

ASSEMBLY, No. 293

STATE OF NEW JERSEY

219th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2020 SESSION

Sponsored by:

Assemblyman VINCENT MAZZEO

District 2 (Atlantic)

SYNOPSIS

Requires release of performance guarantee if municipal governing body or engineer fail to meet certain deadlines.

CURRENT VERSION OF TEXT

Introduced Pending Technical Review by Legislative Counsel.



1 **AN ACT** concerning performance guarantees and amending
2 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 filing of final
10 subdivision plats or recording of minor subdivision deeds or as a
11 condition of final site plan approval or as a condition to the
12 issuance of a zoning permit pursuant to subsection d. of section 52
13 of P.L.1975, c.291 (C.40:55D-65), the municipality may require and
14 shall accept in accordance with the standards adopted by ordinance
15 and regulations adopted pursuant to section 1 of P.L.1999, c.68
16 (C.40:55D-53a) for the purpose of assuring the installation and
17 maintenance of certain on-tract improvements, the furnishing of a
18 performance guarantee, and provision for a maintenance guarantee
19 in accordance with paragraphs (1) and (2) of this subsection. If a
20 municipality has adopted an ordinance requiring a successor
21 developer to furnish a replacement performance guarantee, as a
22 condition to the approval of a permit update under the State
23 Uniform Construction Code, for the purpose of updating the name
24 and address of the owner of property on a construction permit, the
25 governing body may require and shall accept in accordance with the
26 standards adopted by ordinance and regulations adopted pursuant to
27 section 1 of P.L.1999, c.68 (C.40:55D-53a) for the purpose of
28 assuring the installation and maintenance of certain on-tract
29 improvements, the furnishing of a performance guarantee, and
30 provision for a maintenance guarantee, in accordance with
31 paragraphs (1) and (2) of this subsection.

32 (1) (a) If required by ordinance, the developer shall furnish a
33 performance guarantee in favor of the municipality in an amount
34 not to exceed 120% of the cost of installation of only those
35 improvements required by an approval or developer's agreement,
36 ordinance, or regulation to be dedicated to a public entity, and that
37 have not yet been installed, which cost shall be determined by the
38 municipal engineer, according to the method of calculation set forth
39 in section 15 of P.L.1991, c.256 (C.40:55D-53.4), for the following
40 improvements as shown on the approved plans or plat: streets,
41 pavement, gutters, curbs, sidewalks, street lighting, street trees,
42 surveyor's monuments, as shown on the final map and required by
43 "the map filing law," P.L.1960, c.141 (C.46:23-9.9 et seq.; repealed
44 by section 2 of P.L.2011, c.217) or N.J.S.46:26B-1 through
45 N.J.S.46:26B-8, water mains, sanitary sewers, community septic

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.

1 systems, drainage structures, public improvements of open space,
2 and any grading necessitated by the preceding improvements.

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

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

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

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

42 (d) A developer shall, if required by an ordinance adopted by
43 the municipality, furnish to the municipality a "safety and
44 stabilization guarantee," in favor of the municipality. At the
45 developer's option, a "safety and stabilization guarantee" may be
46 furnished either as a separate guarantee or as a line item of the
47 performance guarantee. A "safety and stabilization guarantee" shall
48 be available to the municipality solely for the purpose of returning

1 property that has been disturbed to a safe and stable condition or
2 otherwise implementing measures to protect the public from access
3 to an unsafe or unstable condition, only in the circumstance that:

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

8 (ii) work has not recommenced within 30 days following the
9 provision of written notice by the municipality to the developer of
10 the municipality's intent to claim payment under the guarantee. A
11 municipality shall not provide notice of its intent to claim payment
12 under a "safety and stabilization guarantee" until a period of at least
13 60 days has elapsed during which all work on the development has
14 ceased for reasons other than force majeure. A municipality shall
15 provide written notice to a developer by certified mail or other form
16 of delivery providing evidence of receipt.

17 The amount of a "safety and stabilization guarantee" for a
18 development with bonded improvements in an amount not
19 exceeding \$100,000 shall be \$5,000.

20 The amount of a "safety and stabilization guarantee" for a
21 development with bonded improvements exceeding \$100,000 shall
22 be calculated as a percentage of the bonded improvement costs of
23 the development or phase of development as follows:

24 \$5,000 for the first \$100,000 of bonded improvement costs, plus
25 two and a half percent of bonded improvement costs in excess of
26 \$100,000 up to \$1,000,000, plus
27 one percent of bonded improvement costs in excess of
28 \$1,000,000.

29 A municipality shall release a separate "safety and stabilization
30 guarantee" to a developer upon the developer's furnishing of a
31 performance guarantee which includes a line item for safety and
32 stabilization in the amount required under this paragraph.

33 A municipality shall release a "safety and stabilization
34 guarantee" upon the municipal engineer's determination that the
35 development of the project site has reached a point that the
36 improvements installed are adequate to avoid any potential threat to
37 public safety.

38 (2) (a) If required by ordinance, the developer shall post with the
39 municipality, prior to the release of a performance guarantee
40 required pursuant to subparagraph (a), subparagraph (b), or both
41 subparagraph (a) and subparagraph (b) of paragraph (1) of this
42 subsection, a maintenance guarantee in an amount not to exceed
43 15% of the cost of the installation of the improvements which are
44 being released.

45 (b) If required, the developer shall post with the municipality,
46 upon the inspection and issuance of final approval of the following
47 private site improvements by the municipal engineer, a maintenance
48 guarantee in an amount not to exceed 15% of the cost of the

1 installation of the following private site improvements: stormwater
2 management basins, in-flow and water quality structures within the
3 basins, and the out-flow pipes and structures of the stormwater
4 management system, if any, which cost shall be determined
5 according to the method of calculation set forth in section 15 of
6 P.L.1991, c.256 (C.40:55D-53.4).

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

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

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

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

35 d. (1) Upon substantial completion of all required street
36 improvements (except for the top course) and appurtenant utility
37 improvements, and the connection of same to the public system, the
38 obligor may request of the governing body in writing, by certified
39 mail addressed in care of the municipal clerk, that the municipal
40 engineer prepare, in accordance with the itemized cost estimate
41 prepared by the municipal engineer and appended to the
42 performance guarantee pursuant to subsection a. of this section, a
43 list of all uncompleted or unsatisfactory completed bonded
44 improvements. If such a request is made, the obligor shall send a
45 copy of the request to the municipal engineer. The request shall
46 indicate which bonded improvements have been completed and
47 which bonded improvements remain uncompleted in the judgment
48 of the obligor. Thereupon the municipal engineer shall inspect all

1 bonded improvements covered by obligor's request and shall file a
2 detailed list and report, in writing, with the governing body, and
3 shall simultaneously send a copy thereof to the obligor not later
4 than **【45】** 30 days after receipt of the obligor's request.

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

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

40 For the purpose of releasing the obligor from liability pursuant to
41 its performance guarantee, the amount of the performance guarantee
42 attributable to each approved bonded improvement shall be reduced
43 by the total amount for each such improvement, in accordance with
44 the itemized cost estimate prepared by the municipal engineer and
45 appended to the performance guarantee pursuant to subsection a. of
46 this section, including any contingency factor applied to the cost of
47 installation. If the sum of the approved bonded improvements
48 would exceed 70 percent of the total amount of the performance

1 guarantee, then the municipality may retain 30 percent of the
2 amount of the total performance guarantee and "safety and
3 stabilization guarantee" to ensure completion and acceptability of
4 bonded improvements, as provided above, except that any amount
5 of the performance guarantee attributable to bonded improvements
6 for which a "temporary certificate of occupancy guarantee" has
7 been posted shall be released from the performance guarantee even
8 if such release would reduce the amount held by the municipality
9 below 30 percent.

10 (2) If the municipal engineer fails to send or provide the list and
11 report as requested by the obligor pursuant to subsection d. of this
12 section within ~~【45】~~ 30 days from receipt of the request, the obligor
13 shall be entitled to a release of the performance guarantee, and may
14 apply to the court in a summary manner for an order compelling
15 ~~【the municipal engineer to provide the list and report within a~~
16 ~~stated time and the cost of applying to the court, including~~
17 ~~reasonable】~~ release of the performance guarantee. Reasonable
18 attorney's fees, may be awarded to the prevailing party in this
19 summary action.

20 If the governing body fails to approve or reject the bonded
21 improvements determined by the municipal engineer to be complete
22 and satisfactory or reduce the performance guarantee for the
23 complete and satisfactory improvements within ~~【45】~~ 35 days from
24 the receipt of the municipal engineer's list and report, the obligor
25 shall be entitled to a release of the performance guarantee, and may
26 apply to the court in a summary manner for an order compelling
27 ~~【,~~ within a stated time, approval of the complete and satisfactory
28 improvements and approval of a reduction in the performance
29 guarantee for the approvable complete and satisfactory
30 improvements in accordance with the itemized cost estimate
31 prepared by the municipal engineer and appended to the
32 performance guarantee pursuant to subsection a. of this section; and
33 the cost of applying to the court, including reasonable ~~】~~ release of
34 the performance guarantee. Reasonable attorney's fees, may be
35 awarded to the prevailing party in this summary action.

36 (3) In the event that the obligor has made a cash deposit with the
37 municipality or approving authority as part of the performance
38 guarantee, then any partial reduction granted in the performance
39 guarantee pursuant to this subsection shall be applied to the cash
40 deposit in the same proportion as the original cash deposit bears to
41 the full amount of the performance guarantee, provided that if the
42 developer has furnished a "safety and stabilization guarantee," the
43 municipality may retain cash equal to the amount of the remaining
44 "safety and stabilization guarantee".

45 f. If any portion of the required bonded improvements is
46 rejected, the approving authority may require the obligor to
47 complete or correct such improvements and, upon completion or

1 correction, the same procedure of notification, as set forth in this
2 section shall be followed.

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

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

12 (a) not to exceed, except for extraordinary circumstances, the
13 greater of \$500 or 5% of the cost of bonded improvements that are
14 subject to a performance guarantee under subparagraph (a),
15 subparagraph (b), or both subparagraph (a) and subparagraph (b) of
16 paragraph (1) of subsection a. of this section; and

17 (b) not to exceed 5% of the cost of private site improvements
18 that are not subject to a performance guarantee under subparagraph
19 (a) of paragraph (1) of subsection a. of this section, which cost shall
20 be determined pursuant to section 15 of P.L.1991, c.256 (C.40:55D-
21 53.4).

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

30 (3) For those developments for which the inspection fees total
31 \$10,000 or greater, fees may, at the option of the developer, be paid
32 in four installments. The initial amount deposited in escrow by a
33 developer shall be 25% of the inspection fees. When the balance on
34 deposit drops to 10% of the inspection fees because the amount
35 deposited by the developer has been reduced by the amount paid to
36 the municipal engineer for inspection, the developer shall make
37 additional deposits of 25% of the inspection fees.

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

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

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

14 (cf: P.L.2017, c.312, s.1)

15
16 2. This act shall take effect immediately, and shall apply to a
17 performance guarantee for which the obligor has requested a list
18 and report of all uncompleted or unsatisfactorily completed bonded
19 improvements on or after the date of enactment.

20 21 22 STATEMENT

23
24 This bill would require the release of a performance guarantee if
25 the municipal governing body or municipal engineer fail to meet
26 certain deadlines. The bill would also reduce the deadline for the
27 municipal engineer to return a list of all uncompleted or
28 unsatisfactorily completed bonded improvements, following a
29 request from the developer, from 45 days to 30 days. Similarly, the
30 bill would reduce the deadline for the municipal governing body to
31 adopt a resolution approving or rejecting the bonded improvements
32 from 45 days to 35 days after receipt of this list from the engineer.
33 As used in the “Municipal Land Use Law,” P.L.1975, c.291
34 (C.40:55D-1 et seq.), which this bill amends, a “performance
35 guarantee” means any security, which may be accepted by a
36 municipality, including but not limited to surety bonds, letters of
37 credit under certain circumstances, and cash.

38 Specifically, the bill requires that, if the municipal engineer fails
39 to send or provide the list of all uncompleted or unsatisfactorily
40 completed bonded improvements within 30 days from receipt of the
41 developer’s request, the developer shall be entitled to a release of
42 the performance guarantee. The bill also requires that, if the
43 governing body fails to approve or reject the bonded improvements
44 determined by the municipal engineer to be complete and
45 satisfactory or reduce the performance guarantee for the complete
46 and satisfactory improvements within 35 days from the receipt of
47 the municipal engineer's list and report, the developer is then
48 entitled to a release of the performance guarantee. Finally, the bill

- 1 allows a developer to apply to court in a summary manner for an
- 2 order compelling the performance guarantee's release if either the
- 3 municipal engineer or municipal governing body fail to meet their
- 4 applicable deadlines.