

MOVING TOWARDS CONSISTENCY – AMENDMENTS TO THE MUNICIPAL LAND USE LAW, N.J.S.A. 40:55D-53, BOND REQUIREMENTS

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During his last day in office, Governor Christie signed into law Assembly Bill 1425/Senate Bill 3233, which implements major reforms to the requirements for performance and other bonds posted in connection with municipal land use approvals under the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq. ("MLUL")). The amendments were intended to bring greater consistency in calculating performance bonds under N.J.S.A. 40:55D-53 and to introduce other modifications to the development process to address practices that resulted in cost and delay and to codify useful practices. Rather than viewing these amendments as either pro-municipality or pro-developer, the amendments should be viewed as an effort to create consistency such that a developer working in multiple municipalities is not faced with disparate bonding requirements in each municipality and has the ability to anticipate its costs relative to guarantees and inspection fees.

The amendments make clear that only improvements required to be dedicated, as enumerated in the statute, may be subject to a performance bond requirement and only if required by a duly adopted ordinance. These dedicated improvements include, among other items, streets, curbs, sidewalks, street lighting, street trees, water mains, drainage structures. The dedication requirement may be set forth in an approval, developer's agreement, ordinance or regulation. Perimeter landscape buffers required by ordinance, approval or developer's agreement also may be required to be bonded as distinguished from other landscaping included in a project, such as parking lot landscaping or foundation plantings.

In addition to the clarification regarding the improvements as to which performance bonds may be required, a new guarantee, referred to as the "safety and stabilization guarantee," ("SSG") has been introduced. This new guarantee is, in part, a codification of the restoration bond that land use boards or officials often require to be posted prior to site disturbance but as to which there was no statutory authority. The SSG may be posted separately or as a line item under the performance bond. This guarantee is intended to provide the municipality with a source of funds to protect the public from unsafe or unstable conditions. Funds may be used, for example, to re-seed an area that has been cleared to protect against erosion or to fence or gate an unfinished road or an incomplete detention basin, without requiring the municipality to use municipal funds to do so. The guarantee amount is calculated as a percentage of the bonded

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improvements. The municipality has recourse to these funds only if all work on the project has stopped for a period of at least sixty (60) consecutive days and a notice is provided which does not result in work recommencing within thirty (30) days following the notice.

The amendments also introduces a "temporary certificate of occupancy guarantee" ("TCOG"). The TCOG must be posted with the municipality, if required by an ordinance adopted by the municipality, at the time a temporary certificate of occupancy is sought. The guarantee is equal to 120% of the cost of only those items which are not completed and completion of which will be required to obtain a permanent certificate of occupancy. When these improvements are completed and the permanent certificate of occupancy is issued, the TCOG will be released by the officer or employee authorized by ordinance to do so, without the need for further process.

The new law makes changes with regard to maintenance guarantees under N.J.S.A. 40:55D-53.a.(2)., a guarantee which may be required by ordinance and is posted at the time of release of the performance guarantee. The maintenance guarantee continues to be calculated at 15% of the performance guarantee. Maintenance guarantees also may include 15% of the cost of certain components of private storm water management facilities, including basins, inflow and water quality structures within the basin and outflow pipes and structures, even though these items, as private improvements, would not be included in the performance bond amount upon which the 15% maintenance guarantee is calculated. Maintenance guarantees now expire automatically at the end of two years.

Finally, the amendments make changes to the inspection fee provisions set forth at N.J.S.A. 40:55D-53.h. While inspection fees are still calculated at five (5%) percent of the cost of both the dedicated site improvements that are the subject of the performance guarantee and private site improvements for which no performance guarantee is required, the amendments alter the process for replenishing the inspection escrow. Historically, when the five (5%) percent escrow was depleted, a municipality would simply demand additional funds to replenish the escrow without explanation or justification and work on a project could be stopped until additional funds were deposited. Under the amendments, a municipality will have to send a request to the developer seeking additional funds, signed by the municipal engineer, setting forth the basis for the request including the items or undertakings that require inspection, estimates of the time required and the estimated cost of those inspections. The amendments also eliminate the provision that allowed inspections to cease where sufficient funds were not on deposit.

While the new law, by its terms, took effect immediately, there are many questions regarding what this means in practice. The new law requires municipalities to adopt an ordinance prior to requiring any of the guarantees. It appears clear that as of the effective date of the amendments, municipalities can only require new performance guarantees calculated upon the cost those improvements specified in the amended act. Since performance guarantees are not among the "general terms and conditions" protected under vesting provisions of the MLUL, the applicability of the new law to any particular project is not affected by the date of Board approval. While replacing existing guarantees may raise practical difficulties, it appears clear that the amount of any existing performance guarantees should be adjusted at the time of any renewal and

guarantees for future phases of a development of a multi-phased project must be calculated under the new law notwithstanding that a different law applied to earlier phases. Particular circumstances may require negotiation with the municipality to reach a workable accommodation that balances the cost differential between guarantees required under the prior law and that under the amendments against the cost of fighting over the proper application of the new law. Further, a municipality arguing against applicability of the amendments to a project approved prior to the effective date of the amendments may be hard pressed to claim a right to require either the SSG or TCOG. Therefore, a cooperative effort by all parties will be required to work through the period of adjustment to the amendments.

The views and opinions expressed in this article are those of the author and do not necessarily reflect those of Sills Cummis & Gross P.C or the New Jersey Builders Association.