

## **Article 907: PERFORMANCE GUARANTEE PROCEDURES**

(Adopted August 19, 2008, Amended 01/04/11, 8/2011, 12/16/2014)

### **907.1 Purpose**

The purpose of the Performance Guarantee (bond) is two-fold. The bonding of the improvements is a way for the Planning Board to insure that the site is developed in accordance with the final approved plan. Bonding also insures that if, for some unforeseen reason the developer is unable to complete the required improvements, the Town of Kingston has the resources to stabilize, complete or improve any portions of the project left in a state deemed unsafe, un-stabilized, or non-compliant for the health, safety and welfare of the community. The bonding process is not undertaken to complete a private development that is abandoned by the applicant/owner/developer.

### **907.2 Acceptable Forms of Guarantee**

The following are acceptable methods for posting a Performance Guarantee:

- A. Cash Bond:** A certified check made payable to the Town of Kingston, in the amount adequate for the installation and completion of the improvements, utilities and facilities according to the specifications given hereto. The check to be deposited by the Treasurer in an escrow account for the Town of Kingston in the name of the applicant. (An example of a Cash Bond Agreement can be found at the end of this Section.)
- B. Letter of Credit:** A Letter of Credit issued from a financial institution authorized to do business in the State of New Hampshire will be provided to the Town in the amount adequate for the installation and completion of the improvements, utilities and facilities according to the specifications given hereto. The Letter of Credit is to be reviewed and approved by the Town Attorney prior to approval by the Planning Board and acceptance by the Board of Selectmen. The applicant will pay any costs associated with this review.
- C.** Performance Guarantees are to be approved by the Planning Board prior to being submitted to and accepted by the Board of Selectmen.

### **907.3 Site Construction and Improvements**

#### **A. Submission and Review**

1. The applicant shall submit to the Planning Board a detailed, proposed bond amount for work required by the approved or conditionally approved plan. The guarantee shall cover the estimated cost of construction and installation all site improvements. An example of the Bond Worksheet is attached to this Section.
2. The bonding instrument will include language granting the Town entrance to the property for inspections or for any construction required for bonded items in the case of owner default.
3. The Planning Board, in consultation with the Town Engineer or other professional chosen by the Board, shall set the amount of the performance guarantee prior to the final (or conditional) approval of the plan.

#### **B. Estimated Costs**

1. Basis for determining the performance guarantee shall be 125% (one hundred and twenty-five per cent) of the costs of all required road construction and site improvements including the completion of all ancillary work as conditioned by the Planning Board's approval.
  - a. Site improvements include, but are not limited to, road work (both public and private), drainage facilities, erosion control systems, utility easements, logging operations (including intent to cut activities), loam and seed for the entire project area, fencing, construction survey, preparation of record drawings, individual or public parking facilities, required buffer/landscaping, and other items at the discretion of the Planning Board.
  - b. Performance bonding for construction of streets and roadways shall cover all work to be performed within the proposed right(s)-of-way and all work associated with the storm drain system(s). It shall also cover any required off-site improvements.
  - c. The Performance Bond amount shall include the cost of installation of utilities, including any work that needs to be done in existing Town roads and/or rights-of-way. These costs shall include the costs of patching, repairing, loaming, and seeding of any existing areas disturbed during installation.
  - d. In the case of electric lines or other utilities to be installed by a public corporation or a municipal department, a written statement shall accompany the bond from such public utility, corporation, or

municipal department indicating that the installation shall be place underground, within the right-of-way, and that work will be done within a reasonable time and will completed without expense to the Town.

2. Estimation of the cost of proposed improvements shall be at or above the New Hampshire Department of Transportation Weighted Average Unit Prices, at the discretion of the Town Engineer. IN addition, the Planning Board may have the estimate reviewed by a professional consultant, if deemed necessary.
  - a. When estimating the costs for a performance guarantee (bond), the applicant will itemize all improvements.
  - b. Any projects involving required landscaping or buffering shall separate these costs from other bond costs as landscaping necessitates monitoring to insure that the planting survives past the first season.
  - c. The costs associated with the necessary project inspections by the Town’s Engineer or other professionals/consultants shall be itemized separately and included in the proposed bond total.
3. An additional 10% (ten per cent) shall be added to the bond estimate for any unexpected contingencies during the development process.
  - a. The amount shall be reviewed and approved by the Planning Board annually.
4. The cost of review for any portion of the performance review or estimated costs shall be borne by the applicant (including, but not limited to, engineering, legal and other professional review).

#### **907.4 Acceptance of Performance Guarantee**

- A. The developer/owner/applicant must post a guarantee deemed acceptable by the Planning Board prior to the issuance of any building permits for the site. No construction shall take place on the site until the Performance Guarantee has been approved by the Planning Board and accepted by the Board of Selectmen.
- B. Performance guarantees shall be held by the Board of Selectmen.
- C. Bonding (posting of a Performance Guarantee) shall not be considered a vesting of rights, nor shall posting of a bond be considered “active and substantial development or building”. Failure to commence work on site improvements within the specified time limits may result in the revocation of final plan approval in accordance with RSA 676:4-a.

- D.** Time limitations shall be imposed upon completion of the improvements of the site in accordance with the approval.
  - 1. If the Planning Board does not set a specific time limit, the time limit shall be twelve (12) months from the date of approval; prior reaching the expiration of the time limit, the applicant can request additional time to complete the project.
  - 2. Requesting an extension will require a re-evaluation of the performance guarantee.
  - 3. Receiving an extension will require the posting of a revised Performance Guarantee, if deemed necessary by the Planning Board.
  - 4. If the required improvements are not satisfactorily installed within the mutually agreed upon timetable, the posted performance guarantee shall be forfeited by the applicant.

#### **907.5 Release of Performance Guarantee**

- A.** The Selectmen shall not draw upon or release any security until they are in receipt of a decision based by a majority of the Planning Board stating the purpose and amount to be drawn or released. The Selectmen shall enforce such securities by all appropriate legal and equitable remedies.
- B.** Upon inspection of a partial completion of required improvements, the Planning Board may authorize in writing a reduction of the performance guarantee up to an amount equal to the work completed.
- C.** The Town shall retain sufficient funds for the current cost to complete the remaining improvements as indicated by a qualified contractor's bid estimate approved by the Board, plus a retainer of 20% (twenty per cent) of the original performance guarantee amount which shall be kept until all required improvements have been inspected and accepted by the Town.
  - 1. This retainer will act as a maintenance guarantee covering the maintenance of public roads and other public improvements for a period of two (2) years from the date of completion as established by the Town Engineer or Agent as designated by the Planning Board.
  - 2. If repair or unusual maintenance is needed or additional improvements are required then a sum of one hundred and fifty per cent (150%) of such costs as are necessary shall be drawn against said guarantee. The applicant shall pay for any necessary reviews by the Town Engineer or any other professional service necessary in determining the details of the bond or its release.
  - 3. If the costs for completing the required improvements exceed the amount of performance guarantee held by the Town, additional funds

shall be required by the Planning Board, in order to ensure completion before the development proceeds any further. The retainer shall be held until the completion of all required improvements have been inspected and approved by the Board.

4. No more than one bond reduction shall be allowed in any thirty (30) day period. In addition, bond reduction request must be submitted thirty (30) days prior to expected release.
- D.** The Performance Guarantee (or balance thereof) shall not be released until:
1. the Planning Board has certified, after inspection by the Town's consulting engineer (and/or other Town designee), that the required site improvements have been installed and completed in accordance with the approved plan.
  2. Town Counsel has reviewed and approved all deeds governing land to be used for public purposes, as well as all easement agreements for the site.
    - a. A fee, payable by the subdivider/developer, may be charged to cover the cost of professional and/or legal consultation selected by the Planning Board to assist in determining completion of all required work.
    - b. All recording fees shall be borne by the subdivider/developer.
    - c. The developer shall certify that the "as built" location of all newly installed utilities are in conformance with the approved site plan.
    - d. Any change in location of the utilities shall require the submission of "as built" plans indicating the actual location of the newly installed utilities.
    - e. All stormwater basins and structures will be cleaned of any sedimentation or debris.
  3. The road has had final acceptance by the Board of Selectmen.
- E.** Should progress toward the completion of all required improvements fall substantially behind the mutually agreed upon timetable, the Planning Board may obtain a completion cost estimate from either the developer's contractor or a qualified professional of the Planning Board's choice.
1. The developer/subdivider will pay any costs associated with this estimate.
  2. If the estimated completion and maintenance costs exceed the amount of the performance guarantee posted with the Town, the developer shall post an additional performance guarantee as is necessary to complete the required improvements. The developer shall post such guarantee within thirty (30) days of notice thereof.
- F.** From the start of construction to the final completion and acceptance of all improvements, the applicant shall be responsible to maintain all roads, all

stormwater management facilities, and all other improvements. Any maintenance, including, but not limited to snowplowing and stormwater facilities, that is performed by the Town will be drawn from the performance guarantee at a rate of one hundred and fifty per cent (150 %) of the Town's cost.

**907.7 EXCAVATION BOND** (Amended 08/2011)

The Planning Board, or its designee, shall establish the amount of a performance bond prior to the issuance of the excavation permit. The bond amount shall be reasonably sufficient to guarantee compliance with the restoration in compliance with NH RSA 155:E. The bond requirements shall be based on the acreage of the project or approved phases and the estimated per acre restoration costs. The bond will be returned to the applicant when restoration work has been completed and a final satisfactory site inspection has been conducted by the Planning Board or its designee. The applicant shall pay for any bond reviews by the Town Engineer or Town Counsel, or any other professional service necessary to review the proposed excavation/restoration plan.

EXAMPLE:

CASH BOND AGREEMENT

By this document, \_\_\_\_\_ (Name) \_\_\_\_\_, of \_\_\_\_\_ (Address) \_\_\_\_\_  
\_\_\_\_\_ (Town, State) \_\_\_\_\_ (hereinafter referred to as “Developer”) hereby  
issues an escrow account in the amount of \_\_\_\_\_ (escrow amount) \_\_\_\_\_  
dollars to the Treasurer, Town of Kingston, New Hampshire. The escrow account is held as a  
cash bond to guaranty completion of all improvements required by the Kingston Planning Board  
and the Town of Kingston Subdivision Regulation in conjunction with a subdivision plan entitled \_  
\_\_\_\_\_ (Name of Plan as shown on recorded and approved plan by the Kingston  
Planning Board) dated \_\_\_\_\_ and approved by the Kingston Planning Board on  
\_\_\_\_\_ (date of final approval) \_\_\_\_\_. The Developer hereby authorizes the Treasurer of the  
Town of Kingston to draw drafts payable for amounts not to exceed \_\_\_\_\_ (amount of  
bond) \_\_\_\_\_.

Now therefore, in consideration of the Kingston Planning Board granting subdivision approval to  
the Developer, it is agreed by the Developer and guaranteed by this cash bond, that the  
Developer will make the following improvements:

1. The construction of \_\_\_\_\_ (roadway footage amount) of roadway in accordance  
with the standards required by the Town of Kingston Subdivision Regulations, Town  
of Kingston Road Specifications and all Town of Kingston Ordinances.
2. Strict adherence to the corresponding storm water management plan (if applicable).
3. Other

under the following conditions:

1. The Developer will follow exactly the above-referenced plans which has been  
submitted for approval.
2. The Developer assumes the cost of all inspections by the Town Engineer to assure  
adherence to all applicable Town of Kingston regulations.
3. The Developer may be required by the Town Engineer to provide a certified “as-built  
plan”, at the Developer’s expense, in order to assure compliance with the original  
design intent.
4. Up to 10% of the total security amount may be held to guarantee maintenance until  
the road is accepted and the Board of Selectmen have been assured of proper  
completion of all improvements.

Title III: Rules and Regulations

Section 900 – Planning Board Rules and Regulations

Article 907 – Performance Guarantee Procedures

5. The Developer shall convey, by warranty deed, with marketable title, the fee to the roadway, and appurtenant easements shown on the plan.
6. A Performance Bond Agreement dated \_\_\_\_\_ is incorporated by reference herein.
7. Other

If all improvements, under the specified conditions, guaranteed by this cash bond, are not completed by \_\_\_\_ (deadline date) \_\_\_\_, then this cash bond shall be considered to have been called, and without further action by the Town of Kingston, its Treasurer, or its Selectmen, these funds shall become the sole property of, and be made available to the Town of Kingston. The funds shall be used exclusively for the purpose of completing the improvements, under the conditions listed herein, which are guaranteed by the cash bond. Any funds not needed by the Town to complete said improvements or secure retainage, under the conditions listed herein, shall be returned to the Developer.

IN WITNESS WHEREOF, the parties set their hands and seals this \_\_\_\_\_ day of (month, year).

WITNESS:

_____	_____	_____
	(Developer)	(Date)

_____	_____	_____
	(Chairman, Board of Selectmen)	(Date)

_____	_____	_____
	(Chairman, Planning Board)	(Date)



**Sample Letter of Credit**

(Bank Letterhead)

Credit No.: XXXXXXXXX  
Irrevocable Standby Letter of Credit  
Date and Place of Expire: (Date)  
(Name of Bank)  
(Address)

(Date)

Treasurer  
Town of Kingston  
Town Hall  
163 Main Street  
Kingston, NH 03848

RE: (project name and tax map number)

**Account Party:**

(Owner)  
(Address)

**Beneficiary:**

Town of Kingston  
Kingston, NH

**Amount:**

(description)  
(amount of bond)

**Re:** Name/Title of Project

Dear Town Treasurer,

By this document, the \_\_\_\_\_ Bank (Hereinafter “issuer”) hereby issues an irrevocable Letter of Credit in the amount of \_\_\_\_\_ to the Town of Kingston, New Hampshire on behalf of \_\_\_\_\_ (hereafter “developer”). This irrevocable Letter of Credit is issued to guarantee completion of all improvements required by the Kingston Planning Board and the Town of Kingston Subdivision and/or Site Plan Regulations in conjunction with a plan entitled \_\_\_\_\_

\_\_\_\_\_ dated \_\_\_\_\_, prepared by \_\_\_\_\_ and approved by the Kingston Planning Board on \_\_\_\_\_.

It is understood that the improvements guaranteed by the Irrevocable Letter of Credit include, but are not limited to, the following: (add in requirements, conditions road guarantee, etc.)

Title III: Rules and Regulations

*Section 900 – Planning Board Rules and Regulations*

*Article 907 – Performance Guarantee Procedures*

It is agreed and understood by the Issuer of this Letter of Credit that it shall be issued on demand. If all improvements guaranteed by this Letter of Credit are not completed by (Date) and if a certificate indicating completion of all improvements has not been issued by the Town Senior Engineer or such other individuals as the Town of Kingston shall designate, then this Letter of Credit shall be automatically considered to have been called and without further action of the Town of Kingston or its Planning Board, (Bank) shall forthwith forward a check in the amount of (Amount of Letter of Credit) to the Treasurer of the Town of Kingston. The funds so forwarded to the Town Treasurer shall be used exclusively for the purpose of completing the improvements which are guaranteed by this Letter of Credit. Any funds not needed by the Town of Kingston to complete improvements required by the Subdivision and/or site plan referred to above shall be returned to (Bank).

In the event any proceeding of a quasi-judicial or judicial nature is commenced in conjunction with this Letter of Credit, the exclusive jurisdiction for the proceeding shall be the Courts of Rockingham County for the State of New Hampshire, Kingston, New Hampshire, of the United States District Court for the District of New Hampshire, Kingston, New Hampshire, wherever jurisdiction is appropriate and the Issuer consents to the jurisdiction and venue of any such court and waives any argument that venue is such a forum is not convenient and ay firths the Issuer may have under any Federal or State law establishing jurisdiction or venue in another forum.

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(Signature of Bank Official and Date)

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(Printed Name of Bank Official)

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(Title of Bank Official)

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(Contact Information)

I have read this Letter of Credit and agree to its terms:

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(Signature of Developer and Date)

(Printed Name of Developer)