



## Memorandum

**To** Royce Swensen, City Recorder

**From** Shay Stark, Planner

**Date** July 8, 2022

A handwritten signature in blue ink, appearing to read "Shay Stark", is written over the "From" line.

**Subject:** Ambleview Estates Subdivision - Plat A – Completion Period for Terms and Conditions of Approval

In the process of drafting the Improvement Completion Assurance and Improvement Warranty Agreement (Attached) for Ambleview Estates I have run into an issue that I need some guidance with. The Developer has elected to complete all the required improvements prior to recording the Plat. Per state code he is not required to post an Improvement Completion Assurance (performance guarantee) if he waits to record the Plat until the improvements are completed and accepted by the City. There is a conflict between the City code and State code that will be addressed later. The immediate problem that requires guidance pertains to language found in 10-1A-3: PROCEDURE FOR APPROVAL OF A SUBDIVISION C-3: 3. *The action of approval by the city council shall be valid for a period of six (6) months. In the event that any terms or conditions of approval are not satisfied, or the performance guarantees or other document required for final approval under this code or as a condition of final approval by the city council shall not have been completed within six (6) months from the date of approval by the city council, said approval shall be null and void.*

In the current construction environment with labor and material shortages causing extensive delays it is not physical possible for the Developer to complete construction of the infrastructure improvements, and for City Council to accept those improvements and record the Final Plat within six months.

From the perspective of conflicts in the city code 10-15D-2: TIME LIMIT FOR INSTALLATION; PERFORMANCE GUARANTEE states the following:

*A. All required improvements not in place prior to the approval of the final plat by the City Council shall be installed by the subdivider one year from the date of final plat approval by City Council; provided, however, that upon a showing of good and sufficient cause (i.e., lateness of the final approval date, unexpected delays, etc.), the City Council may extend the date of completion or authorize a longer period of time for completing construction of part or all of the uncompleted improvements to a date not more distant than July 1 of the next succeeding year.*

*B. A performance guarantee securing the installation of all required improvements which have not been completed and accepted by the City Council prior to final plat approval shall be required as a condition of final plat approval. The performance guarantee shall be in accordance with the provisions of chapter 16 of this title.*

Subsection A. grants one year for the installation of improvements and provides a pathway for an extension. The timing for construction of required improvements is separate from the timing for completing the terms and conditions of approval. If a performance guarantee is utilized, then once the guarantee is in place the plat may be recorded and the terms and conditions of approval mentioned in 10-1A-3-C-3 have been fulfilled which is feasible within six months of approval. In the case of recording the plat after the improvements are completed the six-month time frame is not so easily achieved.

Subsection B and various other references in the City code are in conflict with state code with respect to the use of the performance guarantee. Subsection B requires the use of a performance guarantee. The language in state code allows the Developer to choose whether they are going to utilize a performance

guarantee or record the plat after construction is completed which would not require the use of a performance guarantee as follows:

**Effective 5/14/2019**

**10-9a-604.5. Subdivision plat recording or development activity before required infrastructure is completed -- Improvement completion assurance -- Improvement warranty.**

- (1) A land use authority shall establish objective inspection standards for acceptance of a landscaping or infrastructure improvement that the land use authority requires.
- (2) (a) **Before an applicant conducts any development activity or records a plat, the applicant shall:**
  - (i) **complete any required landscaping or infrastructure improvements; or**
  - (ii) **post an improvement completion assurance for any required landscaping or infrastructure improvements.**
- (b) **If an applicant elects to post an improvement completion assurance,** the applicant shall provide completion assurance for:
  - (i) completion of 100% of the required landscaping or infrastructure improvements; or
  - (ii) if the municipality has inspected and accepted a portion of the landscaping or infrastructure improvements, 100% of the incomplete or unaccepted landscaping or infrastructure improvements.
- (c) A municipality shall:
  - (i) establish a minimum of two acceptable forms of completion assurance;
  - (ii) **if an applicant elects to post an improvement completion assurance,** allow the applicant to post an assurance that meets the conditions of this title, and any local ordinances;
  - (iii) establish a system for the partial release of an improvement completion assurance as portions of required landscaping or infrastructure improvements are completed and accepted in accordance with local ordinance; and
  - (iv) issue or deny a building permit in accordance with Section 10-9a-802 based on the installation of landscaping or infrastructure improvements.
- (d) A municipality may not require an applicant to post an improvement completion assurance for:
  - (i) landscaping or an infrastructure improvement that the municipality has previously inspected and accepted;
  - (ii) infrastructure improvements that are private and not essential or required to meet the building code, fire code, flood or storm water management provisions, street and access requirements, or other essential necessary public safety improvements adopted in a land use regulation; or
  - (iii) in a municipality where ordinances require all infrastructure improvements within the area to be private, infrastructure improvements within a development that the municipality requires to be private.
- (3) At any time before a municipality accepts a landscaping or infrastructure improvement, and for the duration of each improvement warranty period, the municipality may require the applicant to:
  - (a) execute an improvement warranty for the improvement warranty period; and
  - (b) post a cash deposit, surety bond, letter of credit, or other similar security, as required by the municipality, in the amount of up to 10% of the lesser of the:
    - (i) municipal engineer's original estimated cost of completion; or

*(ii) applicant's reasonable proven cost of completion.*

- (4) *When a municipality accepts an improvement completion assurance for landscaping or infrastructure improvements for a development in accordance with Subsection (2)(c)(ii), the municipality may not deny an applicant a building permit if the development meets the requirements for the issuance of a building permit under the building code and fire code.*
- (5) *The provisions of this section do not supersede the terms of a valid development agreement, an adopted phasing plan, or the state construction code.*

The definitions of some of the key terms in this section of code are found in **10-9a-103. Definitions.:**

- (11) *"Development activity" means:*
- (a) any construction or expansion of a building, structure, or use that creates additional demand and need for public facilities;*
  - (b) any change in use of a building or structure that creates additional demand and need for public facilities; or*
  - (c) any change in the use of land that creates additional demand and need for public facilities.*
- (26) *"Infrastructure improvement" means permanent infrastructure that is essential for the public health and safety or that:*
- (a) is required for human occupation; and*
  - (b) an applicant must install:*
    - (i) in accordance with published installation and inspection specifications for public improvements; and*
    - (ii) whether the improvement is public or private, as a condition of:*
      - (A) recording a subdivision plat;*
      - (B) obtaining a building permit; or*
      - (C) development of a commercial, industrial, mixed use, condominium, or multifamily project.*
- (23) *"Improvement completion assurance" means a surety bond, letter of credit, financial institution bond, cash, assignment of rights, lien, or other equivalent security required by a municipality to guaranty the proper completion of landscaping or an infrastructure improvement required as a condition precedent to:*
- (a) recording a subdivision plat; or*
  - (b) development of a commercial, industrial, mixed use, or multifamily project.*

Please note that based upon the definitions provided in the State code, the term development activity in 10-9A-604.5-2-a is different than infrastructure improvements. Those items described in the definition for Development Activity are typically activities that occur after the infrastructure improvements are in place and thus cause the need for public facilities. 10-9A-604.5 states that the Developer must complete the infrastructure improvements before recording or provide a form of improvement completion assurance. This choice is reinforced in subsection 2-b and 2-c-ii with the language "If an applicant elects to post an improvement completion assurance"....

In 2019 the State Legislature passed amendments to the Municipal Land Use Development and Management Act that removed the language that allowed municipalities to impose stricter requirements or higher standards than the state law requires as follows:

Section 3. Section **10-9a-104** is amended to read:

565 **10-9a-104. Municipal standards.**

566 (1) ~~[Except as provided in Subsection (2), a municipality may enact a land use~~  
567 ~~regulation imposing stricter requirements or higher standards than are required by this chapter.]~~  
568 This chapter does not prohibit a municipality from adopting the municipality's own land use

569 standards.

570 (2) ~~[A]~~ Notwithstanding Subsection (1), a municipality may not impose a requirement,  
571 regulation, condition, or standard that conflicts with a provision of this chapter, other state law,  
572 or federal law.

As Elk Ridge has rarely had Developers of large subdivisions elect to complete all improvements before recording the plat I would suggest that the Amblevue Estates Subdivision Improvement Completion Assurance Agreement go before City Council for consideration with language that specifically extends the completion period of terms and conditions of approval to match the construction duration.

If this is not the direction the City would prefer to go please provide guidance as to how the City would like this issue addressed.

-End-

Attachment:

Draft Ambelview Estates Subdivision Plat A Improvement Completion Assurance and Improvement Warranty Agreement