

Ordinance

No. 14-2018

AN ORDINANCE REPEALING CHAPTER 298, SITE PLAN REVIEW, ARTICLE V. SITE PLANS, SECTION 298-17 PERFORMANCE GUARANTY AND ADOPTING A NEW SECTION - CHAPTER 298, SITE PLAN REVIEW, ARTICLE V. SITE PLANS, SECTION 298-17, GUARANTEES OF THE CODE OF THE BOROUGH OF WESTVILLE

BE IT ORDAINED by the Mayor and Borough Council of the Borough of Westville, County of Gloucester and State of New Jersey, that Chapter 298. Site Plan Review, Article V. Site Plans, Section 298-17 Performance Guaranty is hereby repealed and a new section entitled Chapter 298. Site Plan Review, Article V. Site Plans, Section 298-17; Guarantees is hereby adopted to read as follows:

Section 1. A. Performance Guarantees.

1. No site plan shall be approved by the Land Use Board until the completion of all such required improvements has been certified to the Land Use Board by the Borough Engineer and Superintendent of Water and Sewer, unless the applicant has furnished a performance guarantee in favor of the Borough of Westville 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 Borough Engineer, according to the method of calculation set forth in section 15 of P.L. 1991, c. 256 (N.J.S.A. 40:55D-53.4), for the following improvements as shown on the approved plans or plat: streets, pavement, gutters, curbs, sidewalks, street lighting, street trees, surveyor's monuments (as shown on the final map and required by the Map Filing Law (N.J.S.A. 46:23-9.9 et seq.) or N.J.S.A. 46:26B-1 through N.J.S.A. 46:26B-8, water mains, sanitary sewers, community septic systems, drainage structures, public improvements of open space and any grading necessitated by the preceding improvements, and within an approved phase or section of a development, privately owned perimeter buffer landscaping. At the developer's option, a separate performance guarantee may be posted for the privately-owned perimeter buffer landscaping.
2. 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 Borough 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. Upon posting of a "temporary certificate of occupancy guarantee," all sums remaining under a performance guarantee, required pursuant to Section (A)(1) of this section, which relate to the development, unit, lot, building, or phase of development for which the temporary certificate of occupancy is sought, shall be released. The scope and amount of the "temporary certificate of occupancy guarantee" shall be determined by the Zoning officer, Borough Engineer, or other Borough Official designated by the Borough Council. At no time may the Borough hold more than one guarantee or bond of any type with respect to the same line item. The "temporary certificate of occupancy guarantee" shall be released by the Zoning officer, Borough Engineer, or other Borough Official designated by the Borough Council 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.

3. In addition to a performance guarantee required pursuant to Section (A)(1) of this Section, a developer shall furnish to the Borough a separate guarantee, referred to as a "safety and stabilization guarantee," in favor of the Borough to be available to the Borough 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:
 - (a) site disturbance has commenced and, thereafter, all work on the development has ceased for a period of at least sixty (60) consecutive days following such commencement for reasons other than force majeure, and
 - (b) work has not recommenced within thirty (30) days following the provision of written notice by the Borough to the developer of the Borough's intent to claim payment under the guarantee. The Borough shall not provide notice of its intent to claim payment under a "safety and stabilization guarantee" until a period of at least sixty (60) days has elapsed during which all work on the development has ceased for reasons other than force majeure. The Borough shall provide written notice to the developer by certified mail or other form of delivery providing evidence of receipt.

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

\$5,000 for the first \$100,000 of bonded improvement costs, plus two and a half percent of bonded improvement costs in excess of \$100,000 up to \$1,000,000, plus one percent of bonded improvement costs in excess of \$1,000,000.

The Borough shall release a separate “safety and stabilization guarantee” to the developer upon the developer's furnishing of a performance guarantee which includes a line item for safety and stabilization in the amount required under this paragraph. The Borough shall release a “safety and stabilization guarantee” upon the municipal engineer's determination 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.

4. No more than ten percent (10%) of the total performance guarantees shall be in cash, and the balance shall be in the form of a surety bond issued by a bonding company licensed to do business in the State of New Jersey and rated A+ or better by A.M. Best or a letter of credit issued by a banking institution licensed to do business in the State of New Jersey. Such bond or letter of credit must be approved and accepted by the Borough governing body. The Borough Engineer shall review the improvements required by the reviewing board which are to be bonded and itemize their cost. This itemization shall be the basis for determining the amount of the performance guarantees required by the Borough and the inspection fees required by this Code. The Borough Engineer shall forward his/her estimate of the cost of improvements to the applicant within thirty (30) days after the date of receipt of a request sent by certified mail for this estimate. Any performance guarantee delivered to the Borough Clerk pursuant to this section shall be for an initial term of not less than two years, shall provide for automatic one-year renewals and shall only be terminable on the date of expiration, either of the original period or any renewal period, upon not less than sixty (60) days advanced written notice. In the event that any of the improvements to be installed are covered by a performance guarantee to another governmental agency, no performance guarantee shall be required from the Borough for such improvements.

5. If at any time during the period of time between acceptance of the initial performance guarantee and the date the Borough Council formally releases such performance guarantee, the Borough Council has reasonable cause to doubt the value, legality, enforceability or effectiveness of such guarantee, all development activity for which such guarantee was established shall be discontinued until such time as a substitute guarantee, in form and substance equivalent to the guarantee which was required to be in place at the time the status of the original guarantee was questioned, shall be delivered to and accepted by the Borough Council. By way of illustration and not limitation, the following shall be instances of reasonable cause to doubt the value, legality, enforceability or effectiveness of such guarantees:
 - (a) The company issuing the bond shall cease to do business, declare insolvency or bankruptcy or be forced into involuntary bankruptcy.

- (b) The bank, savings and loan, credit union, mortgage banking company or other banking or banking-like entity issuing a letter of credit shall become insolvent, be taken over by any governmental or quasigovernmental agency or company or otherwise cease to do business.
 - (c) The issuer of any performance guarantee shall serve on the Borough notice of termination or cancellation of such guarantee.
- 6. The amount of any performance guarantee may be reduced by the Borough Council, by resolution, when portions of the improvements have been certified by the Borough Engineer to have been completed. The time allowed for installation of the improvements for which the performance guarantee has been provided may be extended by the Borough Council by resolution. If the sum of the approved bonded improvements would exceed seventy percent (70%) of the total amount of the performance guarantee, then the Borough may retain thirty percent (30%) of the amount of the total performance 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 Borough below thirty percent (30%).
- 7. If the required improvements are not completed or corrected in accordance with the finally approved development plans and approvals, the obligor and surety shall be liable thereon to the Borough for the reasonable cost of the improvements not completed or corrected, and the Borough, either prior to or after the receipt of the proceeds of the performance guarantee, may complete such improvements.
- 8. When all of the required improvements have been completed, the obligor shall notify the administrative officer, in writing, by certified mail, with a copy to the Municipal Clerk, of the completion of such improvements and shall send a copy thereof to the Borough Engineer. Upon receipt of this notice, the Borough Engineer shall inspect all of the improvements and shall file a detailed report, in writing, with the Administrative Officer, indicating approval, partial approval or rejection of the improvements with a statement of reasons for rejection. If partial approval is indicated, the cost of the improvements rejected shall be set forth. The Borough Engineer shall have forty-five (45) days to inspect all of the improvements and to file a detailed report in writing with the Administrative Officer indicating approval, partial approval or rejection of the improvements with a statement of the reasons for rejection.
- 9. The Borough Council shall either approve, partially approve or reject the improvements on the basis of the report of the Borough Engineer and shall notify the obligor, in writing, by certified mail, of the contents of the Borough Engineer's report and the action of the Borough Council with relation thereto

not later than forty-five (45) days after receipt of the notice from the obligor of the completion of the improvements. Where partial approval is granted, the obligor shall be released from all liability pursuant to the performance guarantee except for that portion adequately sufficient to secure completion of the improvements not yet approved. Failure of the Borough Council to send or provide such notification to the obligor within forty-five (45) days shall be deemed to constitute approval of the improvements and the obligor and surety, if any, shall be released from all liability pursuant to such performance guarantee.

10. If any portion of the required improvements is rejected, the obligor shall complete such improvements, and, upon completion, the same procedure of notification as set forth in this section shall be followed.
11. The obligor shall reimburse the Borough for all reasonable inspection fees paid to the Borough Engineer for the foregoing inspection of improvements, pursuant to Chapter 205, Land Use and Development.

Section 2. B. Maintenance Guarantees.

1. As a condition of the final release of all performance guaranties posted by an applicant with respect to any development approval within the Borough, and/or as identified in Section (A)(1), the applicant shall deliver to the Borough Clerk, for the purpose of assuring that all improvements installed in accordance with such development approval have been installed in a good and workmanlike manner and that all materials are fit for their intended purpose, a maintenance guarantee in accordance with the following standards:
 - (a) The maintenance guarantee shall be for a period of two (2) years commencing on the date that the Borough Council finally accepts the improvements as being complete, in an amount not to exceed 15% of the total cost of the installation of the improvements as set forth on the Borough Engineer's estimate for such improvements completed with Section A.
 - (b) The developer shall post with the Borough, upon the inspection and issuance of final approval of the following private site improvements by the Borough Engineer, 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 by the Borough

Engineer according to the method of calculation set forth in Section 15 of P.L. 1991. c.256.

- (c) In the event that other governmental agencies or public utilities automatically will own the utilities or improvements which are installed or the improvements are covered by a maintenance guarantee provided by the applicant to another governmental agency, no maintenance guarantee in favor of the Borough shall be required for such utilities or improvements. Such maintenance guarantee shall be in the form of a surety bond issued by a surety licensed to do business in the State of New Jersey and rated A+ or better by A.M. Best or a letter of credit issued by a banking institution licensed to do business in the State of New Jersey. Such maintenance guarantee shall be approved and accepted by the Borough Council.
 - (d) If at any time prior to the expiration of the maintenance guarantee the Borough Council has reasonable cause to doubt the value, legality, enforceability or effectiveness of such guarantee, the obligor must deliver to the Borough Clerk a substitute guarantee, equivalent to the guarantee which was required to be in place at the time the status of the original guarantee was questioned. By way of illustration and not limitation, the following shall be instances of reasonable cause to doubt the value, legality, enforceability or effectiveness of such guaranties:
 - (i) The company issuing the bond shall cease to do business, declare insolvency or bankruptcy or be forced into involuntary bankruptcy.
 - (ii) The bank, savings and loan company, credit union, mortgage banking company or other banking or banking-like entity issuing a letter of credit shall become insolvent, be taken over by any governmental or quasigovernmental agency or company, or otherwise cease to do business.
2. If the Borough determines that any improvements which are covered by such maintenance guarantee have not been completed in a good and workmanlike manner, or that any materials which were incorporated into such improvements are not fit for their intended purpose and the obligor, under such maintenance guarantee, has not corrected the improvements to the satisfaction of the Borough Engineer within thirty (30) days after written notice of such defect, the obligor and the surety shall be liable on such guarantee to the Borough for the reasonable cost of correcting and/or replacing such improvements, and the Borough, either prior to or after the

receipt of the proceeds of such guarantee, shall have the right, but not the obligation, to complete corrective work or replacements of such improvements which may be required.

Section 3. Repealer.

All Ordinances or parts of Ordinances inconsistent with this Ordinance are hereby repealed to the extent of such inconsistencies.

Section 4. Severability.

Each section of this Ordinance is an independent section, and the holding of any section or part thereof to be unconstitutional, void or ineffective, shall not be deemed to affect the validity or constitutionality of any other sections or parts hereof.

Section 5. Effective date.

This Ordinance shall be in full force and effect from and after its adoption and any publication as may be required by law.

Introduced: May 31, 2018

Adopted:

BOROUGH OF WESTVILLE

**Russell W. Welsh, Jr.
MAYOR**

ATTEST:

**Kathleen Carroll
DEPUTY MUNICIPAL CLERK**