



MOTION: DUFFY

July 9, 2024
Legislative Session
Ordinance No. 24-18

SECOND: MACKINTOSH

RE: Amending City Code Chapter 72, "Unified Development Ordinance," Section 72-27, "Performance Guarantees"

ACTION: APPROVED: Ayes: 6; Nays: 0

FIRST READ: June 25, 2024

SECOND READ: July 9, 2024

Sec. I. Introduction.

Section 72-27, "Performance Guarantees," of the City's Unified Development Ordinance (UDO) has been largely unchanged since the UDO's original adoption in 2013. Staff now recommends some updates to these requirements. The purpose of this Ordinance is to update the City's required performance guarantees to enhance developers' maintenance responsibilities for landscaping during the initial period of establishment for new plantings.

The City Council adopted a resolution to initiate this text amendment at its meeting on April 9, 2024. The Planning Commission held its public hearing on the amendment on May 8, 2024, after which it voted to recommend the amendment to the City Council. The City Council held its public hearing on this amendment on June 25, 2024.

In adopting this ordinance, City Council has considered the applicable factors in Virginia Code § 15.2-2284. The City Council has determined that public necessity, convenience, general welfare and good zoning practice favor this text amendment.

Sec. II. City Code amendment.

It is hereby ordained by the Fredericksburg City Council that City Code Chapter 72, "Unified Development Ordinance," Article 72-2, "Administration," Section 72-27, "Performance Guarantees," is amended to add the underlined language and delete the language shown in strikethrough as follows:

72-27.0 Performance guarantees.

- A. Performance guarantees required. As a condition to the approval of a final subdivision plat, site plan, grading permit or building permit, the owner or developer shall be required to guarantee completion of the public and other site-related improvements associated with the development.

B. Facilities required to be guaranteed.

- (1) The owner or developer shall guarantee construction of the following facilities:
 - (a) Any right-of-way located within any subdivision or section thereof;
 - (b) Any street, curb, gutter, sidewalk, bicycle trail, drainage or sewerage system, waterline as part of a public system or other improvement dedicated for public use, and maintained by the City, the commonwealth, or other public agency;
 - (c) Other site-related improvements required by local ordinance for vehicular ingress and egress, including traffic signalization and control, for public access streets, for structures necessary to ensure stability of critical slopes, and for stormwater management facilities;
 - (d) Erosion and sediment control measures required as a condition to grading, building, or other permits or land disturbing approvals;
 - (e) Any private streets to be constructed in a subdivision;
 - (f) Any privately-owned site-related improvements, including but not limited to fencing, landscaping, buffering, internal sidewalks, lighting, paving, private recreational facilities and pavement marking, required by this chapter but not completed prior to issuance of occupancy certificate. To ensure plant survival, fifty percent (50%) of the performance guarantee for landscaping shall be retained until final inspection and approval, which shall occur no earlier than 24 months after approval of the initial installation of the landscape improvements.
- (2) Provided the developer and the City Council have agreed on the delineation of sections within the proposed development, the developer shall not be required to furnish to the City Council a performance guarantee in the amount of the estimated cost of construction of facilities to be dedicated for public use within each section of the development until such time as construction plans are submitted for the section in which such facilities are to be located.
- (3) No performance guarantee shall apply to, or include the cost of, any facility or improvement unless such facility or improvement is shown or described on the approved plat or plan of the project for which such guarantee is being furnished. The terms, conditions, and specifications contained in any agreement, contract, performance agreement, or similar document, however described or delineated, between the City and an owner or developer of property entered into pursuant to this section in conjunction with any performance guarantee shall be limited to those items depicted or provided for in the approved plan, plat, permit application, or similar document for which such performance guarantee is applicable.

C. Amount.

- (1) The required guarantee shall be provided in the following total amount:
 - (a) The total estimated cost of construction based on unit prices for new public or private sector construction in the City; plus
 - (b) ~~Prior to July 1, 2014: an~~ An additional 10% of the total estimated cost of construction, which shall constitute a reasonable allowance for estimated administrative costs, inflation, and potential damage to existing roads or utilities, ~~and~~
 - (c) ~~On or after July 1, 2014: an~~ An additional 25% of the total estimated cost of erosion and sediment control measures associated with the land-disturbing activity~~construction~~, which shall constitute a reasonable allowance for estimated administrative costs, and inflation, ~~and potential damage to existing roads or utilities.~~
- (2) The owner or developer shall submit a written itemized estimate of the total estimated cost of construction, certified as being accurate, as part of his request for development approval.
- (3) The Development Administrator may establish a uniform unit price schedule for common construction items, using locally developed figures or industry-recognized standards, to be included in the City's Development Procedures Manual. The Development Administrator shall consider this schedule, and shall consider the estimate provided by the owner or developer, and shall then make a determination as to the total estimated cost of construction based on unit prices for new public or private sector construction.

D. Form of guarantee.

- (1) The following forms of guarantees may be used to satisfy the requirements of this section:
 - (a) The owner or developer may:
 - [1] Certify to the City Council that the total estimated construction costs have been paid to the person constructing such facilities or, at the option of the City Council; ~~or~~
 - [2] Present evidence satisfactory to the City Council that the time for recordation of any mechanics' lien has expired or evidence that any debt for said construction that may be due and owing is contested and provide indemnity with adequate surety in an amount deemed sufficient by the City Council or the Development Administrator.
 - (b) The owner or developer may furnish to the City Council a certified check or cash escrow in the amount of the estimated costs of construction or a personal, corporate or property

bond, with surety satisfactory to the Development Administrator, in an amount sufficient for and conditioned upon the construction of such facilities, or a contract for the construction of such facilities and the contractor's bond, with like surety, in like amount and so conditioned.

- (c) The owner or developer may furnish to the City Council a bank or savings institution's letter of credit on certain designated funds satisfactory to Development Administrator as to the bank or savings institution, the amount and the form.
- (2) All performance guarantees shall provide that such bond, letter of credit, or other agreement shall not be terminated, canceled, or modified without at least 30 days' prior written notice by certified mail to the Development Administrator.
- (3) All performance guarantees shall provide for the completion of construction of all facilities within a time to be determined by the Development Administrator.
- (4) Any bond shall be issued by an insurance company licensed to transact fidelity and surety insurance business in Virginia, and shall be a company holding a certificate of authority as acceptable surety on federal bonds or an acceptable reinsuring company per the United States Department of the Treasury's Listing of Certified Companies current annual circular. The surety, when notified of the owner or developer's default, shall elect either to perform in the owner or developer's stead or to pay the face amount of the bond, or any lesser amount determined by the Development Administrator. The surety shall agree to provide said funds to the City prior to the performance of the work, based upon the Development Administrator's estimate of the funds required.
- (5) Any letter of credit shall specify Uniform Commercial Code or Uniform Customs and Practice for Documentary Credits, be irrevocable, and contain an automatic renewal clause. The lending institution issuing the letter of credit shall be insured by the FDIC or FSLIC and have a place of business within 50 miles of the City of Fredericksburg. In case of failure on the part of the owner or developer to complete the specified improvements within the required time period, the lending institution shall pay to the City immediately and without further action such funds as are necessary to finance the completion of the facilities, in accordance with the Development Administrator's estimate, up to the limit of credit stated in the letter.
- (6) Any cash escrow account shall be established with a financial institution approved by the Treasurer and insured by FDIC or FSLIC. The escrow account shall be held in trust until released by the Development Administrator and may not be used or pledged by the owner or developer as security in any other matter during that period. In the case of failure by the owner or developer to complete the facilities, the escrow agreement shall provide that the financial institution shall immediately make the funds in the account available to the

City for use in the completion of those facilities. The owner or developer shall pay a nonrefundable ~~\$200~~ administrative fee in accordance with the fee schedule adopted by City Council to cover the City's legal and administrative review costs for any proposed cash escrow agreement. All such agreement shall be reviewed and approved by the City Attorney. Any such agreement shall be approved only if it affords protection to the City equivalent to a corporate surety bond.

- (7) Additional terms, conditions, and forms for guarantees shall be set forth in the City's Development Procedures Manual.
- E. Extensions of time. If guaranteed facilities are not timely completed in a manner acceptable to the City, the Development Administrator may proceed via the provisions for default, below, or grant an extension of time for the completion of facilities, not to exceed one year, provided that:
- (1) All surety consents have been acquired and approved by the City;
 - (2) The owner has submitted an acceptable schedule for completion; and
 - (3) Inspection of existing physical improvements is found to be satisfactory.
- F. Partial release.
- (1) Upon the completion of at least 30% of the improvements covered by a performance guarantee, the applicant may file a written request with the Development Administrator for a partial release of such guarantee. The developer shall be entitled to no more than three periodic partial releases within any twelve-month period.
 - (2) The Development Administrator shall act upon each written request for a periodic partial release within 30 days of receipt thereof. The Development Administrator may inspect the facilities for conformance with the terms and conditions of the approved plan and specifications for the facilities for which the performance guarantee is applicable. Such request shall be granted unless the Development Administrator notifies the subdivider or developer in writing of nonreceipt of approval by an applicable state agency, or of any specified defects or deficiencies in construction and suggested corrective measures prior to the expiration of the thirty-day period.
 - (3) The Development Administrator shall have the authority to require that each request be accompanied by the certification of a professional who is licensed to make such a determination that the required improvements have been partially or finally completed in accordance with the approved plans and specifications. Upon such certification, the City may accept such improvements without further inspection.

- (4) To ensure plant survival, fifty percent (50%) of the performance guarantee for landscaping shall be retained until final inspection and approval, which shall occur no earlier than 24 months after approval of the initial installation of the landscape improvements.
- (5) Up to 90% of the original amount of the performance guarantee, excluding the performance guarantee for landscaping, may be released through periodic partial releases, based upon the percentage of public facilities completed and approved by the City or other agency having jurisdiction.
- (56) If no action is taken by the Development Administrator within the thirty-day time period, the request for partial release shall be deemed approved, and a partial release shall be granted to the subdivider or developer.

G. Final release.

- (1) Upon final completion of the facilities and as part of the as-built plan application, the subdivider or developer may file a written request for final release of the performance guarantee. The Development Administrator may inspect the facilities for conformance with the terms and conditions of the approved plan and specifications for the facilities for which the performance guarantee is applicable.
- (2) Within 30 days of the receipt of the written request and approval of the as-built plan application, the Development Administrator shall either accept the facilities and release the remaining guarantee or notify the applicant that the facilities are not accepted and that there are specific defects or deficiencies in construction, in which case the Development Administrator shall suggest corrective measures.
- (3) As used herein, "acceptance" means the public facility is accepted by and taken over for operation and maintenance by the City.
- (4) If the Development Administrator fails to act within the thirty-day time period, then the applicant may make an additional request in writing for final release, sent by certified mail to the City Manager. The City Manager shall act within 10 working days of receipt of this request. If no action is taken, the request shall be deemed approved and final release granted to the applicant.
- (5) The Development Administrator shall require submission of as-built plans for public facilities, demonstrating compliance with all City requirements, the receipt of which shall be a condition precedent to final release of any performance guarantee.

- H. Default. In the event of default in the construction of guaranteed facilities, the Development Administrator is authorized to take such action as may be required to protect the City and the public, including, but not limited to:

- (1) Require recalculation and reassessment of security, and, if deemed advisable, the substitution of a more desirable form of security;
 - (2) Draw or make demand on the owner or developer's security;
 - (3) Contract for the completion of the work, following the rules for public procurement;
 - (4) Enter the property for purposes of completing the work; and
 - (5) Bring an action at law against the owner, developer, and/or surety.
- I. Guarantees associated with conditional rezoning. Whenever a performance guarantee is required by the terms of a conditional rezoning, the Zoning Administrator shall employ the procedures provided in this section to establish the amount of the guarantee, the form of the guarantee, and extensions of time, as set out in this section or other applicable portions of this chapter. The reduction or release of the guarantee shall be decided by City Council upon the submission by the owner or developer of satisfactory evidence that the condition has been met in whole or in part.
- J. As-built plan requirements.
- (1) Unless the Development Administrator determines that a site visit inspection will suffice based on the limited scope of work, upon satisfactory completion of the installation of the improvements shown on the approved site plan or a section thereof, the owner, developer or their authorized agent shall submit an as-built plan application, in accordance with the Procedures Manual. The as-built plan shall be certified by a person duly certified by the state and licensed to practice in accordance with Section 54.1-406 of the Code of Virginia, as amended, and submitted for review and approval to confirm that the constructed improvements conform with the approved site plan. The as-built certificate, as shown in the Unified Development Ordinance Procedures Manual, shall be signed and sealed by the licensed professional. No as-built plan shall be approved until each building, structure, and site involved complies in all respects with the approved site plan or section thereof. No performance guarantee shall be released until the as-built plan has been approved by the Development Administrator. All entities who construct public water or sewer lines, storm drainage systems, bike paths, sidewalks, trails or streets to be maintained by the City of Fredericksburg must submit an "as-built" set of construction drawings for approval as a part of the City's acceptance process. Additionally, entities constructing any stormwater management or stream restoration facilities must submit an "as-built" set of construction drawings. The initial submittal shall be three sets of "red-lined" marked up prints, which should be delivered to the Department of Building and Development Services. This submittal shall include recorded copies of any public easements required with the project.
 - (2) The as-built drawings shall clearly show any changes or variations from the approved

design. Deviations from the approved site plan shall be redlined, bubbled, or otherwise clearly labeled. Horizontal variations greater than one foot should be shown dimensionally or through plus stations. Horizontal variations greater than five feet should also show the graphic relocation of the object. Vertical elevation variations greater than two feet shall be provided for all shown design elevations. A benchmark elevation and benchmark description and location shall also be provided on each plan sheet.

- (3) As-built plans for a surface stormwater management facility shall include the following additional information:
 - (a) Length, width, slope information and depth or contours (one-foot intervals) of the pond area along with a verification of the original design volume.
 - (b) A benchmark on the riser, inlet headwall, or other approved location.
 - (c) Revised design computations verifying the functionality of the pond. Computations shall be submitted, along with an additional paper copy of the as-built plans.
 - (d) The grading/storage volumes must be approved by the Stormwater Administrator ~~Building and Development Services~~ ~~prior to landscaping/planting~~. All plantings must be added to the as-built plans after plant installation. As-built plans will not be approved without required plantings.

NOTE: If as-built data shows that the constructed facility varies from the original design storage elevations by greater than or equal to 1%, the variations will have to be corrected (regraded) prior to submission for review unless storage is verified. All constructed features not previously approved on the original construction drawings will need to be modified to adhere to the approved plans or be approved after the fact.

- (4) All as-built information shall be blocked in and shown on the original construction drawings. Placing as-built information upon a scanned image or other reproduction of the original construction drawings may be acceptable so long as the quality, integrity, and legibility of the original drawings are substantially preserved without undue compromise.
- (5) The submittal shall include recorded copies of any public easements required with the project. ~~The as-built certificate [shown in Subsection J(7) below] shall be signed and sealed by a professional who is licensed to make such a certification and shall appear on the cover sheet of the as-built plan set. All sheets included in the permit set must be submitted in the final as-built set.~~
- (6) Once the City has determined that the as-built information is satisfactorily shown, the design professional will be notified to submit final digital and paper copies ~~MyLars~~ for as-built approval in accordance with the Unified Development Ordinance Procedures Manual.

~~The as-built information shall preferably be shown on the original construction drawings (i.e., the original Mylars with the permit approval stamp and design professional seal). Placing as-built information upon a scanned image or other reproduction of the original construction drawings may be acceptable so long as the quality, integrity, and legibility of the original drawings are substantially preserved without undue compromise. As-built drawings will be scanned by the City for archiving, so both the as-built and original information must be sufficiently discernible. The as-built plat set shall be submitted for signature and shall contain the same red-lined information as approved in the as-built review. No paper prints, paper or Mylar sepias will be accepted.~~

~~(7) As-built certificate:~~

~~I hereby certify that the information shown on this record drawing is an accurate and complete representation of data established from field information obtained under the direction of a professional land surveyor or a professional engineer, and that the physical dimensions or elevations shown thus: "58.67'" are as-built information and the facility was constructed according to the approved plans, except as otherwise noted hereon.~~

~~Name, License #~~

~~Title, Date~~

~~Additional As-Built plan information for streets:~~

- ~~i. — Street names;~~
- ~~ii. — R/W/ width (feet);~~
- ~~iii. — Pavement width (feet);~~
- ~~iv. — Center line (miles);~~
- ~~v. — Number of lanes;~~
- ~~vi. — FUNC class; and;~~

~~Confirm that streets have been recorded and dedicated.~~

Sec. III. Effective date.

This ordinance shall be effective immediately.

Votes:


Ayes: Devine, Frye, Duffy, Gerlach, Holmes, Mackintosh

Nays: None

Absent from Vote: Graham

Absent from Meeting: Graham

Approved as to form:



Kelly Lackey, City Attorney

Clerk's Certificate

I, the undersigned, certify that I am Clerk of Council of the City of Fredericksburg, Virginia, and that the foregoing is a true copy of Ordinance No. 24-18 duly adopted at a meeting of the City Council meeting held July 9, 2024 at which a quorum was present and voted.



Tonya B. Lacey, MMC
Clerk of Council