

ORDINANCE NO. 19-01  
INTRODUCTION DATE: 03-06-19  
ADOPTION DATE: 04-03-19

ORDINANCE AMENDING CHAPTER XXXV (LAND USE AND DEVELOPMENT REGULATIONS), ARTICLE XIII, (GUARANTEES AND INSPECTIONS), SECTION 13-2 (PERFORMANCE GUARANTEES REQUIRED), SECTION 13-3 (INSPECTIONS), SECTION 13-4 (DEVELOPERS AGREEMENT AND SECTION 13-5 (RELEASE OF GUARANTEES) OF THE REVISED GENERAL ORDINANCES OF THE TOWNSHIP OF MILLSTONE, COUNTY OF MONMOUTH, STATE OF NEW JERSEY.

BE IT ORDAINED by the Township Committee of the Township of Millstone, County of Monmouth, State of New Jersey, as follows:(additions are underlined, and deletions are in [brackets]):

**I**

Chapter XXXV, Land Use and Development Regulations, Article XIII, Guarantees and Inspections, Section 13-2, Performance Guarantees Required, is hereby amended to read as follows:

**13-2.1 Amount of Performance Guarantee.**

a. Before the ~~[signing and recording]~~ filing of final subdivision plats, or the recording of a minor subdivision deed, or as a condition of final site plan approval, or as a condition to the issuance of a zoning permit pursuant to N.J.S.A. 40:55D-65, the ~~[applicant]~~ developer shall have installed under the inspection of the Township Engineer, ~~[all]~~ certain improvements required, (sometimes hereafter referred to as “bonded” or required improvement”) unless the applicant has posted and the Township Committee has accepted a performance guarantee providing for such installation of only those improvements required by an approval, a developer’s agreement or ordinance to be dedicated to the Township or other public entity, and that have not yet been installed. The amount of the guarantee shall be determined by the Township Engineer, not to exceed one hundred twenty (120) percent of the estimated cost of constructing the improvements including: streets, curbs, ~~[grading,]~~ pavement, gutters, sidewalks, street lighting, ~~[shade]~~ street trees, surveyors monuments as shown on the final map and required by the “Map Filing Law,” or N.J.S.A. 46:26B-1 through N.J.S.A. 46:26B-8 ~~[N.J.S.A. 46:23-9.9 et seq., culverts, storm sewers],~~ community septic systems, drainage structures, [erosion control and sedimentation control devices,] public improvements of open space, traffic street signage, pavement markings, and, if applicable, sanitary sewers ~~[or other means of sewage disposal, and, in the case of site plans only, other on-site improvements and landscaping],~~ and any grading necessitated by the preceding improvements; as well as privately owned perimeter buffer landscaping as required by ordinance or imposed as a condition of approval for each section or phase of the development. The Township 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.

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

c. In the event that the developer seeks 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 "temporary certificate of occupancy guarantee" 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, and which are not covered by an existing performance guarantee. The scope and amount of the "temporary certificate of occupancy shall be determined by the Township Engineer and accepted by resolution from the governing body. At no time shall more than one guarantee be held by the Township for the same improvement. The "temporary certificate of occupancy guarantee" shall be released by the governing body upon the issuance of a permanent certificate of occupancy with regard to the unit, lot, building or phase as to which the "temporary certificate of occupancy guarantee" relates.

d. In addition to the performance guarantee pursuant to subparagraph (a) above the developer shall also post a "safety and stabilization guarantee" in favor of the Township to be available solely for the purpose of returning property that has been disturbed to a safe and stable condition or otherwise implementing measures to protect the public from access to an unsafe or unstable condition, only in the circumstance that:

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 Township to the developer of the Township's intent to claim payment under the guarantee. The Township shall not serve notice of its intent to claim payment under a "safety and stabilization guarantee" until a period of at least 60 days has elapsed during which all work on the development has ceased for reason other than force majeure. The Township shall provide written notice to a developer by certified mail or other form of delivery providing proof of receipt.

e. The amount of the "safety and stabilization guarantee" for a development with bonded improvements in the amount not exceeding \$100,000 shall be \$5,000. The amount of the "safety and stabilization guarantee" for a development with bonded improvements exceeding \$100,000 shall be calculated as a percentage of the bonded improvements costs of the development or phase of development as follows:

1. \$5,000 for the first \$100,000 of bonded improvements, plus

2. Two and one half percent of bonded improvements costs in excess of \$100,000 up to \$1,000,000; plus

3. One percent of bonded improvement cost in excess of \$1,000,000

f. At the developer's option the safety and stabilization guarantee may be provided as a separate guarantee or as a line item in the performance guarantee.

g. "Performance Guarantee" as used hereafter in this Section may, as appropriate to the context of use, refer to all guarantees provided in this subsection 13-2.1.

**13-2.2 Posting of Performance Guarantee.**

Performance guarantees shall be submitted in the following form:

- a. A minimum of ten (10) percent of the performance guarantee must be posted in cash.
- b. The remaining ninety (90) percent of the performance guarantee amount shall be posted in cash, certified check, irrevocable standby letter of credit or surety bond in accordance with N.J.S.A. 40:55D-53a and N.J.A.C. 5:39.
- c. All guarantees shall provide for construction of the required improvements within the time provided in Section 10-5 hereof. This time period may be extended by the Township Committee, in the form of a resolution granting such extension provided the Township Agency has, if necessary, extended the period of protection pursuant to N.J.S.A. 40:55D-52a. As a condition of this extension the guarantee amount may be adjusted to one hundred twenty (120) percent of the estimated cost to construct the improvements at that time and additional appropriate inspection fees [~~deemed necessary by the Township Agency~~] shall be paid.
- d. All performance guarantees shall remain in effect until formally released by the Township Committee by a resolution and receipt of an approved maintenance guarantee as required consistent with N.J.S.A. 40:55D-53.
- e. If the property or any part of same is sold, or otherwise conveyed to a successor developer prior to the completion and acceptance of all improvements, an Assignment of Developer's Agreement, and new performance or maintenance guarantees shall be required from the new owner or successor developer. 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 or successor developer shall file with the building department an application for a permit update to notify the building department of the name and address of the new owner or successor developer and of all other changes to information previously submitted to the building department. The building department shall not approve the application for a permit update until it receives notification from the Governing Body or its designee that the new owner or successor developer has furnished adequate replacement performance or maintenance guarantees and Assignment of Developer's Agreement.

## II

Chapter XXXV, Land Use and Development Regulations, Article XIII, Guarantees and Inspections, Section 13-3, Inspections, is hereby amended to read as follows:

### **13-3 INSPECTIONS.**

a. All site improvements shall be inspected during the time of their installation under the supervision of the Township Engineer. Prior to the start of construction of any improvements, the applicant shall deposit by cash or certified check with the Township Clerk the applicable inspection fee required by ~~Article 5~~ subparagraphs (g) and (h) hereof. In addition, a preconstruction meeting shall be held with the Township Engineer, the developer, site superintendent, and all prime contractors, as required.

b. In no case shall installation of underground facilities or any paving work be conducted without permission from the Township Engineer.

c. The Engineer's office shall be notified two (2) working days prior to commencement of each of the following phases of construction so that the Engineer or his designated representative may be present to inspect the work.

1. Site clearing and grading.
2. Road subgrade.
3. Curb and gutter forms.
4. Curbs and gutters.
5. Road paving.
6. Sidewalk forms and driveway apron.
7. Sidewalks and driveway aprons.
8. Drainage pipes and other stormwater management construction.
9. Street name signs.
10. Survey monuments.
11. Water distribution systems.
12. Detention and/or retention basins.

13. Final grading, topsoil, seeding, planting, shade trees.
14. Traffic signage and stripping

d. Any improvement installed contrary to the plan or plat approval by the Township or Township design standard shall constitute just cause to void the Township approval.

e. Any improvements installed without notice for inspection (as determined by the Township Engineer) shall constitute just cause for:

1. The issuance of a "stop work" order by the Township Engineer pending the resolution of any dispute.
2. Removal of the uninspected improvements.
3. The payment by the developer of any costs of material testing.
4. The restoration by the developer of improvements disturbed by any material testing.

f. Inspection by the Township of the installation of improvements and utilities shall not operate to subject the Township to liability for claims, suits or liability of any kind that may at any time arise because of defects or negligence during construction or at any time thereafter; it being recognized that the responsibility to maintain safe conditions at all times during construction and to provide proper utilities and improvements is upon the owners and his contractor, if any.

g. Inspection Fees. The obligor shall reimburse the Township for ~~all~~ reasonable inspection fees paid to the Township Engineer for the foregoing inspection of improvements; ~~provided that the~~ which fees shall not exceed the sum of the amount set forth in subparagraphs (1) and (2) of this subsection g. The Township may require of the developer a deposit for the inspection fees in an amount: (1) not to exceed, except for extraordinary circumstances, the greater of five hundred (\$500.00) dollars or five (5) percent of the cost of improvements estimated pursuant to N.J.S.A. 40:55D-53.4 of the Municipal Land Use Law and (2) not to exceed five (5) percent of the cost of private site improvements that are not subject to a performance guarantee under Section 13-2.1. For those developments for which the reasonably anticipated fees ~~are~~ total less than ten thousand (\$10,000.00) dollars, fees may, at the option of the developer, be paid in two installments. The initial amount deposited in escrow by a developer shall be fifty (50) percent of the reasonably anticipated fees. When the balance on deposit drops to ten (10) percent of the reasonably anticipated fees because the amount deposited by the developer has been reduced by the amount paid to the Township Engineer for inspections, the developer shall deposit the remaining fifty (50) percent of the anticipated inspection fees. For those developments for which the reasonably anticipated fees ~~are~~ total ten thousand (\$10,000.00) dollars or greater, fees may, at the option of the developer, be paid in four (4) installments. The initial amount deposited in escrow by a developer shall be twenty-five (25) percent of the reasonably anticipated fees. When the balance on deposit drops to ten (10) percent of the reasonably anticipated fees because the amount deposited by the developer has been

reduced by the amount paid to the Township Engineer for inspection, the developer shall make additional deposits of twenty-five (25) percent of the reasonably anticipated fees. [~~The Township Engineer shall not perform any inspection if sufficient funds to pay for those inspections are not on deposit.~~]

h. If the Township determines that the amount in escrow for the payment of inspection fees, as calculated pursuant to subparagraphs (1) and (2) of this subsection h., is insufficient to cover the cost of additional required inspections, the municipality may require the developer to deposit additional funds in escrow provided that the Township delivers to the developer a written inspection escrow deposit request, signed by the Township Engineer which: (1) informs the developer of the need for additional inspections, (2) details the items or undertakings that require inspection, (3) estimates the time required for those inspections, and (4) estimates the cost of performing those inspections.

### III

Chapter XXXV, Land Use and Development Regulations, Article XIII, Guarantees and Inspections, Section 13-4, Developers Agreement, is hereby amended to read as follows:

#### **13-4 DEVELOPERS AGREEMENT.**

a. Prior to the signing and [~~recording~~] filing of final major subdivision plat or the signing and recording of a minor subdivision deed and as a condition of final site plan approval in the case of a site plan, the developer shall enter into an agreement with the Township Committee. This agreement shall be of a form that is acceptable to the Township Attorney and one in which the developer agrees to abide by the terms and conditions of approval, construct the required improvements in accordance with the approved plans, agree to maintain the constructed improvements including but not limited to, payment of street lighting charges, snow removal, maintenance of storm drainage, sewer and water facilities. The developer also shall agree that in the event the improvements are not maintained, the Township can utilize the cash portions of the performance guarantees to immediately attend to items presenting a safety hazard.

### IV

Chapter XXXV, Land Use and Development Regulations, Article XIII, Guarantees and Inspections, Section 13-5, Release of Guarantees, is hereby amended to read as follows:

#### **13-5 RELEASE OF GUARANTEES.**

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 Township Committee in writing, by certified mail addressed in care of the Township Clerk, that the Township Engineer prepare, in accordance with the itemized cost estimate prepared by the Township Engineer and appended to the performance guarantee pursuant to Section 13-2, 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 Township Engineer. The request shall indicate which improvements have been completed and which improvements remain uncompleted in the judgment of the obligor.

Concurrent with this request, the obligor shall forward a set of as-built plans for the following:

1. Roads (plan and profiles).
2. Surface and stormwater drainage (plans and profiles) for facilities in roads and easements.

~~[3. Sanitary sewers including individual lot connections and cleanouts (plans and profiles) for facilities in roads and easements.]~~

[4] 3. ~~[Water mains,]~~ Gas mains and underground electric, telephone and community antenna television (C.A.T.V.) conduits (plans and profiles) for facilities in roads and easements.

Upon acceptance of the as-built plan information by the Township Engineer, ~~two (2) mylar and~~ four (4) paper copies of the as-built plan shall be submitted to the Township.

Thereupon the Township Engineer shall inspect all of the improvements covered by the obligor's request and shall file a detailed list and report, in writing, with the Township Committee, and shall simultaneously send a copy thereof to the obligor not later than forty-five (45) days after receipt of the obligor's request.

The list prepared by the Township Engineer shall state, in detail, with respect to each required 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 required improvement determined to be unsatisfactory. The report prepared by the Township Engineer shall identify each required 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 Township Engineer and appended to the performance guarantee pursuant to subsection 13-2.1.

b. The Township Committee, by resolution, shall either approve the improvements determined to be complete and satisfactory by the Township 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 required improvements accepted, in accordance with the itemized cost estimate prepared by the Township Engineer and appended to the performance guarantee pursuant to subsection 13-2.1. This resolution shall be adopted not later than forty-five (45) days after receipt of the list and report prepared by the Township Engineer. Upon adoption of the resolution by the Township

Committee, 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 thirty (30) percent of the amount of the performance guarantee posted may be retained to ensure completion and acceptability of all required improvements.

c. 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 Township Engineer and appended to the performance guarantee pursuant to subsection a. of this [s]Section, including any contingency factor applied to the cost of installation. If the sum of the approved improvements would exceed seventy (70) percent of the total amount of the performance guarantee, then the Township may retain thirty (30) percent of the amount of the total performance guarantee to ensure completion and acceptability of all required improvements, as provided above.

d. If the Township Engineer fails to send or provide the list and report as requested by the obligor pursuant to subsection 13-5a. above within forty-five (45) days from receipt of the request, the obligor may apply to the court in a summary manner for an order compelling the Township 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 Township Committee fails to approve or reject the improvements determined by the Township Engineer to be complete and satisfactory or reduce the performance guarantee for the complete and satisfactory improvements within forty-five (45) days from the receipt of the Township 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 Township Engineer and appended to the performance guarantee pursuant to subsection 13-2.1; and the cost of applying to the court, including reasonable attorney's fees, may be awarded to the prevailing party.

e. In the event that the obligor has made a cash deposit with the Township 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 [s]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 Township Committee or the Township Engineer.

~~[h. The obligor shall reimburse the Township for all reasonable inspection fees paid to the Township Engineer for the foregoing inspection of improvements; provided that the Township may require of the developer a deposit for the inspection fees in an amount not to exceed, except for extraordinary circumstances, the greater of five hundred (\$500.00) dollars or five (5) percent of the cost of improvements estimated pursuant to N.J.S.A. 40:55D-53.4 of the Municipal Land Use Law. For those developments for which the reasonably anticipated fees are less than ten thousand (\$10,000.00) dollars, fees may, at the option of the developer, be paid in two installments. The initial amount deposited by a developer shall be fifty (50) percent of the reasonably anticipated fees. When the balance on deposit drops to ten (10) percent of the reasonably anticipated fees because the amount deposited by the developer has been reduced by the amount paid to the Township Engineer for inspection, the developer shall deposit the remaining fifty (50) percent of the anticipated inspection fees. For those developments for which the reasonably anticipated fees are ten thousand (\$10,000.00) dollars or greater, fees may, at the option of the developer, be paid in four (4) installments. The initial amount deposited by a developer shall be twenty five (25) percent of the reasonably anticipated fees. When the balance on deposit drops to ten (10) percent of the reasonably anticipated fees because the amount deposited by the developer has been reduced by the amount paid to the Township Engineer for inspection, the developer shall make additional deposits of twenty five (25) percent of the reasonably anticipated fees. The Township Engineer shall not perform any inspection if sufficient funds to pay for those inspections are not on deposit, nor shall the developer proceed with any work for which an inspection is required until sufficient funds are on deposit.]~~

[i]h. In the event that final approval is by stages or sections of development pursuant to N.J.S.A. 40:55D-38, the provisions of this [s]Section shall be applied by stage or section.

[j]i. Any release of performance guarantees will be conditioned upon the provision of a maintenance guarantee to be posted with the Township Committee, for an effective period of two (2) years, in an amount equal to fifteen (15) percent of the performance guarantee amount.In addition, upon the inspection and issuance of final approval of the following private site improvements by the municipal engineer, the developer shall post with the Township, a maintenance guarantee in an amount not to exceed 15% of the cost of the installation of 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, which cost shall be determined according to the method of calculation set forth in N.J.S.A. 40:55D-53.4.

[k]j. To the extent that any of the improvements have been dedicated to the Township on the subdivision plat or site plan, the Township Committee shall be deemed, upon the release of any performance guarantee required pursuant to subsection a. above, 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.

#### **IV**

All Ordinances and parts of Ordinances inconsistent herewith are hereby repealed.

**V**

If any section, subparagraph, sentence, clause or phrase of this Ordinance shall be held to be invalid, such decision shall not invalidate the remaining portion of this Ordinance.

**VI**

This Ordinance shall take effect upon adoption and publication according to law and filing with the Monmouth County Planning Board.

**EXPLANATORY STATEMENT:**

This ordinance revises the Land Use Ordinance provisions for Performance Guarantees, Inspections and Maintenance Guarantees to reflect recent amendment to the state Municipal Land Use Law, N.J.S.A. 40:55D-1 et. seq.