

[Second Reprint]

SENATE, No. 3233

STATE OF NEW JERSEY
217th LEGISLATURE

INTRODUCED MAY 25, 2017

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.



(Sponsorship Updated As Of: 6/27/2017)

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

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.

Matter enclosed in superscript numerals has been adopted as follows:

¹Senate SCU committee amendments adopted June 19, 2017.

²Assembly AAP committee amendments adopted December 18, 2017.

1 curbs, sidewalks, street lighting, **[shade]** street trees, surveyor's
2 monuments, as shown on the final map and required by "the map
3 filing law," P.L.1960, c.141 (C.46:23-9.9 et seq.; repealed by
4 section 2 of P.L.2011, c.217) or N.J.S.46:26B-1 through
5 N.J.S.46:26B-8, water mains, **[culverts, storm sewers,]** sanitary
6 sewers **[or other means of sewage disposal]**, community septic
7 systems, drainage structures, **[erosion control and sedimentation**
8 **control devices,]** public improvements of open space, and **[**, in the
9 case of site plans only, other on-site improvements and
10 landscaping] any grading necessitated by the preceding
11 improvements.

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

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

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

22 (c) In the event that the developer shall seek a temporary
23 certificate of occupancy for a development, unit, ¹lot, ¹ building, or
24 phase of development, as a condition of the issuance thereof, the
25 developer shall, if required by an ordinance adopted by the
26 municipality, furnish a separate guarantee, referred to herein as a
27 "temporary certificate of occupancy ¹**[bond]** guarantee¹," in favor
28 of the municipality in an amount equal to 120% of the cost of
29 installation of only those improvements or items which remain to be
30 completed or installed under the terms of the temporary certificate
31 of occupancy and which are required to be installed or completed as
32 a condition precedent to the issuance of the permanent certificate of
33 occupancy for the development, unit, ¹lot, ¹ building or phase of
34 development ¹and which are not covered by an existing
35 performance guarantee¹. Upon posting of a "temporary certificate
36 of occupancy ¹**[bond]** guarantee¹," all sums remaining under a
37 performance guarantee, required pursuant to subparagraph (a) of
38 this paragraph, which relate to the development, unit, ¹lot, ¹
39 building, or phase of development for which the temporary
40 certificate of occupancy is sought, shall be released. ¹The scope
41 and amount of the "temporary certificate of occupancy guarantee"
42 shall be determined by the zoning officer, municipal engineer, or
43 other municipal official designated by ordinance.¹ At no time may
44 a municipality hold more than one guarantee or bond of any type
45 with respect to the same line item. The temporary certificate of
46 occupancy ¹**[bond]** guarantee¹ shall be released ¹by the zoning

1 officer, municipal engineer, or other municipal official designated
2 by ordinance¹ upon the issuance of a permanent certificate of
3 occupancy with regard to the development, unit, ¹lot,¹ building, or
4 phase as to which the temporary certificate of occupancy relates.

5 (d) In addition to a performance guarantee required pursuant to
6 subparagraph (a) of this paragraph, a developer shall, if required by
7 an ordinance adopted by the municipality, furnish to the
8 municipality a separate guarantee, referred to herein as a “safety
9 and stabilization ¹[bond] guarantee¹,” in favor of the municipality,
10 to be available to the municipality solely for the purpose of
11 returning property that has been disturbed to a safe and stable
12 condition or otherwise implementing measures to protect the public
13 from access to an unsafe or unstable condition, only in the
14 circumstance that:

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

19 (ii) work has not recommenced within 30 days following the
20 provision of written notice by the municipality to the developer of
21 the municipality’s intent to claim payment under the ¹[bond]
22 guarantee¹. A municipality shall not provide notice of its intent to
23 claim payment under a “safety and stabilization ¹[bond]
24 guarantee¹” until a period of at least 60 days has elapsed during
25 which all work on the development has ceased for reasons other
26 than force majeure. A municipality shall provide written notice to a
27 developer by certified mail or other form of delivery providing
28 evidence of receipt.

29 The amount of a “safety and stabilization ¹[bond] guarantee¹”
30 for a development with bonded improvements in an amount not
31 exceeding \$100,000 shall be \$5,000.

32 The amount of a “safety and stabilization ¹[bond] guarantee¹”
33 for a development with bonded improvements exceeding \$100,000
34 shall be calculated as a percentage of the bonded improvement costs
35 of the development or phase of development as follows:

36 \$5,000 for the first \$100,000 of bonded improvement costs, plus
37 two and a half percent of bonded improvement costs in excess of
38 \$100,000 up to \$1,000,000, plus
39 one percent of bonded improvement costs in excess of
40 \$1,000,000.

41 (2) **[Provision for]** (a) If required ¹by ordinance¹, the developer
42 shall post with the municipality, prior to the release of a
43 performance guarantee required pursuant to subparagraph (a),
44 subparagraph (b), or both subparagraph (a) and subparagraph (b) of
45 paragraph (1) of this subsection, a maintenance guarantee **[**to be
46 posted with the governing body for a period not to exceed two years
47 after final acceptance of the improvement**]** in an amount not to

1 exceed 15% of the cost of the **[improvement]** installation of the
2 improvements which are being released.

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

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

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

22 b. The time allowed for installation of the ²bonded²
23 improvements for which the performance guarantee has been
24 provided may be extended by the governing body by resolution. As
25 a condition or as part of any such extension, the amount of any
26 performance guarantee shall be increased or reduced, as the case
27 may be, to an amount not to exceed 120% of the cost of the
28 installation, which cost shall be determined by the municipal
29 engineer according to the method of calculation set forth in section
30 15 of P.L.1991, c.256 (C.40:55D-53.4) as of the time of the passage
31 of the resolution.

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

41 d. (1) Upon substantial completion of all required street
42 improvements (except for the top course) and appurtenant utility
43 improvements, and the connection of same to the public system, the
44 obligor may request of the governing body in writing, by certified
45 mail addressed in care of the municipal clerk, that the municipal
46 engineer prepare, in accordance with the itemized cost estimate
47 prepared by the municipal engineer and appended to the
48 performance guarantee pursuant to subsection a. of this section, a

1 list of all uncompleted or unsatisfactory completed ²bonded²
2 improvements. If such a request is made, the obligor shall send a
3 copy of the request to the municipal engineer. The request shall
4 indicate which ¹bonded¹ improvements have been completed and
5 which ²bonded² improvements remain uncompleted in the judgment
6 of the obligor. Thereupon the municipal engineer shall inspect all
7 bonded improvements covered by obligor's request and shall file a
8 detailed list and report, in writing, with the governing body, and
9 shall simultaneously send a copy thereof to the obligor not later
10 than 45 days after receipt of the obligor's request.

11 (2) The list prepared by the municipal engineer shall state, in
12 detail, with respect to each bonded improvement determined to be
13 incomplete or unsatisfactory, the nature and extent of the
14 incompleteness of each incomplete improvement or the nature and
15 extent of, and remedy for, the unsatisfactory state of each
16 completed ²bonded² improvement determined to be unsatisfactory.
17 The report prepared by the municipal engineer shall identify each
18 ¹bonded¹ improvement determined to be complete and satisfactory
19 together with a recommendation as to the amount of reduction to be
20 made in the performance guarantee relating to the completed and
21 satisfactory ²bonded² improvement, in accordance with the itemized
22 cost estimate prepared by the municipal engineer and appended to
23 the performance guarantee pursuant to subsection a. of this section.

24 e. (1) The governing body, by resolution, shall either approve
25 the bonded improvements determined to be complete and
26 satisfactory by the municipal engineer, or reject any or all of these
27 ²bonded² improvements upon the establishment in the resolution of
28 cause for rejection, and shall approve and authorize the amount of
29 reduction to be made in the performance guarantee ¹and the
30 “safety and stabilization bond”¹ relating to the improvements
31 accepted, in accordance with the itemized cost estimate prepared by
32 the municipal engineer and appended to the performance guarantee
33 pursuant to subsection a. of this section. This resolution shall be
34 adopted not later than 45 days after receipt of the list and report
35 prepared by the municipal engineer. Upon adoption of the
36 resolution by the governing body, the obligor shall be released from
37 all liability pursuant to its performance guarantee ¹and “safety and
38 stabilization bond,”¹ with respect to those approved bonded
39 improvements, except for that portion adequately sufficient to
40 secure completion or correction of the improvements not yet
41 approved; provided that 30% of the amount of the total performance
42 guarantee ¹and “safety and stabilization bond”¹ ²and “safety and
43 stabilization bond”² posted may be retained to ensure completion
44 and acceptability of all improvements. ²The safety and stabilization
45 guarantee shall be reduced by the same percentage as the

1 performance guarantee is being reduced at the time of each
2 performance guarantee reduction.²

3 For the purpose of releasing the obligor from liability pursuant to
4 its performance guarantee ¹~~["and "safety and stabilization bond,""]~~ .¹
5 the amount of the performance guarantee ¹~~["and "safety and~~
6 ~~stabilization bond"]~~¹ attributable to each approved bonded
7 improvement shall be reduced by the total amount for each such
8 improvement, in accordance with the itemized cost estimate
9 prepared by the municipal engineer and appended to the
10 performance guarantee pursuant to subsection a. of this section,
11 including any contingency factor applied to the cost of installation.
12 If the sum of the approved bonded improvements would exceed 70
13 percent of the total amount of the performance guarantee, then the
14 municipality may retain 30 percent of the amount of the total
15 performance guarantee ¹~~["and "safety and stabilization bond"]~~¹ ²and
16 "safety and stabilization bond"² to ensure completion and
17 acceptability of ¹~~["all"]~~ bonded¹ improvements, as provided above,
18 except that any amount of the performance guarantee attributable to
19 bonded improvements for which a "temporary certificate of
20 occupancy ¹~~["bond"]~~ guarantee¹" has been posted shall be released
21 from the performance guarantee even if such release would reduce
22 the amount held by the municipality below 30 percent.

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

30 If the governing body fails to approve or reject the ¹bonded¹
31 improvements determined by the municipal engineer to be complete
32 and satisfactory or reduce the performance guarantee for the
33 complete and satisfactory improvements within 45 days from the
34 receipt of the municipal engineer's list and report, the obligor may
35 apply to the court in a summary manner for an order compelling,
36 within a stated time, approval of the complete and satisfactory
37 improvements and approval of a reduction in the performance
38 guarantee for the approvable complete and satisfactory
39 improvements in accordance with the itemized cost estimate
40 prepared by the municipal engineer and appended to the
41 performance guarantee pursuant to subsection a. of this section; and
42 the cost of applying to the court, including reasonable attorney's
43 fees, may be awarded to the prevailing party.

44 (3) In the event that the obligor has made a cash deposit with the
45 municipality or approving authority as part of the performance
46 guarantee, then any partial reduction granted in the performance
47 guarantee pursuant to this subsection shall be applied to the cash

1 deposit in the same proportion as the original cash deposit bears to
2 the full amount of the performance guarantee ¹, provided that if the
3 safety and stabilization guarantee is included as a line item of the
4 performance guarantee the municipality may retain cash equal to
5 the amount of the remaining safety and stabilization guarantee¹.

6 f. If any portion of the required ¹bonded improvements is
7 rejected, the approving authority may require the obligor to
8 complete or correct such improvements and, upon completion or
9 correction, the same procedure of notification, as set forth in this
10 section shall be followed.

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

14 h. (1) The obligor shall reimburse the municipality for [all]
15 reasonable inspection fees paid to the municipal engineer for the
16 foregoing inspection of improvements; [provided that the] which
17 fees shall not exceed the sum of the amounts set forth in
18 subparagraphs (a) and (b) of this paragraph. The municipality may
19 require [of] the developer [a deposit for] to post the inspection
20 fees in escrow in an amount:

21 (a) not to exceed [, except for extraordinary circumstances, the
22 greater of \$500 or] ¹, except for extraordinary circumstances, the
23 greater of \$500 or ¹ 5% of the cost of bonded improvements that are
24 subject to a performance guarantee under subparagraph (a),
25 subparagraph (b), or both subparagraph (a) and subparagraph (b) of
26 paragraph (1) of subsection a. of this section; and

27 (b) not to exceed 5% of the cost of private site improvements
28 that are not subject to a performance guarantee under subparagraph
29 (a) of paragraph (1) of subsection a. of this section, which cost shall
30 be determined pursuant to section 15 of P.L.1991, c.256 (C.40:55D-
31 53.4).

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

40 (3) For those developments for which the inspection fees [are]
41 total \$10,000 or greater, fees may, at the option of the developer, be
42 paid in four installments. The initial amount deposited in escrow by
43 a developer shall be 25% of the inspection fees. When the balance
44 on deposit drops to 10% of the inspection fees because the amount
45 deposited by the developer has been reduced by the amount paid to
46 the municipal engineer for inspection, the developer shall make
47 additional deposits of 25% of the inspection fees. [The municipal

1 engineer shall not perform any inspection if sufficient funds to pay
2 for those inspections are not on deposit.】

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

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

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

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

28

29 2. This act shall take effect immediately.