

(CORRECTED COPY)
CHAPTER 123

AN ACT concerning performance guarantees under the "Municipal Land Use Law," amending and supplementing P.L.1975, c.291.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Section 29 of P.L.1975, c.291 (C.40:55D-38) is amended to read as follows:

C.40:55D-38 Contents of ordinance.

29. Contents of ordinance. An ordinance requiring approval by the planning board of either subdivisions or site plans, or both, shall include the following:

a. Provisions, not inconsistent with other provisions of this act, for submission and processing of applications for development, including standards for preliminary and final approval and provisions for processing of final approval by stages or sections of development;

b. Provisions ensuring:

(1) Consistency of the layout or arrangement of the subdivision or land development with the requirements of the zoning ordinance;

(2) Streets in the subdivision or land development of sufficient width and suitable grade and suitably located to accommodate prospective traffic and to provide access for firefighting and emergency equipment to buildings and coordinated so as to compose a convenient system consistent with the official map, if any, and the circulation element of the master plan, if any, and so oriented as to permit, consistent with the reasonable utilization of land, the buildings constructed thereon to maximize solar gain; provided that no street of a width greater than 50 feet within the right-of-way lines shall be required unless said street constitutes an extension of an existing street of the greater width, or already has been shown on the master plan at the greater width, or already has been shown in greater width on the official map;

(3) Adequate water supply, drainage, shade trees, sewerage facilities and other utilities necessary for essential services to residents and occupants;

(4) Suitable size, shape and location for any area reserved for public use pursuant to section 32 of this act;

(5) Reservation pursuant to section 31 of P.L.1975, c.291 (C.40:55D-53) of any open space to be set aside for use and benefit of the residents of a cluster development or a planned development, resulting from the application of standards of density or intensity of land use, contained in the zoning ordinance, pursuant to section 52 of P.L.1975, c.291 (C.40:55D-65);

(6) Regulation of land designated as subject to flooding, pursuant to subsection e. of section 52 of P.L.1975, c.291 (C.40:55D-65), to avoid danger to life or property;

(7) Protection and conservation of soil from erosion by wind or water or from excavation or grading;

(8) Conformity with standards promulgated by the Commissioner of Transportation, pursuant to the "Air Safety and Zoning Act of 1983," P.L.1983, c.260 (C.6:1-80 et seq.), for any airport hazard areas delineated under that act;

(9) Conformity with a municipal recycling ordinance required pursuant to section 6 of P.L.1987, c.102 (C.13:1E-99.16);

(10) Conformity with the State highway access management code adopted by the Commissioner of Transportation under section 3 of the "State Highway Access Management Act," P.L.1989, c.32 (C.27:7-91), with respect to any State highways within the municipality;

(11) Conformity with any access management code adopted by the county under R.S.27:16-1, with respect to any county roads within the municipality;

(12) Conformity with any municipal access management code adopted under R.S.40:67-1, with respect to municipal streets;

(13) Protection of potable water supply reservoirs from pollution or other degradation of water quality resulting from the development or other uses of surrounding land areas, which provisions shall be in accordance with any siting, performance, or other standards or guidelines adopted therefor by the Department of Environmental Protection;

(14) Conformity with the public safety regulations concerning storm water detention facilities adopted pursuant to section 5 of P.L.1991, c.194 (C.40:55D-95.1) and reflected in storm water management plans and storm water management ordinances adopted pursuant to P.L.1981, c.32 (C.40:55D-93 et al.); and

(15) Conformity with the model ordinance promulgated by the Department of Environmental Protection and Department of Community Affairs pursuant to section 2 of P.L.1993, c.81 (C.13:1E-99.13a) regarding the inclusion of facilities for the collection or storage of source separated recyclable materials in any new multifamily housing development.

c. Provisions governing the standards for grading, improvement and construction of streets or drives and for any required walkways, curbs, gutters, streetlights, shade trees, fire hydrants and water, and drainage and sewerage facilities and other improvements as shall be found necessary, and provisions ensuring that such facilities shall be completed either prior to or subsequent to final approval of the subdivision or site plan by allowing the posting of performance guarantees by the developer;

d. Provisions ensuring that when a municipal zoning ordinance is in effect, a subdivision or site plan shall conform to the applicable provisions of the zoning ordinance, and where there is no zoning ordinance, appropriate standards shall be specified in an ordinance pursuant to this article; and

e. Provisions ensuring performance in substantial accordance with the final development plan; provided that the planning board may permit a deviation from the final plan, if caused by change of conditions beyond the control of the developer since the date of final approval, and the deviation would not substantially alter the character of the development or substantially impair the intent and purpose of the master plan and zoning ordinance.

2. Section 29.1 of P.L.1975, c.291 (C.40:55D-39) is amended to read as follows:

C.40:55D-39 Discretionary contents of ordinance.

29.1. Discretionary contents of ordinance. An ordinance requiring approval by the planning board of either subdivisions or site plans or both may include the following:

a. Provisions for off-tract water, sewer, drainage, and street improvements which are necessitated by a subdivision or land development, subject to the provisions of section 30 of P.L.1975, c.291 (C.40:55D-42);

b. Provisions for standards encouraging and promoting flexibility, and economy in layout and design through the use of planned development, cluster development or both; provided that such standards shall be appropriate to the type of development permitted; and provided further that the ordinance shall set forth the limits and extent of any special

provisions applicable to planned developments and to cluster developments, considering the availability of existing and proposed infrastructure and the environmental characteristics of any area proposed for development and any area proposed for protection as open space, agricultural land, or historic site, so that the manner in which such special provisions differ from the standards otherwise applicable to subdivisions or site plans can be determined;

c. Provisions for planned development:

(1) Authorizing the planning board to grant general development plan approval to provide the increased flexibility desirable to promote mutual agreement between the applicant and the planning board on the basic scheme of a planned development and setting forth any variations from the ordinary standards for preliminary and final approval;

(2) Requiring that any common open space resulting from the application of standards for density, or intensity of land use, be set aside for the use and benefit of the owners or residents in such development subject to section 31 of P.L.1975, c.291 (C.40:55D-43);

(3) Setting forth how the amount and location of any common open space shall be determined and how its improvement and maintenance for common open space use shall be secured subject to section 31 of P.L.1975, c.291 (C.40:55D-43);

(4) Authorizing the planning board to allow for a greater concentration of density, or intensity of land use, within a section or sections of development, whether it be earlier, later or simultaneous in the development, than in others, in order to realize the preservation of agricultural lands, open space, and historic sites, or otherwise advance the purposes of P.L.1975, c.291 (C.40:55D-1 et seq.);

(5) Setting forth any requirement that the approval by the planning board of a greater concentration of density or intensity of land use for any section to be developed be offset by a smaller concentration in any completed prior stage or by an appropriate reservation of public open space or common open space on the remaining land, or preservation of land for historic or agricultural purposes, by grant of development restriction, easement, or by covenant in favor of the municipality; provided that such reservation shall, as far as practicable, defer the precise location of common open space until an application for final approval is filed, so that flexibility of development can be maintained;

(6) Setting forth any requirements for timing of development among the various types of uses and subgroups thereunder and, in the case of planned unit development and planned unit residential development, whether some nonresidential uses are required to be built before, after or at the same time as the residential uses.

d. Provisions ensuring in the case of a development which proposes construction over a period of years, the protection of the interests of the public and of the residents, occupants and owners of the proposed development in the total completion of the development.

e. Provisions that require as a condition for local municipal approval the submission of proof that no taxes or assessments for local improvements are due or delinquent on the property for which any subdivision, site plan, or planned development application is made.

f. Provisions for the creation of a Site Plan Review Advisory Board for the purpose of reviewing all site plan applications and making recommendations to the planning board in regard thereto.

g. Provisions for standards governing outdoor advertising signs required to be permitted pursuant to P.L.1991, c.413 (C.27:5-5 et seq.) including, but not limited to, the location, placement, size and design thereof.

h. Provisions for cluster development:

(1) Authorizing the planning board flexibility to approve a subdivision or site plan or both through mutual agreement with an applicant to allow for the clustering of development

within a section or sections of development at a greater concentration of density or intensity of land use than established for the zoning district, in order to achieve the goal of permanently protecting land as public open space or common open space, or for historic or agricultural purposes.

(2) Requiring the placement of a development restriction on any land identified for preservation in accordance with section 9 of P.L.2013, c.104 (C.40:55D-39.1).

i. Provisions requiring a successor developer to furnish a performance guarantee as a replacement for a performance guarantee that was previously accepted in accordance with standards adopted by ordinance and regulations adopted pursuant to section 1 of P.L.1999, c.68 (C.40:55D-53a) and section 41 of P.L.1975, c.291 (C.40:55D-53), or this subsection, for the purpose of assuring the installation and maintenance of on-tract improvements, and releasing the predecessor obligor and surety, if any, from liability pursuant to its performance guarantee.

3. Section 41 of P.L.1975, c.291 (C.40:55D-53) is amended to read as follows:

C.40:55D-53 Guarantees required; surety; release.

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 and regulations adopted pursuant to section 1 of P.L.1999, c.68 (C.40:55D-53a) for the purpose of assuring the installation and maintenance of on-tract improvements, the furnishing of a performance guarantee, and provision for a maintenance guarantee in accordance with paragraphs (1) and (2) of this subsection. If a municipality has adopted an ordinance requiring a successor developer to furnish a replacement performance guarantee, as a condition to the approval of a permit update under the State Uniform Construction Code, for the purpose of updating the name and address of the owner of property on a construction permit, the governing body may require and shall accept in accordance with the standards adopted by ordinance and regulations adopted pursuant to section 1 of P.L.1999, c.68 (C.40:55D-53a) for the purpose of assuring the installation and maintenance of on-tract improvements, the furnishing of a performance guarantee, and provision for a maintenance guarantee, in accordance with paragraphs (1) and (2) of this subsection.

(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 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 total performance guarantee posted may be retained to ensure completion and acceptability of all improvements.

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.

(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 inspection 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 inspection fees. When the balance on deposit drops to 10% of the 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 deposit the remaining 50% of the inspection fees. For those developments for which the inspection 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 inspection fees. When the balance on deposit drops to 10% of the 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 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.

C.40:55D-53c Acceptance of performance guarantee from successor developer.

4. a. The governing body or an approving authority may accept a performance guarantee in favor of the municipality from a successor developer as a replacement for a performance guarantee that was previously furnished, pursuant to section 41 of P.L.1975, c.291 (C.40:55D-53), for the purpose of assuring the installation of improvements. Except as otherwise provided by an ordinance requiring a successor developer to furnish a replacement performance guarantee, the governing body or approving authority shall not accept a replacement performance guarantee without securing:

(1) written confirmation from the new obligor that the intent of the new obligor is to furnish a replacement performance guarantee, relieving the predecessor obligor and surety, if any, of any obligation to install improvements, and

(2) written verification from the municipal engineer that the replacement performance guarantee is of an amount sufficient to cover the cost of the installation of improvements, but not to exceed 120% of the cost of the installation, which verification shall be determined consistent with section 41 of P.L.1975, c.291 (C.40:55D-53).

b. An approving authority shall notify the governing body whenever it accepts a replacement performance guarantee. Notice shall contain a copy of the written confirmation of the new obligor's intent to furnish a replacement performance guarantee and the municipal engineer's written verification of the sufficiency of the amount of that replacement performance guarantee.

c. Within 30 days after receiving notice from the approving authority of its acceptance of a replacement performance guarantee, the governing body, by resolution, shall release the predecessor obligor from liability pursuant to its performance guarantee.

5. Section 12 of P.L.1975, c.217 (C.52:27D-130) is amended to read as follows:

C.52:27D-130 Permit required; application; contents; issuance; transfer.

12. Except as otherwise provided by this act or in the code, before construction or alteration of any building or structure, the owner, or his agent, engineer or architect, shall submit an application in writing, including signed and sealed drawings and specifications, to the enforcing agency as defined in this act. The application shall be in accordance with regulations established by the commissioner and on a form prescribed by the commissioner and shall be accompanied by payment of the fee to be established by the municipal governing body by ordinance in accordance with standards established by the commissioner. The application for a construction permit shall be filed with the enforcing agency and shall be a public record; and no application for a construction permit shall be removed from the custody of the enforcing agency after a construction permit has been issued. Nothing contained in this paragraph shall be interpreted as preventing the imposition of requirements in the code, for additional permits for particular kinds of work, including but not limited to plumbing, electrical, elevator, fire prevention equipment or boiler installation or repair work, or in other defined situations.

Upon the transfer of ownership of property that is the subject of a construction permit, and prior to beginning or continuing work authorized by the construction permit, the new owner shall file with the enforcing agency an application for a permit update to notify the enforcing agency of the name and address of the new owner and of all other changes to information previously submitted to the enforcing agency. If the municipality has adopted an ordinance requiring a successor developer to furnish a replacement performance guarantee, and a performance guarantee has previously been furnished in favor of the municipality to assure the installation of on-tract improvements on the property that is the subject of an application for a permit update for the purpose of notifying the enforcing agency of the name and address of a new owner, the enforcing agency shall not approve the application for a permit update until it receives notification from the governing body or its designee that the new owner has furnished an adequate replacement performance guarantee.

No permit shall be issued for a public school facility unless the final plans and specifications have been first approved by the Bureau of Facility Planning Services in the Department of Education or a municipal code official who is appropriately licensed by the Commissioner of Community Affairs for the type and level of plans being reviewed. Approval by the Bureau of Facility Planning Services in the Department of Education shall only be required when a review for educational adequacy is necessary. Requirements determining when a review for educational adequacy is necessary shall be established jointly by the Department of Community Affairs and the Department of Education. The standards shall thereafter be adopted as part of the Uniform Construction Code regulations by the Department of Community Affairs. After the final plans and specifications have been approved for educational adequacy by the Bureau of Facility Planning Services in the Department of Education, a local board of education may submit the final plans and specifications for code approval to either the Bureau of Facility Planning Services in the Department of Education or a municipal code official who is appropriately licensed by the Commissioner of Community Affairs for the type and level of plans being reviewed. The Bureau of Facility Planning Services in the Department of Education when approving final plans and specifications shall be responsible for insuring that the final plans and specifications conform to the requirements of the code as well as for insuring that they provide for an educationally adequate facility. In carrying out its responsibility pursuant to

the provisions of this section the Department of Education shall employ persons licensed by the Commissioner of Community Affairs for the type and level of plans being reviewed.

C.52:27D-130.8 Adoption of ordinance requiring replacement for performance guarantee.

6. The governing body of a municipality may adopt an ordinance requiring a successor developer to furnish a performance guarantee as a replacement for a performance guarantee that was previously accepted in accordance with standards adopted by ordinance and regulations adopted pursuant to section 1 of P.L.1999, c.68 (C.40:55D-53a) and section 41 of P.L.1975, c.291 (C.40:55D-53) for the purpose of assuring the installation and maintenance of on-tract improvements, and releasing the predecessor obligor and surety, if any, from liability pursuant to its performance guarantee.

7. This act shall take effect immediately.

Approved August 9, 2013.