

**ORDINANCE 21-2019
BOROUGH OF CLAYTON
GLOUCESTER COUNTY, NEW JERSEY**

**AN ORDINANCE AMENDING CHAPTER 88, ARTICLE X, FEES, GUARANTEES,
AND OFF-TRACT IMPROVEMENTS, SECTION 85 IMPROVEMENT AND
MAINTENANCE GUARANTEES**

WHEREAS, the State Legislature has recently amended provisions of the Municipal Land Use Law at N.J.S.A. 40:55D-53 governing performance, maintenance and related bonds; and

WHEREAS, the Borough Council desires to amend and update its existing code provisions to be in accord with State statute and serve the best interests of the Borough and its residents.

NOW, THEREFORE, BE IT ORDAINED, by the Clayton Borough Council of the County of Gloucester, State of New Jersey that Chapter 88, Article X, Fees, Guarantees, and Off-Tract Improvements, Section 85, Improvement and Maintenance Guarantees, be and is hereby amended as follows:

Section 1: Chapter 88, Section 85 shall be deleted and be replaced with the following:

§88-85 Improvement and maintenance guarantees.

§88-85 A. Required Guarantees; surety.

In accordance with N.J.S.A. 40:55D-53.4, for the purpose of assuring the installation and maintenance of bondable land development improvements, as a condition of all final site plan, subdivision, and/or zoning permit approvals, the Board or Zoning Officer, as appropriate, shall require, and the Borough Council shall accept the following guarantees:

1) Performance Guarantees

- a. The furnishing of a performance guarantee in favor of the Borough 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 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; water mains, sanitary sewers, community septic systems, drainage structures, public improvements of open space, and any grading necessitated by the preceding improvements. The performance guarantee shall also cover the cost for privately-owned perimeter buffer landscaping

in an approved phase or section of a development, either as a separate guarantee or as a line item of the performance guarantee.

- b. The cost of the improvements covered by the performance guarantee shall be determined by the Borough Engineer.
- c. The Borough 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.

2) Maintenance Guarantee.

- a. In accordance with N.J.S.A. 40:55D-53.4a(2), developer shall post with the municipality, a maintenance guarantee in an amount not to exceed 15% of the cost of the installation of the following private site improvements: storm water management basins, in-flow and water quality structures within the basins, and the out-flow pipes and structures of the storm water management system, if any, which cost shall be determined by the municipal engineer. Additionally, in accordance with N.J.S.A. 40:55D-53.4a(2) a maintenance guarantee is required for any items on the performance bond associated with improvements being dedicated to the Municipality if any, which cost shall be determined by the municipal engineer.
- b. The Maintenance Guarantee shall be furnished upon the inspection and issuance of final approval of the applicable private site improvements by the municipal engineer.
- c. The term of the maintenance guarantee shall be for a period not to exceed two years and shall automatically expire at the end of the established term.

3) Temporary Certificate of Occupancy Guarantee

- a. Pursuant to N.J.S.A. 40:55D-53(1)(c), a developer shall furnish a Temporary Certificate of Occupancy Guarantee ("TCOG") whenever the developer seeks a temporary certificate of occupancy for a development, unit, lot, building, or phase of development. The TCOG shall be furnished in favor of the municipality in an amount equal to 120% of the cost of installation of any improvements which (1) remain to be completed or installed under the terms of the temporary certificate of occupancy; (2) are required to be completed or installed as a condition precedent to the issuance of a permanent certification of occupancy; and (3) are not covered by an existing performance guarantee.

The scope and amount of the TCOG shall be determined by the Municipal Engineer.

The TCOG shall be released upon the issuance of a permanent certificate of occupancy as issued and determined by the Borough Engineer and Construction Code Official.

4) Safety and Stabilization Guarantee

- a. Pursuant to NJSA 40:55D-53(1)(d), a developer shall furnish a Safety and Stabilization Guarantee ("SSG") in favor of the municipality, either as a separate guarantee or as a line item of the performance guarantee.
- b. The amount of the SSG for a development with bonded improvements in an amount not exceeding \$100,000 shall be \$5,000. The amount of the SSG 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.
- c. The municipality shall release a separate SSG to a developer upon the developer's furnishing of a performance guarantee which includes a line item for safety and stabilization in the amount required pursuant to this chapter.
- d. A SSG shall be available the municipality for the purpose of returning property that has been disturbed to a safe and stable condition, or taking other measures to protect the public from access to an unsafe or unstable condition. An SSG shall only be available to the municipality when:
 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 municipality to the developer of the municipality's intent to claim payment under the guarantee. A municipality shall not provide notice of its intent to claim payment under a SSG until a period of at least 60 days has elapsed during which all work on the development has ceased for reasons other than force

majeure. A municipality shall provide written notice to a developer by certified mail or other form of delivery providing evidence of receipt.

- e. The municipality shall release a SSG 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.

§88-85 B. Other governmental agencies.

In the event that other governmental agencies or public utilities will automatically own the utilities to be installed or the improvements are covered by a performance or maintenance guarantee to another governmental agency, no performance or maintenance guarantee, as the case may be, shall be required by the Borough for such utilities or improvements.

§88-85 C. Borough Solicitor Review

The performance, maintenance, TCOG and SSG guarantees must be reviewed by the Borough Solicitor to confirm that they are issued satisfactory as to form, sufficiency, and execution and they meet all statutory requirements. After review and approval of the Borough Solicitor all guarantees must be posted in original form with the Borough Clerk prior to the Planning Board Chair's and Secretary's signature of any site plan, subdivision plat or minor subdivision deed, and prior to issuance of any zoning, building or other permit or certificate.

§88-85 D. Default; Reductions and Release

If the required improvements are not completed or corrected in accordance with the performance guarantee, the developer and surety, if any, shall be liable thereon to the municipality for the reasonable cost of the improvements not completed or corrected and the municipality may either prior to or after the receipt of the proceeds thereof complete such improvements. Such compilation or correction of improvements shall be subject to the public bidding requirements of the Local Public Contracts Law (NJSA 40A:11-1 et seq.). Otherwise, the guarantees will be subject to reduction and release as provided in N.J.S.A. 40:55D-53.

§88-85 E. Request For List of Uncompleted or Unsatisfactory Completed Improvements

Upon substantial completion of all required street improvements (except for the top course) and appurtenant utility improvements, and the connection of the same to the public system, the obligor may request of the governing body in writing, by certified mail addressed in care of the municipal clerk, that the municipal engineer and appended to the

performance guarantee pursuant to this Section, 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 municipal engineer. The request shall indicate which improvements have been completed and which improvements remain uncompleted in the judgement of the obligor. Thereupon the municipal engineer shall inspect all bonded improvements covered by obligor's request that shall file a detailed list and report, in writing, with the governing body, and shall simultaneously send a copy thereof to the obligor not later than 45 days after receipt of the obligor's request. The list prepared by the municipal engineer shall state, in detail, with respect to each bonded improvement determined to be incomplete or unsatisfactory, the nature and extent of the incompleteness of each incomplete improvement or the nature and extent or, and remedy for, the unsatisfactory state of each completed improvement determined to be unsatisfactory. The report prepared by the municipal engineer shall identify each 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 municipal engineer and appended to the performance guarantee pursuant to this Section.

§88-85 F. Action by Governing Body

The governing body, by resolution, shall either approve the bonded improvements determined to be complete and satisfactory by the municipal 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 and the "safety and stabilization bond" relating to the improvements accepted, in accordance with the itemized cost estimate prepared by the municipal engineer and appended to the performance guarantee pursuant to this Section. This resolution shall be adopted not later 45 days after receipt of the list and report prepared by the municipal engineer. Upon adoption of the resolution by the governing body, the obligor shall be released from all liability pursuant to its performance guarantee and "safety and stabilization bond," with respect to those approved bonded improvements, except for that portion adequately sufficient to secure completion or correction of the improvements not yet approved; provided that 30% of the amount of the total performance guarantee and "safety and stabilization bond," the amount of the performance guarantee and "safety and stabilization bond" attributable to each approved bonded improvement shall 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 pursuant to subsection a. of this section, including any contingency factor applied to the cost of installation. If the sum of the approved bonded improvements would exceed 70 percent of the total amount of the performance guarantee, then the municipality may retain 30 percent of the amount of the total performance guarantee and "safety and stabilization bond" to ensure completion and acceptability of all improvements, as provided above, except that any amount of the performance guarantee even if such release would reduce the amount held by the municipality below 30 percent. 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 section shall be followed.

§88-85 G. Inspections and Tests

- 1) All improvements and utility installations shall be inspected during the time of their installation under the supervision of the Borough Engineer to ensure satisfactory completion. The cost of said inspection shall be the responsibility of the applicant, and he or she shall deposit with the Planning Board Secretary for placement in an escrow account an amount not to exceed, except for extraordinary circumstances, the greater of \$500 or 5% of the amount of the performance guarantee estimate of the cost of improvements pursuant to this chapter. The obligor shall reimburse the Borough for all reasonable inspection fees paid to the Borough Engineer for the foregoing inspection of improvements. For those developments for which the reasonably anticipated fees are \$10,000 or greater, the fees may, at the option of the developer, be paid in four installments. The initial amount deposited by a developer shall be 25% of the anticipated fees. When the balance on deposit drops to 10% of the anticipated fees because of payments to the Borough Engineer for inspection, the developer shall make additional deposits of 25% of the anticipated fees. The Borough Engineer shall not perform any inspection if sufficient funds to pay for such inspection are not on deposit.
- 2) In no case shall any paving work be done without permission from the Borough Engineer's office. At least 48 hours' notice shall be given to the Borough Engineer's office prior to any such construction so that he or a qualified representative may be present at the time the work is to be done.
- 3) The Borough Engineer's office shall be notified 48 hours in advance of any work being done so that he or a qualified representative may inspect the work.
- 4) Any improvement installed without notice for inspection pursuant to Subsection G(3) above shall constitute just cause for:
 - (a) Removal of the uninspected improvement;
 - (b) The payment by the developer of any costs for material testing;
 - (c) The restoration by the developer of any improvements disturbed during any material testing; and/or
 - (d) The issuance of a stop-work order by the Borough Engineer pending the resolution of any dispute.
- 5) A final inspection of all improvements and utilities will be done by the Borough Engineer to determine whether the work is satisfactory and in agreement with the approved final plan drawings and Borough specifications. The general condition of the site shall also be considered. Upon a satisfactory final inspection report, action will be taken to release or declare in default the performance guarantee covering such improvements and utilities.

- 6) Inspection by the Borough of the installation of improvements and utilities by the applicant shall not subject the Borough to liability for claims, suits or any other liability of any kind that may at any time arise because of defects or negligence during construction or at any time thereafter; it is recognized that the responsibility to maintain safe conditions at all times during construction and to provide proper utilities and improvements is upon the applicant and his contractors, if any.

§88-85 H. Engineering Inspection Fees

The obligor shall reimburse the municipality for reasonable inspection fees paid to the municipal engineer for the foregoing inspection of improvements: which fees shall not exceed the sum of the amounts set forth in subparagraphs (1) and (2) of this paragraph. The developer shall post the inspection fees in escrow in an amount:

1. Not to exceed 5% of the cost of bonded improvements that are subject to a performance guarantee under §88-85(A); and
2. Not to exceed 5% of the cost of private site improvements that are not subject to a performance guarantee under §88-85(A), which cost shall be determined pursuant to NJSA 40:55D-53.4
3. **Installments.** For those developments for which the inspection fees total less than \$10,000, fees may, at the option of the developer, be paid in two installments. The initial amount deposited in escrow by a developer shall be 50% of the inspection fees. When the balance on deposit drops to 10% of the inspection fees because the amount deposited by the developer has been reduced by the amount paid to the municipal engineer for inspections, the developer shall deposit the remaining 50% of the inspection fees. For those developments for which the inspection fees total \$10,000 or greater, fees may, at the option of the developer shall be 25% of the inspection fees. When the balance on deposit drops to 10% of the inspection fees because the amount deposited by the developer has been reduced by the amount paid to the municipal engineer for inspection, the developer shall make additional deposits of 25% of the inspection fees.
4. **Request for additional deposit.** If the municipality determines that the amount in escrow for the payment of inspection fees, as calculated pursuant to subparagraphs and (2) of this subsection, is insufficient to cover the cost of additional funds in escrow provided that the municipality delivers to the developer a written inspection escrow deposit request, signed by the municipal engineer, which: informs the developer of the need for additional inspections, details the items or undertakings that require inspection, estimate the time required for those inspections, and estimates the cost of performing those inspections.

§88-85 I. Applicability of Amendments Not Codified in This Ordinance

Any and all amendments made to NJSA 40:55D-53 et al. that have not been codified in this Ordinance shall be deemed incorporated herein.

§88-85 J. Applicability to Existing Projects

The modifications in this ordinance shall be applicable to all projects that have not yet received final approvals from the Borough Planning Board or the Borough Zoning Board of Adjustment and/or which have not posted bonds and begun construction of required improvements as of January 16, 2018, the date of enactment of P.L. 2017, c.312 obviated the Borough's previously lawful ordinances.

Section 2. Severability. If the provisions of any article, section, subsection, paragraph, subdivision, clause or application of the Ordinance shall be judged invalid by any Court of competent jurisdiction, such order or judgment shall not affect or invalidate the remained of any such article, section, subsection, paragraph, subdivision, clause or application, and to this end, the provisions of this Ordinance are hereby declared to be severable.

Section 3. This ordinance may be renumbered for codification purposes.

Section 4. Effective Date. This Ordinance shall take effect immediately upon final passage and publication as required by law.

BOROUGH OF CLAYTON



THOMAS BIANCO, Mayor

Attest:



CHRISTINE NEWCOMB, Borough Clerk

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MAINTENANCE GUARANTEES**

This Ordinance was introduced at a meeting held on the 24th day of October, 2019. It is scheduled for a public hearing and final adoption at a meeting of the Mayor and Council of the Borough of Clayton beginning at 7:30 p.m. on the 14th day of November, 2019, at the Municipal Building, 125 N. Delsea Drive, Clayton, New Jersey.

The purpose of this Ordinance is to amend and update the Borough of Clayton's existing code provisions to be in accord with the recently amended N.J.S.A. 40:55D-53 governing performance, maintenance and related bonds.

A copy of this Ordinance can be obtained without any cost, by any member of the general public in the Borough Clerk's office within the Borough of Clayton in the Municipal Building, 125 North Delsea Drive, Clayton, New Jersey, during normal business hours, Monday through Friday from 8:00 a.m. to 4:00 p.m.

Christine Newcomb, Municipal Clerk
Borough of Clayton

**BOROUGH OF CLAYTON
NOTICE OF INTRODUCTION**

ORDINANCE 21-2019

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MAINTENANCE GUARANTEES**

TAKE NOTE that the foregoing ordinance was introduced at a meeting of the Mayor and Council of the Borough of Clayton held on October 24, 2019 and was then read for the first time. The said ordinance will be further considered for final passage by the Mayor and Council at the Municipal Building, 125 N. Delsea Drive, Clayton, New Jersey, at a meeting beginning 7:30 p.m. on November 14, 2019, at which time and place, or any time and place to which such meeting be adjourned, all persons interested will be given an opportunity to be heard concerning such ordinance.

BY ORDER of the Mayor and Council of the Borough of Clayton.

Christine Newcomb
Borough Clerk

**BOROUGH OF CLAYTON
NOTICE OF ADOPTION**

ORDINANCE 21-2019

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AND OFF-TRACT IMPROVEMENTS, SECTION 85 IMPROVEMENT AND
MAINTENANCE GUARANTEES**

The foregoing Ordinance was finally adopted by the Mayor and Council of the Borough of Clayton on November 14, 2019.

Christine Newcomb
Borough Clerk