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Municipal Lobbying: Regulations May Affect Land Use Practitioners

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Abstract: Land use and real estate attorneys may find their practice areas impacted by recently passed lobbying legislation in both New York state, and New York City that require burdensome requirements for lawyers whose clients are seeking legislative action. This article explores the history of New York lobbying legislation, recent amendments to the lobbying laws, and the impact that lobbying legislation has on the practice of law. Notably, this review explores Article 1-A of the Legislative Law (known as the "Lobbying Act") and the Public Employee Ethics Reform Act, both of which expanded the definition of lobbying, and significantly changed the landscape of land use law practice.

Introduction

Under recently expanded legislation at the state level, and in New York City, practitioners who represent clients seeking legislative action, including amendments to zoning, subdivision, and other land use laws, may be subject to onerous registration and reporting requirements. Similar provisions affect attorneys who represent clients seeking to sell land to, or buy land from, municipalities in the state. These laws also significantly curtail the ability of attorneys to give gifts to municipal officials. Unfortunately, many land use and real estate attorneys -- especially those who have never considered themselves "lobbyists" in the traditional sense -- are unaware of these statutory amendments that directly impact their practice, and trigger criminal and civil penalties for noncompliance. We hope to shed some light on the subject by providing a brief survey of the current state of lobbying regulation in New York, with a particular emphasis on implications for the real estate and land use bar.

New York State Lobbying Act

State regulation of lobbying began in earnest in 1977 with the creation of the New York Temporary State Commission on Regulation of Lobbying (in 1981 renamed the New York Temporary State Commission on Lobbying, recently merged into the Commission on Public

Integrity), which was designed to require both registration and reporting of traditional lobbying activities, such as attempts to influence state legislation. For the New York land use practitioner, there was no direct impact on their practice.

Municipal Lobbying

This changed dramatically in 1999 and 2005 with the enactment of several amendments to Article 1-A of the Legislative Law (known as the “Lobbying Act”). These cumulative changes to the Lobbying Act, which took effect in 2002 and 2006 (affecting municipal and procurement lobbying) greatly expanded the statutory definition of “lobbying” and extended the jurisdictional reach of the Lobbying Commission. The definition of lobbying was expanded to include attempts to influence the passage or defeat of any local law, ordinance, resolution, or regulation by a municipality or subdivision thereof¹ and the Lobbying Commission’s jurisdiction was extended to include “any jurisdictional subdivision of the state, including but not limited to counties, cities, towns, villages, improvement districts and special districts, with a population of more than fifty thousand, and industrial development agencies in jurisdictional subdivisions with a population of more than fifty thousand... .”² For the first time, municipal lobbying activities would fall under the Lobbying Act’s registration, disclosure and reporting requirements. At the time, New York was only the second state in the nation to adopt such an expansive lobbying law.

Consequently, if a land use attorney now engages in activities designed to influence the passage or defeat of any local law, ordinance, resolution or regulation pending before a municipality with a population greater than 50,000, the Lobbying Act will apply, unless the activities fall within exemptions specified in §1-c of the Act, which are numerous. Relevant exempt activities include drafting and advising clients on local legislation; participating as an attorney in public proceedings or meetings; participating in adjudicatory proceedings, and engaging in ministerial matters, such as applying for licenses and permits. For these and other enumerated activities, the Lobbying Act will not apply.

The 1999 amendments to the Lobbying Act subjected lobbying activities targeting the actions of local *legislative* boards to the full provisions of the law. Less clear, however, is whether the 2005 amendments which, among other things, added the word “resolution” to the list of potential municipal actions that could fall within the definition of local legislation³, effectively extended the Lobbying Act’s application to matters before zoning and planning boards as well, since these boards may act by formal “resolution.” Unfortunately, the legislative history behind the Lobbying Act’s 2005 amendments is silent on this point and the Lobbying Commission (now the Commission on Public Integrity) has yet to address the matter, either through the issuance of compliance guidelines or advisory opinions.

Finally, at what point is a land use practitioner obligated to register with the Commission on Public Integrity and begin reporting his or her lobbying activities before municipal boards? Lobbying Commission Advisory Opinion No. 51 (03-2), which considered an application before a municipal zoning board to amend a local zoning law, concluded that activities engaged in by attorneys “preliminary to the creation of any local legislation required to carry out their client’s objectives” did not trigger application of the Lobbying Act. But the Lobbying Commission

further noted that “if, however a local law or ordinance is introduced to change zoning in favor of the client’s goals, any activity then carried out by the attorneys to influence the passage or defeat of that legislation would be considered lobbying.”

Three Year Look-Back on Municipal Lobbying

Land use practitioners should also note the requirement of a three-year “look-back” to identify *prior* lobbying activity once the formal introduction of a local law, ordinance, resolution or regulation has triggered the Lobbying Act. The Lobbying Commission justified the three year look-back rule as being implied within the language of the Lobbying Act. The rule requires that once lobbying activities cross the statutory threshold that trigger registration under §1-e of Lobbying Act, i.e. the individual or firm receives or reasonably anticipates receiving more than \$5,000 in reportable compensation and expenses, any reportable lobbying activities for the preceding three year period related to the particular matter in question must then be captured, itemized and subsequently reported. The look-back review therefore dictates that once retained, counsel should keep detailed records of all professional activities and compensation/expenses related to a particular municipal lobbying matter, with an eye towards possible future registration and disclosure.

Procurement Lobbying

While the 1999 Lobbying Act amendments focused on municipal lobbying, the 2005 amendments targeted activities related to “procurement lobbying,” defined as any attempt to influence a determination “by a public official, or by a person or entity working in cooperation with a public official related to a governmental procurement.”⁴ The 2005 amendments brought such activities under the jurisdiction of the Lobbying Commission and simultaneously extended the law’s application to municipalities with populations over 50,000. Thus beginning in 2006, state and municipal procurement lobbying also became a regulated activity in New York.

Of particular relevance to the New York land use practitioner is the Lobbying Act’s broadly-defined term “governmental procurement,” which includes the preparation, solicitation, evaluation, award, approval or denial of a contract or other agreement for a “commodity, service, technology, public work, construction, revenue contract, *the purchase, sale or lease of real property or an acquisition or granting of other interest in real property.*”⁵ Accordingly, an attorney representing a client wishing to sell or acquire an interest in real property with either the State of New York or a municipality with a population over 50,000 may now have to comply with the registration, disclosure and reporting requirements of the Lobbying Act, along with additional disclosure requirements and significant restrictions imposed on contacts with state public officials found in §§ 139-j and 139-k of the State Finance Law. However, certain activities are exempt from registration, and procurement contracts valued under \$15,000 or those issued by a school district are exempt entirely. Further, an attorney who receives less than \$5,000 in reportable compensation for services related to procurement lobbying will be exempt under the Lobbying Act, unless he or she exceeds the \$5,000 statutory threshold by lobbying on other, unrelated matters.

Public Employee Ethics Reform Act of 2007

This year's passage of the Public Employee Ethics Reform Act (PEERA) furthers the state trend of increased regulation over an expanding variety of lobbying activities.⁶ PEERA amends the Lobbying Act by requiring that lobbyists now file "public monies lobbying reports" disclosing all activities attempting to influence the disbursement of state or municipal grants, loans or public monies in excess of \$15,000. The Reform Act also expands the definition of procurement lobbying to include additional state agencies and public benefit corporations not previously covered by the Lobbying Act. In addition, effective just last month, the 13-member Commission on Public Integrity assumed the functions and duties of both the State Ethics Commission and Temporary State Commission on Lobbying. For the land use practitioner, it is worth noting that PEERA leaves untouched the essential registration and disclosure provisions of the Lobbying Act, including both the municipal and procurement lobbying provisions. However, PEERA does significantly increase penalties for violations of the Lobbying Act and tightens the ban on lobbyist gift-giving to public officials.

Gift Ban

Under PEERA, for the first time, both lobbyists and their employees are banned from offering a public official anything other than a nominal gift, such as a cup of coffee. Previously, practical application of the law allowed gift-giving of up to \$75 in value (such as a meal). Now, a land use attorney registered as a lobbyist and representing a client regarding a local law amending a municipal zoning ordinance, formally introduced and pending before a council in a municipality with a population over 50,000, is effectively banned from buying lunch for any municipal council member, or for that matter any employee of the municipal council. But if the above fact pattern is applied in a city with a population *under* 50,000, there will be no such ban because of how the Lobbying Act defines the term "municipality"!

Penalties

Penalties for violating the Lobbying Act are significant: a civil penalty of up to \$25,000 and a Class E felony conviction (for repeated violations) may be imposed for knowingly and willfully failing to register or file timely reports with the Commission on Public Integrity; a civil penalty of up to \$50,000 may be imposed for intentionally filing false information; a Class A Misdemeanor conviction may be imposed for violating the gift ban; and the Commission on Public Integrity can further impose a four-year ban on lobbying for those who engage in improper activities that violate the Lobbying Act. The Public Officers Law and State Finance Law impose additional penalties, including fines and debarment from procurement lobbying, for violations of the gift ban and failure to comply with certain provisions of the Lobbying Act, respectively.

New York City Lobbying Act

New York City also regulates lobbying activities that could directly impact a land use practice. §§3-211 – 3-223 of the City Administrative Code (the “City Lobbying Act”) regulate attempts to influence municipal determinations and actions with respect to: “any determination made by the mayor, city council, the city planning commission, a borough president, a borough board or a community board with respect to zoning, or the use, development or improvement of real property subject to city regulation; the terms of the acquisition or disposition by the city of any interest in real property; the procurement of goods, services and related contracts; and the disbursement of public monies,” unless the activity in question falls within a specific exemption. The regulation is triggered when a lobbyist receives in excess of \$2,000 in reportable compensation and expenses (which is in contrast to the \$5,000 state threshold). Like the state, New York City requires that lobbyists register and file periodic disclosure reports, in this instance with the City Clerk. Unfortunately, given the existence of two overlapping yet similar laws, New York City lobbyists are burdened with the requirement of filing multiple and often redundant reports with both the city and state.

2006 Amendments

In 2006, the New York City Council adopted several amendments to the City Lobbying Act which, like recent amendments to state law, significantly expanded the breadth and scope of lobbying regulation in New York City.⁷ Noteworthy changes to the City Lobbying Act include expanded lobbyist registration and disclosure requirements; new “fundraising and political consulting reports” which must be filed by lobbyists who engage in such activities; strict prohibitions on lobbyist gift-giving to any city public officials; increased financial penalties; and enhanced City Clerk’s office enforcement powers. The amendments also eliminate public matching funds for political campaign contributions made by lobbyists and related parties.

Suffolk County Lobbying Act

Practitioners with business on Long Island should be aware of the Suffolk County Lobbying Act. Enacted in 1988, before adoption of the state Lobbying Acts amendments, the Suffolk County Act applies to those who lobby before the legislature, agencies, departments, commissions and boards of Suffolk County. Given its limited scope, the Suffolk County Act is less relevant to a typical land use practice. However, any land use attorneys registered as lobbyists in Suffolk County should note that since Suffolk has a population over 50,000 and has not harmonized its reporting requirements with the state, they – like their New York City colleagues -- are required to file registration statements and periodic disclosure reports with two separate jurisdictions.

Conclusion

Depending upon the nature of his or her professional activities, a New York land use practitioner representing clients seeking approvals, contracts or grants before state or local government may now be considered a lobbyist in the eyes of peering regulators. If so, any related

lobbying activity will fall under the jurisdiction of applicable state and local lobbying laws, as well as relevant statutes governing a registered lobbyist's interactions with elected and other public officials.

¹ N.Y. Legis. Law § 1-c(c)(vii) –(x).

² *Id.* at § 1-c(k).

³ *See* N.Y. Legis. Law § 1-c(c) (vii) & (ix).

⁴ N.Y. Legis. Law § 1-c(c)(v)

⁵ *Id.* at § 1-c(o) (emphasis added).

⁶ A. 3736A, Ch. 14, 2007-2008 Leg., Reg. Sess. (N.Y. 2007).

⁷ New York City Local Law Nos. 15, 16, 17 (2006).