Real Estate/ Municipal Law

Surprise! You May Be A Lobbyist

If your law practice involves contacts with local governments in any matter in which you seek governmental action regarding your client, including procurement matters, you may be subject to the New York Lobbying Act.

Once thought only to apply to those who engaged in efforts to have legislation adopted or blocked in the State Legislature in Albany, the term "lobbyist" has had a substantially different and broader meaning since 2002, and the scope of that term has been significantly broadened by the 2015 Legislature.

A. Thomas Levin

As this article will demonstrate, "lobbying" now includes a range of activities, not necessarily limited to legislation, and those who engage in it are subject to a myriad of registration and reporting requirements. Further, the regulated activities are not limited the those involving the State or its agencies, and now apply with respect to activities involving counties, cities, towns, villages, school districts, industrial development agencies and other levels of local government which have a population base in excess of 5,000.

Those who ignore this new regulatory area, or who fail to appreciate how pervasive it is, do so at their peril. The legislation is complex, and riddled with details and exceptions, and the space available for this article does not permit a thorough exposition. It is the intention of the author to provide here an overview, perhaps to be expanded upon in future articles.

The New York Lobbying Act is found in Legislative Law Article 1-A, and is supervised and enforced by the Joint Commission on Public Ethics (JCOPE). As summarized in JCOPE's Guidelines to the New York State Lobbying Act[1], any person or entity (including a public corporation), and clients or employers of any such person or entity, who in any year actually does, or reasonably anticipates, spending, incurring or receiving more than $5,000 of combined reportable compensation and expense for lobbying activities at the State and/or local level is required to file disclosure reports with.

In determining whether one is subject to this legislation, the first line of inquiry is whether you are or expect to be compensated or have expenses in any one year in excess of $5,000 for engaging in lobbying activities. If your anticipated income and expenses is less than that, you are not required to file disclosure forms (although those for whom you perform such activities may have to do so anyway).

"Local Lobbying" is generally defined as an attempt to influence the passage or defeat of any local law, ordinance, resolution or regulation, or the adoption or rejection of any order, rule, regulation or resolution having the force of law, or any rate making proceeding, by any covered local government. "Local Lobbying" also includes any attempt to influence a public official, or any person acting in cooperation with a public official, in relation to a governmental procurement. The breadth of this definition is clear – read it again, carefully, and think about your recent interactions with local government officials on behalf of your clients.

Fortunately, there are some exceptions which exempt a variety of activities from the foregoing definition. For example, the statute expressly provides that if you are engaged in drafting, advising clients on, or rendering opinions on proposed legislation, orders, rules, regulations, ordinances, resolutions, rates or procurement contracts you are not engaged in "lobbying" so long as your activities are not otherwise connected with executive or legislative action. In other words, if you are providing professional services in the form of research, advice, or drafting documents for your client, and not doing so in connection with legislative or executive action, you are not "lobbying."

Other activities which are exempt from the definition include participation as an attorney, witness, or other representative in a public proceeding (but only if your participation is part of a public record of the proceeding) or in an adjudicatory proceeding (as defined in the State Administrative Procedure Act) and all preparation for such participation. (It is unclear whether "preparation" which includes contact with public officials which includes discussion intended to persuade would qualify for this exemption.) Also exempt is any communication with a public agency, public officer or body, which is in response to a request from the agency, officer or body for information or comments.

Appearing on behalf of a client in a conference provided for in an RFP or invitation for bids, or otherwise responding to an offer of or invitation to bid for a procurement contract, is also not "lobbying." And contact with a staff person designated for such purpose as part of any procurement proceeding is not "lobbying". Similarly, applying for a license or permit authorized by law, or making or being a party to a complaint to an official agency or administrative body is not "lobbying" (but additional contacts with public officials or agencies in furtherance of such applications or complaints may be).

If you or your client[2] are subject to the local lobbying regulations, various filing requirements apply.

For lobbyists, that means filing a statement of registration as a lobbyist. This must be done every two years, commencing January 1, 2015 if you were retained on or before December 15, 2014. If you are retained after that date, you must register within fifteen days after being retained for an activity which will cause you to be considered a "lobbyist," or within ten days after you receive or incur payment or expenses related to your services, whichever comes first. You must also file bi-monthly reports, until you have concluded your lobbying activities, at which time you must file a termination report.

Clients who retain lobbyists must file semi-annual reports of the compensation and expenses they have paid for that purpose. These reports are required even if the lobbyist is not required to register or report. These reports are due January 15 and July 15 of each year.

Public corporations which retain lobbyists or engage in lobbying are also subject to reporting requirements. Space does not here permit the details.

The Local Lobbying Act contains many counter-intuitive provisions and many intricacies which bring ordinary actions into the category of "lobbying". If you deal with covered local governments in the course of your law practice, you should take the time to read this statute carefully and become familiar with it (or become good friends with someone who has). Those who fail to do so put themselves, and their clients, at peril.

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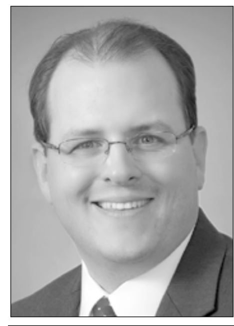
1. JCOPE has a wealth of material and information available on its website, including numerous opinions interpreting the Lobbying Act, at www.JCOPE.ny.gov.

Can You Rely On That Certificate Of Occupancy?

In the area of real estate and land use law there is a critical document that property owners, attorneys, banks and title companies all look for when someone intends to buy, sell or improve a property: the certificate of occupancy. The certificate of occupancy is a document maintained by the local municipal and announces to the world that the property and the structures located thereon are fully compliant with all of the applicable codes, rules and regulations. What if I told you that this critical document may not be worth the paper on which it is printed?



John Farrell

Imagine a scenario where a property owner decides that he needs to expand his home to accommodate his growing family. He wants to construct a two-story addition with a master bedroom suite and two new bedrooms so that his children no longer have to share a room. He hires an architect and tells her about his plan and directs her to obtain all of the necessary approvals. He specifically tells her that he wants the construction to be performed according to code and does not want to have to obtain a variance from the local board of appeals. When the plans are complete, the architect files the application with the municipality and the plans examiner issues a building permit for construction of the addition. Construction is completed and a certificate of occupancy is issued for the addition.

Five years later, the homeowner receives a letter in the mail informing him that the municipality reviewed building permits issued during a certain time period and that his permit was being revoked because it did not comply with the restrictions on gross floor area. The homeowner is advised that the prior building inspector interpreted the code in such a way that would allow him to increase his gross floor area as long as the addition complied with all of the restrictions of the code. Unfortunately, the current building inspector reads the code in a manner that mandates that the entire dwelling and the property must comply with code in order to increase the floor area and since his front porch (which was built in 1927 before permits were even required) was only 34.5 feet from the front property line instead of the required 35 feet. Thus, in his opinion, the entire addition was illegal.

Can the certificate of occupancy be revoked simply because a building inspector interprets the code differently than his predecessor? Whether or not this is proper, it actually happens, and several municipalities around Long Island are doing this more frequently.

Under New York State law, a homeowner has no rights under an improperly issued building permit.[1] Therefore, regardless of whether a building permit is obtained from a local municipality, a property owner may not rely on it if it does not comply with the local zoning code.

In the case of *Parkview Associates v. City of New York*,[2] the New York City Department of Buildings erroneously interpreted the city zoning map and issued a permit to a developer to construct a 31-story building, 12 stories higher than permitted in that zone.[3] After substantial construction was completed on the building, the borough superintendent realized the error and issued a stop work order to the developer and the building permit was partially revoked. The plaintiff appealed this decision to the Board of Standards and Appeals (BSA) which upheld the decision to revoke the permit. In affirming the decision of the BSA, the Court of Appeals held that the building department had no discretion to issue a permit in contravention of the zoning code. According to the Court:

> Insofar as estoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are results are harsh results… the City should not be

See FARRELL, Page 6

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FARRELL ...

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> estopped here from revoking that portion of the building permit which violated the long-standing zoning limits imposed by the applicable P.I.D. resolution.[4]

Further illustrative of this point is *Lamar Advertising of Penn LLC. v. Pitman.*[5] There the Third Department upheld a stop work order which was issued after the Building Inspector issued a permit to erect a billboard that exceeded the maximum allowable height under the code. Again, after construction had commenced, a stop work order was issued. Lamar commenced an Article 78 proceeding alleging that it had acquired a vested right based on the partially completed construction. In rejecting the argument, the court held:

> There can be no doubt that a permittee may acquire a vested right to complete a structure where substantial work already has been performed in good faith reliance upon a valid building permit. However, no such right inures upon an improperly issued permit that purports to allow construction of a structure that violates applicable zoning regulations.[6]

The reason a municipality cannot be estopped from enforcing its own code is because it "could easily result in large scale public fraud."[7] A developer may be more inclined to bribe a local official to issue a permit to construct a building in excess of the permitted zoning, if he knew that he would be allowed to complete the construction even if the fraud were discovered based on a claim of estoppel. The increase in the value of the property would make engaging in fraud worth the risk. "As stated long ago by the United States Supreme Court, 'It is better that an individual should now and then suffer by [governmental] mistakes, than to introduce a rule against an abuse, of which, by improper collusions, it would be very difficult for the public to protect itself.'"[8]

This logic is understandable in the *Parkview and Lamar Advertising* cases where there were clear violations of the zoning code. However, those cases are quite different from the situation described in the beginning of this article.

In that situation, the homeowner had his certificate of occupancy revoked because the current building inspector interpreted the code differently than his predecessor. This is a harsh consequence to suffer based on one's subjective opinion, particularly when the homeowner follows the correct procedures, obtains a building permit and makes a significant investment into his home in reliance on the opinion of the public officials charged with reviewing and interpreting the code.

While the homeowner clearly has the right to make an application to the board of appeals to challenge the new interpretation, there are costs and expenses associated with that application that the average person may not be able to absorb. Moreover, there is a risk that the board of appeals will deny the request for relief placing the homeowner in a difficult position of having to spend significant money to put the home back to its pre-construction condition.

Until the courts or legislature address this issue, property owners are seemingly at the mercy of municipal officials' reading of the local zoning codes.

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1. *Vill. of Wappingers Falls v. Tomlins*, 87 A.D.3d 630, 631 (2d Dept. 2011); *Lamar Adver. of Penn, LLC. v. Pitman*, 9 A.D.3d 734, 736 (3d Dept 2004).
2. 71 N.Y.2d 274 (1988).
3. *Id.* at 280.
4. *Id.* at 282 (internal citations omitted).
5. 9 A.D.3d 734 (3d Dept. 2004).
6. *Id.* at 736 (internal citations omitted).
7. *New York State Med. Transporters Ass'n, Inc. v. Perales*, 77 N.Y.2d 126, 130 (1990) (internal quotation marks omitted) (quoting *E.F.S Ventures Corp. v. Foster*, 71 N.Y.2d 359, 370 (1988)).
8. *E.F.S Ventures Corp.*, 71 N.Y.2d at 370 (alteration in original) (quoting *Lee v. Munroe*, 11 U.S. 366 (1813)).

OPPORTUNITIES ...

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Access to Justice Committee

Collaborate with The Safe Center LI, Nassau/Suffolk Law Services, the Legal Aid Society of Nassau County, the Assigned Counsel Defender Plan, Hofstra and Touro law schools and the Nassau County government to provide information on free and reduced fee legal resources, coordinate legal services for the community and strengthen the core of volunteer attorneys through education and professional development.

Annual Free Legal Information Day

Participate in this annual clinic which is presented during national Pro Bono week in October when Nassau residents are invited to the NCBA to discuss any legal issue with a volunteer attorney. Attorneys in all practice areas are welcome. (see front page article for details on this event)

Senior Citizen Consultation Clinics

Share your legal knowledge as a consultant at the NCBA's monthly Senior Citizen Consultation Clinic. Attorneys who practice in elder care, matrimonial, real estate and trusts and estates are most needed for the monthly clinic, held 9:30-11 a.m., at the Bar Association.

Student Mentoring

Provide valuable adult guidance and serve as a role model for middle school students in one-on-one sessions held at a local middle school. The commitment is twice a month for less than an hour, but the rewards and appreciation you receive are immeasurable. Mentors are always in demand.

Community Relations & Public Education

Develop and implement seminars, projects and programs, including the annual Law Day, to educate the general public on the law.

Mock Trial Tournament

Encourage and motivate high school students to consider a career in the legal profession by serving as a team coach or trial judge. The students argue a case in a real courtroom during the annual New York State Mock Trial competition.

Speakers Bureau

Address community groups, business groups and organizations and provide a better understanding of the law.

BOLD Program

Assist in translating legal concepts and counsel residents in their native tongue through our unique Bridge Across Language Divides (BOLD) program.

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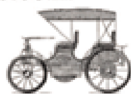

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