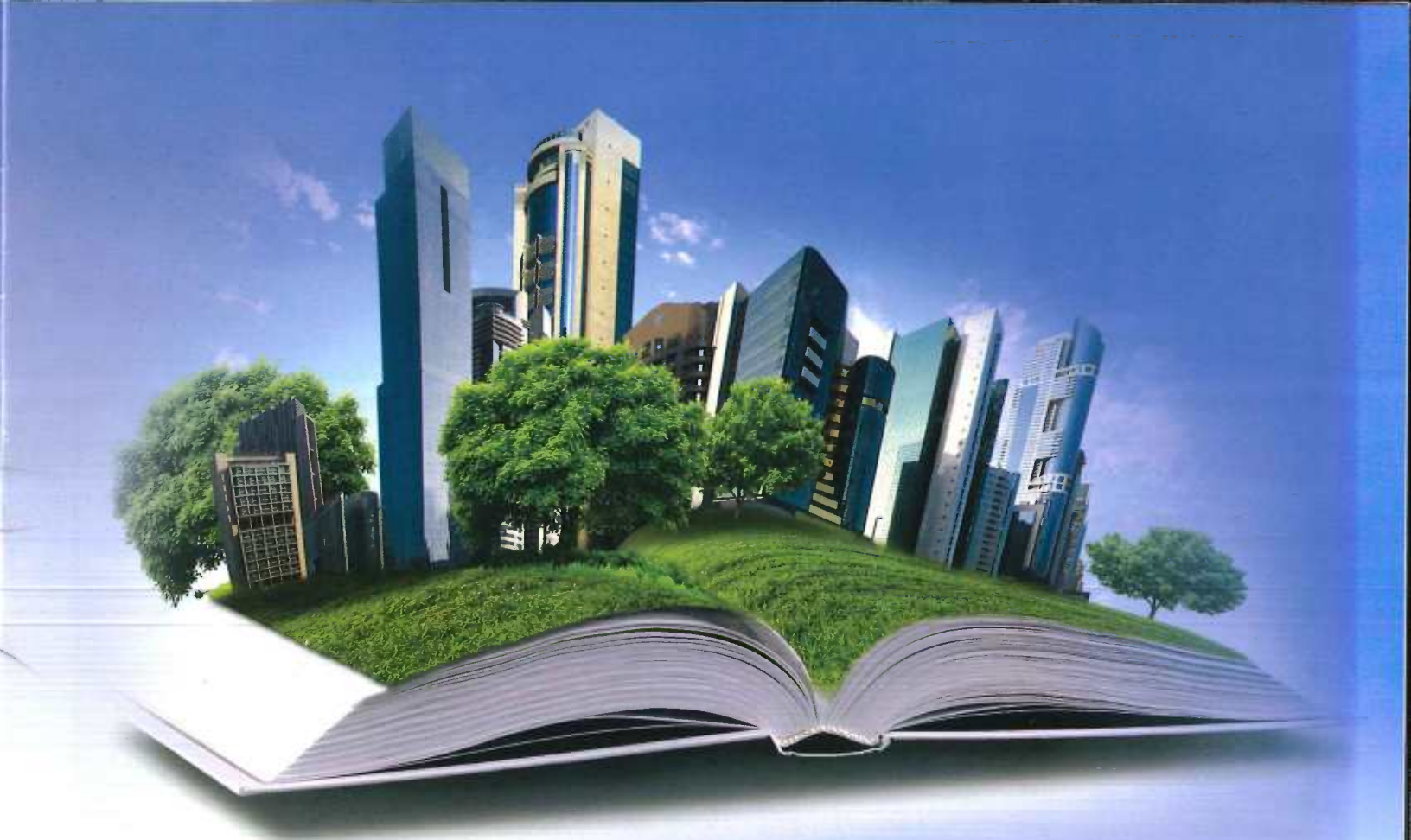


FINANCIAL SECURITY FOR
COMPLETION OF IMPROVEMENTS INDEVELOPMENT
PROJECTS

BY LOUDON L. CAMPBELL, ESQ.

**When a landowner or developer seeks final municipal approval of a subdivision or land development plan,**

the developer must post with the municipality financial security covering the cost of completion of required improvements that are referenced in the approved plan. Improvements that must be financially secured include, but are not limited to: roads, curbs, sidewalks, street lights, fire hydrants, shade trees, water mains and sanitary sewers, storm sewers, storm water management facilities (including detention or retention basins), recreation facilities, open space improvements, traffic control devices and other improvements that may be required by the municipality's subdivision and land development ordinance.



The Pennsylvania Municipalities Planning Code (“MPC”) requires that financial security in the amount of 110% of the cost of completing the improvements must be posted before final approval of the subdivision or land development plan unless such improvements are completed prior to final approval.

The cost of required improvements will vary greatly depending upon the topography, geology, proximity to public roads and utilities, traffic impact and complexity of the project. If a municipality fails to obtain the required financial security from the developer and there is a subsequent failure to complete the required improvements, the municipality may be held responsible to complete the improvements at its own cost in certain circumstances, such as an insolvency of the developer.

Completion of improvements before final approval is rarely done when the developer is borrowing funds for the site improvements as lenders typically require final approval as a condition of financing the development project. If the developer has sufficient funds to complete some of the improvements without borrowing, the developer may proceed to install various improvements before final subdivision or land development approval is obtained from the municipality. To the extent that improvements are completed after preliminary plan approval but before final plan approval, the developer avoids the cost associated with posting the financial security, but must bear some risk that final approval may not be granted as expected.

Acceptable types of financial security include irrevocable letters of credit, restrictive or escrow accounts in a federal or Commonwealth chartered lending institution chosen by the developer, or a surety bond issued by a surety company. The lending institution or surety company must be authorized to conduct business in Pennsylvania. The municipality may also accept other types of financial security, but the municipality may not unreasonably withhold approval of other types of security.

The cost of completing the improvements is estimated as of 90 days following the date scheduled for completion of the improvements by the developer and is typically an amount agreed to by the developer and the municipality. This process is begun by a submission of an estimate prepared by the developer’s engineer and certified to be a fair and reasonable estimate of the cost of completion. Usually, there is a period of negotiation with the municipal engineer before the municipality agrees to the cost. If the developer and municipality are unable to reach agreement on the completion cost, the MPC provides that a third engineer, agreed to by the developer and municipality, shall submit and certify an estimate that shall be presumed fair and reasonable.

If it takes longer than one year to complete the required improvements, a municipality may annually adjust the amount of the financial security in order to ensure that the financial security equals 110% of the cost of the improvements. The amount of the security may be increased by 10% per year if the work is not completed by the end of the first year, or adjusted to an amount not exceeding 110% of the cost of completing the required improvements as reestablished on or about the expiration of the preceding one-year period.

CONTINUED ON PAGE 6



SCAN THIS PAGE
WITH LAYER APP

In larger developments where a project is expected to be built over a period of years, the municipality may authorize the submission of final plans in phases or stages of development. This phasing allows the developer to seek final approval for one phase at a time and avoid the necessity and expense of providing financial security for improvements required in future phases not yet finally approved.

Most developers post a letter of credit, usually issued by the project lender. Completion bonds issued by a surety company are used less frequently. Each device has somewhat different aspects of cancellation, term, renewal and reduction of security upon stages of completion of the improvements.

Generally, if a developer is borrowing funds to finance the improvements, the lender financing the project will issue a letter of credit securing to the municipality the cost of completing the required improvements if the developer defaults. Most lenders will require that the developer have on deposit with the lender sufficient funds to cover the entire amount secured. A typical fee for a letter of credit is in the range of 1% per year of the amount secured. Letters of credit usually allow the municipality to make a demand on the letter of credit and the lender is obligated to make the payment demanded. If the developer disputes the payment, the developer must litigate the matter after the payment has been made to the municipality.

Larger commercial contractors who build public facilities for federal, state or local governments are required to post bid and performance bonds by public procurement laws. Such contractors are experienced in dealing with surety companies that carefully underwrite a contractor's financial condition and historical performance before issuing surety bonds. If the surety company ultimately must pay funds under the bond, the contractor is obligated to pay back the surety company. Developers and contractors

experienced with surety companies are more likely to consider using surety bonds to guarantee completion of the required site improvements in private projects. One advantage is that, unlike letters of credit, a surety company may not require the developer to deposit the amount secured by the surety bond. There is also the likelihood that a surety company might, in some circumstances, aggressively defend against claims under the bond prior to making payment to a municipality. The fee for a surety bond may range up to 2% annually of the amount secured.

**IF THE
DEVELOPER
DISPUTES
THE PAYMENT,
THE DEVELOPER
MUST
LITIGATE
THE MATTER
AFTER THE
PAYMENT HAS BEEN
MADE TO THE
MUNICIPALITY.**

The MPC provides that, as the work of installing the required improvements proceeds, the developer may request the municipality to release such portions of the financial security necessary for payment to the contractor or subcontractor performing a particular site improvement. Within 45 days of the request, the municipal engineer should inspect the improvement to determine if it has been properly completed in accordance with the specified requirements. When the municipal engineer certifies to the municipality that the improvement has been satisfactorily completed, the municipality must authorize release of the financial security in an amount fairly representing

the value of the completed improvements. If the municipality fails to act within 45 days of the request to release security, the municipality is deemed to have approved the release of funds as requested. When this interim release of security is approved, the municipality may retain 10% of the original amount of the posted financial security for the completed improvement until final release of all security.

When all of the required improvements have been completed, the developer notifies the municipality in writing. The municipality must, within 10 days after receipt of written notice of completion, authorize the municipal engineer to inspect all of the improvements. The municipal engineer must mail a report to the municipality within 30 days after receipt of the municipal authorization to inspect and indicate the approval or rejection of the improvements in whole or in part. If any improvements are not approved, the report shall contain a statement of the reasons for disapproval. The municipality is required to notify the developer of its action by certified or registered mail within 15 days of receipt of the report from the engineer. If the municipality or the municipal engineer fails to comply with these time limitations, all improvements are deemed to be approved and the developer is released from all liability under the financial security. If any of the improvements are rejected, the developer must complete the improvements, and the same notification and inspection procedure applies. Where the municipality accepts dedication of some or all of the improvements following completion, the municipality may require posting of financial security in an amount not to exceed 15% of the actual cost to install the improvement to guarantee structural integrity and functioning of such improvements for a period not to exceed 18 months from the date of acceptance of dedication. ■



Loudon L. Campbell has been with Eckert Seamans Attorneys at Law since 1999 and is currently their Chair of the Government Affairs Practice Group. He has served as legal counsel for the Pennsylvania Builders Association for over 35 years, is very well versed in his field of practice, which is focused in the area of land use, development and zoning as well as government affairs. He represents trade and professional associations, corporate clients from a variety of business sectors, and serves on the Board of Directors of SCG Legal (a worldwide network of leading law firms). Mr. Campbell is a member of Dauphin County and Pennsylvania Bar Associations, the Pennsylvania Association of Government Relations, and the Pennsylvania Builders Association. He can be reached at 717.237.6028 or lcampbell@eckertseamans.com.