

**AN INTRODUCTION TO THE
WETLANDS CONSULTANT PEER REVIEW PROCESS**

Legal Considerations for M.G.L. Chapter 44, Section 53G

MASSACHUSETTS ASSOCIATION OF CONSERVATION COMMISSIONS

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Barry P. Fogel is a partner at Keegan Werlin LLP, and became the initial member of its Environmental and Land Use Group in 1991. Mr. Fogel's clients include a wide variety of businesses, institutions, municipalities and individuals engaged in real estate transactions, land use development, permitting, enforcement proceedings, and general compliance with federal, state and local environmental regulations. His practice involves working with clients and their consultants to guide proposals for new or modified projects through all levels of environmental impact review and permitting, including commercial and industrial facilities, energy and infrastructure projects, and other land uses that require approvals for resource area protection, waste-site remediation, waste discharges, and air emissions. Mr. Fogel has extensive experience with projects that require local, state and federal permits and licenses, including permits for activities in and near inland and coastal wetlands and other protected resource areas. He regularly manages cases involving administrative appeals, civil disputes involving litigation and mediation, resolution of enforcement, and resolution of transactional liability disputes.

Mr. Fogel formerly served as Deputy General Counsel and as Regional Director for the Massachusetts Department of Environmental Protection, with responsibility for implementation of state programs in wetlands protection, air quality, oil and hazardous material release remediation, solid and hazardous waste management, water pollution control, and drinking water supply.

Mr. Fogel served for more than ten years as a member of the Conservation Commission in the town of West Newbury, Massachusetts.

I. BACKGROUND OF THE LAW – M.G.L. C. 44, § 53G (“SECTION 53G”)

- In 2003, this section of state law was amended to allow conservation commissions:
 - (i) To impose “*reasonable* fees for the employment of outside consultants,”
 - (ii) Fees to be expended at the direction of the ConComm,
 - (iii) In connection with “carrying out its responsibilities under the law.”
- Fees may be assessed to cover consulting services for application review, monitoring, reporting and compliance under Ch. 40, § 8C, Ch. 131, § 40, or a local wetlands ordinance or by-law.
- ConComm **must adopt rules** in order to be able to impose the fees, place the fees in a special municipal account, and have the fees available for direct expenditure by the ConComm without appropriation.
 - These rules can be adopted under the authority of a local ordinance or bylaw, or under state law (G.L. c. 40 § 8C, or G.L. c. 111 § 31).
 - Rules adopted under 53G must establish a **process** for applicants to file an administrative appeal with the city council or board of selectmen to challenge the outside consultant on the grounds the consultant **has a conflict of interest or does not possess the minimum, required qualifications** (lacks educational degree or three or more years of practice in the field or a related field).

II. HOW COMMISSIONS CAN PUT SECTION 53G INTO EFFECT

- ConComm can follow its normal procedures for adopting rules
- Adopting rules does not require action by town meeting or other municipal entity
- MACC issued guidance and a **model rule** for ConComms dated July 11, 2006
 - Suggested contents of the rules: Purpose; Special Account; Potential Services, Notice of Consultant Services and Fee for the Project; Appeal of Consultant Selection; Fees

III. PROCESS FOR HIRING CONSULTANT AND ACCOUNTING FOR FEES

Massachusetts Department of Revenue issued “Informational Guideline Release (IGR) No. 03-208” in August 2003 to address Section 53G processes.

- Consultant Selection Process
 - Must be consistent with any applicable charter, by-law, ordinance or statute, e.g., Uniform Procurement Act, G.L. Ch. 30B
 - Contracts for “continuing services” are not prohibited under c. 30B [based on value], but follow the c. 30B selection process.
 - Contracts under \$10,000. Must use “**sound business practices.**”
 - “Sound business practices” is defined as ensuring receipt of a favorable price by periodically soliciting price lists or quotes.
 - Does not require a formal process, but municipality must ensure they receive “quality of services” at a “reasonable price.”
 - Contracts between \$10,000 and \$34,999.99.
 - Seek price quotes from at least three vendors and award the contract to the responsible vendor offering the supply or service needed for the best price [e.g., lowest hourly rate].
- Accounting for Fees Collected by the ConComm
 - Separate bank accounts are ***not*** required for funds from separate projects. Local treasurer may pool all 53G fees in a common account, but the interest must be allocated to the fees charged for each project.
 - Payment voucher with appropriate supporting documentation from the consultant must be submitted to the accounting officer in order to place the consultant’s bill on the treasury warrant for payment.
 - Accounting officer must prepare a final report of the activities **for each applicant** and **refund any balance with interest**.
 - Section 53G states: any “excess” amount collected for a specific project must be repaid “at the completion of said project” with accrued interest.

IV. THE PROCESS FOR APPEALING CONSULTANT SELECTION

- The applicable time limits for action by the ConComm on the NOI or RDA are extended by the duration of an administrative appeal of consultant selection.
- The ConComm’s selection stands if no decision is made by the city council or board of selectmen within one month following the filing of the appeal.
- The local appeal does not preclude judicial review, if otherwise permitted by law, on the grounds of conflict of interest or lack of qualifications.
- The fee amount being assessed for third party review **cannot** be appealed to the city council or board of selectmen.

V. A FEW NOTES ON THE CONFLICT OF INTEREST LAW - G.L. c. 268A

- Statute is written broadly to prevent public employees from becoming involved in situations that create a conflict of interest **or** the appearance of a conflict
- Potential conflict of interest arises when a public employee does both public work and private work in the same community
- “Municipal employee” includes a person performing services for a municipal agency by contract of hire or engagement on a consultant basis. c. 268A, § 1(g)
 - An “individual” who performs services will be designated as a public employee if: (1) the services are sought from that individual, (2) the work requires specialized knowledge, and (3) that individual has direct control of the performance of the services.
 - A “position” will not be designated as a public employee if the work is performed by anyone among a group of employees at a company, without requirements for the company to use particular individuals or provide specialized knowledge [**NOTE:** company is not an “employee”]
- “Special municipal employee” – includes a “municipal employee” in a position expressly classified as “special employee” under c. 268A; provided, however, no municipal employee shall be classified as a special municipal employee

unless s/he in fact does not earn compensation as a municipal employee for an aggregate of more than 800 hours during the preceding 365 days.

- Compensation by the day shall be equivalent to seven (7) hours/day.
- A special municipal employee shall be in such status on days for which s/he is not compensated as well as on days on which he earns compensation.
- Municipal employee has greater restrictions than *special* municipal employee, so it may be desirable to have an assignment as a third party consultant designated as “special” and to work fewer than 800 hours in a 365-day period.
- There are even fewer restrictions if individual “serves” [i.e., does “substantive work”] as a public employee on **fewer than 60 days** in a one-year period
 - Use time sheets to track if substantive vs. ministerial work is performed for compensation on a given day
- C. 268A, §§ 17, 18 – Limits on Private Activities for Municipal Employees
- *Some Examples of Prohibitions on Other Work in the Same Community*
- § 17(a) No municipal employee shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the city or town or municipal agency in relation to any particular matter in which the same city or town is a party or has a direct and substantial interest.
 - Consultants who serve a ConComm and are owners or partners in a consulting firm with its own employees cannot earn revenue from the work of an employee or partner on a matter in the same community
- § 17(c) No municipal employee shall act as agent or attorney for anyone in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.
 - Consultants who serve a ConComm cannot represent other parties in other matters in the same community, but consultants who are not

attorneys can give advice to parties appearing before the same ConComm if the advice is given without compensation.

- A special municipal employee is subject to paragraphs 17(a) and 17(c) only in relation to a particular matter:
 - in which s/he has participated at any time as a municipal employee, or
 - which is a subject of official responsibility currently, or
 - which was a subject of official responsibility in the prior year, or
 - which is pending in the municipal agency in which he is serving [this clause does not apply to a special municipal employee who serves no more than 60 days during any period of 365 consecutive days.]
- § 18(a) – Never do future work (free or paid) on a matter in which you participated: A former municipal employee **cannot** act as agent for, or receive compensation, directly or indirectly, from anyone other than the same city or town, in connection with any particular matter in which the city or town is a party or has a direct and substantial interest, *if it is a matter in which s/he participated as a municipal employee while so employed.*
- § 18(b) – “Cooling Off” - Cannot appear before any agency in the same city or town as an agent for anyone other than the city or town within one year after employment has ceased on any matter in which the city or town has a direct interest *if* that matter that was under your official responsibility as a municipal employee at any time within two years prior to the termination of employment.
 - A city or town has a “direct and substantial interest” in a particular matter when the ConComm is permit granting authority.
- § 18(d) - “Partners” of individual serving as a municipal employee are also prohibited from representing other parties before the ConComm being served by the individual *if* it the matter is one in which the consultant serving the ConComm participated or is one for which consultant has responsibility.

DISCLAIMER – *These are not all of the prohibitions in Chapter 268A. The State Ethics Commission gives informal advice and formal opinions, and publishes decisions on its investigations and proceedings. Consult an attorney for legal advice.*

Model Rules for Hiring Outside Consultants under G.L. Ch. 44 §53G

Massachusetts Association of Conservation Commissions

July 11, 2006

[This bracketed paragraph is for information purposes and should be deleted prior to adoption of consultant fee regulations. G.L. Ch. 44 §53G permits Conservation Commissions to adopt regulations requiring permit applicants to pay for consultant review of permit requests. Adoption of rules does not require approval of any other municipal entity including town meeting. To foster good relations with the public MACC recommends that the Commission hold a public hearing to accept comments on its draft rules, although this is not required. The final rules should be adopted by a vote of the Commission at one of its regular meetings. Similar procedures should be followed when revising the rules. The rules must not conflict with the statute. They should be available at all Commission meetings. MACC recommends that communities with Wetlands Bylaws adopt these rules both separately and under the bylaw.]

Purpose. As provided by G.L. Ch. 44 §53G, the *[name of municipality]* Conservation Commission may impose reasonable fees for the employment of outside consultants, engaged by the Conservation Commission, for specific expert services. Such services shall be deemed necessary by the Commission to come to a final decision on an application submitted to the Conservation Commission pursuant to the requirements of: the Wetlands Protection Act (G.L. Ch. 131 §40), the *[name of municipality]* non-zoning wetlands bylaw *[ordinance]*, Conservation Commission Act (G.L. Ch. 40 §8C), or any other state or municipal statute, bylaw *[ordinance]* or regulation, as they may be amended or enacted from time to time. The Conservation Commission may also impose fees for other consultant services, related to application review, or permit conditioning or monitoring, under any of the above-referenced laws or regulations.

Special Account. Funds received pursuant to these rules shall be deposited with the town *[city]* treasurer who shall establish a special account for this purpose. Expenditures from this special account may be made at the direction of the Conservation Commission without further appropriation as provided in G.L. Ch. 44 §53G. Expenditures from this account shall be made only in connection with a specific project or projects for which a consultant fee has been collected from the applicant. Expenditures of accrued interest may also be made for these purposes.

Consultant Services. Specific consultant services may include but are not limited to resource area survey and delineation, analysis of resource area values, hydrogeologic and drainage analysis, impacts on municipal conservation lands, and environmental or land use law. Services may also include on-site monitoring during construction, or other services related to the project deemed necessary by the Commission. The consultant shall be chosen by, and report only to, the Commission and/or its administrator.

Notice. The Conservation Commission shall give written notice to the applicant of the selection of an outside consultant. Such notice shall state the identity of the consultant, the amount of the fee to be charged to the applicant, and a request for payment of said fee in its entirety. Such notice shall be deemed to have been given on the date it is mailed or delivered. No such costs or expenses shall be incurred by the applicant if the application or request is withdrawn within five days of the date notice is given.

Payment of Fee. The fee must be received prior to the initiation of consulting services. The Commission may request additional consultant fees if necessary review requires a larger expenditure than originally anticipated or new information requires additional consultant services. Failure by the applicant to pay the consultant fee specified by the Commission within ten (10) business days of the request for payment, or refusal of payment, shall be cause for the Commission to deny the application based on lack of sufficient information to evaluate whether the project meets applicable performance standards in 310 CMR 10.00 and the [*name of municipality*] wetlands bylaw [*or ordinance*] or its regulations. An appeal stops the clock on the above deadline; the countdown resumes on the first business day after the appeal is either denied or upheld. A denial for lack of information may be based solely on the lack of the third party consultant review identified as necessary by the Commission. The Commission shall specify in its denial the nature of the information lacking which its chosen consultant would provide, e.g. the questions it needs answered.

[OPTIONAL: For Inclusion in Non-Zoning Wetlands Bylaw/Ordinance Regulations

Only. Failure by the applicant to pay the consultant fee specified by the Commission within ten (10) business days of the request for payment shall be cause for the Commission to deny the permit application.]

Appeals. The applicant may appeal the selection of the outside consultant to the selectboard [*city council*], who may only disqualify the outside consultant selected on the grounds that the consultant has a conflict of interest or does not possess the minimum required qualifications. The minimum qualifications shall consist of either an educational degree or three or more years of practice in the field at issue or a related field. Such an appeal must be in writing and received by the selectboard [*city council*] and a copy received by the Conservation Commission, so as to be received within ten (10) days of the date consultant fees were requested by the Conservation Commission. The required time limits for action upon the application shall be extended by the duration of the administrative appeal.

Return of Unspent Fees. When the Commission's review of a project is completed and an Order of Conditions issued, any balance in the special account attributable to that project shall be returned within 30 days. The excess amount, including interest, shall be repaid to the applicant or the applicant's successor in interest. For the purpose of this regulation, any person or entity claiming to be an applicant's successor in interest shall provide the Commission with appropriate documentation. A final report of said account shall be made available to the applicant or applicant's successor in interest.



Informational Guideline Release

Property Tax Bureau
Informational Guideline Release (IGR) No. 03-208
August 2003

(Supersedes IGR 91-101)

SPECIAL REVOLVING FUNDS FOR HIRING OUTSIDE CONSULTANTS

Chapter 46 §36 of the Acts of 2003
(Amending G.L. Ch. 44 §53G)

This Informational Guideline Release (IGR) informs local officials that conservation commissions that impose fees on applicants for permits or approvals for the purpose of hiring expert consultants to assist in reviewing the applications may now deposit those fees into a special project account and spend them without appropriation to pay the consultants.

Topical Index Key:

Accounting Policies and Procedures
Fees and Charges
Special Funds

Distribution:

Treasurers
Accountants/ Auditors
Mayors/Selectmen
City/Town Managers/Exec. Secys.
Finance Directors
Finance Committees
City/Town Councils
City Solicitors/Town Counsels

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August 2003

(Supersedes IGR 91-101)

SPECIAL REVOLVING FUNDS FOR HIRING OUTSIDE CONSULTANTS

**Chapter 46 §36 of the Acts of 2003
(Amending G.L. Ch. 44 §53G)**

SUMMARY:

A recent amendment to G.L. Ch. 44 §53G adds conservation commissions to the list of boards authorized to use a special revolving fund for fees charged applicants for permits or approvals for the specific purpose of hiring expert consultants to assist in reviewing the applications. The fees paid by the applicant are deposited into a separate project account, which may be spent without appropriation by the board to cover the professional services it needs to review the particular application. Interest on the fees remains with the individual project account. The accounts remain open until the project is completed. The unspent balance, including interest, is refunded to the applicant at the end of the review process.

Previously, these special project revolving accounts were available only to zoning boards of appeal (or other special permit granting authorities designated by zoning by-laws or ordinances), planning boards and boards of health. Consultant fees imposed by conservation commissions belonged to the general fund and could not be spent without appropriation unless the city or town authorized a departmental revolving fund for the commission under G.L. Ch. 44 §53E½ for all such fees generated during a particular fiscal year. Under that revolving fund, however, the unspent fees paid by an applicant for a particular project could not be refunded. Conservation commissions will now be able to do so.

The amendment became **effective July 31, 2003.**

These guidelines update those issued when G.L. Ch. 44 §53G was enacted to reflect the addition of conservation commissions. See Bureau of Accounts Informational Guideline Release No. 91-101, *Special Funds for Hiring Outside Consultants* (February 1991).

GUIDELINES:

A. CONSULTANT FEES AND SELECTION

1. Fees

Applicants for permits and approvals from the conservation commission, zoning board of appeal (or other special permit granting authorities designated by zoning by-laws or ordinances), planning board or board of health may be charged reasonable fees by the board for the specific purpose of defraying the cost of hiring outside consultants as needed to perform its legal duties in reviewing the applications. The fees to be paid by applicants for particular permits and approvals must be established by rules and regulations of the commission or board. G.L. Ch. 40 §8C; 40A §§9 and 12; Ch. 40B §21; Ch. 41 §81Q; Ch. 111 §31.

2. Selection

A commission or board charging fees for hiring consultants must establish rules for choosing the consultants in order to use the special project funds. The selection must also be consistent with any applicable charter, by-law, ordinance or statutory provisions, *e.g.*, the Uniform Procurement Act, G.L. Ch. 30B.

The rules must set qualifications for the consultants. At a minimum those qualifications must include: (a) an educational degree in or related to the field at issue or (b) three or more year's of practice in the field at issue or a related field.

3. Appeal

The rules must provide the applicant paying the fee with an administrative appeal of the selected consultant. The appeal is to the board of selectmen or city council and is limited to claims that the consultant has a conflict of interest or does not possess the minimum required qualifications.

The time required for action by the commission or board on the application for a permit or approval is extended pending the appeal. The selection by the commission or board stands unless the board of selectmen or city council decides otherwise within one month following the filing of the appeal.

An administrative appeal does not preclude judicial review, if otherwise permitted by law, on the matter.

B. ACCOUNTING PROCEDURES

1. Fee Turnover

The commission or board must turn over all consultant fees received to the treasurer. The fees should be paid over as soon as possible, but at least weekly. The turnover should be accompanied by a report identifying by applicant the amount paid for each project. A copy of the report must also be forwarded to the accounting officer.

2. Investment and Interest

The treasurer may invest all fees collected in the same manner as general funds. A separate bank account is not required for the fees paid by an applicant for each project. The treasurer may pool all fees collected in a common account, but must allocate the interest earned on the fees charged to each project, however. The interest remains with the fees and accrues to the benefit of the applicant.

3. Project Account

The accounting officer must establish and maintain a separate account for the fees paid by the applicant for each project.

4. Annual Reports

The accounting officer must make an annual report of any special project accounts to the town administrator or town manager and the selectmen in a town or the mayor or city manager and city council in a city. This report must also be published in the annual report of the municipality.

All financial activity related to the special project accounts is also reported annually to the Director of Accounts in Schedule A.

C. EXPENDITURE OF FEES

1. Allowable Use

The commission or board may spend the fees, including any interest earned, without appropriation to engage outside consultants to assist in carrying out its legal responsibilities with respect to that particular project. The fees may not be used to pay for the services of municipal employees.

For example, the planning board may use the fees to hire an expert consultant to do a traffic study needed for a proposed project. The fees could not be used to defray the cost of a town planner who conducts the study.

2. Consultant Bills

The commission or board must use the same process used for payment of other departmental expenses to obtain payment of all bills being charged to the revolving fund. A payment voucher with appropriate supporting documentation is submitted to the accounting officer for placement of the bill on the treasury warrant.

D. REFUND OF UNSPENT FEES

1. Account Report

The commission or board must notify the accounting officer when each project is completed and all bills have been submitted for payment. The accounting officer must prepare a final report of the account activities for the applicant.

2. Refund Payment

Any balance remaining in the project account must be refunded to the applicant. If a refund is due, the commission or board should submit a voucher to the accounting officer for placement on the treasury warrant. Upon approval of the warrant, the treasurer will issue the refund to the applicant.