

ASSEMBLY, No. 311

STATE OF NEW JERSEY

Introduced Pending Technical Review by Legislative Counsel

PRE-FILED FOR INTRODUCTION IN THE 1996 SESSION

By Assemblyman BODINE

1 AN ACT concerning the release of the performance guarantee upon  
2 acceptance of improvements 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:

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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 of  
10 final subdivision plats or as a condition of final site plan approval or  
11 as a condition to the issuance of a zoning permit pursuant to  
12 subsection d. of section 52 of P.L.1975, c.291 (C.40:55D-65), the  
13 approving authority may require and shall accept in accordance with  
14 the standards adopted by ordinance for the purpose of assuring the  
15 installation and maintenance of on-tract improvements:

16 (1) The furnishing of a performance guarantee in favor of the  
17 municipality in an amount not to exceed 120% of the cost of  
18 installation, which cost shall be determined by the municipal engineer  
19 according to the method of calculation set forth in section 15 of  
20 P.L.1991, c.256 (C.40:55D-53.4), for improvements which the  
21 approving authority may deem necessary or appropriate including:  
22 streets, grading, pavement, gutters, curbs, sidewalks, street lighting,  
23 shade trees, surveyor's monuments, as shown on the final map and  
24 required by the "Map Filing Law," P.L.1960, c.141 (C.46:23-9.9 et  
25 seq.), water mains, culverts, storm sewers, sanitary sewers or other  
26 means of sewage disposal, drainage structures, erosion control and  
27 sedimentation control devices, public improvements of open space  
28 and, in the case of site plans only, other on-site improvements and  
29 landscaping.

30 The municipal engineer shall prepare an itemized cost estimate of  
31 the improvements covered by the performance guarantee, which  
32 itemized cost estimate shall be appended to each performance

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

**Matter underlined thus is new matter.**

1 guarantee posted by the obligor.

2 (2) Provision for a maintenance guarantee to be posted with the  
3 governing body for a period not to exceed two years after final  
4 acceptance of the improvement, in an amount not to exceed 15% of  
5 the cost of the improvement, which cost shall be determined by the  
6 municipal engineer according to the method of calculation set forth in  
7 section 15 of P.L.1991, c.256 (C.40:55D-53.4). In the event that  
8 other governmental agencies or public utilities automatically will own  
9 the utilities to be installed or the improvements are covered by a  
10 performance or maintenance guarantee to another governmental  
11 agency, no performance or maintenance guarantee, as the case may be,  
12 shall be required by the municipality for such utilities or improvements.

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

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

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

1 days after receipt of the obligor's request.

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

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

31 For the purpose of releasing the obligor from liability pursuant to  
32 its performance guarantee, the amount of the performance guarantee  
33 attributable to each approved improvement shall be reduced by the  
34 total amount for each such improvement, in accordance with the  
35 itemized cost estimate prepared by the municipal engineer and  
36 appended to the performance guarantee pursuant to subsection a. of  
37 this section, including any contingency factor applied to the cost of  
38 installation. If the sum of the approved improvements would exceed  
39 70 percent of the total amount of the performance guarantee, then the  
40 municipality may retain 30 percent of the amount of the total  
41 performance guarantee to ensure completion and acceptability of all  
42 improvements, as provided above.

43 (2) If the municipal engineer fails to send or provide the list and  
44 report as requested by the obligor pursuant to subsection d. of this  
45 section within 45 days from receipt of the request, the obligor may  
46 apply to the court in a summary manner for an order compelling the

1 municipal engineer to provide the list and report within a stated time  
2 and the cost of applying to the court, including reasonable attorney's  
3 fees, may be awarded to the prevailing party.

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

17 (3) In the event that the obligor has made a cash deposit with the  
18 municipality or approving authority as part of the performance  
19 guarantee, then any partial reduction granted in the performance  
20 guarantee pursuant to this subsection shall be applied to the cash  
21 deposit in the same proportion as the original cash deposit bears to the  
22 full amount of the performance guarantee.

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

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

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

1 fees are \$10,000 or greater, fees may, at the option of the developer,  
2 be paid in four installments. The initial amount deposited by a  
3 developer shall be 25% of the [reasonably anticipated] inspection fees.  
4 When the balance on deposit drops to 10% of the [reasonably  
5 anticipated] inspection fees because the amount deposited by the  
6 developer has been reduced by the amount paid to the municipal  
7 engineer for inspection, the developer shall make additional deposits  
8 of 25% of the [reasonably anticipated] inspection fees. The municipal  
9 engineer shall not perform any inspection if sufficient funds to pay for  
10 those inspections are not on deposit.

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

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

24 (cf: P.L.1991, c.256, s.12; P.L.1991, c.301, s.1; P.L.1991, c.311, s.1)

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26 2. This act shall take effect 90 days next following enactment.

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#### STATEMENT

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31 This bill governs the calculation of the retainage allowed on the part  
32 of the municipality in releasing performance guarantees under the  
33 "Municipal Land Use Law."

34 Section 41 of P.L.1975, c.291 (C.40:55D-53), allows for the  
35 release of performance guarantees as required improvements are  
36 completed; the municipality, however, is allowed to retain 30 percent  
37 of the amount of the performance guarantee to ensure the completion  
38 and acceptability of all improvements.

39 This bill provides that as each improvement covered by the  
40 performance guarantee is fully completed and accepted by both the  
41 municipal engineer and the governing body, the bond amount relative  
42 to the individual item shall be reduced by the total amount for each  
43 such improvement, in accordance with the itemized cost estimate  
44 prepared by the municipal engineer and appended to the performance  
45 guarantee, including any contingency factor applied to the cost of  
46 installation.

1       The 30 percent retainage must be based on the total bond amount  
2 rather than each separate improvement. If an improvement is  
3 accepted, it must be reduced in full. In making this calculation,  
4 however, the municipality must include the 20 percent contingency  
5 factor applied to the cost of installation in order to determine the  
6 amount of the performance guarantee. If the calculation performed in  
7 this way would otherwise allow the municipality to withhold less than  
8 30 percent of the total performance guarantee, the bill allows the  
9 municipality to withhold up to 30 percent of the total.

10       This bill also reconciles and harmonizes the conflicting amendments  
11 made to subsection h. of section 41 of P.L.1975, c.291 (C.40:55D-53)  
12 by P.L.1991, c.256 and P.L.1991, c.311. This bill replaces the term  
13 "reasonably anticipated fees," which was used in the language of  
14 P.L.1991, c.311, with the term "inspection fees," which was used in  
15 P.L.1991, c.256. In this way, the conflict between the two chapters  
16 is eliminated.

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21       Clarifies formula for calculating release of performance guarantee  
22 under "Municipal Land Use Law."