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### **Remedying construction defects by pursuing a developer's performance bonds**

By Eric F. Frizzell, Esq., Buckalew Frizzell & Crevina LLP

Is the developer of your new condominium association delaying repairs of defects in the roads, landscaping, drainage and other exterior common elements, or failing to complete them entirely? Are unit owners concerned that the developer appears to be in serious financial difficulty and that they could end up being compelled to pay for expensive repairs? What can your association do?

One remedy that associations sometimes overlook is asking the local municipality to enforce any performance guarantees - bonds or cash - that it required the developer to post as a condition of approving the developer's application to construct the condominium complex. A performance bond is issued by an independent surety or insurance company, and guarantees the municipality that the developer will complete major improvements. The bond, which can be in an amount up to 120% of the cost of installation as determined by the municipal engineer, normally is not released until the construction has been approved by the engineer and accepted by the municipality. If a developer fails to properly construct any bonded improvements, the municipality can declare the developer in default and demand payment under the bond for the reasonable cost to complete the work. A condominium association has no right to make a direct claim against the bond and therefore needs to obtain the active cooperation of the municipality in doing so.

Items that commonly are covered by performance guarantees include internal roadways/pavement, sidewalks, sanitary and storm sewer systems, gutters, street lighting, grading and drainage, irrigation, pump stations, underground pipes, shade trees and landscaping, curbing, signage, detention/retention basins, and similar items. The actual condominium buildings and individual units, however, are not covered.

Once a developer substantially completes construction of bonded improvements, it can apply to the municipality to release the bond. The developer can seek a partial release if only some items are finished. Within 45 days of the municipality's receipt of the developer's request for bond release, the municipal engineer must inspect all of the improvements and file a detailed report with the municipal governing body, that (1) identifies each improvement deemed complete and satisfactory and the recommended amount of reduction in the bond, and (2) details the nature, extent and remedy of any incomplete item. Under New Jersey law, the governing body must enact a resolution within 45 days approving or rejecting the improvements, and releasing the bond as to those approved (although it may retain 30% of the total guarantee to ensure acceptable completion of all remaining improvements).

Therefore, it is critical for a condominium association to diligently pursue the municipality's cooperation in enforcing the performance bond/cash guarantees against a defaulting developer.

The first step in this process is for the association to obtain from the municipality a copy of all performance bonds/guarantees posted by the developer, the amount still being held, and the list of all covered improvements. To obtain this information, the association's attorney should make a formal request to the municipality's custodian of records (usually the municipal clerk) pursuant to New Jersey's Open Public Records Act. The association should be sure to use the municipality's prescribed form and to submit any required fees. The municipality is legally required to provide the requested documents within seven business days of receiving the request, provided that the records are currently available and not in storage or archived.

Once the association receives the documents, its attorney and/or engineer should review them and immediately notify the municipal governing body in writing if any bonded improvements suffer from construction defects or otherwise have not been properly completed; request that the municipality hold all bonds/cash guarantees until those improvements have been satisfactorily completed; and ask that the municipal engineer conduct an on-site inspection with the association's engineer, to assure that the municipal engineer agrees with the association's position regarding the asserted deficiencies.

The association's goal is to persuade the municipality that the performance guarantees should not be released until the association's concerns have been fully resolved. Accordingly, it is imperative for the association to retain its own engineer to advocate on its behalf, since complicated engineering issues can be involved and the municipal engineer may not initially agree with the association's contentions. If the association has obtained its own independent engineering report identifying defects in bonded items, the association should provide a copy to the municipal governing body and engineer.

If the performance bonds already have been released when the association first contacts the municipality about their status, all hope is not lost - the municipality may still be holding a "maintenance guarantee" for various improvements. The maintenance guarantee can be for an amount up to 15% of the cost of the improvements and can remain posted for up to two years.