SENATE, No. 1530

STATE OF NEW JERSEY

INTRODUCED OCTOBER 3, 1996

By Senator HAINES

AN ACT concerning the release of the performance guarantee upon acceptance of improvements and amending P.L.1975, c.291.

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 of final subdivision plats 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 may require and shall accept in accordance with the standards adopted by ordinance for the purpose of assuring the installation and maintenance of on-tract improvements:

(1) The furnishing of a performance guarantee in favor of the municipality in an amount not to exceed 120% of the cost of 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), for improvements which the approving authority may deem necessary or appropriate including: streets, grading, pavement, gutters, curbs, sidewalks, street lighting, shade 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.), water mains, culverts, storm sewers, sanitary sewers or other means of sewage disposal, 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.

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.

(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 <u>thus</u> is new matter.

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, 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). 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 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 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 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 improvements have been completed and which improvements remain uncompleted in the judgment of the obligor. Thereupon the municipal engineer shall inspect all 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 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 improvement determined to be unsatisfactory. The report prepared by the municipal engineer shall identify each 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 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 improvements determined to be complete and satisfactory by the municipal engineer, or reject any or all of these 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, with respect to those approved 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 <u>total</u> performance guarantee posted may be retained to ensure completion and acceptability of all improvements.

<u>For the purpose of releasing the obligor from liability pursuant to its performance guarantee, the amount of the performance guarantee attributable to each approved 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 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 to ensure completion and acceptability of all improvements, as provided above.</u>

(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 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.

f. If any portion of the required 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. The obligor shall reimburse the municipality for all reasonable inspection fees paid to the municipal engineer for the foregoing inspection of improvements; provided that the municipality may require of the developer a deposit for the inspection fees in an amount not to exceed, except for extraordinary circumstances, the greater of $500 or 5% of the cost of improvements, which cost shall be determined pursuant to section 15 of P.L.1991, c.256 (C.40:55D-53.4). For those developments for which the **[**reasonably anticipated**]** <u>inspection</u> fees are less than $10,000, fees may, at the option of the developer, be paid in two installments. The initial amount deposited by a developer shall be 50% of the **[**reasonably anticipated**]** <u>inspection</u> fees. When the balance on deposit drops to 10% of the **[**reasonably anticipated**]** <u>inspection</u> fees because the amount deposited by the developer has been reduced by the amount paid to the municipal engineer for inspection, the developer shall deposit the remaining 50% of the **[**anticipated**]** <u>inspection</u> fees. For those developments for which the **[**reasonably anticipated**]** <u>inspection</u> fees are $10,000 or greater, fees may, at the option of the developer, be paid in four installments. The initial amount deposited by a

developer shall be 25% of the [reasonably anticipated] inspection fees. When the balance on deposit drops to 10% of the [reasonably anticipated] 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 [reasonably anticipated] inspection fees. The municipal engineer shall not perform any inspection if sufficient funds to pay for those inspections are not on deposit.

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.1991, c.256, s.12; P.L.1991, c.301, s.1; P.L.1991, c.311, s.1)

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

STATEMENT

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

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

This bill provides that as each improvement covered by the performance guarantee is fully completed and accepted by both the municipal engineer and the governing body, the bond amount relative to the individual item 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, including any contingency factor applied to the cost of installation.

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

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

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

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