

P.L. 1997, CHAPTER 126, *approved June 23, 1997*
Senate, No. 1530

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
33 guarantee posted by the obligor.

34 (2) Provision for a maintenance guarantee to be posted with the

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

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

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

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

46 (2) The list prepared by the municipal engineer shall state, in detail,

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

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

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

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

1 fees, may be awarded to the prevailing party.

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

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

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

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

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

1 developer shall be 25% of the [reasonably anticipated] inspection fees.
2 When the balance on deposit drops to 10% of the [reasonably
3 anticipated] inspection fees because the amount deposited by the
4 developer has been reduced by the amount paid to the municipal
5 engineer for inspection, the developer shall make additional deposits
6 of 25% of the [reasonably anticipated] inspection fees. The municipal
7 engineer shall not perform any inspection if sufficient funds to pay for
8 those inspections are not on deposit.

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

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

22 (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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24 2. This act shall take effect 90 days next following enactment.
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27 STATEMENT

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

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

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

45 The 30 percent retainage must be based on the total bond amount
46 rather than each separate improvement. If an improvement is

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

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

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19 Clarifies formula for calculating release of performance guarantee
20 under "Municipal Land Use Law.