

LEGISLATIVE HISTORY CHECKLIST

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(Performance guarantees)

NJSA: 40:55D-53

LAWS OF: 1997 CHAPTER: 126

BILL NO: S1530

SPONSOR(S): Haines

DATE INTRODUCED: October 3, 1996

COMMITTEE: ASSEMBLY: ---

SENATE: Community Affairs

AMENDED DURING PASSAGE: No

DATE OF PASSAGE: ASSEMBLY: May 8, 1997

SENATE: March 24, 1997

DATE OF APPROVAL: June 23, 1997

FOLLOWING STATEMENTS ARE ATTACHED IF AVAILABLE:

SPONSOR STATEMENT: Yes

COMMITTEE STATEMENT: ASSEMBLY: No

SENATE: Yes

FISCAL NOTE: No

VETO MESSAGE: No

MESSAGE ON SIGNING: No

FOLLOWING WERE PRINTED:  
REPORTS: No

HEARINGS: No

KBP:pp

not printed

P.L. 1997, CHAPTER 126, *approved June 23, 1997*  
Senate, No. 1530

1 **AN ACT** concerning the release of the performance guarantee upon  
2 acceptance of improvements and amending 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 recording of  
10 final subdivision plats or as a condition of final site plan approval or  
11 as a condition to the issuance of a zoning permit pursuant to  
12 subsection d. of section 52 of P.L.1975, c.291 (C.40:55D-65), the  
13 approving authority may require and shall accept in accordance with  
14 the standards adopted by ordinance for the purpose of assuring the  
15 installation and maintenance of on-tract improvements:

16 (1) The furnishing of a performance guarantee in favor of the  
17 municipality in an amount not to exceed 120% of the cost of  
18 installation, which cost shall be determined by the municipal engineer  
19 according to the method of calculation set forth in section 15 of  
20 P.L.1991, c.256 (C.40:55D-53.4), for improvements which the  
21 approving authority may deem necessary or appropriate including:  
22 streets, grading, pavement, gutters, curbs, sidewalks, street lighting,  
23 shade trees, surveyor's monuments, as shown on the final map and  
24 required by the "Map Filing Law," P.L.1960, c.141 (C.46:23-9.9 et  
25 seq.), water mains, culverts, storm sewers, sanitary sewers or other  
26 means of sewage disposal, drainage structures, erosion control and  
27 sedimentation control devices, public improvements of open space  
28 and, in the case of site plans only, other on-site improvements and  
29 landscaping.

30 The municipal engineer shall prepare an itemized cost estimate of  
31 the improvements covered by the performance guarantee, which  
32 itemized cost estimate shall be appended to each performance  
33 guarantee posted by the obligor.

34 (2) Provision for a maintenance guarantee to be posted with the

**EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.**

**Matter underlined thus is new matter.**

1 governing body for a period not to exceed two years after final  
2 acceptance of the improvement, in an amount not to exceed 15% of  
3 the cost of the improvement, which cost shall be determined by the  
4 municipal engineer according to the method of calculation set forth in  
5 section 15 of P.L.1991, c.256 (C.40:55D-53.4). In the event that  
6 other governmental agencies or public utilities automatically will own  
7 the utilities to be installed or the improvements are covered by a  
8 performance or maintenance guarantee to another governmental  
9 agency, no performance or maintenance guarantee, as the case may be,  
10 shall be required by the municipality for such utilities or improvements.

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

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

29 d. (1) Upon substantial completion of all required street  
30 improvements (except for the top course) and appurtenant utility  
31 improvements, and the connection of same to the public system, the  
32 obligor may request of the governing body in writing, by certified mail  
33 addressed in care of the municipal clerk, that the municipal engineer  
34 prepare, in accordance with the itemized cost estimate prepared by the  
35 municipal engineer and appended to the performance guarantee  
36 pursuant to subsection a. of this section, a list of all uncompleted or  
37 unsatisfactory completed improvements. If such a request is made, the  
38 obligor shall send a copy of the request to the municipal engineer. The  
39 request shall indicate which improvements have been completed and  
40 which improvements remain uncompleted in the judgment of the  
41 obligor. Thereupon the municipal engineer shall inspect all  
42 improvements covered by obligor's request and shall file a detailed list  
43 and report, in writing, with the governing body, and shall  
44 simultaneously send a copy thereof to the obligor not later than 45  
45 days after receipt of the obligor's request.

46 (2) The list prepared by the municipal engineer shall state, in detail,

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

12 e. (1) The governing body, by resolution, shall either approve the  
13 improvements determined to be complete and satisfactory by the  
14 municipal engineer, or reject any or all of these improvements upon  
15 the establishment in the resolution of cause for rejection, and shall  
16 approve and authorize the amount of reduction to be made in the  
17 performance guarantee relating to the improvements accepted, in  
18 accordance with the itemized cost estimate prepared by the municipal  
19 engineer and appended to the performance guarantee pursuant to  
20 subsection a. of this section. This resolution shall be adopted not later  
21 than 45 days after receipt of the list and report prepared by the  
22 municipal engineer. Upon adoption of the resolution by the governing  
23 body, the obligor shall be released from all liability pursuant to its  
24 performance guarantee, with respect to those approved improvements,  
25 except for that portion adequately sufficient to secure completion or  
26 correction of the improvements not yet approved; provided that 30%  
27 of the amount of the total performance guarantee posted may be  
28 retained to ensure completion and acceptability of all improvements.

29 For the purpose of releasing the obligor from liability pursuant to  
30 its performance guarantee, the amount of the performance guarantee  
31 attributable to each approved improvement shall be reduced by the  
32 total amount for each such improvement, in accordance with the  
33 itemized cost estimate prepared by the municipal engineer and  
34 appended to the performance guarantee pursuant to subsection a. of  
35 this section, including any contingency factor applied to the cost of  
36 installation. If the sum of the approved improvements would exceed  
37 70 percent of the total amount of the performance guarantee, then the  
38 municipality may retain 30 percent of the amount of the total  
39 performance guarantee to ensure completion and acceptability of all  
40 improvements, as provided above.

41 (2) If the municipal engineer fails to send or provide the list and  
42 report as requested by the obligor pursuant to subsection d. of this  
43 section within 45 days from receipt of the request, the obligor may  
44 apply to the court in a summary manner for an order compelling the  
45 municipal engineer to provide the list and report within a stated time  
46 and the cost of applying to the court, including reasonable attorney's

1 fees, may be awarded to the prevailing party.

2 If the governing body fails to approve or reject the improvements  
3 determined by the municipal engineer to be complete and satisfactory  
4 or reduce the performance guarantee for the complete and satisfactory  
5 improvements within 45 days from the receipt of the municipal  
6 engineer's list and report, the obligor may apply to the court in a  
7 summary manner for an order compelling, within a stated time,  
8 approval of the complete and satisfactory improvements and approval  
9 of a reduction in the performance guarantee for the approvable  
10 complete and satisfactory improvements in accordance with the  
11 itemized cost estimate prepared by the municipal engineer and  
12 appended to the performance guarantee pursuant to subsection a. of  
13 this section; and the cost of applying to the court, including reasonable  
14 attorney's fees, may be awarded to the prevailing party.

15 (3) In the event that the obligor has made a cash deposit with the  
16 municipality or approving authority as part of the performance  
17 guarantee, then any partial reduction granted in the performance  
18 guarantee pursuant to this subsection shall be applied to the cash  
19 deposit in the same proportion as the original cash deposit bears to the  
20 full amount of the performance guarantee.

21 f. If any portion of the required improvements is rejected, the  
22 approving authority may require the obligor to complete or correct  
23 such improvements and, upon completion or correction, the same  
24 procedure of notification, as set forth in this section shall be followed.

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

28 h. The obligor shall reimburse the municipality for all reasonable  
29 inspection fees paid to the municipal engineer for the foregoing  
30 inspection of improvements; provided that the municipality may  
31 require of the developer a deposit for the inspection fees in an amount  
32 not to exceed, except for extraordinary circumstances, the greater of  
33 \$500 or 5% of the cost of improvements, which cost shall be  
34 determined pursuant to section 15 of P.L.1991, c.256  
35 (C.40:55D-53.4). For those developments for which the [reasonably  
36 anticipated] inspection fees are less than \$10,000, fees may, at the  
37 option of the developer, be paid in two installments. The initial  
38 amount deposited by a developer shall be 50% of the [reasonably  
39 anticipated] inspection fees. When the balance on deposit drops to  
40 10% of the [reasonably anticipated] inspection fees because the  
41 amount deposited by the developer has been reduced by the amount  
42 paid to the municipal engineer for inspection, the developer shall  
43 deposit the remaining 50% of the [anticipated] inspection fees. For  
44 those developments for which the [reasonably anticipated] inspection  
45 fees are \$10,000 or greater, fees may, at the option of the developer,  
46 be paid in four installments. The initial amount deposited by a

1 developer shall be 25% of the [reasonably anticipated] inspection fees.  
2 When the balance on deposit drops to 10% of the [reasonably  
3 anticipated] inspection fees because the amount deposited by the  
4 developer has been reduced by the amount paid to the municipal  
5 engineer for inspection, the developer shall make additional deposits  
6 of 25% of the [reasonably anticipated] inspection fees. The municipal  
7 engineer shall not perform any inspection if sufficient funds to pay for  
8 those inspections are not on deposit.

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

13 j. To the extent that any of the improvements have been dedicated  
14 to the municipality on the subdivision plat or site plan, the municipal  
15 governing body shall be deemed, upon the release of any performance  
16 guarantee required pursuant to subsection a. of this section, to accept  
17 dedication for public use of streets or roads and any other  
18 improvements made thereon according to site plans and subdivision  
19 plats approved by the approving authority, provided that such  
20 improvements have been inspected and have received final approval by  
21 the municipal engineer.

22 (cf: P.L.1991, c.256, s.12; P.L.1991, c.301, s.1; P.L.1991, c.311, s.1)

23  
24 2. This act shall take effect 90 days next following enactment.  
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26

## 27 STATEMENT

28  
29 This bill governs the calculation of the retainage allowed on the part  
30 of the municipality in releasing performance guarantees under the  
31 "Municipal Land Use Law."

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

37 This bill provides that as each improvement covered by the  
38 performance guarantee is fully completed and accepted by both the  
39 municipal engineer and the governing body, the bond amount relative  
40 to the individual item shall be reduced by the total amount for each  
41 such improvement, in accordance with the itemized cost estimate  
42 prepared by the municipal engineer and appended to the performance  
43 guarantee, including any contingency factor applied to the cost of  
44 installation.

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

1 accepted, it must be reduced in full. In making this calculation,  
2 however, the municipality must include the 20 percent contingency  
3 factor applied to the cost of installation in order to determine the  
4 amount of the performance guarantee. If the calculation performed in  
5 this way would otherwise allow the municipality to withhold less than  
6 30 percent of the total performance guarantee, the bill allows the  
7 municipality to withhold up to 30 percent of the total.

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

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

# SENATE COMMUNITY AFFAIRS COMMITTEE

## STATEMENT TO

### SENATE, No. 1530

# STATE OF NEW JERSEY

DATED: JANUARY 14, 1997

The Senate Community Affairs Committee reports favorably Senate Bill No. 1530.

This bill concerns the calculation of the amount of a performance guarantee under the "Municipal Land Use Law" that may be retained by a municipality after a portion of improvements have been completed.

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

This bill would provide that as each improvement covered by the performance guarantee is fully completed and accepted by both the municipal engineer and the governing body, the amount of the performance guarantee attributable to the individual item must be reduced by the total amount for each such improvement, in accordance with the itemized cost estimate prepared by the municipal engineer and appended to the performance guarantee, including any contingency factor applied to the cost of installation.

The 30 percent amount that a municipality may retain to ensure completion and acceptability of all improvements would be based on the amount of the total performance guarantee rather than each separate improvement. Under the bill's provisions, once an improvement is accepted, it would be reduced in full. In making this calculation, however, the municipality would be required to include the 20 percent contingency factor applied to the cost of installation in order to determine the amount of the performance guarantee. If the calculation performed in this way would otherwise allow the municipality to withhold less than 30 percent of the total performance guarantee, the bill would allow the municipality to withhold up to 30 percent of the total.

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