

ORDINANCE NO. 723

An Ordinance Amending Chapter 303 the Code of the Borough of Harrington Park titled “Subdivision and Site Plan Review,” to Update the Provisions Requiring Performance and Maintenance Guarantees.

WHEREAS, the Mayor and Council of the Borough of Harrington Park is authorized to create and from time to time modify land use regulations consistent with the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq.) (“MLUL”), and the purpose of this ordinance is to amend the Borough’s regulations requiring developers and successor developers to furnish performance and maintenance guarantees, in response to P.L. 2017, Chapter 312, revising the applicable MLUL provisions, to better enforce the provisions of the Harrington Park land use ordinances, as authorized by the MLUL, and to advance the public health, safety, and welfare of Harrington Park’s residents and property owners.

NOW, THEREFORE, BE IT ORDAINED by the Mayor and Council of the Borough of Harrington Park as follows:

Article VII: Section 303-46-48 of the Code of the Borough of Harrington Park (“Code”) is amended to state:

§303-46. On-tract Improvements: Guarantees Required.

The Borough, as a condition of final site plan approval, may require the developer to furnish and shall accept in accordance with the standards adopted by this Code and the regulations adopted pursuant to section 1 of P.L.1999, c.68 (C.40:55D-53a) a performance guarantee, for the purpose of assuring the installation and maintenance of certain on-tract improvements, and a maintenance guarantee, both in accordance with paragraphs (1) and (2) of this subsection. Successor developers shall furnish a replacement performance guarantee, as a condition to the approval of a permit update under the State Uniform Construction Code, for the purpose of updating the name and address of the owner of property on a construction permit, and the Borough shall accept the replacement performance guarantee in accordance with the standards adopted by this Code and the regulations adopted pursuant to section 1 of P.L.1999, c.68 (C.40:55D-53a) for the purpose of assuring the installation and maintenance of certain on-tract improvements, the furnishing of a performance guarantee, and provision for a maintenance guarantee, in accordance with paragraphs (1) and (2) of this subsection.

(a) The developer shall furnish 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, 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.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," P.L. 1960, c.141 (C.46:23-9.9 et seq.; repealed by section 2 of P.L.2011, c.217) or N.J.S.46:26B-1 through N.J.S.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.

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.

(b) The developer also will furnish a performance guarantee to include, within an approved phase or section of a development privately-owned perimeter buffer landscaping, as imposed as a condition of approval.

At the developer's option, a separate performance guarantee may be posted for the privately-owned perimeter buffer landscaping.

If the developer seeks 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 subparagraph (a) of this paragraph, which relate to the development, unit, lot, building, or phase of development of 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 and Borough engineer. The Borough will not 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, or the Borough engineer 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.

A developer shall furnish to the Borough a “safety and stabilization guarantee,” in favor of the Borough. At the developer’s option, a “safety and stabilization guarantee” may be furnished either as a separate guarantee or as a line item of the performance guarantee. A “safety and stabilization guarantee” shall 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:

(i) 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

Work has not recommenced within 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 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 a 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 a developer upon the developer’s furnishing of a performance guarantee that 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 Borough 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.

(a) The developer shall post with the Borough, prior to the release of a performance guarantee required pursuant to subparagraph (a), subparagraph (b), or both subparagraph (a) and subparagraph (b) of paragraph (1) of this subsection, a maintenance guarantee in an amount not to exceed 15% of the cost of the installation of the improvements which are being released.

(b) If required, 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 according to the method of calculation set forth in section 15 of P.L.1991, c.256 (C.40:55D-53.4).

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.

If other governmental agencies or public utilities automatically will 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.

The time allowed for installation of the bonded improvements for which a performance guarantee has been provided may be extended by the governing body by resolution. As a condition or as part of any such extension, the amount of any performance guarantee shall be increase or reduced, as the case may be, to an amount not to exceed 120% of the cost of the installation, 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.40:55D-53.4) as of the time of the passage of the resolution.

If the required bonded improvements are not completed or corrected in accordance with the performance guarantee, the obligor and surety, if any, shall be liable thereon to the Borough for the reasonable cost of the improvements not completed or corrected and the Borough may either prior to or after the receipt of the proceeds thereof complete such improvements. Such completion or correction of improvements shall be subject to the public

bidding requirements of the “Local Public Contracts Law,” P.L.1971, c.198 (C.40A:11-1 et seq.).

(1) Upon substantial completion of all required street improvements (except for the top course) and appurtenant utility improvements, and the connection of same to the public system, the obligor may request of the governing body in writing, by certified mail addressed in care of the Borough clerk, that the Borough engineer prepare, in accordance with the itemized cost estimate prepared by the Borough engineer and appended to the performance guarantee pursuant to subsection A of this section, a list of all incomplete or unsatisfactory completed improvements. If such a request is made, the obligor shall send a copy of the request to the Borough engineer. The request shall indicate which improvements have been completed and which improvements remain incomplete in the judgment of the obligor. Thereupon the Borough engineer shall inspect all bonded improvements covered by obligor’s request and 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.

(2) The list prepared by the Borough 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 of, and remedy for, the unsatisfactory state of each completed bonded improvement determined to be unsatisfactory. The report prepared by the Borough engineer shall identify each bonded 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 bonded improvement, in accordance with the itemized cost estimate prepared by the Borough engineer and appended to the performance guarantee pursuant to subsection A of this section.

(1) The governing body, by resolution, shall either approve the bonded improvements determined to be complete and satisfactory by the Borough engineer, or reject any or all of these bonded 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 relating to the improvements accepted, in accordance with the itemized cost estimate prepared by the Borough engineer and appended to the performance guarantee pursuant to subsection A of this section. This resolution shall be adopted not later than 45 days after receipt of the list and report prepared by the Borough engineer. Upon adoption of the resolution by the governing body, the obligor shall be released from all liability pursuant to its performance guarantee with respect to those approved

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 guarantee” posted may be retained to ensure completion and acceptability of all improvements. The safety and stabilization guarantee shall be reduced by the same percentage as the performance guarantee is being reduced at the time of each performance guarantee reduction.

For the purpose of releasing the obligor from liability pursuant to its performance guarantee, the amount of the performance guarantee 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 Borough 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 Borough may retain 30 percent of the amount of the total performance guarantee and “safety and stabilization 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 30 percent.

(2) If the obligor has made a cash deposit with the Borough as part of the performance guarantee, then any partial reduction granted in the performance guarantee pursuant to this subsection shall be applied to the cash deposit in the same proportion as the original cash deposit bears to the full amount of the performance guarantee provided that if the developer has furnished a “safety and stabilization guarantee” the Borough may retain cash equal to the amount of the remaining safety and stabilization guarantee,” the Borough may retain cash equal to the amount of the remaining safety and stabilization guarantee.

If any portion of the required bonded improvements is rejected, the Borough 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.

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

Not to exceed, except for extraordinary circumstances, the greater of \$500 or 5% of the cost of bonded improvements that are subject to a performance guarantee under subparagraph (a), subparagraph (b), or both subparagraph (a) and subparagraph (b) of paragraph (1) of subsection A of this section; and

Not to exceed 5% of the cost of private site improvements that are not subject to a performance guarantee under subparagraph (a) of paragraph (1) of subsection A of this section, which cost shall be determined pursuant to section 15 of P.L.1991, c.256 (C.40:55D-53.4).

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 20% of the inspection fees because the amount deposited by the developer has been reduced by the amount paid to the Borough 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, be paid in four installments. The initial amount deposited in escrow by a 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 Borough engineer for inspection, the developer shall make additional deposits of 25% of the inspection fees.

If the Borough determines that the amount in escrow for the payment of inspection fees, as calculated pursuant to subparagraphs (a) and (b) of paragraph (1) of this subsection, is insufficient to cover the cost of additional required inspections, the Borough may require the developer to deposit additional funds in escrow provided that the Borough delivers to the developer a written inspection escrow deposit request, signed by the Borough engineer, which: informs the developer of the need for additional inspections, details the items or undertakings that require inspection, estimates the time required for those inspections, and estimates the cost of performing those inspections.

If final approval is by stages or sections of development pursuant to subsection a of section 29 of P.L.1975, c.291 (C.40:55D-38), the provisions of this section shall be applied by stage or section.

If any of the improvements have been dedicated to the Borough on a subdivision plat or site plan, the governing body shall be deemed, upon the release of any performance guarantee required pursuant to subsection A of this

section, to accept dedication for public use of streets or roads and any other improvements made thereon according to site plan and subdivision plats approved by the approving authority, provided that such improvements have been inspected and have received final approval by the Borough engineer.

All ordinances or parts of ordinances that are inconsistent with the provisions of this ordinance are hereby repealed, but only to the extent of any inconsistencies.

The provisions of this ordinance are severable. If any part of this ordinance is declared to be unconstitutional or invalid by any court, the remaining parts of this ordinance will remain in full force and effect.

This ordinance will take effect upon passage and publication in accordance with N.J.S.A. 40:49-2(d), and copies will be served on the County Planning Board and the Borough's tax assessor within thirty days of adoption.

This is a certified copy of an Ordinance adopted after second reading at the Agenda Meeting on July 9, 2018, of the Mayor and Council of the Borough of Harrington Park.