consecutive days.