



TOWN OF DOVER

MAYOR AND BOARD OF ALDERMEN

ORDINANCE NO. 13-2018

AN ORDINANCE OF THE TOWN OF DOVER, COUNTY OF MORRIS, STATE OF NEW JERSEY, AMENDING AND SUPPLEMENTING ARTICLE IV ZONING CHAPTER 236-57 OF THE TOWN OF DOVER LAND USE CODE ENTITLED PERFORMANCE GUARANTEE FOR IMPROVEMENTS

WHEREAS, the New Jersey Legislature has adopted S3233, amending the requirements for performance and maintenance guarantees under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-53, et seq. and authorizing new types of guarantees a municipality may require of a developer; and

WHEREAS, this ordinance implements these new changes to be current with State law.

NOW, THEREFORE, BE IT ORDAINED, by the Mayor and Board of Alderman of the Town of Dover, County of Morris, State of New Jersey, as follows:

SECTION 1. The Town of Dover Land Use Code is hereby amended to delete in its entirety Article IV Zoning Chapter 236-57 Performance Guaranty for Improvements and is replaced in its entirety with a new Chapter 236-57 entitled "Performance and Maintenance Guarantees" so that it shall read as follows:

§236-57

A. **Escrow.** At least one-week prior to the beginning of construction or installation of any required improvements, the developer shall notify the Municipal Engineer, in writing, of the developer's intention to commence such work. All improvements and utility installation shall be inspected during the time of their installation by the Municipal Engineer or his designee to ensure satisfactory completion, and no underground installation shall be covered until inspected by the Municipal Engineer or his designee. The developer shall reimburse the Town for reasonable inspection fees paid to the Municipal Engineer for the inspection of improvements which fees shall not exceed the sum of the amounts set forth below. The developer shall deposit the necessary inspection fee with the Planning and Zoning Office prior to the start of any construction or prior to signing the final plat, whichever shall first occur. The inspection fee shall be in addition to the amount of any required performance or maintenance guaranties and shall consist of a sum equal in an amount:

(1) not to exceed, except for extraordinary circumstances, the greater of \$500 or 5% of the cost of bonded improvements that are subject to a performance guarantee; and

(2) not to exceed 5% of the cost of private site improvements that are not subject to a performance guarantee, which cost shall be determined pursuant to N.J.S.A. 40:55D-53.4

SECTION 2. Replenishment of Escrow Account

B. **Replenishment of escrow account.** If the Town determines that the amount in escrow for the payment of inspection fees, is insufficient to cover the cost of additional required inspections, the Town may require the developer to deposit additional funds in escrow, provided that the Town delivers to the developer a written escrow deposit request, signed by the Municipal Engineer, which: informs the developer of the need for additional inspections, details the items or undertakings that require inspection, estimates the time required for those inspections, and estimates the cost of performing those inspections.

SECTION 3. Performance, Safety and Stabilization and Temporary Certificate of Occupancy Guarantees

C. Performance Guarantee

(1) Requirements; form; rights.

(a) Improvements; cost.

(1) Prior to the filing of a final subdivision plat, recording of minor subdivision deeds, or as a condition of final site plan approval, or as a condition to the issuance of a zoning permit, the developer shall have filed with the Municipal Clerk a performance guarantee in favor of the municipality in an amount not to exceed 120% of the cost of installation of only those improvements required by an approval or Developer's Agreement, Ordinance or Regulation to be dedicated to a public entity, and that have not yet been installed, which cost shall be determined by the Municipal Engineer, including the following improvements as shown on the approved plans or plat:

- (a) Streets
- (b) Pavement
- (c) Gutters
- (d) Curbs
- (e) Sidewalks
- (f) Street Lighting
- (g) Street Trees
- (h) Surveyor's monuments
- (i) Water mains
- (j) Sanitary sewers
- (k) Community septic systems
- (l) Drainage structures
- (m) Public improvements of open space
- (n) any grading necessitated by the preceding improvements
- (o) Privately owned perimeter buffer landscaping, within an approved phase or section of a development provided, however that a developer may choose to post a separate performance guarantee for the privately-owned perimeter buffer landscaping

(b) 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.

(c) Such guarantee shall assure the installation of such improvements on or before an agreed date, guarantee the completion of all improvements without damage to or interference with adjacent properties or public facilities and hold the Mayor and Board of Alderman and Town Planning Board or Zoning Board of Adjustment and their employees and agents harmless with respect to any acts of the developer, its agents, successors or assigns.

(d) The total estimated cost to the Town of constructing all improvements shall be based upon the estimated contract construction costs, which would prevail upon expiration of the guarantee period, and shall also include appropriate allowances for contract-related costs such as engineering, legal, financial and other usual costs, which shall be estimated to be 20% of the estimated contract construction costs.

(e) Such performance guarantee may be in the form of cash, certified check, negotiable securities, a performance bond issued by a bonding company or surety company approved by the Mayor and Board of Alderman or any other type of surety acceptable to and approved by the Town Attorney and Mayor and Board of Alderman, provided that at least 10% of the performance guarantee shall be in cash or certified check. The balance of said performance guarantee shall be in the form of cash, certified check, certificate of deposit, an irrevocable letter of credit (said letter to be issued by a financial institution whose deposits are insured by the Federal Savings and Loan Insurance Corporation or Federal Deposit Insurance Corporation) or a bond issued by a surety or bonding company authorized to do business in New Jersey; provided, however, that all rights, including the right to interest with dividends, shall be assigned to the Town of Dover in a form of assignment acceptable to the Town Attorney for the period of the bond and that the principal amount of the passbook or certificate of deposit, together with interest, shall be returned to the developer upon completion of the bonded improvements, or, in the event of default, both interest and principal shall be used by and

for the benefit of the Town in the completion of said improvements.

(f) The form of the performance guarantee shall be subject to the approval of the Town Attorney.

(g) Subject to N.J.S.A. 40:55D-1 et seq., as amended and supplemented, all rights in the performance guarantee, including the right to any interest earned on any deposits, shall belong to the Town of Dover.

(h) Notwithstanding the requirement of Subsection A(1) above, when a letter of credit which has been previously accepted pursuant to Subsection A(1) as a performance guarantee is about to expire, it may be renewed administratively by the Town Attorney, provided that all pertinent requirements are met by the applicant.

(i) In the event of default, the principal and any interest shall be used for the benefit of the Town in the completion of the improvements.

(2) All guaranties authorized by this Chapter shall run to and be in favor of the Town of Dover in the County of Morris.

(3) Such performance guarantee shall run for a period to be fixed by the Mayor and Board of Alderman, but in no case for a term of more than two years. However, with the consent of the owner and the surety, if there is one, the Mayor and Board of Alderman may, by resolution, extend the term of such performance guarantee for an additional period not to exceed one year. The amount of the performance guarantee may be revised by the Mayor and Board of Alderman from time to time to reflect work progress, increasing costs and changing conditions in regard to the uncompleted or unacceptable portions of the required improvements. If the required improvements have not been installed in accordance with the performance guarantee, the obligor and surety shall be liable thereon, at the option of the municipality, for:

(a) The reasonable cost of the improvements not installed, and, upon receipt of the proceeds thereof, the municipality shall install such improvements; or

(b) The completion of all required improvements.

(4) Municipal Engineer list and report.

(a) 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 unsatisfactorily completed bonded 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 bonded improvements have been completed and which bonded 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.

(b) The list prepared by the Municipal Engineer shall state, in detail, with respect to each bonded 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.

(5) Approval or rejection of governing body.

- (a) The governing body, by resolution, shall either approve the bonded improvements determined to be complete and satisfactory by the Municipal Engineer or reject any or all of these bonded 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 bonded 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 and "safety and stabilization guarantee" posted may be retained to ensure completion and acceptability of all improvements. The "safety and stabilization guarantee" shall be reduced by the same percentage as the performance guarantee is being reduced at the time of each performance guarantee reduction.

For the purpose of releasing the obligor from liability pursuant to its performance guarantee, the amount of the performance guarantee attributable to each approved bonded 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 bonded improvements would exceed 70% of the total amount of the performance guarantee, then the municipality may retain 30% of the amount of the total performance guarantee and "safety and stabilization guarantee" to ensure completion and acceptability of bonded improvements as provided above; except that any amount of the performance guarantee attributable to bonded improvements for which a "temporary certificate of occupancy guarantee" has been posted shall be released from the performance guarantee even if such release would reduce the amount held by the municipality below 30 percent.

- (b) If the Municipal Engineer fails to send or provide the list and report as requested by the obligor pursuant to Subsection 4 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 bonded 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.

- (c) 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, provided that if the developer has furnished a safety and stabilization guarantee, the municipality may retain cash equal to the amount of the remaining safety and stabilization guarantee.
- (6) If any portion of the required improvements are rejected, the Mayor and Board of Alderman may require the obligor to complete such improvements, and, upon completion, the same procedure of notification as set forth in this section shall be followed.
- (7) Nothing herein, however, shall be construed to limit the right of the obligor to contest by legal proceedings any determination of the Mayor and Board of Alderman or the Municipal Engineer.

D. Safety and Stabilization Guarantee

- (1) Safety and Stabilization Guarantee Required
 - (a) The developer shall furnish a "safety and stabilization guarantee" in favor of the Town of Dover to ensure that the Town has an adequate guarantee to return the property that has been disturbed to a safe and stable condition or otherwise implement measures to protect the public from access to an unsafe or unstable condition.
 - (b) The Town shall be permitted to access the guarantee when:
 - (1) site disturbance has commenced and, thereafter, all work on the development has ceased for a period of at least 60 consecutive days following such commencement for reasons other than force majeure; and
 - (2) work has not recommenced within 30 days following the provision of written notice by the municipality to the developer of the municipality's intent to claim payment under the guarantee. Written notice shall be provided to a developer by certified mail or other form of delivery providing evidence of receipt.
 - (c) At the developer's option, the "safety and stabilization guarantee" may be furnished either as a separate guarantee or as a line item of the performance guarantee.
 - (d) The amount of the safety and stabilization guarantee shall be calculated pursuant to N.J.S.A. 40:55D-53.4 as follows:
 - (i) \$5,000 for the first \$100,000 of bonded improvement costs, plus
 - (ii) Two and a half percent (2.5%) of bonded improvement costs in excess of \$100,000 up to \$1,000,000; plus
 - (iii) One percent (1%) of bonded improvement costs in excess of \$1,000,000.

- (e) The safety and stabilization guarantee shall be released upon the determination of the Town Engineer that the development of the project site has reached a point that the improvements installed are adequate to avoid any potential threat to public safety.

E. Temporary Certificate of Occupancy Guarantee

- (1) In the event that the developer shall seek a temporary certificate of occupancy for a development, unit, lot, building, or phase of development, as a condition of the issuance thereof, the developer shall furnish a separate guarantee, referred to herein as a “temporary certificate of occupancy guarantee” in favor of the Town of Dover in an amount equal to 120% of the cost of installation of only those improvements or items which remain to be completed or installed under the terms of the temporary certificate of occupancy and which are required to be installed or completed as a condition precedent to the issuance of the permanent certificate of occupancy for the development, unit, lot, building or phase of development and which are not covered by an existing performance guarantee.
- (2) Upon posting of a “temporary certificate of occupancy guarantee,” all sums remaining under a performance guarantee which relate to the development, unit, lot, building, or phase of development for which the temporary certificate of occupancy is sought, shall be released.
- (3) The scope and amount of the “temporary certificate of occupancy guarantee” shall be determined by the Municipal Engineer
- (4) The “temporary certificate of occupancy guarantee” shall be released by the Municipal Engineer upon the issuance of a permanent certificate of occupancy with regard to the development, unit, lot, building, or phase as to which the temporary certificate of occupancy relates.

SECTION 4.

F. Maintenance Guarantee

- 1. A maintenance guarantee shall be furnished by the developer prior to the release of the performance guarantee in an amount equal to 15% of the cost of the installation of the improvements covered under the performance guarantee along with the following private site improvements: stormwater management basins, in-flow and water quality structures within the basins, and the out-flow pipes and structures of the stormwater management system, if any.
- 2. The developer may elect to furnish such maintenance guarantee either by maintaining on deposit with the Town the ten-percent cash or certified check portion of the performance guarantee provided in accordance with this chapter or by a bond issued by a bonding company or surety company, or other type of surety acceptable to and approved by the Town Attorney and Mayor and Board of Alderman.
- 3. The term of the maintenance guarantee shall begin with the release of the performance guarantee and shall run for a period of two years. The guarantee shall automatically expire at the end of the established term.
- 4. The maintenance guarantee shall be to the effect that the applicant, developer, owner or user guarantees the complete maintenance of all improvements for a period of two years from the release of his performance guaranty. Should the applicant, developer, owner or user fail in its obligation to properly maintain all improvements, the Town may, on 10 days’ written notice, or immediately in the case of hazard to life, health or property, proceed with necessary repair or replacement of any unacceptable improvements and charge the cost thereof against the guaranty. At the end of the maintenance guaranty, the cash or certified

check on deposit will be returned to the developer less any sums, properly documented by the Town, which have been expended to repair or replace any unsatisfactory improvements.

SECTION 5. All ordinances or parts of ordinances inconsistent herewith are hereby repealed.

SECTION 6. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

SECTION 7. This ordinance shall take effect after second reading and publication as required by law.

ATTEST:

TOWN OF DOVER, COUNTY OF MORRIS, NJ


Tara Pettoni, Municipal Clerk


James P. Dodd, Mayor

INTRODUCED: 9/25/2018

ADOPTED: 10/9/2018