Who Pays the Piper . . .
Funding Professional Reviews in Wetlands Applications

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Land use reviews have become more complex and the risks of making a mistake have increased. In Glasson v. Portland, 6 Conn. App. 229 (1985), the Appellate Court found the town liable for drainage impacts on a downstream owner resulting from an upstream subdivision that the town had approved. Issues of stormwater management, habitat impact, and erosion control arise in almost every wetland application, but specialized technical expertise is needed to perform a competent review to guide the wetlands agency in its decision making. Town budgets have been strained for years and funding to adequately staff local land use agencies is harder to come by than ever. What to do?

The General Statutes provide two responses to this problem. First, Conn. Gen. Stats. § 22a-42a(d)(2) provides, in relevant part:

> The inland wetlands agency may require a filing fee to be deposited with the agency. The amount of such fee shall be sufficient to cover the reasonable cost of reviewing and acting on applications and petitions, including, but not limited to, the costs of certified mailings, publications of notices and decisions and monitoring compliance with permit conditions or agency orders.

Although the language doesn't actually say this, most towns have construed this to mean that a fee schedule should be adopted by the agency as part of its Inland Wetlands and Watercourses Regulations, often as an appendix or schedule. By using the same procedures as for any other amendment to the regulations, procedural due process questions are avoided.

A second funding source is in Conn. Gen. Stats. §8-1c, which allows a municipality to adopt an ordinance setting the application fees for all land use agencies, which schedule shall supersede those set by the land use agencies themselves. In selectman towns, this means that approval is required by the Town Meeting. The authority to adopt application fees which cover all costs of review, including post-approval monitoring of compliance, has been upheld in the case of Pollio v. Planning Commission of Somers, 232 Conn. 44 (1995).

Under either Section 22a-42a(d)(2) or Section 8-1c, the agency can include all costs, not just those for outside consultants. Each land use agency can and should determine, as accurately as possible: the percent of staff time (including clerical and stenographic services) used by that agency and the salary and benefits of those staff; costs for paper and other hard supplies; their proportional share of the costs of office space (heat, lights, etc.) at the municipal office building; legal advertisements and notices; the history of appeals and a factor to allow for transcription and legal fees for a foreseeable risk of such appeals in the future. These "in house" costs should constitute the "base line" for application fees. As long as the calculation of costs is based on a reasonable estimate and the best available information, a court will probably uphold it.

Another element of some fee schedules is a penalty for applications that are incomplete

or shoddy. These schedules allow a certain number of reviews, or a certain number of hours of review time, to be covered under the "base fee." If review time exceeds that fixed amount, then additional fees become payable for the extra hours or reviews.

For outside consultants, there are two methods of calculating fees: One is to determine which consultants will be needed for each application and then ask each such consultant to estimate his/her fees for review. Towns that use this method usually apply a 150% contingency factor to the estimate and require the applicant to file the estimated fees up front. If the fees are lower than estimated, the applicant receives a refund and if they are higher, the municipality must pay the difference. A second method is to estimate these kinds of consulting costs for the "typical" application on a per lot, or per linear foot of road, or per acre of wetlands or other numeric basis; or some combination thereof. This factor is then added to the "base line" fee.

The first method tends to be more responsive to the uniqueness of each application, but it requires more bookkeeping by the municipality. Each application fee balance must be separately accounted for and each bill must be correctly paid from the proper account. It's a lot of paperwork. The second method is simpler to operate because the fees are calculated based on a formula, with no need for prior fee estimates or separate accounts for each application. However, a controversial or difficult application may end up paying much less than its actual review costs.

Regardless of the method used, the municipality must be in a position to collect the fee. The local regulation must include a provision that the fee is to be paid before the agency votes on the application and that failure to pay the fee will be grounds for denial of the application without prejudice. Making the fee payment a condition of approval is risky because the application may be *denied*, in which case the applicant has no incentive to pay the fee at all.

Lastly, the agency should consider a provision that allows the application fee to be waived. Some agencies are willing to waive fees for municipal applications or non-profit sponsors, while others are not. Just remember that you must be consistent in applying whatever rule you adopt.

The money you need to review applications properly is there for the asking. When I represent developers, I actually prefer to have adequate professionals working with the agency because it keeps the discussion on a factual and scientific level, rather than on gut reaction, fear, and conjecture. So look at your review process and see if it's meeting your current needs. If it's not, look at your costs and explore recovering them through a new application fee calculation.