

ORDINANCE NO. 1165-2022

AN ORDINANCE OF THE TOWNSHIP OF CLINTON IN HUNTERDON COUNTY, NEW JERSEY AMENDING CHAPTER 165 (LAND USE REGULATIONS) OF THE “CODE OF THE TOWNSHIP OF CLINTON” REGARDING PERFORMANCE AND MAINTENANCE GUARANTEES, INSPECTIONS, AND ACCEPTANCE OF IMPROVEMENTS

BE IT ORDAINED by the Mayor and Council of the Township of Clinton, in Hunterdon County, New Jersey as follows:

Section 1. Provisions regarding improvements, guarantees, inspections, and start of construction amended. Section 165-49, “Improvements” in Part 6, “Subdivision and Site Plan Review” of Chapter 165, “Land Use Regulations” of the Code of the Township of Clinton is hereby deleted in its entirety and replaced with a new section 165-49, which shall read as follows:

§ 165-49. Improvements; guarantees; inspections; start of construction.

A. Guarantees required.

- (1) Before filing of final subdivision plats or recording of minor subdivision deeds or as a condition of final site plan approval or as a condition to the issuance of a zoning permit pursuant to N.J.S.A. 40:55D-65, the Township or approving Board shall, for the purposes of assuring the installation and maintenance of certain on- and off-tract improvements require the developer to furnish a performance guarantee(s) and provide for a maintenance guarantee in accordance with the terms of this section.
 - (a) Performance guarantees as used in this section shall mean a performance guarantee required by subsection 165-49B below, a temporary certificate of occupancy guarantee required by subsection 165-49C below, and a safety and stabilization guarantee as required by subsection 165-49D below. A maintenance guarantee as used in this section shall mean a maintenance guarantee required by subsection 165-49 below.
 - (b) All performance and maintenance guarantee estimates shall be prepared by the Township Engineer as required by subsections 165-49B(1) and 165-49E(2) below. Any adjustment in the amount of a

performance or maintenance guarantee shall be approved by resolution of the Township Mayor and Council.

- (c) The developer shall present two copies of the performance or maintenance guarantee(s) required by subsections 165-49B and 165-49E below to the Township Clerk for the review and approval of the Township Attorney as to form and execution.
- (2) At least 10% of the amount of the approved performance guarantee(s) shall be deposited by the developer in cash with the Township. The remaining 90% may be in cash, irrevocable letter of credit or surety bond. In the event of default, the 10% cash may be first applied to the completion of the requirements and any bidding and legal costs associated therewith, and the remaining 90% cash, letter of credit or surety bond may thereafter be ~~restored-resorted~~ to, if necessary, for the completion of the requirements and any additional bidding and legal costs associated therewith.
- (a) In the case of surety bonds, the developer shall be the principal and the bond shall be provided by a surety company operating pursuant to a valid certificate of authority issued pursuant to N.J.S.A. 17:17-1 *et seq.* Proof of such valid certificate of authority shall be furnished to the Township when the surety bond is submitted.
 - (b) Irrevocable letters of credit shall comply with the "Uniform Customs and Practices for Documentary Credits" (1984 Revision), International Chamber of Commerce, Publication No. 400 and shall be issued or confirmed by a New Jersey banking institution. The Township shall accept a performance guarantee or maintenance guarantee which is an irrevocable letter of credit if it:
 - [1] Constitutes an unconditional payment obligation of the issuer running solely to the municipality for an express initial period of time in the amount determined;
 - [2] Is issued by a banking or savings institution authorized to do and doing business in this state;
 - [3] Is for a period of time of at least one year; and
 - [4] Permits the municipality to draw upon the letter of credit if the obligor fails to furnish another letter of credit which complies with the provisions of this section 30 days or more in advance of the expiration date of the letter of credit or such longer period in advance thereof as stated in the letter of credit.

B. Performance guarantees.

(1) Public improvements.

Developer shall furnish a performance guarantee in favor of the Township 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 Township Engineer, according to the method of calculation set forth in N.J.S.A. 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 (N.J.S.A. 46:23-9.9 *et seq.*), repealed by section 2 of P.L. 2011, c.217, or N.J.S.A. 46:26B-1 through N.J.S.A. 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 Township Engineer shall prepare an itemized cost estimate of the improvements to be covered by the performance guarantee, which itemized cost estimate shall be appended to each performance guarantee posted by the developer.

(2) Perimeter Buffering.

The performance guarantee may also be required to include, at the discretion of the Township or approving board, a guarantee for the installation of privately-owned perimeter buffer landscaping within an improved phase or section of a development as a condition of approval. At the developer's option, a separate performance guarantee may be posted for the privately-owned perimeter buffer landscaping.

C. Temporary certificate of occupancy guarantee.

- (1) In the event that a developer shall seek a temporary certificate of occupancy for a development, unit, lot, building or phase of a development, then as a condition of the issuance thereof, the developer shall furnish a separate guarantee, referred to as a "temporary certificate of occupancy guarantee" in favor of the Township in an amount equal to 120% of the cost of the terms of the temporary certificate of occupancy and which must 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.

- (2) Upon posting of a “temporary certificate of occupancy guarantee”, all sums remaining under a performance guarantee, required pursuant to subsection 165-49B above, which relate to the development, unit, lot building or phase of development for which the temporary certificate of occupancy is sought, shall be released.
- (3) The scope and amount of the “temporary certificate of occupancy guarantee” shall be determined by the Township Engineer, the zoning officer, or other municipal official designated by ordinance.
- (4) The Township shall not, at any time, hold more than one guarantee or bond of any type with respect to the same line item.
- (5) The “temporary certificate of occupancy guarantee” shall be released by the Township Engineer, the zoning officer, or other municipal official designated by ordinance 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.

D. Safety and stabilization guarantee.

- (1) A developer shall furnish to the Township a “safety and stabilization guarantee” in favor of the Township. 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 Township 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. The Township shall be permitted to access the guarantee when:
 - (a) 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
 - (b) Work has not resumed within 30 days following the provision of written notice by the Township to the developer of the Township’s intent to claim payment under the guarantee. The Township 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 Township shall provide written notice to a developer by certificated mail or other form of delivery providing evidence of receipt.

- (2) Pursuant to N.J.S.A. 40:55D-53a(1)(d), the amounts to be posted in connection with a “safety and stabilization guarantee” shall be as follows:
 - (a) For a development with bonded improvements in an amount not exceeding \$100,000, shall be \$5,000.
 - (b) 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:
 - [1] \$5,000 for the first \$100,000 of bonded improvement costs, plus two and a half percent (2.5%) of bonded improvement costs in excess of \$100,000 up to \$1,000,000, plus
 - [2] One percent (1.0%) of bonded improvement costs in excess of \$1,000,000.
- (3) The Township shall release a separate “safety and stabilization guarantee” 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 under this paragraph.
- (4) The Township shall release a “safety and stabilization guarantee” upon the Township 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.

E. Maintenance Guarantees.

- (1) Prior to the release of a performance guarantee required pursuant to subsection 165-49B above, the developer shall post with the Township a maintenance guarantee in an amount not to exceed 15% of the cost of the installation of the improvements which are being released.
- (2) If required, the developer shall post with the Township, upon the inspection and issuance of final approval of the following private site improvements by the Township 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 (N.J.S.A. 40:55D-53.4).

- (3) 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.

F. Improvements owned by other entities.

In the event that 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 Township for such utilities or improvements.

G. Extensions of time for installation of bonded improvements.

- (1) All required bonded improvements shall be completed to the satisfaction of the Township Engineer within twelve months of the receipt of the initial construction permit.
- (2) The time allowed for installation of the bonded improvements for which the performance guarantee has been provided may be extended by the Township Mayor and Council by resolution. As a condition or as part of any such extension, the amount of any performance guarantee shall be increased 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 Township Engineer according to the method of calculations set forth in section 15 of P.L. 1991, c. 256 (N.J.S.A. 40:55D-53.4) as of the time of the passage of the resolution.

H. Recourse by Township.

If the required bonded improvements are not completed or corrected in accordance with the performance guarantee, the developer and surety, if any, shall be liable thereon to the Township for the reasonable cost of the improvements not completed or corrected and the Township 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 (N.J.S.A. 40A:11-1 *et seq.*).

I. Substantial completion of improvements; reduction/release of guarantee(s).

- (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 developer may request of the Township Mayor and Council in writing, by certified mail addressed

in care of the Township Clerk, that the Township Engineer prepare, in accordance with the itemized cost estimate prepared by the Township Engineer and appended to the performance guarantee pursuant to subsection 165-49B above, a list of all uncompleted or unsatisfactory completed bonded improvements. If such a request is made, the developer shall send a copy of the request to the Township Engineer. The request shall indicate which bonded improvements have been completed and which bonded improvements remain uncompleted in the judgment of the developer. Thereupon the Township Engineer shall inspect all bonded improvements covered by developer's request and shall file a detailed list and report, in writing, with the Township Mayor and Council, and shall simultaneously send a copy thereof to the developer not later than 45 days after receipt of the developer's request.

- (2) The list prepared by the Township Engineer shall state, in detail, as 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 Township 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 Township Engineer and appended to the performance guarantee pursuant to subsection 165-49B above.
- (3) The Township Mayor and Council, by resolution, shall either approve the bonded improvements determined to be complete and satisfactory by the Township 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 Township Engineer and appended to the performance guarantee pursuant to subsection 165-49B above. This resolution shall be adopted not later than 45 days after receipt of the list and report prepared by the Township Engineer. Upon adoption of the resolution by the Township Mayor and Council, the developer shall be released from all liability pursuant to its performance guarantee 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 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.

- (a) For the purpose of releasing the developer 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 Township Engineer and appended to the performance guarantee pursuant to subsection 165-49B above, including any contingency factor applied to the cost of installation. If the sum of the approved bonded improvements would exceed 70% of the total amount of the performance guarantee, then the Township may retain 30% 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 Township below 30%.
- (4) If the Township Engineer fails to send or provide the list and report as requested by the developer pursuant to subsection 165-49I(1) above within 45 days from receipt of the request, the developer may apply to the court in a summary manner for an order compelling the Township Engineer to provide the list and report within a stated time and the cost of apply to the court, including reasonable attorney’s fees may be awarded to the prevailing party.
- (5) If the Township Mayor and Council fails to approve or reject the bonded improvements determined by the Township Engineer to be complete and satisfactory or reduce the performance guarantee for the complete and satisfactory improvements within 45 days from the receipt of the Township Engineer’s list and report, the developer may apply to the court in a summary manner for an order compelling, within a stated time, approval of the complete and satisfactory improvements and approval of a reduction in the performance guarantee for the approvable complete and satisfactory improvements in accordance with the itemized cost estimate prepared by the Township Engineer and appended to the performance guarantee pursuant to subsection 165-49B above; and the cost of applying to the court, including reasonable attorney’s fees, may be awarded to the prevailing party.
- (6) In the event that the developer has made a cash deposit with the Township or approving authority 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 Township may retain cash equal to the amount of the remaining “safety and stabilization guarantee”.

- (7) If any portion of the required bonded improvements is rejected, the approving authority may require the developer 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.
- (8) Irrevocable letters of credit and bonds, if any, shall be released first; cash shall be released last.
- (9) Nothing herein shall be construed to limit the right of the developer to contest by legal proceedings any determination of the Township Mayor and Council or the Township Engineer.

J. Inspections.

- (1) The developer shall reimburse the municipality for all reasonable inspection fees paid to the Township Engineer for the foregoing inspection of improvements; provided that the municipality may require of the developer a deposit for the inspection fees in an amount not to exceed, except for extraordinary circumstances, the greater of \$500 or 5% of the cost of improvements. For those developments for which the reasonably anticipated fees are less than \$10,000, fees may, at the option of the developer, be paid in two installments. The initial amount deposited by a developer shall be 50% of the reasonably anticipated fees. When the balance on deposit drops to 10% of the reasonably anticipated fees because the amount deposited by the developer has been reduced by the amount paid to the Township Engineer for inspection, the developer shall deposit the remaining 50% of the anticipated inspection fees.
- (2) For those developments for which the reasonably anticipated fees are \$10,000 or greater, 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 reasonably anticipated fees. When the balance on deposit drops to 10% of the reasonably anticipated fees because the amount deposited by the developer has been reduced by the amount paid to the Township Engineer for inspection, the developer shall make additional deposits of 25% of the reasonably anticipated fees. The Township

Engineer shall not perform any inspection if sufficient funds to pay for those inspections are not on deposit.

- (a) Failure of the developer to deposit the additional funds in escrow may subject the developer to a “stop-work” order and/or suspension of construction permits.
- (3) Any improvement installed contrary to the approved plan(s) or plat(s) shall constitute just cause to void the approval(s).
- (4) Any improvement installed without compliance with subsection 165-49J(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 Township Engineer pending the resolution of any dispute.
- (5) Inspection by the Township of the installation of improvements and utilities shall not operate to subject the Township of Clinton to liability for claims, suits or liability of any kind that may at any time arise because of defects or negligence during construction or at any time thereafter; it being recognized that the responsibility to maintain safe conditions at all times during construction and to provide proper utilities and improvements is upon the owner and his contractor, if any.
- (6) In the event that final approval is by stages or sections of development pursuant to N.J.S.A. 40:55D-38, the provisions of this section shall be applied by stage or section.
- (7) To the extent that any of the improvements have been dedicated to the Township on the subdivision plat or site plan, the Township Mayor and Council shall be deemed, upon the release of any performance guarantee required pursuant to subsection 165-49B above, to accept dedication for public use of streets or roads and any other improvements made thereon according to site plans and subdivision plats approved by the approving authority, provided that such improvements have been inspected and have received final approval by the Township Engineer.
- (a) Prior to such acceptance, the developer shall also provide an affidavit stating that there are no liens or other legal encumbrances

on any of the improvements or utilities proposed to be dedicated to the Township.

- (b) Notwithstanding anything to the contrary herein, nothing shall prohibit the Township from formally accepting such improvements via ordinance in accordance with N.J.S.A. 40A:12-5 *et seq.*
- (8) The approval of any application for development by the Township shall in no way be construed as acceptance of any street or drainage system, or any other improvement, nor shall such approval obligate the Township in any way to exercise jurisdiction over such street or drainage system or other improvement.
- (9) No improvement shall be accepted by the Township unless and until all of the following conditions have been met:
 - (a) The Township Engineer shall have certified in writing that the improvements are completed and that they comply with the requirements of this chapter; and
 - (b) The owner shall have filed with the Township Mayor and Council a maintenance guarantee in accordance with subsection 165-49E above. The requirements for a maintenance guarantee may be waived by the Township Mayor and Council only if the Township Engineer has certified that the improvements have been in continuous use for not less than two years from the date the Township Engineer certified completion of such improvements and that during this period the owner has maintained the improvements in a satisfactory manner.

K. Successor developers/owners.

If the property or any part of same is sold or otherwise conveyed to a successor developer prior to the completion and acceptance of all improvements, an Assignment of Developer's Agreement, and new performance, maintenance or other guarantees shall be required from the new owner or successor developer. Upon the transfer of ownership of property that is the subject of a construction permit, and prior to the beginning or continuing work authorized by the construction permit, the new owner or successor developer shall file with the Construction Code Office an application for a permit update to notify the Construction Code Office of the name and address of the new owner or successor developer and of all other changes to information previously submitted to the Township. The Construction Code Office shall not approve the application for a permit update until it receives notification from the Township Mayor and Council or its designee that the new owner or successor developer has

furnished adequate replacement performance, maintenance or other guarantees and the Assignment of Developer's Agreement.

L. Start of construction.

No construction shall commence until:

- (1) The developer has entered into a developer's agreement with the Township in a form acceptable to the Township Attorney;
- (2) The developer has paid all fees required by this chapter;
- (3) All easements, dedications, conveyances, deed restrictions, licenses, agreements and manuals have been submitted to, reviewed and approved by the appropriate Township officials;
- (4) The developer has received all other governmental permitted approvals required by the Board's resolution of memorialization granting subdivision or site plan approval;
- (5) The developer has satisfied all conditions of approval required by the Board's resolution of memorialization granting subdivision and/or site plan approval and all changes required by the Board to the developer's subdivision and/or site plans have been filed with and approved by the Township Engineer;
- (6) The developer's construction plans have been filed with and approved by the Township Engineer;
- (7) The developer has held a pre-development conference with the Township Engineer and the Hunterdon County Soil Conservation District for purposes *inter alia* of agreeing upon the anticipated construction schedule, procedure of construction, and any particular requirements of the Township Engineer; and
- (8) The developer has furnished the Township the performance guarantees required by subsection 165-49B above.

Section 2. Repealer. All ordinances and resolutions or parts thereof inconsistent with this ordinance are hereby repealed as to such inconsistencies only.

Section 3. Severability. If any paragraph, section, subsection, sentence, sentence clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court

or administrative agency of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision of such holding shall not affect the validity of the remaining paragraphs or sections hereof.

Section 4. Referral to Planning Board. Pursuant to the Municipal Land Use Law, *N.J.S.A.* 40:55D-64, the Clerk shall cause a copy of this ordinance to be referred to the Clinton Township Planning Board for review prior to its adoption.

Section 5. Effective Date. This ordinance shall take effect 20 days after its final passage by council and the filing of same with the Hunterdon County Planning Board, all in accordance with law.

Carla Conner, RMC, Township Clerk

Hon. Brian Mullay, Mayor

Introduced: February 23, 2022
Public hearing: March 23, 2022
Adopted: _____, 2022