

ORDINANCE

AMENDING THE REQUIREMENTS FOR PERFORMANCE GUARANTEES UNDER LAND USE APPROVALS

CITY OF NASHUA

In the Year Two Thousand and Ten

The City of Nashua ordains that Chapter 190 “Land Use”, Article XVI “Subdivision Procedures”, Section 190-143 “Performance guarantees” of the Nashua Revised Ordinances, as amended, be hereby further amended by deleting the struck-through language and adding the new underlined language as follows:

“§ 190-143. Performance guarantees.

Purpose: This section establishes procedures for bonding, subdivision improvement agreements or other guarantees where improvements are not completed before conditional plan approval as provided by RSA 674:36.III(b). This section also establishes guarantees to warrant and to ensure proper maintenance of the improvements.

- A. Applicability. This section applies where the applicant chooses to provide performance guarantees in lieu of completing improvements prior to conditional plan approval.
- B. Initiation.
 - (1) The applicant shall post a performance bond, irrevocable letter of credit, certified check or deposit in escrow, in a sum in an amount determined by the City Engineer.
 - (2) No performance bond, certified check, deposit in escrow or cash shall be accepted unless the City Engineer provides a statement that the improvements comply with the requirements of this chapter.

- (3) No performance bond or deposit in escrow shall be accepted unless the City Solicitor/Corporation Counsel or, in the case of a vacancy in this position, an attorney licensed to practice law in this state, furnishes a statement as to the validity, adequacy and enforceability of the security offered.
 - (4) In addition to all other security, when the City of Nashua participates in the cost of an improvement, the applicant shall provide a performance bond from the contractor, with the City of Nashua as a co-obligee.
 - (5) The issuer of any surety bond shall be subject to the approval of the City Attorney and the Division of Public Works.
 - (6) If security is provided in the form of a cash escrow, the applicant shall deposit with the Finance Department of City of Nashua a cash amount or certified check endorsed to the escrow agent for a face value in an amount not less than the amount specified by the Division of Public Works.
 - (7) The surety bond or cash escrow account shall accrue to the City of Nashua for administering the construction, operation and maintenance of the improvements.
 - (8) If oversized facilities such as waterlines, sewer lines, streets, storm drainage, or similar improvements are required, the City Engineer and applicant shall specify a reimbursement procedure in a subdivision improvement agreement executed by the Administrative Officer, City Engineer, and the applicant.
- C. Duration. Performance guarantees shall be ~~for a period not to exceed one year and may be extended by the City Engineer for an additional year continuous in nature and will be released by the City of Nashua upon final approval of the required improvements.~~ Construction of the required improvements shall be completed within 10 months of approval. If construction is not completed during this time period, the Planning Board may grant an extension of time, ~~and the applicant either post a new performance guarantee or extend the period of validity for the performance guarantee to correspond to this time period.~~ Failure to complete all street and utility improvements to the satisfaction of the City within the time specified shall mean forfeiture of the bond, certified check or deposit in escrow. The applicant may arrange with the Planning Board to stage improvements and have construction within a subdivision such that required street and utility improvements can safely be completed within the one-year time period.

D. Maintenance guarantee.

- (1) The applicant shall guarantee the improvements against defects in workmanship and materials for a period of one year from the date of acceptance of such improvements. The warranty phase shall not end during and between the months of November and April, and if necessary shall be extended beyond the one-year time frame so as not to end during these months.
- (2) The maintenance guarantee shall be secured by a surety bond or cash escrow in an amount reflecting 10% of the cost of the completed improvements.
- (3) The applicant shall construct and pay for all costs of temporary improvements required by the City Engineer and shall maintain said temporary improvements for the period specified by the City Engineer.
- (4) Thirty days prior to the expiration of the maintenance guarantee instrument, if any defects in workmanship and/or materials are not repaired to the satisfaction of the City Engineer, the applicant shall make all necessary repairs immediately.

E. Release of security.

- (1) Upon completion of all improvements as covered by the security, the City Engineer (or his/her designee) shall inspect the work. If the Administrative Officer determines that the work is satisfactory and complete, the security shall be released. The applicant shall provide evidence that all contractors have been paid in full prior to the release of the performance security.
- (2) Ten percent of the performance guarantee for any streets shall be held until the Board of Aldermen accept dedication. The performance security shall be released upon acceptance of dedication of the streets. For other public improvements for which acceptance of dedication is not required by the Board of Aldermen, the performance guarantee shall not be released until the improvement is approved by the City Engineer.

F. Bond reduction. Procedures for improvements to be accepted by the City, a homeowners' association, other agency or for the release or reduction of a bond for any other reason are as follows:

- (1) No more than three reductions shall be permitted in any twelve-month period. The cumulative amount of all bond reductions shall equal no less than 80% of the original bond value. Periodic partial releases may not occur before the completion of at least 30% of the facilities covered by the bond.

- (2) After all physical improvements, or those improvements for which a bond reduction is requested, are completed and a set of as-built plans, certified as to construction by a licensed engineer, are submitted to the City, the developer must submit a request to the City for an inspection.
- (3) The City Engineer shall set a date for a field inspection, and shall transmit a punch list of those items requiring correction to the applicant. Depending on the extent of repairs required, the City Engineer may require an extended warranty phase accompanied by an extended warranty bond. The City may call the bond and complete the repairs itself if the applicant does not complete the repairs as required by this chapter during this period. The City shall notify the developer of the items requiring correction or revision within 30 days of receipt of the developers request for an inspection. The applicant shall complete the items requiring correction within 60 days.
- (4) If these punch list corrections are not completed by the end of the time period, the entire project may be subject to reinspection. The applicant will notify the City that he has completed the punch list items and desires final inspection. The City Engineer shall set a date for the final inspection by the City with the applicant and representative of the receiving authority (homeowners association or other agency) if applicable. Final inspection shall be made once the applicant has supplied all necessary plans, quitclaims, as-built plans and other required items to the City. Failure to supply these required items will require rescheduling the inspection. If the final inspection indicates that any improvements, or parts thereof for which bond reduction is requested, are satisfactorily completed, the improvements bond may be replaced or supplemented with a maintenance guarantee as set forth in Subsection B above.
- (5) A maintenance guarantee shall be released after the expiration period prescribed in Subsection B and satisfactory completion of the final inspection.”

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

This ordinance shall take effect upon passage.

LEGISLATIVE YEAR 2010

ORDINANCE: O-10-35

PURPOSE: Amending the requirements for performance guarantees under land use approvals

SPONSOR(S): Alderman-at-Large David W. Deane

**COMMITTEE
ASSIGNMENT:**

FISCAL NOTE: None.

ANALYSIS

This legislation amends the performance guarantee section of the land use code by requiring a performance guarantee to be continuous in nature rather than allowing a one-year expiration period.

Planning and zoning ordinances and amendments require a public hearing and referral to the city planning board. RSA 675:2; NRO § 190-132. The public hearing is conducted by the aldermanic planning and economic development committee with notice published in a newspaper of general circulation and posted in two public places at least ten (10) days prior to the date of the hearing. RSA 675:7. That notice shall not include the day notice is posted or the day of the public hearing. Under RSA 676:12 and NRO § 105-3, no building permit may be issued after the legal notice has been posted if the proposed changes would, if adopted, justify refusal of the permit. The restriction lapses 120 days after the first legal notice.

Approved as to form: Office of Corporation Counsel

By: Dowhey Clarke

Date: Sept. 15, 2010



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“§ 190-143. Financial guarantees.

Purpose: This section establishes procedures for bonding, subdivision improvement agreements or other guarantees where improvements are not completed before final approval as provided by RSA 674:36 III (b). This section also establishes guarantees to warrant and to ensure proper maintenance of the improvements.

- A. *Financial Guarantees:* No subdivision plat shall be recorded prior to the applicant providing an acceptable financial guarantee for all public and/or common private improvements, together with easements for any public rights-of-way, utility or storm drainage easements, slope and access easements, conservation easements, agreements to provide a private easement, public improvement guarantee or any other required legal document.
- B. *Acceptable Financial Guarantee:* The following types of financial guarantees are acceptable to assure the completion of the required improvements.
 - (1) A non-lapsing letter of credit drawn on a bank authorized to do business in New Hampshire payable to the City and deposited with it.

- (2) A non-lapsing surety bond issued by a surety company authorized to do business in New Hampshire, to be filed with the City.
 - (3) Cash or a certified check to be deposited with the City under an escrow agreement.
- C. *Amount of Financial Guarantee:* The amount of the financial guarantee shall be approved by the City Engineer as sufficient to secure to the City the satisfactory construction and installation of the required public and private improvements, including contingency and inflation factors. A licensed professional engineer shall submit a construction cost estimate acceptable to the City Engineer which includes breakdowns by quantity of material and unit costs, along with contingencies, prior to the presentation of any financial guarantee.
- D. *Legal Provisions:* All financial guarantees shall comply with all statutory requirements and shall be satisfactory to Corporation Counsel as to form, sufficiency and manner of execution as set forth in these regulations.
- E. *Duration:* Construction of the required improvements shall be completed within two (2) years of approval. If construction is not completed during this time period, the City Engineer may grant an extension of up to one (1) additional year. Failure to complete all street and utility improvements to the satisfaction of the City Engineer within the time specified shall mean forfeiture of the bond, certified check or deposit in escrow.
- F. *Reduction of Financial Guarantees:* A reduction of a financial guarantee may be authorized by the City Engineer upon completion of a significant portion of the subdivision, and then only to the ratio that the public or private secured improvement so completed relates to the current total cost of the improvements for the subdivision plat. In no event shall a financial guarantee be reduced below twenty-five percent (25%) of the principal amount until all public improvements are completed and, if required, accepted by the Board of Aldermen, and all required private improvements are complete. For private improvements a financial guarantee shall be reduced upon satisfactory completion of the required private improvements and then only to the ratio that the private improvement so accepted bears to the total required private improvements for the subdivision plat. In no event shall a financial guarantee be reduced below twenty-five percent (25%) of the principal amount until all public or secured private improvements are completed to the satisfaction of the City Engineer.
- G. *Release of Financial Guarantees:* The release of a financial guarantee shall not be undertaken until the City Engineer has submitted a certificate stating that all required improvements have been satisfactorily completed, an acceptable as-built plan has been submitted, a maintenance guarantee has been provided pursuant to subsection H, Maintenance Guarantee, and, if required, the public improvements have been accepted by the Board of Aldermen.

- H. *Maintenance Guarantee:* The applicant shall be required to file a maintenance guarantee with the City at the time of release of the financial guarantee. The maintenance guarantee shall be in an amount considered adequate by the City Engineer and in a form satisfactory to Corporation Counsel in order to assure the satisfactory condition of the required improvements, including all lot improvements on the individual subdivided lots. The maintenance guarantee shall be in an amount reflecting ten percent (10%) of the cost of the completed improvements, and shall in no event be less than ten percent (10%) of the original financial guarantee. The maintenance guarantee shall be for a period of two (2) years after the date of the acceptance of the improvements by the Board of Aldermen, if required, or by the City Engineer. Unsatisfactory condition of the improvements as determined by the City Engineer within the time specified shall mean forfeiture of the bond, certified check or deposit in escrow.”

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

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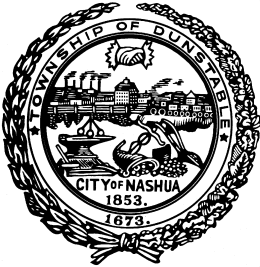
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- I. *Restoration:* In the event the subdivision approval terminates or lapses before all required subdivision improvements and utilities have been completed, the Planning Board may, at its discretion, use the funds available in the Financial Guarantee to restore all or any portion of the site to a natural condition. The Planning Board will not use the Financial Guarantee to restore the site if the cost to complete all required improvements and utilities would be less than the cost of performing such restoration. The Planning Board will not make any decision to use a Financial Guarantee for restoration without obtaining an estimate for the costs of both restoration and completion of all required improvements and utilities from the City Engineer or a similarly qualified consultant.

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IN THE BOARD OF ALDERMEN

1ST READING _____ SEPTEMBER 15, 2010

Referred to:

PLANNING AND ECONOMIC DEVELOPMENT COMMITTEE, NASHUA PLANNING BOARD AND PUBLIC HEARING ON TUESDAY, OCTOBER 5, 2010 AT 7:00 PM IN THE ALDERMANIC CHAMBERS

2ND Reading _____ NOVEMBER 23, 2010

3RD Reading _____

4TH Reading _____

Other Action _____

Passed _____ NOVEMBER 23, 2010

Indefinitely Postponed _____

Defeated _____

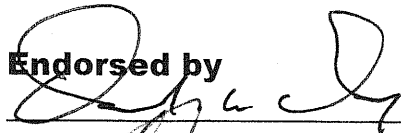
Attest: _____
City Clerk

_____ President

Approved _____
Mayor's Signature

11/23/10
Date

Endorsed by

_____ 

DEANE

MCCARTHY

COOKSON

SHEEHAN

COX

MELIZZI-

GOLJA

CRAFFEY

VITALE

PRESSLY

Vetoed: _____

Veto Sustained: _____

Veto Overridden: _____

Attest: _____
City Clerk

_____ President