

Peer Review and “53 G” ...

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Presentation Overview

- Purpose of presentation
- Overview of MGL Chapter. 44, Section 53G
- Why municipalities hire peer review consultants?
- Engaging the peer review consultant
- Developing a process and schedule
- Role of the peer review consultant
- Peer review document contents
- Tricks of the trade
- Questions/comments



Peer Review Defined

Peer review is the evaluation of creative work or performance by other people in the same field in order to maintain or enhance the quality of the work or performance in that field ¹.



¹ The word *peer* is often defined as *a person of equal standing*. However, in the context of peer review it is generally used in a broader sense to refer to people in the same profession who are of the same or higher ranking.

Why Hire a Peer Review Consultant

- In-house expertise not available (due to lack of personnel or workload)
- Need for specialized reviews (e.g., radio frequency engineer, traffic, etc.)



Section 53G of M.G.L. c.44

... authorizes Zoning Boards of Appeals, Planning Boards, Boards of Health and Conservation Commissions to establish special revolving funds for fees payable by applicants for permits and approvals. The boards and commissions may use revolving funds, without appropriation, to hire outside consultants to examine the applications. Once an applicant's project is completed or their application is denied, the unused portion of the fee is returned to them, plus interest.



53G funds may only be used for:

1. Zoning Boards of Appeals, M.G.L. c.40A, §§9 or 12
2. Low or Moderate Income Housing, M.G.L. c.40B, §21
3. Subdivision Control, M.G.L. c.41, §81Q
4. Boards of Health, M.G.L. c.111, §31
5. Conservation Commissions, M.G.L. c.40, §8C; M.G.L. c.131, §40; or any local wetlands ordinance or bylaw (added 2003).



Caveats ...



- M.G.L. c.44, §53G does not authorize the hiring of consultants or the imposition of fees to do so; it merely provides a means by which to pay the cost of certain consultants without appropriation.
- Municipalities may only hire these outside consultants without appropriation if they have promulgated rules for the hiring of outside consultants under one of the statutes listed in M.G.L. c.44, §53G.

Rules for Implementing M.G.L. c.44, §53G

Section 53G of M.G.L. c.44 specifies certain administrative rules a municipality must enact prior to establishing a revolving fund.

RULES

Adopted Regulations Must ...

1. Impose a reasonable fee for the employment of outside consultants;
2. Provide a means to appeal the choice of consultants to the city council or town board of selectmen; and
3. Set qualifications for the consultants (e.g., education degree or three or more years practice in field).



Qualifications Requirements



For a procurement pursuant to M.G.L. c.44, §53G, your quality requirements must include at least one of the “minimum qualifications” listed by the statute: either an educational degree in or related to the field at issue, or three or more years of practice in the field at issue or a related field. You may choose to include additional quality requirements to fit the demands of your particular project.



Towns have encountered legal trouble by assuming M.G.L. c.44, §53G grants them the authority to hire a type of consultant that is not expressly authorized by the laws, and to impose those fees on applicants.

For example, one Zoning Board of Appeals enacted a rule providing that “in hiring outside consultants, the Board may engage ... lawyers...who can assist the Board in analyzing a project to ensure compliance with all relevant laws,” and requiring the permit applicant to pay a “review fee” covering the reasonable cost of legal fees for that service.



On its face, the rule appeared to be perfectly reasonable. However, the Massachusetts Housing Appeals Committee held that because the rule was promulgated under the authority of M.G.L. c.40B, which does not contain specific authority to hire lawyers, the review fee was invalid. The Housing Appeals Committee found, based on the language of the statute and cases interpreting it, that M.G.L. c.40B only allows fees to be imposed for “technical review” and not for legal services.

Consequently, the jurisdiction had to assume a cost of almost \$20,000 in legal fees it had charged to the applicant.

Play it safe ...

If you have any questions about whether a given fee or expense may permissibly be transferred to applicants, please check with your legal counsel **prior** to incurring the expense.



Legal ...

*In Massachusetts, the law authorizing peer review is **MGL Chapter 44, Section 53G.***



*Some procurements must also comply with the Uniform Procurement Act, also known as **MGL Chapter 30B.***

Breaking news ...



Chapter 30B. Uniform Procurement Act amended **11/1/09**

Section 1. Application of Chapter; **Exceptions.**

(a) This chapter shall apply to every contract for the procurement of supplies, services or real property and for disposing of supplies or real property by a governmental body as defined herein.

(b) **This chapter shall not apply to:**

(32A) contracts with architects, engineers and related professionals;

More on the 30B Exception



- Chapter 30B as revised on 11/1/09 includes specific definitions of professionals included in the exception.
- It is important to be sure the consultant hired under M.G.L. c.44, §53G is included in the definitions provided in the exception, otherwise the requirements of the Uniform Procurement Act will apply.
- See attached handout containing text of the revised section, including definitions. State's website is not updated!

Suggestions ...



- An attorney with the Office of Inspector General recommended, despite the exception, that an annual check of rates for comparable consultants be conducted.
- She also noted that due to the exception, acceptance of the lowest price/bid is not required. Other factors can be taken into consideration (familiarity with town, etc). However, prices should not be so out of range that they can't be justified.

Specifics ...

- Once your Board/Committee has promulgated rules for the hiring of outside consultants, it's time to select a peer review consultant.
- Some municipalities solicit three quotes for each project.
- Most towns have one or more “on call” peer review firms that they rely upon.



Things to consider ...



- Who will be point of contact with Consultant?
- What are the goals of the review?
- Is applicant (or his/her engineer) permitted to contact or meet with the Consultant? How manage access?
- Keep budget on track. Phone calls, inquires, meetings all take Consultant's time (= money).
- Requiring applicants to submit a narrative describing the proposed project provides invaluable context and information, not only to Board/Committee, but also to Consultant.
- In Wrentham, BTI has become part of our "team" since we do not have an engineer on staff.

Developing a Process and Schedule

- Paying the review fee into the town account before review begins (many towns require up front deposit towards review fee).
- Meeting between applicant, peer review consultant and Town prior to start of review (optional)
- Reviewing context of project
- Becoming aware of special circumstances
- Deadlines for peer review comments and responses before hearing
- Consultants present at public hearings

Notes

- Establish up front how consultant will interact with applicant.
- Ensure consultant fully understands budget limitations (you go over without authorization, you're out of luck).
- Ensure adequate review time for peer reviewer.
- Keep an eye on supplemental services (many projects require a second review; the costs of which are hard to predict at beginning of process).

A Case Study: Wrentham



- Beals and Thomas, Inc. (BTI) has served as Planning Board Peer Review engineer since 1996. Conservation Commission since 2009.
- BTI reviews (almost) all subdivision and special permit applications for the Wrentham Planning Board.
- After receiving an application, Planner makes recommendation to the Planning Board on whether engineering (or other) review is warranted for project. Board votes to authorize use of 53G for project.
- Planner instructs applicant to send full application package to peer review consultant; informs consultant of anticipated delivery.

Case Study Continued ...



- BTI prepares a Scope of Services for the project, which is then sent to the Planner. Upon receipt, Planner forwards Scope to applicant. Applicant has choice of appeal or to provide the funds to the Planning Board.
- Peer review cannot start until funds are received by the Town. No additional review or services may be performed unless authorized by the Planning Board (to avoid budget overruns).
- Lead time is typically at least a month (delays often occur waiting for deposit of review funds by applicant. Many towns require initial deposit at time of application, which could reduce delay).

Case Law Related to Peer Review

- In the Matter of Ruth Vecchione, Trustee; DEP WET 2009-004; Douglas
 - Land-owner filed an NOI for work involving crossing of an intermittent stream.
 - Land-owner refused to pay Douglas Conservation Commission for a peer review of the project.
 - Douglas Conservation Commission (DCC) denied the application on the basis of lack of information.
 - Land-owner sought a Superceeding OOC. MA DEP CERO affirmed DCC decision.
 - SOOC appealed-Presiding Officer found that technical expertise to evaluate stormwater warranted denial.
 - Commissioner did not adopt Presiding Officer's decision and found that there was sufficient evidence and information for the DCC to make a decision.
 - Commissioner remanded the NOI to the DCC to review the NOI filing without a peer review.

Role of the Peer Review Consultant

- Role of Professionals-Review May Include
 - Civil Engineering
 - Landscape Architects
 - Wetland Scientists
 - Certified Planners-AICP
 - Traffic Engineer
 - And Less Frequently:
 - Hydrogeologists
 - Architects
 - Radio Frequency Engineers (for wireless towers)
- Additional Review Coordination as Dictated by Specialized Projects
 - Hazardous Waste & Contamination (for Brownfield Sites)
 - Shadow Impacts
 - Noise

Role of the Peer Review Consultant

- Recognize that municipalities and board members have a finite amount of time for their review.
 - Board Members are volunteers
 - Municipal staff have many responsibilities
 - A thorough review is essential to minimize repeated public hearings
- Consideration for Selection of a Peer Review Consultant
 - Should serve as a resource for the municipality
 - NPDES
 - Low Impact Development
 - LEED
 - EPA Residual Designation
 - Chapter 40B Comprehensive Permit
 - Construction Issues
- Is able to assist with design considerations in addition to civil engineer
 - Landscape Architecture
 - Permitting
 - Wetlands
 - Brownfields/Remediation

Peer Review Document Contents

- State the purpose of the review - Site Plan Review, Special Permit, Earth Removal By-law, Watershed Protection, Subdivision Rules and Regulations.
- Confirm the documents received for review, including the revision date, preparer and information necessary to establish the administrative record.
- Provide a concise overview of the project.
 - Recognize that Board Members and members of the public need to fully understand the role of the peer review.
 - Identify significant elements of the design (i.e. retaining walls, substantial earthwork, grade differentials, proximity to abutters, etc.).
 - Summarize the important elements of the development program.

Peer Review Document Contents

- Identify limitations (if any) of the review.
 - For example: wetland boundary not field reviewed; limited to an evaluation of generally accepted engineering practices; septic system design capacity not reviewed.
 - Alternative jurisdictions within a municipality may review specific design elements
 - Board of Health – sewage disposal and stormwater
 - DPW – stormwater and utilities
 - Conservation Commission-wetlands delineation and stormwater
 - Recognize overlapping review jurisdiction and the need for non-conflicting comments to the Applicant.

Peer Review Document Contents

- Presentation of Review Comments:
 - Non-biased
 - Professional practice based comments
 - Present comments in a manner that invites cooperation
 - State if the project is well designed
 - Assist with an understanding of the relationship of a proposed project to existing development and neighboring land use
 - Capacity of existing infrastructure
 - Consistency with community plan
 - Compliance with zoning and development regulations
 - Conformance with standard engineering and planning practices.
 - Be judicious with repetitive technical comments

Peer Review Document Contents

- **Overall Site Design**
 - Roadway
 - Parking lot – spaces, aisles and landscape treatment
 - Pedestrian Circulation
 - Vehicular Circulation
 - Intersection/Stopping Sight Distance
 - Accessibility
 - Lighting
 - Landscaping
- **Stormwater Management Comments**
 - Compliance with DEP Stormwater
 - Local By-law
 - Erosion Control
 - Low Impact Development Techniques
 - Maintenance considerations
 - Homeowners Association requirements

Peer Review Document Contents

Use digital photography to assist with presenting comments



The proposed roadway location and intersection with Shallow Pond Lane

6. A retaining wall system is proposed adjacent to the roadway between existing residences at No. 52 and 60 Shallow Pond Lane. A detail for the construction materials and methods for the proposed retaining wall should be included on the detail sheet. In addition, screening of the roadway with plantings should be considered.

Applicant Response: The retaining wall has been eliminated as part of this revised design.

Current BTI Comment: Based on the revised grading along the roadway and elimination of the retaining wall, the comment regarding the retaining wall is no longer applicable. Landscaping has also been incorporated along the entry roadway.

Peer Review Document Contents

7. The Applicant should confirm that the headlights approaching the proposed intersection from the new roadway will not create a nuisance condition for existing homes.

Applicant Response: Landscaping will be provided on either side of the entrance to provide a buffer between the proposed roadway and existing dwellings. Also, there is not a dwelling directly across Shallow Pond Lane at the location of the intersection to be affected by headlights.



Current BTI Comment: The aerial photograph above shows the intersection of the proposed roadway and Shallow Pond Lane. Although there may not be a dwelling directly across from the proposed roadway, as vehicles maneuver and turn onto Shallow Pond Lane the potential for headlights to shine into the adjacent dwellings. We request that the Applicant consider providing a vegetative screen for the two homes across from the proposed roadway if acceptable to the homeowners.

Supplemental Review Document Contents

In an effort to establish clarity for the administrative record, we have included the original comments as presented in our letter dated November 16, 2009, followed by the Applicant's responses in *italicized font* (January 25, 2010 letter), followed by our current evaluation in **bold font** to provide the status of each original comment.

Supplemental Review

- Require timely and responsive comments from the Applicant's consultant
- Comments should be presented by the responsible engineer for the Applicant, not from an attorney, unless it is a legal matter
- Format of the Supplemental Review
- Include the original comment, the Applicant's response and a status to establish the administrative record

General Comments

1. The density calculations for the as-of-right plan should be provided on Sheet 3.

Applicant Response: This has been provided on Sheet 3 and 4.

Current BTI Comment: We consider this comment to be adequately addressed.

2. The proposed location of the emergency access route requires grading of a relatively steep hillside upgradient of Shallow Pond. We recommend that the Applicant consult with the Town of Plymouth Fire Department to consider the operational requirements for the emergency access route. If the emergency access route is advanced at the proposed location, it is recommended that the plans be revised to include additional stabilization methods on the hillside slopes upgradient of Shallow Pond, rather than just loam and seed as currently proposed. Plantings, erosion control blankets, and/or geotextile fabric are suggested.

Applicant Response: The emergency access road has been eliminated.

Current BTI Comment: We acknowledge the proposed roadway layout revisions eliminate the emergency access road. However, we respectfully request that the Applicant provide the Planning Board with documentation that the revised roadway layout and turn-around have been approved by the Plymouth Fire Department. Note that "Turnaround Detail With Engine 1 Overlay" depicted on Sheet 9 includes a note that states, "Provide an area free of obstructions over 6-inches in height for fire truck overhang". The respective area necessary to accommodate the turning movement extends beyond the road layout. Accordingly, we recommend that an easement be provided to accommodate the turning movement. We also anticipate that the area will need to be plowed during the winter to accommodate the turning movement requirements.

Tricks of the Trade

- Peer review of project spanning two or more municipalities
 - If municipalities use two different peer review consultants normally, encourage them to use the same one for this type of project
- A Planning Board stormwater review can be used by the Conservation Commission (and vice versa)
- Word choice in reviews
 - “mistake” v. “inconsistent”
- No need to “edit” the applicants plans
- Proximity of peer review consultant to project
- Using portions of the review comments as conditions of the approval
- Engage not just a reviewer but also a practitioner
- Engage a consultant active with professional societies and current with regulatory advances
- The review letter should establish an administrative review

Questions/Comments

