



For Staff Use Only	
S Number _____	BM _____ Page _____

STORMWATER IMPROVEMENTS PERFORMANCE GUARANTEE AGREEMENT

1. **Purpose:** This Stormwater Improvements Performance Guarantee Agreement ("Agreement") is intended to ensure that developers properly install all required stormwater improvements in a timely manner, in accordance with approved plats and construction plans. This agreement is not executed for the benefit of persons providing services or material to the stormwater/project, or for the benefit of persons buying lots or homes in the stormwater, or other possible third party beneficiaries.

2. **Parties:** This Agreement is between the County of Wake, North Carolina (the "County") and *[Insert Name of "Developer"]* _____
 - a. *[Insert Developer's Phone Number]* _____
 - b. *[insert Developer's Email Address]* _____
 - c. *[Insert Developer's Mailing Address]* _____

3. **Term:** This Agreement shall remain in full force and effect until such time as all stormwater improvements required by this Agreement are complete and Wake County has issued a Stormwater Certificate of Completion.

4. **Stormwater/Project:** This Agreement applies to property the Developer is developing as *[Insert Project Name]* _____, Phase(s) _____, recorded in Book(s) of Maps and Page(s) to be provided upon plat recordation.

5. **Party Responsibility for Completion of Improvements:** The Developer is solely responsible for the construction, installation and completion at the Developer's sole expense, of the following improvements:
 - a) drainage facilities and easements;
 - b) stormwater management devices;
 - c) removal of erosion and sedimentation control devices; and
 - d) any other on- or off-site improvements required by county ordinance or stormwater plat approval.

6. **Standards:** The Developer will construct and install improvements required in Article 9 of the Wake County Unified Development Ordinance in accordance with all applicable County stormwater regulations and any other applicable Federal, State or County standards in effect at the time of stormwater plat approval.

7. **Estimate of Costs:** The Developer and their Engineer hereby agree and state that the following estimates for the cost of completion of stormwater improvements include the cost

of design, engineering and construction and project management and supervision. The Developer further represents that the Developer’s estimates of such costs represent the Developer’s good-faith efforts to accurately predict the total costs of such improvements. The Developer hereby agrees that the construction of the improvements will be completed on or prior to *[insert “Construction Completion Date”]* _____, which date shall not exceed four years from the date of execution of this Agreement.

The Developer estimates, based on the certified formal cost estimate(s) attached hereto, that the total cost of the construction of the improvements will be as follows:

Improvement	Estimate of Probable Cost	Construction Completion Date
a.	\$	
b.	\$	
c.	\$	
d.	\$	
e.	\$	
f.	\$	
Subtotal; Estimated Supervision/General Contractor and Project Management Costs (for all above-listed improvements)	\$	
Plus 25% of Total Estimated Cost	+	
	\$	
TOTAL AMOUNT OF FINANCIAL SECURITY REQUIRED >>>>>		

Note: Pursuant to Wake County stormwater regulations, estimated costs must be itemized by improvement type and certified by the applicant’s engineer. Cost estimates must be based on industry norms within Wake County. Itemized costs estimates must be attached to this Agreement and sealed by the Engineer.

8. **Security:** To secure the performance of the Developer’s obligations under this Agreement, the Developer will provide the County either an irrevocable letter of credit, performance bond or a cash deposit in the amount of *[insert total amount of financial security required, from above]* \$_____.

- a. **Letter of Credit:** If the Developer provides a letter of credit, it must be valid for the term of this Agreement, automatically renewed on an annual basis, until such time as the Stormwater Certificate of Completion has been issued and the County authorizes release of the performance guarantee; the Letter of Credit must be payable to the County at any time upon presentation of (a) an affidavit executed by an authorized County Official stating that the Developer is in default under this Agreement, and (b) the original or copy of the letter of credit. The letter of credit will be issued by a financial institution approved by the County and located within Wake County, North Carolina, and must be irrevocable. An authorized county official for purpose of this subsection shall include the County Manager, the Planning & Development Services Director, the Finance Director or their designees.

- b. Performance Bond:** Some basic information should be established in the bond language:
- 1. Establish the total dollar amount required for the bond** (125% of the cost of construction of stormwater improvements)
 - 2. Specify the length of the bond.**
The release of the bond should be tied to completion and final approval of the STP and then posting of a maintenance bond.
 - 3. Set the requirements for notice of defect or lack of maintenance.**
The bond shall outline the time period for completion the stormwater improvements. In addition, the bond should establish a time period for response from the bonding company if the permittee fails to meet their obligation.
 - 4. Bond enforcement.**
If the permittee does not successfully complete all required work or violates any requirement of the bond, the local government shall spell out any enforcement measures it deems necessary to ensure project completion and proper maintenance. Bonds often provide for a local government to take corrective measures and to charge the cost to the permittee. These costs can include the actual cost of any work deemed necessary as well as administrative and inspection costs. Local governments may also reserve the right to solicit a new bid and contract for the correction of problems after expiration of the time limits, with liability for costs assigned to the current contractor and the insurance company or bank.
- c. Cash Deposit:** a cashier's check shall be provided in the amount of the surety. Cash deposits will be placed in a separate Wake County account and designated for this purpose.
- 9. Reduction of Security:** Once all of the required improvements are at least 50% complete, as certified by a North Carolina Registered Professional Engineer, the developer may request, subject to County approval, a reduction in the total financial security by the ratio that the completed improvements bear to the total estimated cost of improvements required, provided that no more than one such reduction may be permitted prior to releasing the performance guarantee.
- 10. Release of Security:** The County will release the performance guarantee after all stormwater requirements are met and the Stormwater Certificate of Completion has been issued.
- 11. Events of Default:** The following conditions, occurrences, omissions or actions will constitute a default by the Developer:
- a. Developer's failure to either (1) complete the required improvements within the timeframe noted in 7. Estimate of Costs; (2) provide the County a properly executed As Built Package including the Engineer's Certification stating that all required stormwater improvements have been constructed and are functioning as designed; Developer's insolvency, the appointment of a receiver for the Developer, or the filing of a voluntary or involuntary petition in bankruptcy respecting the Developer; or
 - b. Foreclosure of any lien against the property or a portion of the property, or assignment or conveyance of the property in lieu of foreclosure.

12. **Notice of Default:** The County need not provide any notice before declaring a default under Section 11a. Within 10 days after any appointment of a receiver for the Developer, filing of a bankruptcy petition respecting the Developer, foreclosure against the property, or conveyance of the property in lieu of foreclosure, the Developer will give the County written notice of such event.
13. **County's Rights Upon Default:** When any event of default occurs, the County may draw on the financial security to the extent of its face value. The County will have the right to use the drawn funds to construct, install or arrange for the construction or installation of any stormwater improvements. The County will have the right to conduct such work itself, or to contract with a third party to do so. The Developer grants the County, its successors, assigns, agents, contractors, and employees, a nonexclusive right to enter the property for the purposes of constructing or installing stormwater improvements.
14. **Indemnification:** The Developer expressly agrees to indemnify and hold the County harmless from and against any claims, cost, and liability for injury or damage received or sustained by any person or entity in connection with work performed under this Agreement. The Developer further agrees to aid and defend the County if the County is named as a defendant in an action concerning work performed under this Agreement except where the action is brought by the Developer. The Developer is not an agent or employee of the County.
15. **No Waiver:** No waiver of any provision of this Agreement will constitute a waiver of any other provision, nor will it constitute a continuing waiver, unless expressly provided for by a written amendment to this Agreement. Nor will any waiver of any default under this Agreement constitute a waiver of any subsequent default of defaults of the same type. The County's failure to exercise any right under this Agreement will not constitute the approval of any wrongful act by the Developer. The County's exercise of any right under this Agreement will not relieve the Developer from any obligation to construct or install stormwater improvements under the County's ordinances and will not constitute a waiver of the County's right to exercise any enforcement action under those ordinances.
16. **Amendment or Modification:** The parties to this Agreement may amend or modify this Agreement only by written instrument executed on behalf of the County by the County Attorney (or his designee) and by the Developer (or the Developer's authorized officer). An amendment or modification must be properly notarized before it is effective.
17. **Attorney's Fees:** Should either party be required to resort to litigation, arbitration, or mediation to enforce the terms of this Agreement, the prevailing party, whether plaintiff or defendant, will be entitled to costs - including reasonable attorney's fees and expert witness fees - from the opposing party.
18. **Third Party Rights:** No person or entity not a party to this Agreement will have any right of action under this Agreement.
19. **Scope:** This Agreement constitutes the entire agreement between the parties, and no statement, promise, or inducement not contained in this Agreement will be binding on the parties.

- 20. **Time:** For the purpose of computing time periods under this Agreement, times in which war or civil or natural disasters occur will not be included if such occurrences reasonably prevent the Developer or County from performing this Agreement.
- 21. **Severability:** If the courts hold any part of this Agreement to be illegal or otherwise unenforceable, such illegality or unenforceability will not affect the validity of any other part, and the rights of the parties will be construed as if the part was never a part of the Agreement.
- 22. **Notice:** Any notice required by this Agreement will be considered effective when personally delivered in writing, or 3 days after being deposited with the U.S. Postal Service, postage prepaid, and addressed as follows:

if to the Developer: *[Insert Name of "Developer"]*_____

a. *[Insert Developer's Phone Number]*_____

b. *[Insert Developer's Email Address]*_____

*[insert Developer's Mailing Address]*_____ if
to the County:

Wake County Planning and Development Services
Wake County Office Building
P.O. Box 550
Raleigh, NC 27602

- 23. **Immunity:** Nothing contained in this Agreement constitutes a waiver of the County's sovereign, governmental or public official immunities under state law.

[For one or more individuals]

Dated this _____ day of _____, 20____.

By: _____

Name(s) of Developer (s)

North Carolina
_____ County

I, _____, a Notary Public for said County and State, do hereby certify that _____ personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal, this the _____ day of _____, 20____.

Wake County Stormwater Performance Agreement

(Official Seal) _____
Notary Public

My commission expires _____, 20____.

[For a Corporation]

Dated this _____ day of _____, 20____.

by: _____
(Signature)

[Title and name printed]

North Carolina

_____ County

I, _____, a Notary Public for said County and State, do hereby certify that _____, personally appeared before me this day and stated that he is _____ of _____ and acknowledged, on behalf of _____, the due execution of the foregoing instrument.

Witness my hand and official seal, this _____ day of _____, 20____.

(Official Seal)

Notary Public

My commission expires _____, 20____.

AGREEMENT ACCEPTED BY:

Timothy W. Maloney, PLA, ASLA

_____, Wake County Planning and Development Services Director

Dated this _____ day of _____, 20____.