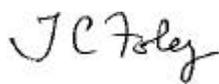


COUNTY OF ALBEMARLE

EXECUTIVE SUMMARY

AGENDA TITLE: Performance Bonds for Development	AGENDA DATE: February 5, 2014
SUBJECT/PROPOSAL/REQUEST: Review existing County policies and procedures for performance bonds with development projects	ACTION: INFORMATION:
STAFF CONTACT(S): Foley, Walker, Davis, Kamptner, Graham, Brooks, and McCulley	CONSENT AGENDA: ACTION: INFORMATION: X
PRESENTER (S): N/A	ATTACHMENTS: No
LEGAL REVIEW: Yes	REVIEWED BY: 

BACKGROUND:

Over the last year, individual Board members have requested information regarding the County's program for performance bonds associated with development projects. This executive summary provides an overview of the program.

As required by the Subdivision, Water Protection, and Zoning Ordinances, Community Development manages performance bonds that ensure that necessary improvements with development projects can be completed by the County if the developer fails to do so. State law does not mandate that localities use performance bonds, nor does the State require localities to complete the improvements if the developer fails to do so. State law enables localities to require that required improvements be bonded in order to ensure that public health, safety and welfare can be protected as a result of development activities. The most common of these performance bonds are associated with subdivisions and water protection. Subdivision bonds are used to ensure that purchasers of the lots will have the improvements required by the County's Subdivision Ordinance. These improvements include roads and sidewalks, water and sewer, storm sewers or culverts, and required amenities such as trails or recreational facilities. Water protection bonds primarily ensure that erosion and sediment control measures and stormwater management facilities and non-structured best management practices will be properly installed, operated, and maintained. Somewhat different than the subdivision bond, these performance bonds are intended to protect others from impacts associated with development, such as limiting the amount of sediment that can flow downstream as a result of construction. The Zoning Ordinance contains provisions to ensure improvements are installed, including site improvements required in conjunction with a site plan not completed at the time of a certificate of occupancy, and conditions of zoning, such as proffers, special use permit conditions, and variances approved by the Board of Zoning Appeals.

Community Development typically manages around 400 bonds with a total value in the range of \$50 Million to \$70 Million (379 bonds valued at \$63.8 Million as of January 22nd). The number and value of the bonds held by the County continuously fluctuates as new projects are bonded and bonds are released for projects with completed improvements. In recent years, approximately 80-100 new bonds have been accepted, with a slightly larger number of bonds released. The number of bonds released has been larger in recent years because of a renewed effort to encourage developers to complete projects and improving market conditions. Projects often have multiple bonds. For example, a new subdivision will typically have a subdivision bond for the improvements and a water protection bond for the erosion and sediment control and stormwater management, but it also may have a proffer bond.

STRATEGIC PLAN:

Goal 5: Ensure the health and safety of the community.

DISCUSSION:

The focus for this discussion is the Subdivision and Water Protection Ordinance bonds, as those constitute about 80% of the performance bonds held by the County and 90% of the value of those bonds. There are five phases of the bond program that will be discussed: 1) bond acceptance, 2) inspections and bond reduction, 3) bond renewal, 4) bond release, and 4) bond demand.

Bond Acceptance

At the time a plan or plat is tentatively approved, the property owner (developer) is informed when there is a need to bond the project based on the ordinance requirements. The developer then notifies the County of its interest in

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moving forward and the type of bond they wish to use. Generally, there are three types of bonds the County accepts: 1) Cash or Certified Check, 2) a Letter of Credit, or 3) a Surety from a Virginia approved institution. Based on the type of bond being pursued, staff will then develop a bond agreement. The bond agreement has two major components: 1) The terms and conditions of the bond agreement, which specifies the responsibilities and rights for both the County and property owner under the bond, and 2) the bond amount, which reflects the anticipated cost of the improvements. Community Development staff first calculates the bond amount based on the improvements shown on the approved plan and drafts the agreement based on the type of bond being used. Once the developer signs the agreement, it is then reviewed and approved by the County Attorney to ensure the County's interest in the agreement is protected. Finally, Community Development staff, usually the County Engineer or Zoning Administrator, signs the agreement on behalf of the County. It is noted the Subdivision Ordinance assumes the developer will complete the improvements prior to recording the subdivision plat, but allows the developer to post a subdivision bond in lieu of first completing the improvements.

Inspection and Bond Reduction

Prior to 2008, Community Development had 2 full time staff to inspect work and manage bonds. In 2008, those positions were eliminated and inspection of public roads was transferred to VDOT. However, shortly after this time, VDOT also stopped regular inspection of subdivision improvements, and the program evolved to one that relies on certification and documentation provided when a bond reduction or release is requested. Bond reductions ("partial release") are a requirement under State law as construction of bonded improvements progresses. When the developer requests a bond reduction, the County has 30 days to respond by either approving the reduction request or disallowing the request and noting the deficiencies. If the County does not respond within 30 days after a request, the request is considered approved and the bond reduction must be made. Community Development prioritizes these requests to ensure a response within 30 days, but this is proving increasingly challenging as workload increases and restricts other work initiatives.

Bond Renewal

The bond agreements include a schedule for completion of improvements and an expiration date based on when the improvements are to be completed pursuant to this schedule. Given market conditions over the last five years, few subdivisions have completed the improvements within this time. When the expiration date approaches, a decision must be made to extend the agreement (renewal) or to make a demand on the bond by declaring the developer to be in default of the bond agreement and the County complete the improvements. In making this evaluation, staff determines whether an extension would be in the interest of assuring public health, safety and welfare, while recognizing a bond demand can reduce property values and create hardships for current property owners. Additionally, as part of its consideration as to whether to allow a bond to be renewed, staff evaluates how construction costs may have changed since the bond's origination, and it is common for bond amounts to increase with a bond renewal. The consideration of bond renewals and increased bond amounts frequently puts staff in a contentious position with developers.

Bond Release

When bonded improvements are completed and a developer requests that the bond be released, State law requires that the County respond to the request within 30 days. For most subdivisions, this is managed by noting when VDOT has accepted the streets for State maintenance and the Albemarle County Service Authority (ACSA) has indicated the water and sewer system are accepted. Remaining improvements are inspected and it is determined whether they are complete or deficiencies are noted. Staff has been diligently working to reduce the number of outstanding bonds, but there remain a significant number of old projects with bonds that cannot be released because the improvements have not been completed, primarily because of few lot sales. Currently, there are still more than 25 subdivision bonds that are 10 years or older and 7 water protection bonds that are 10 years or older. Following release, Virginia's records retention requirements requires that the bond files are to be held for five years and then destroyed. Community Development performs an annual purge of records to assure compliance with this requirement.

Bond Demand

On rare occasions, either through a developer's failure to comply with the conditions of the bond agreement or through an inability by the developer to obtain a bond renewal, the County places a demand for the bond by declaring the developer to be in default of the bond agreement. This is often termed "called" and used similar to when people speak of a loan being called. If the bond is a cash bond or a letter of credit, the County seldom has much difficulty in obtaining the bond funds. However, if a surety bond has been used with the bond agreement, it can be a difficult and time consuming process for the County to obtain the funds. This is largely because the agreement provides the

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surety the opportunity to complete the improvements themselves in lieu of providing the funds to the County, and the surety often sees little advantage in quickly responding. To illustrate, there are currently two projects where the surety has decided to complete the improvements, and in both cases more than a year passed from the date the County made its demand until the surety began work on the projects.

BUDGET IMPACT:

This report is for information and no changes to current funding are requested.

RECOMMENDATIONS:

No action is requested. After reviewing this report, if the Board is interested in clarifications or discussions related to the County's performance bond program, staff can schedule a work session to provide in-depth explanations.

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