
Coates' Canons Blog: Subdivision Performance Guarantees: Legislative Changes

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Piedmont County is in a bind. Several years back county officials approved a 250-home subdivision. The county approved the final plat before the developer completed all of the necessary improvements. After a few years and some lot sales, the economy soured and the development company went bankrupt. Some neighborhood roads were graded but never paved. The roads that were paved never reached a density to be accepted by NCDOT, and they are crumbling now. A private park was constructed but the homeowners association never collected dues sufficient to maintain the association-owned amenities. Now the park is overgrown and the playground is safety hazard.

What's a county to do? Piedmont County wants to put rules in place to avoid this happening again. The county wants to: (1) ensure completion of promised infrastructure, (2) make sure roads are maintained in advance of DOT acceptance, and (3) have funds to guarantee maintenance of private improvements.

New legislation affecting the city and county statutes for subdivision regulation has refined and narrowed the authority for subdivision performance guarantees, calling into question some of things Piedmont County wants to do. The law applies to subdivision performance guarantees approved or extended on or after October 1, 2015. This blog considers these new limitations on performance guarantees.

Options for Enforcing Infrastructure Requirements

Several enforcement tools are available to make sure subdivision infrastructure is complete. A local government may require that all infrastructure be complete before final plat approval. Another option is to issue plat approvals for phases such that all of the improvements for one phase must be complete before final plat approval for that particular phase. Additionally, cities and counties may seek injunctive relief, or bring other judicial action to ensure compliance with the subdivision ordinance (N.C.G.S. § 160A-375 and § 153A-334). Local governments may withhold building permits for illegally subdivided lots, but that power may be narrowed by new legislation (discussed below).

Performance guarantees are another option for subdivision enforcement. Under the General Statutes, a subdivision ordinance "may provide for performance guarantees to assure successful completion of required improvements." NCGS § 160A-372; 153A-331. I have written about performance guarantee authority on this blog before: Subdivision Performance Guarantees and A Little More Clarity.

To be clear, local ordinances may allow for performance guarantees, but local governments are not required to allow performance guarantees. The statutory standards and requirements apply if the local government chooses to allow for performance guarantees.

New Provisions

Session Law 2015-187 gives notable clarity and restrictions on the authority for performance guarantees. Here is a summary of the changes. The bulk of the changes are outlined in Section 1.(a) (for municipal authority) and Section 1.(b) (for county authority).

Completion Only. The statutes now explicitly state that "[t]he performance guarantee shall only be used for completion of

the required improvements *and not for repairs or maintenance after completion.*” This new language is explored more below.

Statutory Menu of Financial Instruments. Under the prior law the local government was required to set a menu of acceptable financial instruments. The developer, then, could choose from that menu. The new law sets the menu (the local government cannot narrow or expand this list) to include any of the following:

1. Surety bond issued by any company authorized to do business in this State
2. Letter of credit issued by any financial institution licensed to do business in this State
3. Other form of guarantee that provides equivalent security to a surety bond or letter of credit.

That last option on the menu—some other form of guarantee—leaves the door open for comparable financial instruments to secure the guarantee. This might include cash in escrow, a trust agreement, or some other financial instrument. The new statute does not specify who decides what types of guarantee “provide[] equivalent security to a surety bond or letter of credit.”

Calculation. Per the new statute, a performance guarantee may be up to 125 percent of the estimated cost of completing the improvements. Presumably the additional 25 percent is intended to cover the costs of administration and enforcement as well as inflation.

Extensions. If improvements are not complete as the expiration of a guarantee is approaching, “the performance guarantee shall be extended, or a new performance guarantee issued, for an additional period until such required improvements are complete.” Given the statutory context and the practical mechanics of performance guarantees, this section appears to create an obligation for the developer to obtain an extension or newly issued financial instrument if the current instrument is set to expire. But that language—“the performance guarantee shall be extended”—could be read to require the local government to allow extensions so long as the developer shows reasonable good faith progress toward completing the improvements.

In the event that a developer fails to meet milestones set through the performance guarantee agreement, and the developer is not making good faith efforts, a local government can call the guarantee and use the funds to complete the unfinished improvements.

If an extension is allowed, the amount of the renewed performance guarantee is capped at 125% of the improvements yet to be completed. In other words, the amount must be reduced for improvements that have been completed.

Release. After acknowledgement by the local government that the improvement is complete, the local government must return or release the performance guarantee in a timely manner.

Development Agreements The new provisions for performance guarantees are extended to apply to development agreements as well. (S.L. 2015-187, Sec. 1.(c) & (d)).

Withholding Building Permits. The new law states that, unless otherwise authorized by law, a local government may not withhold a building permit or certificate of occupancy in order to compel compliance with a permit or ordinance on another property (Section 2.(a) & (b)).

For subdivision enforcement, General Statute 160A-375(a) and 153A-334(a) specifically state that “[b]uilding permits required pursuant to G.S. 160A-417 [and 153A-357] may be denied for lots that have been illegally subdivided.” To be legally subdivided, a lot must have been created as part of a lawful subdivision—one that complies with the procedural and substantive standards of the local ordinance and state regulations.

Completion v. Maintenance

Now let’s get back to Piedmont County. They were looking for ways to protect from: (1) unfinished improvements; (2) deterioration of improvements that have not been accepted as public; and (3) inadequate maintenance of private

improvements. What does the new law mean for these?

For 1 & 3 the answer is clear.

First, Piedmont County certainly can require performance guarantees to ensure the completion of construction of subdivision streets and other improvements. The essential function of a performance guarantee is to provide money in case a developer fails to pave a road, install pipes, or construct neighborhood amenities. The County simply must follow the standards outlined in the statute for calculation, extension, and other provisions.

On the other hand, it appears that a local government cannot use the subdivision performance guarantee authority to require ongoing maintenance guarantees. The statute now states that “[t]he performance guarantee shall only be used for *completion* of the required improvements and *not for repairs or maintenance after completion.*” In the case of Piedmont County, they could not use the performance guarantee authority to require the HOA to hold a maintenance bond for upkeep of parks and playgrounds.

Stormwater facilities are the exception to this rule. Local governments have explicit authority for financial arrangements to ensure adequate maintenance and replacement of stormwater management facilities (G.S. 153A-454; 160A-459). Aside from stormwater facilities, though, there is no explicit authority for maintenance bonds for private improvements.

Now, what about the guarantees that fall in between performance and maintenance? As was evident in the recent recession, it may be a matter of years from the end of construction until there is sufficient density on the road for NCDOT to accept the road as public. Can Piedmont County require a bond to cover the time from physical completion to public acceptance? The answer is not clear, but probably no.

The question is this: what is “completion”? The plain language of statute states that performance guarantees are “to assure *successful completion* of required improvements.” If an improvement is intended to be dedicated to the public, arguably the “successful completion” of such improvement would be acceptance of the improvement by the public. Thus, a performance guarantee covering the gap from construction to public acceptance may be allowed. Such a reading of the statute, though, may be ambitious. The plain meaning of the statute appears to be limited to physical completion of construction, not maintenance thereafter.

It is worth noting that public bodies sometimes require a warranty period in conjunction with acceptance of public enterprise improvements for public maintenance (one year warranty of the dedicated improvements, for example). Such warranties are allowed under the general authority to operate public enterprises for municipalities and counties.

Conclusion

New rules applicable to subdivision performance guarantees will affect many communities across the state. The calculation for guarantees is capped at 125%, the statute now sets the menu for acceptable financial instruments, and new language requires developers to obtain guarantee extensions if the current guarantee is expiring. Additionally, building permits may not be withheld to compel ordinance compliance on a separate parcel.

Importantly, the new statute clearly states that performance guarantees may be used to ensure *completion* of required improvement only, not *maintenance*.

Links

- www.ncleg.net/Sessions/2015/Bills/House/PDF/H721v6.pdf
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-372
- www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter_153a/ga_153a-331.html
- canons.sog.unc.edu/?p=7521
- canons.sog.unc.edu/?p=8106
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-375



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- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-334
 - www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-454
 - www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-459
 - www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-312
 - www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-275.html