



CITY of NOVI CITY COUNCIL

Agenda Item 3
April 9, 2012

SUBJECT: Approval of Ordinance Text Amendment 12-173.04, as recommended by the Ordinance Review Committee, to amend Chapter 26.5, Performance Guarantees, of the City of Novi Code to revise requirements for posting a guarantee to allow posting a performance bond. **First Reading**

SUBMITTING DEPARTMENT: Department of Public Services, Engineering Division
Community Development Department

CITY MANAGER APPROVAL: 

BACKGROUND INFORMATION:

The Novi Code of Ordinances requires that a financial guarantee be posted as a condition of the right-of-way permit any time a building permit is issued for a site that is abutting a public street. The intent of the requirement is to protect the public street from damage resulting from the development of the adjacent parcel or lot. The ordinance specifically requires in Section 26.5-34(d) that an amount of \$5,000 "be posted in the form of cash or letter of credit unless otherwise permitted by the city engineer for reasons of financial hardship." The ordinance has been in place since 2008.

In December 2011, staff received the first ever request for relief from a builder under the financial hardship clause. Defining financial hardship is difficult and establishing criteria to prove it is even more difficult. It was determined that further clarification was necessary in the ordinance for consistent application. The attached memo was provided to the Ordinance Review Committee in January 2012 for review and potential revision to the ordinance in this regard.

The Ordinance Review Committee met on March 6, 2012 and recommended removal of the wording regarding financial hardship from the ordinance section and to add language that allows the acceptance of a performance bond as a financial guarantee (see attached minutes). A performance bond also guarantees satisfactory completion of the work by the contractor similar to cash or a letter of credit, but is issued by a third party guarantor that would be involved in resolving performance issues. A third party is not involved in resolving performance issues when a letter of credit or cash is used for financial guarantees.

The City Attorney has drafted the attached ordinance language based on the recommendation from the Committee.

RECOMMENDED ACTION: Approval of Ordinance Text Amendment 12-173.04, as recommended by the Ordinance Review Committee, to amend Chapter 26.5, Performance Guarantees, of the City of Novi Code to revise requirements for posting a guarantee to allow posting a performance bond. **First Reading**

	1	2	Y	N
Mayor Gatt				
Mayor Pro Tem Staudt				
Council Member Casey				
Council Member Fischer				

	1	2	Y	N
Council Member Margolis				
Council Member Mutch				
Council Member Wrobel				

PART II.

Severability. Should any section, subdivision, clause, or phrase of this Ordinance be declared by the courts to be invalid, the validity of the Ordinance as a whole, or in part, shall not be affected other than the part invalidated.

PART III.

Savings Clause. The amendment of the Novi Code of Ordinances set forth in this Ordinance does not affect or impair any act done, offense committed, or right accruing, accrued, or acquired or liability, penalty, forfeiture or punishment, pending or incurred prior to the amendment of the Novi Code of Ordinances set forth in this Ordinance.

PART IV.

Repealer. All other Ordinances or parts of Ordinances in conflict herewith are hereby repealed only to the extent necessary to give this Ordinance full force and effect.

PART V.

Effective Date: Publication. The provisions of this Ordinance shall become effective fifteen (15) days after its adoption and shall be published within 15 days of its adoption by publication of a brief notice in a newspaper circulated in the City, stating the date of enactment and the effective date of the ordinance, a brief statement as to the subject matter of this Ordinance and such other facts as the Clerk shall deem pertinent, and that a copy of the Ordinance is available for public use and inspection at the office of the City Clerk.

Made, Passed and Adopted by the Novi City Council this ____ day of _____, 2012.

Robert J. Gatt, Mayor

Maryanne Cornelius, City Clerk

Certificate of Adoption

I hereby certify that the foregoing is a true and complete copy of the ordinance adopted at the regular meeting of the Novi City Council held on the ____ day of _____, 2012.

Maryanne Cornelius, City Clerk

Adopted:
Published:
Effective:

STATE OF MICHIGAN

COUNTY OF OAKLAND

CITY OF NOVI

ORDINANCE NO. 12- 173.04

AN ORDINANCE TO AMEND THE CITY OF NOVI CODE OF ORDINANCES, CHAPTER 26.5, "PERFORMANCE GUARANTEES," ARTICLE II, "SPECIFIC REQUIREMENTS," SECTION 26.5-34, "SITE RESTORATION BOND," IN ORDER TO REVISE THE REQUIREMENTS FOR POSTING A GUARANTEE TO ALLOW POSTING A PERFORMANCE BOND

THE CITY OF NOVI ORDAINS:

PART I. That Chapter 26.5, "Performance Guarantees," of the City of Novi Code of Ordinances, Article II, "Specific Requirements," Section 26.5-34, "Site Restoration Bond," is hereby amended to read as follows:

26.5-34 Site restoration bond:

- (a) No change.
- (b) No change.
- (c) No change.
- (d) In addition to any other performance guarantees permitted in this section or elsewhere in the city code, as a condition of issuance of any building permit for construction on property abutting a public street or road, the city engineer shall require a site restoration guarantee as provided and for the purposes set forth in this section in the amount of five thousand dollars (\$5,000.00), to be posted in the form of cash, ~~or~~ letter of credit, or performance bond in a form acceptable to the City unless otherwise permitted by the city engineer for reasons of financial hardship. In the event there is damage or other prohibited condition to the public street or road, or other public improvement, directly adjacent to the property for which the site restoration guarantee has been posted, there shall be a rebuttable presumption that the damage or condition has been caused by or in connection with the activity occurring under the building permit, and the city may use the guarantee for the purposes stated in subsections 26.5-34(a)(1) – (5). The building permit holder may rebut the presumption by establishing that the damage or condition was caused by another or by other activity. If the amount of the guarantee is insufficient to repair or remedy the damage or condition, the city may require the posting of an additional guarantee. The permit holder shall ~~be at~~ all times remain responsible for repair of any damage or condition actually caused by the permit holder.

PART II.

Severability. Should any section, subdivision, clause, or phrase of this Ordinance be declared by the courts to be invalid, the validity of the Ordinance as a whole, or in part, shall not be affected other than the part invalidated.

PART III.

Savings Clause. The amendment of the Novi Code of Ordinances set forth in this Ordinance does not affect or impair any act done, offense committed, or right accruing, accrued, or acquired or liability, penalty, forfeiture or punishment, pending or incurred prior to the amendment of the Novi Code of Ordinances set forth in this Ordinance.

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Repealer. All other Ordinances or parts of Ordinances in conflict herewith are hereby repealed only to the extent necessary to give this Ordinance full force and effect.

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Effective Date: Publication. The provisions of this Ordinance shall become effective fifteen (15) days after its adoption and shall be published within 15 days of its adoption by publication of a brief notice in a newspaper circulated in the City, stating the date of enactment and the effective date of the ordinance, a brief statement as to the subject matter of this Ordinance and such other facts as the Clerk shall deem pertinent, and that a copy of the Ordinance is available for public use and inspection at the office of the City Clerk.

Made, Passed and Adopted by the Novi City Council this ____ day of _____, 2012.

Robert J. Gatt, Mayor

Maryanne Cornelius, City Clerk

Certificate of Adoption

I hereby certify that the foregoing is a true and complete copy of the ordinance adopted at the regular meeting of the Novi City Council held on the ____ day of _____, 2012.

Maryanne Cornelius, City Clerk

Adopted:
Published:
Effective:

ORDINANCE REVIEW COMMITTEE
March 6, 2012 | 6:30 p.m.
Mayor's Conference Room | Novi Civic Center | 45175 W. Ten Mile Road

Mayor Gatt called the meeting to order at 6:40 p.m.

ROLL CALL: Mayor Gatt, Council Member Margolis, Council Member Mutch (absent)

ALSO PRESENT: Victor Cardenas, Assistant City Manager
Andy Gerecke, Building Official
Cortney Hanson, Deputy City Clerk
Thomas Schultz, City Attorney

APPROVAL OF AGENDA: Agenda was unanimously approved as presented.

AUDIENCE COMMENT: None

MATTERS FOR DISCUSSION:

1. Right-of-Way Performance Guarantee

Mr. Gerecke began the discussion by explaining that there is a clause in Section 26.5-34(d) that an amount of \$5,000 "be posted in the form of cash or letter of credit unless otherwise permitted by the city engineer for reasons of financial hardship." Engineering has asked that the specific section be removed, mainly because it is difficult to establish criteria to define what qualifies as financial hardship.

Mr. Schultz said there are at least half a dozen different types of guarantees in Chapter 26.5 and this was the only one where administration was able to waive the financial guarantee. He explained that they had to put together a policy in December 2011 when someone actually made the request for relief due to financial hardship. He added that it was difficult to put the policy together because there is no way to define financial hardship. He said they could either keep the waiver option in the ordinance as they already have a policy in place or make it similar to other financial guarantees where Council would make the final decision instead of administration.

Mayor Gatt said the City has only had one circumstance where the builder requested a waiver due to financial hardship. He said since it has only happened once and we already put a policy into place, they should not change it unless it becomes a problem.

Member Margolis said she felt the opposite way. She said there needed to be a certain level of accountability on the builder's behalf which is why it is in the ordinance that the City obtains cash or a letter of credit. She added that any type of financial guarantee waiver should have to go in front of City Council instead of being approved by administration.

Mayor Gatt asked why they couldn't accept a performance bond. Mr. Schultz explained that performance bonds are currently accepted when the amount exceeds \$250,000 and that taking a bond is not as good as receiving a letter of credit or cash. He said there isn't a problem with changing the ordinance to allow a performance bond as well as cash or a letter of credit.

Moved by Margolis, Seconded by Gatt: Carried Unanimously

To remove wording regarding financial hardship from Section 26.5-34(d) and add that a performance bond is an acceptable form of financial guarantee.

2. Proposed Outdoor Gathering Ordinance Changes

Mr. Cardenas began by explaining a temporary special land use permit can be issued for a temporary tent for a maximum of five days in any six-month period. Once an applicant has reached the limit on temporary special land use permits, if they expect over 200 people at the event, they file an outdoor gathering permit application for each event. There is no limit on the number of outdoor gathering permits allowed per applicant or per business. He explained that the issue arose due to businesses submitting applications only a few days before the event, which is not enough time for the Police Department, Building Department and Fire Department to review the application. He said the proposal is to change the ordinance to require applicants to file the application a minimum of ten business days before the event. He said currently the ordinance requires 30 days however the Clerk's Office, Police Department, Building Department and Fire Department have all agreed that ten business days would be sufficient time to review the application.

Mayor Gatt asked why we would change the timeframe from 30 days to ten days because it is only shortening the review time. Mr. Cardenas explained it gave a more reasonable timeframe for applicants to abide by. Mayor Gatt said it was basically a compromise then.

Mayor Gatt asked what would happen if the business owner did not know how many people would be in attendance. Ms. Hanson explained that it is up to the business owner to make an estimate, but if they do not expect more than 200 people, they do not need to file an application for an outdoor gathering.

Mr. Schultz added that most businesses do not file very many outdoor gathering permit applications, but in the specific instance of Paradise Park, he had intended to build a pavilion on the premises. Since he had not built the pavilion, he had been applying for temporary special land use permits and subsequently applies for outdoor gathering permits. Mayor Gatt asked what would happen if he did build the permanent structure. Mr. Schultz said he would no longer have to apply for temporary special land use permits or outdoor gathering permits.

Moved by Margolis, Seconded by Gatt: Carried Unanimously

To amend the filing deadline in the Outdoor Gathering ordinance from 30 days to ten business days.

The meeting was adjourned at 7:06 p.m.

Recorded by: Courtney Hanson
Deputy City Clerk



MEMORANDUM

TO: CLAY PEARSON, CITY MANAGER
FROM: ROB HAYES, DIRECTOR OF PUBLIC SERVICES/CITY ENGINEER *RH*
SUBJECT: RIGHT-OF-WAY PERFORMANCE GUARANTEE
DATE: JANUARY 27, 2012

The Novi Code of Ordinances requires that a financial guarantee be posted as a condition of the right-of-way permit any time a building permit is issued for a site that is abutting a public street. The intent of the requirement is to protect the public street from damage resulting from the development of the adjacent parcel or lot. The ordinance specifically requires in Section 26.5-34(d) that an amount of \$5,000 "be posted in the form of cash or letter of credit unless otherwise permitted by the city engineer for reasons of financial hardship." The ordinance has been in place since 2008.

In December 2011, staff received the first ever request for relief from a builder under the financial hardship clause. Defining financial hardship is difficult and establishing criteria to prove it is even more difficult. In order to respond to this particular request, the attached process was developed. It requires a signed affidavit from the builder to attest to the financial hardship and allows the builder to post a significantly less expensive surety bond instead of cash or a letter of credit. However, one of the reasons for adoption of Chapter 26.5 in 2008 relating to performance guarantees was to develop a consistent requirement for the form of the guarantee, which is cash or a letter of credit. The posting of a bond is a departure from the standards in the ordinance, but was permitted in this case due to the financial hardship clause relating to the right-of-way financial guarantee.

The requirement for the form and amount of the performance guarantee is clearly stated in Section 26.5-7 as "cash, certified check, or irrevocable letter of credit" for all amounts up to \$250,000. There is a provision in Section 26.5-12 that allows the City Council to "authorize exceptions to the requirements and conditions as set forth in this chapter, including, but not limited to, the form, timing, waiver, or reduction of performance guarantee amounts." A review of the ordinance reveals that among the required performance guarantees for site developments, there are no others with similar language allowing administrative relief of a guarantee due to financial hardship.

In order to be consistent with the rest of the requirements under Chapter 26.5, we propose a revision to Section 26.5-34(d) to remove the financial hardship language (see attached). This would make the process for performance guarantee relief consistent with the other site development components requiring performance guarantees as outlined in Section 26.5-12, as a City Council action.

cc: Victor Cardenas, Assistant City Manager

Policy for Consideration of Waiver of Site Restoration Guarantee required under Section 26.5-34(d) of the Novi City Code by the City Engineer for Financial Hardship

In accordance with Section 26.5-34(d) of the Novi City Code, the City Engineer may permit an alternative form of guarantee or may waive the required \$5,000 site restoration guarantee required as a condition of issuance of any building permit for construction on property abutting a public street or road.

Requests for consideration of alternative form of guarantee or waiver shall be made in written form addressed to the City Engineer. Requests must include a completed application in a form provided by the City. The City Engineer shall consider requests and respond within 15 business days, and shall consider the following:

- An individual property owner seeking a reduction or waiver must meet the standards for property tax poverty exemption standards of the Novi City Assessor (income below the published Federal poverty level).
- A contractor seeking a reduction or waiver must:
 - establish that the scope of work will not cause risk to infrastructure of right of way improvements, including assurance that pavement, curbs, gutters, and sidewalks will be protected and that tracked equipment will not be used;
 - confirm that the cost of the improvement is under \$250,000;
 - verify by affidavit that they do not have sufficient funds on hand to post the amount in cash and that they cannot secure a letter of credit; and,
 - attest that they are not currently building any other improvements in the City of Novi for which a reduction or waiver has been granted.

AFFIDAVIT REGARDING FINANCIAL HARDSHIP

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

_____ , being first duly sworn, does hereby attest and verify,
on behalf of _____ :

1. That I am a duly authorized representative of _____ , the contractor responsible for building the improvements to be located at _____ , in the City of Novi, Michigan.

2. That I am aware of the requirement under Section 26.5-34(d) of the Novi City Code that a site restoration guarantee is required in the amount of \$5,000.

3. That I do not have sufficient cash or other funds available to post the required site restoration guarantee.

4. That I have attempted to and have been unable to secure a letter of credit in the amount of \$5,000.

5. That I have secured and will post a performance bond in the amount of \$5,000 as an alternative to the required cash or letter of credit.

6. That the improvements being proposed will not cause risk to infrastructure within the City of Novi's right-of-way, and that I will protect the pavement, curbs, gutters, and sidewalks within the City of Novi's right-of-way during construction.

7. That tracked equipment will not be used in the right-of-way during the construction of the improvements.

8. That the cost of the improvements is less than \$250,000.

9. That the above-named entity is not currently constructing any other improvements within the City of Novi for which a reduction or waiver has been granted under Section 26.5-34(d).

Further, Affiant sayeth not.

Subscribed and sworn to before me this
_____ day of _____, _____

Notary Public
Oakland County, Michigan
Acting in Oakland County, Michigan
My Commission Expires: _____

PROPOSED ORDINANCE REVISIONS

Sec. 26.5-34. - Site restoration bond.

- (a) No change.
- (b) No change.
- (c) No change.
- (d) In addition to any other performance guarantees permitted in this section or elsewhere in the city code, as a condition of issuance of any building permit for construction on property abutting a public street or road, the city engineer shall require a site restoration guarantee as provided and for the purposes set forth in this section in the amount of five thousand dollars (\$5,000.00), to be posted in the form of cash or letter of credit ~~unless otherwise permitted by the city engineer for reasons of financial hardship~~. In the event there is damage or other prohibited condition to the public street or road, or other public improvement, directly adjacent to the property for which the site restoration guarantee has been posted, there shall be a rebuttable presumption that the damage or condition has been caused by or in connection with the activity occurring under the building permit, and the city may use the guarantee for the purposes stated in subsections 26.5-34(a)(1)—(5). The building permit holder may rebut the presumption by establishing that the damage or condition was caused by another or by other activity. If the amount of the guarantee is insufficient to repair or remedy the damage or condition, the city may require the posting of an additional guarantee. The permit holder shall be all times remain responsible for repair of any damage or condition actually caused by the permit holder.