Sponsored by:
Senator JEFF VAN DREW
District 1 (Atlantic, Cape May and Cumberland)
Senator STEVEN V. OROHO
District 24 (Morris, Sussex and Warren)

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

CURRENT VERSION OF TEXT
As reported by the Assembly Appropriations Committee on December 18, 2017, with amendments.
AN ACT concerning performance and maintenance guarantees under

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

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

41. Guarantees required; surety; release. a. Before [recording]
filling of final subdivision plats or recording of minor subdivision
deeds or as a condition of final site plan approval or as a condition
to the issuance of a zoning permit pursuant to subsection d. of
section 52 of P.L.1975, c.291 (C.40:55D-65), the [approving
authority] municipality may require and shall accept in accordance
with the standards adopted by ordinance and regulations adopted
pursuant to section 1 of P.L.1999, c.68 (C.40:55D-53a) for the
purpose of assuring the installation and maintenance of certain on-
tract improvements, the furnishing of a performance guarantee, and
 provision for a maintenance guarantee in accordance with
paragraphs (1) and (2) of this subsection. If a municipality has
adopted an ordinance requiring a successor developer to furnish a
replacement performance guarantee, as a condition to the approval
of a permit update under the State Uniform Construction Code, for
the purpose of updating the name and address of the owner of
property on a construction permit, the governing body may require
and shall accept in accordance with the standards adopted by
ordinance and regulations adopted pursuant to section 1 of
P.L.1999, c.68 (C.40:55D-53a) for the purpose of assuring the
installation and maintenance of certain on-tract improvements, the
furnishing of a performance guarantee, and provision for a
maintenance guarantee, in accordance with paragraphs (1) and (2)
of this subsection.

(1) (a) [The furnishing of] If required "by ordinance" , the
developer shall furnish a performance guarantee in favor of the
municipality in an amount not to exceed 120% of the cost of
installation of only those improvements required by an approval or
developer's agreement, ordinance, or regulation to be dedicated to a
public entity, and that have not yet been installed, which cost shall
be determined by the municipal engineer, according to the method
calculation set forth in section 15 of P.L.1991, c.256 (C.40:55D-
53.4), for the following improvements [which the approving
authority may deem necessary or appropriate including] as shown
on the approved plans or plat: streets, [grading.] pavement, gutters,
curbs, sidewalks, street lighting, [shade] street trees, surveyor's monuments, as shown on the final map and required by "the map filing law," P.L.1960, c.141 (C.46:23-9.9 et seq.; repealed by section 2 of P.L.2011, c.217) or N.J.S.46:26B-1 through N.J.S.46:26B-8, water mains, [culverts, storm sewers,] sanitary sewers [or other means of sewage disposal], community septic systems, drainage structures, [erosion control and sedimentation control devices,] public improvements of open space, and [in the case of site plans only, other on-site improvements and landscaping] any grading necessitated by the preceding improvements.

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

(b) A municipality may also require a performance guarantee to include, within an approved phase or section of a development privately-owned perimeter buffer landscaping, as required by local ordinance or imposed as a condition of approval.

At the developer's option, a separate performance guarantee may be posted for the privately-owned perimeter buffer landscaping.

(c) In the event that the developer shall seek a temporary certificate of occupancy for a development, unit, lot, building, or phase of development, as a condition of the issuance thereof, the developer shall, if required by an ordinance adopted by the municipality, furnish a separate guarantee, referred to herein as a "temporary certificate of occupancy [bond] guarantee," in favor of the municipality in an amount equal to 120% of the cost of installation of only those improvements or items which remain to be completed or installed under the terms of the temporary certificate of occupancy and which are required to be installed or completed as a condition precedent to the issuance of the permanent certificate of occupancy for the development, unit, lot, building or phase of development and which are not covered by an existing performance guarantee. Upon posting of a "temporary certificate of occupancy [bond] guarantee," all sums remaining under a performance guarantee, required pursuant to subparagraph (a) of this paragraph, which relate to the development, unit, lot, building, or phase of development for which the temporary certificate of occupancy is sought, shall be released. The scope and amount of the "temporary certificate of occupancy guarantee" shall be determined by the zoning officer, municipal engineer, or other municipal official designated by ordinance. At no time may a municipality hold more than one guarantee or bond of any type with respect to the same line item. The temporary certificate of occupancy [bond] guarantee shall be released by the zoning
officer, municipal engineer, or other municipal official designated
by ordinance upon the issuance of a permanent certificate of
occupancy with regard to the development, unit, lot, building, or
phase as to which the temporary certificate of occupancy relates.

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

(i) site disturbance has commenced and, thereafter, all work on
the development has ceased for a period of at least 60 consecutive
days following such commencement for reasons other than force
majeure, and

(ii) work has not recommenced within 30 days following the
provision of written notice by the municipality to the developer of
the municipality’s intent to claim payment under the bond guarantee. A municipality shall not provide notice of its intent to
claim payment under a “safety and stabilization bond guarantee” until a period of at least 60 days has elapsed during
which all work on the development has ceased for reasons other
than force majeure. A municipality shall provide written notice to a
developer by certified mail or other form of delivery providing
evidence of receipt.

The amount of a “safety and stabilization bond guarantee”
for a development with bonded improvements in an amount not
exceeding $100,000 shall be $5,000.

The amount of a “safety and stabilization bond guarantee”
for a development with bonded improvements exceeding $100,000
shall be calculated as a percentage of the bonded improvement costs
of the development or phase of development as follows:

- $5,000 for the first $100,000 of bonded improvement costs, plus
- two and a half percent of bonded improvement costs in excess of
$100,000 up to $1,000,000, plus
- one percent of bonded improvement costs in excess of
$1,000,000.

(2) Provision for (a) If required by ordinance, the developer
shall post with the municipality, prior to the release of a
performance guarantee required pursuant to subparagraph (a),
subparagraph (b), or both subparagraph (a) and subparagraph (b) of
paragraph (1) of this subsection, a maintenance guarantee to be
posted with the governing body for a period not to exceed two years
after final acceptance of the improvement in an amount not to
exceed 15% of the cost of the [improvement] installation of the improvements which are being released.

(b) If required, the developer shall post with the municipality, upon the inspection and issuance of final approval of the following private site improvements by the municipal engineer, a maintenance guarantee in an amount not to exceed 15% of the cost of the installation of the following private site improvements: stormwater management basins, in-flow and water quality structures within the basins, and the out-flow pipes and structures of the stormwater management system, if any, which cost shall be determined [by the municipal engineer] according to the method of calculation set forth in section 15 of P.L.1991, c.256 (C.40:55D-53.4).

(c) The term of the maintenance guarantee shall be for a period not to exceed two years and shall automatically expire at the end of the established term.

(3) In the event that other governmental agencies or public utilities automatically will own the utilities to be installed or the improvements are covered by a performance or maintenance guarantee to another governmental agency, no performance or maintenance guarantee, as the case may be, shall be required by the municipality for such utilities or improvements.

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

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

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

(2) The list prepared by the municipal engineer shall state, in detail, with respect to each bonded improvement determined to be incomplete or unsatisfactory, the nature and extent of the incompleteness of each incomplete improvement or the nature and extent of, and remedy for, the unsatisfactory state of each completed bonded improvement determined to be unsatisfactory. The report prepared by the municipal engineer shall identify each bonded improvement determined to be complete and satisfactory together with a recommendation as to the amount of reduction to be made in the performance guarantee relating to the completed and satisfactory bonded improvement, in accordance with the itemized cost estimate prepared by the municipal engineer and appended to the performance guarantee pursuant to subsection a. of this section.

e. (1) The governing body, by resolution, shall either approve the bonded improvements determined to be complete and satisfactory by the municipal engineer, or reject any or all of these bonded improvements upon the establishment in the resolution of cause for rejection, and shall approve and authorize the amount of reduction to be made in the performance guarantee relating to the improvements accepted, in accordance with the itemized cost estimate prepared by the municipal engineer and appended to the performance guarantee pursuant to subsection a. of this section. This resolution shall be adopted not later than 45 days after receipt of the list and report prepared by the municipal engineer. Upon adoption of the resolution by the governing body, the obligor shall be released from all liability pursuant to its performance guarantee and "safety and stabilization bond", with respect to those approved bonded improvements, except for that portion adequately sufficient to secure completion or correction of the improvements not yet approved; provided that 30% of the amount of the total performance guarantee and "safety and stabilization bond" posted may be retained to ensure completion and acceptability of all improvements. The safety and stabilization guarantee shall be reduced by the same percentage as the
performance guarantee is being reduced at the time of each performance guarantee reduction.

For the purpose of releasing the obligor from liability pursuant to its performance guarantee and “safety and stabilization bond,” the amount of the performance guarantee attributable to each approved bonded improvement shall be reduced by the total amount for each such improvement, in accordance with the itemized cost estimate prepared by the municipal engineer and appended to the performance guarantee pursuant to subsection a. of this section, including any contingency factor applied to the cost of installation. If the sum of the approved bonded improvements would exceed 70 percent of the total amount of the performance guarantee, then the municipality may retain 30 percent of the amount of the total performance guarantee and “safety and stabilization bond” to ensure completion and acceptability of all bonded improvements, as provided above, except that any amount of the performance guarantee attributable to bonded improvements for which a “temporary certificate of occupancy” has been posted shall be released from the performance guarantee even if such release would reduce the amount held by the municipality below 30 percent.

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

If the governing body fails to approve or reject the bonded improvements determined by the municipal engineer to be complete and satisfactory or reduce the performance guarantee for the complete and satisfactory improvements within 45 days from the receipt of the municipal engineer’s list and report, the obligor may apply to the court in a summary manner for an order compelling, within a stated time, approval of the complete and satisfactory improvements and approval of a reduction in the performance guarantee for the approvable complete and satisfactory improvements in accordance with the itemized cost estimate prepared by the municipal engineer and appended to the performance guarantee pursuant to subsection a. of this section; and the cost of applying to the court, including reasonable attorney’s fees, may be awarded to the prevailing party.

(3) In the event that the obligor has made a cash deposit with the municipality or approving authority as part of the performance guarantee, then any partial reduction granted in the performance guarantee pursuant to this subsection shall be applied to the cash
deposit in the same proportion as the original cash deposit bears to the full amount of the performance guarantee, provided that if the safety and stabilization guarantee is included as a line item of the performance guarantee the municipality may retain cash equal to the amount of the remaining safety and stabilization guarantee.

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

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

h. (1) The obligor shall reimburse the municipality for all reasonable inspection fees paid to the municipal engineer for the foregoing inspection of improvements; which fees shall not exceed the sum of the amounts set forth in subparagraphs (a) and (b) of this paragraph. The municipality may require of the developer to post the inspection fees in escrow in an amount:

(a) not to exceed $500 or 5% of the cost of bonded improvements that are subject to a performance guarantee under subparagraph (a), subparagraph (b), or both subparagraph (a) and subparagraph (b) of paragraph (1) of subsection a. of this section; and

(b) not to exceed 5% of the cost of private site improvements that are not subject to a performance guarantee under subparagraph (a) of paragraph (1) of subsection a. of this section, which cost shall be determined pursuant to section 15 of P.L.1991, c.256 (C.40:55D-53.4).

(2) For those developments for which the inspection fees total less than $10,000, fees may, at the option of the developer, be paid in two installments. The initial amount deposited in escrow by a developer shall be 50% of the inspection fees. When the balance on deposit drops to 10% of the inspection fees because the amount deposited by the developer has been reduced by the amount paid to the municipal engineer for inspections, the developer shall deposit the remaining 50% of the inspection fees.

(3) For those developments for which the inspection fees total $10,000 or greater, fees may, at the option of the developer, be paid in four installments. The initial amount deposited in escrow by a developer shall be 25% of the inspection fees. When the balance on deposit drops to 10% of the inspection fees because the amount deposited by the developer has been reduced by the amount paid to the municipal engineer for inspection, the developer shall make additional deposits of 25% of the inspection fees. The municipal
engineer shall not perform any inspection if sufficient funds to pay for those inspections are not on deposit.

(4) If the municipality determines that the amount in escrow for the payment of inspection fees, as calculated pursuant to subparagraphs (a) and (b) of paragraph (1) of this subsection, is insufficient to cover the cost of additional required inspections, the municipality may require the developer to deposit additional funds in escrow provided that the municipality delivers to the developer a written inspection escrow deposit request, signed by the municipal engineer, which: informs the developer of the need for additional inspections, details the items or undertakings that require inspection, estimates the time required for those inspections, and estimates the cost of performing those inspections.

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

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

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

2. This act shall take effect immediately.