

ARTICLE 11 - PERFORMANCE GUARANTEES

11.1 Types of Guarantees.

With submittal of the application for final plan approval, the applicant shall provide one of the following performance guarantees for an amount adequate to cover the total construction costs of all required improvements, taking into account the time-span of the construction schedule and the inflation rate for construction costs:

- A. Either a certified check payable to the municipality or a savings account or certificate of deposit naming the municipality as owner, for the establishment of an escrow account;
- B. A performance bond payable to the municipality issued by a surety company, approved by the municipal officers, or town manager; or
- C. An irrevocable letter of credit (see Appendix B for a sample) from a financial

As the name implies, the purpose of a guarantee is to assure that the improvements proposed as part of the subdivision are constructed and completed properly. One of the main purposes of the subdivision statute is to protect consumers by making sure that lots in subdivisions have adequate water and sewage disposal facilities, and that lots are accessible. The statute was first enacted in the early seventies after the infamous land rip-offs of the south resulted in purchasers acquiring worthless lots in the middle of the Arizona desert or Florida swamps often with only half built roads leading to them. One need not travel to such an exotic place to find examples here in Maine where applicants did not fulfill their responsibilities to make the proposed improvements. The new residents along a half built unpaved street typically are likely to petition town meeting seeking to have the town finish the work. With a proper performance guarantee it should not be necessary for the municipality to spend taxpayers' money to complete projects left unfinished by the developer. The amount of the guarantee should take into account inflation rates and the projected time period for construction.

The *Model* suggests four different types of acceptable guarantees. The appropriateness of each type of guarantee will vary from developer to developer and project to project.

The advantage of receiving cash is that the municipality knows it will be available when needed, without the hassle of dealing with insurance companies or banks. The disadvantage for the developer is that unless carefully coordinated with the municipality, he or she must come up with twice the amount of money necessary to do the job. If the municipality accepts cash as the performance guarantee, it must be careful to keep track of it in a separate account and make sure it does not get intermingled in the municipality's general fund. Also, any interest earned on the money should be paid to the developer when the money is returned.

Up until the mid-1980s performance bonds were the typical performance guarantee. Bonds are similar to an insurance policy taken out by the developer which names the municipality as the beneficiary should the developer fail to perform adequately. Like many insurance policies, they are frequently loaded with fine print, require review by the municipal attorney, and are difficult to collect if the developer defaults. A disadvantage to the developer is that typically, in order to buy a bond, he or she has to have cash available equivalent to the amount of the bond. Again, the developer is faced with having to raise twice the cash necessary to construct the subdivision.

In recent years the irrevocable letter of credit has become the most popular form of guarantee. The irrevocable letter of credit is a letter from the bank, or other financial institution, indicating that it has made a loan commitment, and should it be necessary, the

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institution establishing funding for the construction of the subdivision, from which the Municipality may draw if construction is inadequate, approved by the municipal officers, or town manager.

The conditions and amount of the performance guarantee shall be determined by the Board with the advice of the municipal engineer, road commissioner, municipal officers, and/or municipal attorney.

11.2 Contents of Guarantee.

The performance guarantee shall contain a construction schedule, cost estimates for each major phase of construction taking into account inflation, provisions for inspections of each phase of construction, provisions for the release of part or all of the performance guarantee to the developer, and a date after which the applicant will be in default and the municipality shall have access to the funds to finish construction.

11.3 Escrow Account.

A cash contribution to the establishment of an escrow account shall be made by either a certified check made out to the municipality, the direct deposit into a savings account, or the purchase of a certificate of deposit. For any account opened by the applicant, the municipality shall be named as owner or co-owner, and the consent of the municipality shall be required for a withdrawal. Any interest earned on the escrow account shall be returned to the applicant unless the municipality has found it necessary to draw on the account, in which case the interest earned

municipality may have access to the funds set aside for the development. Generally, the developer does not have access to the money to pay the contractors until the municipality has told the bank that the work has been satisfactorily completed.

The amount of the guarantee should be based on the cost estimates for the improvements submitted with the final plan. The municipal officials listed in this section should review those cost estimates for accuracy and the terms of the guarantee for the extent of the protection afforded the municipality.

A complete listing of all the items mentioned in this section will provide the maximum protection to both the developer and the municipality.

shall be proportionately divided between the amount returned to the applicant and the amount withdrawn to complete the required improvements.

11.4 Performance Bond.

A performance bond shall detail the conditions of the bond, the method for release of the bond or portions of the bond to the applicant, and the procedures for collection by the municipality. The bond documents shall specifically reference the subdivision for which approval is sought.

The performance bond should not be a blanket bond which covers the contractor or developer, but should be specifically referenced to the particular subdivision for which an application has been filed.

11.5 Letter of Credit.

An irrevocable letter of credit from a bank or other lending institution with offices in the region, shall indicate that funds have been set aside for the construction of the subdivision for the duration of the project and may not be used for any other project or loan.

The letter of credit should not be solely an indication of a willingness to lend funds but an actual commitment of funds from the financial institution. The letter should stipulate that the funds may only be used for the subdivision under consideration, and should contain the procedures for the release of the money to both the developer and should it be necessary, the municipality. A sample letter of credit is included as Appendix B.

11.6 Phasing of Development.

The Board may approve plans to develop a major subdivision in separate and distinct phases. This may be accomplished by limiting final approval to those lots abutting that section of the proposed subdivision street which is covered by a performance guarantee. When development is phased, road construction shall commence from an existing public way. Final approval of lots in subsequent phases shall be given only upon satisfactory completion of all requirements pertaining to previous phases.

It may be advantageous to both the municipality and the applicant for approval to be given in phases. For the municipality, there may be some orderliness to the development of the subdivision, allowing the expansion of municipal services to expand more slowly. For the applicant, only a portion of the costs must be financed at any one time.

11.7 Release of Guarantee.

Prior to the release of any part of the performance guarantee, the Board shall

The review authority must be extremely careful not to release the guarantee prior to being sure that all of the work has been completed satisfactorily. The review authority should receive a

determine to its satisfaction, in part upon the report of the municipal engineer or other qualified individual retained by the municipality and any other agencies and departments who may be involved, that the proposed improvements meet or exceed the design and construction requirements for that portion or phase of the subdivision for which the release is requested.

11.8 Default.

If upon inspection, the municipal engineer or other qualified individual retained by the municipality finds that any of the required improvements have not been constructed in accordance with the plans and specifications filed as part of the application, he or she shall so report in writing to the code enforcement officer, the municipal officers, the Board, and the applicant or builder. The municipal officers shall take any steps necessary to preserve the municipality's rights.

11.9 Improvements Guaranteed.

Performance guarantees shall be tendered for all improvements required to meet the standards of these regulations and for the construction of the streets, storm water management facilities, public sewage collection or disposal facilities, public water systems, and erosion and sedimentation control measures.

written report from the inspecting official.

This section should be changed to refer to the proper inspecting official, whether it be the road commissioner, director of public works or code enforcement officer. If the inspector finds any problems, he or she should immediately report the findings to the review authority, the applicant and the municipal officers. The applicant should be given a reasonable five to ten day period to correct the problems. Failure to resolve the problems should result in the municipality taking the necessary steps to be assured that the work is completed properly. The necessary steps will vary depending on the type of guarantee and the magnitude of the problem. The municipal attorney should be consulted along the way.

The performance guarantee should cover the costs of all improvements necessary to meet the standards, and which the municipality has a vital public interest in seeing completed. The costs of individual lot improvements or building construction, or common recreational facilities to be owned and used by the lot owners, need not be covered by a guarantee.