How Can I Be Considered A Lobbyist? I'm A Real Estate Developer!

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We hear this question from time to time. Developers often do not consider moving a project through local bureaucracies as "lobbying." But the nation's largest cities and counties increasingly do. Many in-house employees end up qualifying as lobbyists if they spend some, even a small, portion of their work time attempting to influence agencies' zoning or land use decisions, for instance. Several states require state-level disclosure of local-level activities, too. Reporting, gift rule, and occasionally, certification requirements follow registration. Violations risk legal penalties, reputational damage, and business loss. These rules change frequently. To mitigate compliance risks, developers should consider how local governments define lobbying, and the exemptions carved-out from this term, before going to city hall. Opponents use real or imagined disclosure violations to attack projects that are otherwise strong on the merits.

Lobbying definitions. Attempting to influence local governments' zoning or land use decisions on behalf of one's employer generally meets the "lobbying" definition in, for example, New York, Chicago, and Los Angeles. All three cities' rules apply to communications with elected officials and employees who participate in city agencies' decision-making processes. Other jurisdictions restrict the universe of covered personnel to elected officials or senior-level agency employees. New York, Chicago, and Los Angeles' lobbying disclosure laws cover both direct (e.g., in-person meetings, calls, and emails) and grassroots communications (e.g., advertisements or mailers that seek to influence recipients' issue positions and/or urge contacting decision-makers regarding a particular issue). Most jurisdictions exempt communications regarding ministerial actions, such as submitting permit applications in the ordinary course. Another common, but not universal, exemption is testifying at public hearings.

Disclosure. When registration is necessary varies by jurisdiction. Some require it before employees start lobbying, others within a few days of meeting a specific time, effort, or financial threshold. New York requires the employer to register within 15 days of spending more than $5,000 within a calendar year on employee salary or other in-house lobbying costs. Chicago requires employees to register before lobbying. In Los Angeles, an employee must register 10 days after a three- month period in which he/she: (A) makes one direct communication with a city official; and (B) spends 30 or more paid hours, including preparation time, lobbying for his/her employer. Most governments charge filing fees and virtually all require periodic reports to disclose some combination of lobbying issues, contacts, expenses, lobbyist names, gifts, and campaign contributions.

Gifts. Everyone knows that bribing—providing money or other valuables in exchange for official action or nonaction—is illegal. Less well-known are the heightened restrictions on the gifts lobbyists,

their employers, or even their family members may provide to government officials. Lobbying ordinances, ethics rules, and codes of conduct restrict common gifts such as meals, entertainment, event participation, and travel. In New York, for example, offering a meal to a city employee could subject a lobbyist or his/her employer to fines ranging from $2,500 to $30,000 and a Class A Misdemeanor charge. Other jurisdictions punish only the recipient for improper gifts, where the donor faces reputational damage rather than fines or jail time. Knowing what a lobbyist or his/her employer may provide, and the official may accept, before offering the gift is crucial to avoiding compliance problems.

Government Contracting. Many jurisdictions include seeking government contracts in their definitions of "lobbying," exempting some communications that require less sunlight, such as participation in bid conferences or post-award negotiations. This affects developers, for instance, when bidding to develop airport hotels or renovate a convention center. Influencing city contracting decisions is reportable lobbying activity in New York City and may also require disclosure at the state level, too. Chicago not only counts seeking city business as lobbying, it prohibits city officials from having financial interests in such contracts or the businesses that hold them. This can debar a developer that is co-owned by a part-time city official from public projects. Los Angeles requires all bidders for city contracts—including RFPs on hotel redevelopment projects—to certify their compliance with the Los Angeles Municipal Lobbying Ordinance.

Local-level lobbying compliance is complex, particularly when operating in multiple states. But solutions are available. Avoiding violations prevents not only politically sensitive penalties, but also bad press that interferes with obtaining agency approvals. Due diligence before starting a project in a new city, tracking lobbying activity, and calendaring key reporting deadlines are key steps. Counsel who understand development and local lobbying regulation on a national scope can help you with the rest to focus your efforts on development.

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