



Office of the General Counsel
Maryland-National Capital Park and Planning Commission

Review of M-NCPPC Lobbying Regulations

DATE: November 15, 2021

TO: Elizabeth M. Hewlett, Chair
Casey Andersson, Vice-Chair

FROM: Adrian R. Gardner, General Counsel

1. EXECUTIVE SUMMARY

This report is prepared in response to a concerned citizen's inquiry initiated in August 2021. Under both state law and Maryland-National Capital Park and Planning Commission ("Commission") regulations, certain individuals or firms that undertake activities defined as "lobbying" are subject to registration and public disclosure requirements. Among other things, the inquiry questioned why no lobbying registrations had apparently been filed in recent memory. The Office of the General Counsel (OGC) was then tasked with evaluating the agency's compliance with applicable laws and regulations.

The key finding and recommendation of this review is that the Commission's existing lobbying regulations must be revised because they do not adequately cover the scope of activity required and/or implied under the Maryland Public Ethics Law.¹ That is, the Commission's current regulations appear to exclude certain procurement actions, quasi-legislative land-use decisions, and paid lobbying by civic organizations – all of which likely fall within the State law mandate for lobbying regulation.

At a technical level, the primary legal responsibility for compliance with the Commission's lobbying regulations belongs to the individuals and firms who engage in activities that are covered by those rules. As a result of the activities excluded from the Commission's regulations and other related reasons, however, attempting an empirical measure of historical compliance is not a meaningful construct because it would overstate the rate. Suffice it to say that substantive revisions to the regulations are required first.

At a practical level, OGC also recommends making the agency's regulations simpler by avoiding legal classifications tied to opaque court decisions; accepting the Commission's unique role as

¹ Md. Code, General Provisions Article, Title V.

an advisor in the respective legislative affairs of each county; and prescribing clear lines of program authority and responsibilities.

Once corrections and substantive improvements are implemented, the Commission will be called upon to educate affected parties about their respective obligations under the new regulations. For example, the Commission should assume responsibility for apprising the cadre of not-for-profit “citizens’ organizations” that currently are excluded from the lobbying rules, but must now be included based on a proper reading of the State law.

Toward this end, the Commission’s executive team has made a commitment to revise and adopt new, clarifying lobbying rules before the end of the 2021 calendar year, and then to launch an energetic campaign of public education to introduce them.

2. SCOPE

In response to the inquiry described above, Vice-Chair Casey Anderson notified the General Counsel and requested that OGC evaluate the agency’s compliance with applicable laws and regulations. In consultation with Chair Elizabeth Hewlett, OGC determined the review warranted an agency-wide approach.

Meanwhile, upon internal notification about the citizen inquiry, the Commission’s Office of the Inspector General (OIG) also conducted a limited investigation of the citizen’s concerns (the “OIG Report” dated October 20, 2021). This report takes a snapshot that builds on the OIG Report by analyzing the existing compliance environment, and offering specific recommendations for practical improvements to that environment.

3. OVERVIEW OF LEGAL REQUIREMENTS

Under the Maryland Public Ethics Law,² the Commission is required to “adopt regulations relating to [certain third-parties] lobbying” its officials and employees.³ For this purpose, the law defines the term “lobbying” as “performing acts...of a nature comparable to acts requiring registration under” the regulations that govern lobbying the State legislative and executive branches.⁴ The law further requires that, at a minimum, the Commission’s lobbying regulations must be similar to the regulations that govern lobbying the State legislative and executive branches,⁵ and that the agency submit a copy of its lobbying regulations to the State

² Id.

³ Maryland Public Ethics Law at Section 5-830(a).

⁴ Id. at Section 5-801(b).

⁵ Id. at Section 5-830(b).

Ethics Commission.⁶ Finally, the applicable law requires the Commission to prepare annual situation reports on regulated lobbying, submit them to the governing bodies of Montgomery and Prince George's counties, and also publish each annual report on the agency website.⁷

4. KEY ELEMENTS OF THE STATE REQUIREMENTS

As indicated, the State law generally requires the Commission to promulgate regulations that cover a comparable scope of disclosure as the one imposed at the State level. In very broad terms, the State regulations have several core program elements, including three key ones described briefly below.

Registration Requirements. The State law establishes an annual registration mandate for any firm or individual that's triggered based on a matrix of factors that includes:⁸

- A subject matter that involves a *legislative or executive (i.e., administrative) action*
- Communication *activities taken for the purpose of influencing* an official decision
- *Spending or receiving compensation* for the activities taken to influence
- Whether the activity, individual or firm qualifies for one of several *exemptions*

If an individual is lobbying on behalf of an entity, the individual must also identify the entity that authorized the individual to do so, as well as the scope or subject matter of the lobbying authorization.⁹

Activity Reports. In addition to the annual registration requirements, the State lobbying regulations also require each registered lobbyist to file periodic (semi-annual) activity reports.¹⁰ Further, a lobbyist is required to report certain meals, beverages, gifts, receptions, campaign contributions, similar perks and gratuities.¹¹

Prohibited Activities/Standards of Conduct. The standards of conduct for lobbyists regulated by the State are set forth in Section 5-714 of the Maryland Public Ethics Law. Putting aside standards that do not apply to officials and employees who are not elected, the State Ethics Commission has specified that a lobbyist regulated by the State may not:¹²

⁶ Id. at Section 5-830(c).

⁷ Id. at Section 5-830(d).

⁸ Id. at Section 5-702. Included as Attachment A.

⁹ Id. at Section 5-703.

¹⁰ Id. at Section 5-705.

¹¹ Id. at Sections 5-706 through 5-712.

¹² <https://ethics.maryland.gov/wp-content/uploads/filebase/lobbyists/General-Information-Lobbyists.pdf> (last visited November 5, 2021).

- Be engaged for lobbying purposes for compensation that is dependent in any manner on the enactment or defeat of legislation, the outcome of executive action on a procurement contract, or any other contingency related to executive action or legislative action.
- Initiate or encourage the introduction of legislation for the purpose of opposing the legislation.
- Knowingly counsel any person to violate any provisions of the Ethics Law or any other State or Federal Law.
- Engage in or counsel any person to engage in fraudulent conduct.
- While engaging in lobbying activities, knowingly make to an official or employee a statement of material fact relating to lobbying activity that the regulated lobbyist knows to be false.
- Engage in lobbying without being properly registered as a regulated lobbyist in accordance with the lobbying law.
- Request an official or employee to recommend to a potential client the lobbying services of the regulated lobbyist or any other regulated lobbyist.
- Make a gift, directly or indirectly, to an official or employee if the regulated lobbyist knows or has reason to know the gift is in violation of the conflict of interest provisions concerning the receipt of gifts ...
- Make a gift directly or indirectly as a result of a solicitation or facilitation by an official or employee which the regulated lobbyist knows or has reason to know is prohibited by the Ethics Law.
- If the regulated lobbyist is an individual, engage in any charitable fund-raising activity at the request of an official or employee, including soliciting, transmitting the solicitation of, or transmitting a charitable contribution.
- Unless in the ordinary course of the regular business of the regulated lobbyist, make or facilitate the making of any loan of money, goods, or services to an official or employee.
- While engaging in lobbying activities on behalf of an entity, knowingly conceal from an official or employee, the identity of the entity.
- Commit a criminal offense arising from lobbyist activity.

5. THE COMPLIANCE ENVIRONMENT

Current Lobbying Regulations. The Commission’s existing lobbying regulations are contained in Practice No. 5-61 (the “Current Practice” appended for convenience at [Attachment B](#), originally issued on November 9, 1983, and revised on June 12, 1985). In our view, the Current Practice requires further revisions to conform with the current iteration of the Maryland Public Ethics Law.

The Current Practice is drawn too narrowly; that is, it leaves out official decisions or actions that clearly must or should be included. On its face, the Current Practice defines a “lobbyist” as an individual who “communicates orally or in writing with any Commissioner or employee for the purpose of influencing ... [t]he preparation and adoption of *rules and regulations to direct the operation* of the Commission, the Planning Boards, and the Merit System Board.”¹³ (Emphasis added.)

Thus, putting aside so-called “grass roots” expenditures for the moment, the Current Practice requires registration only if a person acts as a (narrowly-defined) lobbyist or employs a (narrowly-defined) lobbyist for \$500 or more to influence a very limited universe of subject matter.¹⁴ That universe only includes topics such as: workplace rules, various health and safety policies, Commission Practices (regulations), Park Rules and Regulations, Planning Board Rules of Procedure, and the like. In an informal survey, Commission staff cannot recall an instance in the last year when anyone, whether compensated or not, sought to influence Commission action on any of these topics.

Commission Acts Covered. The limited scope of the Current Practice is one factor that explains the apparent lack of lobbyist registrations. More importantly, for several reasons discussed briefly below, that scope is not legally sufficient, and we recommend revisions for this reason and various others.

First, the limited scope of the Current Practice does not reach all of the Commission’s “acts... of a nature comparable to acts requiring registration” at the State level (*i.e.*, a “comparable acts standard”).¹⁵ For example, with the exception of certain salespeople,¹⁶ the State registration requirements directly cover a firm or individual who lobbies to influence a State procurement transaction valued at more than \$100,000,¹⁷ a requisite the Current Practice lacks. Similarly, the Current Practice *excludes* the representative of a “*bona fide* citizens’ organization [who lobbies] solely for the purpose of protecting the rights of its own members.”¹⁸ This exclusion is not authorized under the Maryland Public Ethics Law.

Thus, in order to comply with the comparable acts legal standard, the Commission’s lobbying regulations must add a provision to cover certain procurements, delete the provision that

¹³ See Current Practice, Definitions at ¶¶ (a) and (b) (defining the terms “Lobbyist” and “Legislative or Quasi-Legislative Function,” respectively).

¹⁴ Id. at Registration, ¶ (a)(1)-(2).

¹⁵ Maryland Public Ethics Law at Section 5-801(b).

¹⁶ Id. at Section 5-702(b)(4).

¹⁷ Id. at Section 5-702(a)(3).

¹⁸ Current Practice, Exemptions at ¶¶ (a)(6).

exempts certain “citizens organizations,” and make other changes necessary to achieve reasonable alignment.

Second, because its focus is expressly limited to internal “operations,” the Current Practice does not address certain agency land-use functions that Maryland courts classify as quasi-legislative in nature. For example, in *Friends of Frederick County v. Town of New Market*, the Maryland Court of Special Appeals recognized that a town planning commission “acted in a quasi-legislative role” when it prepared a new comprehensive plan for eventual adoption by the town council.¹⁹

As you know, in our jurisdictions, both Planning Boards prepare what amount to recommendations for a General Plan that are taken under advisement until the ultimate legislative action by a respective District Council.²⁰ The agency’s advisory quasi-legislative functions also include planning board comments issued for sector or small-area plan approvals, zoning text amendments, revisions to the subdivision regulations, as well as certain sectional and small area map amendments.

In this light, a serious question arises whether these “quasi-legislative” recommendations made by a Commission planning board fall within the “comparable acts” standard for the purpose of triggering registration and reporting. On this score, OGC notes that many people and firms engaging in the bi-county comprehensive planning process already do register as lobbyists in these matters – that is, when they interact with county governing bodies.²¹ On the other hand, it is not clear that rendering a “mere” recommendation is comparable to a “legislative action,” as that term is defined under the applicable statute.²²

¹⁹ *Friends of Frederick County v. Town of New Market*, 224 Md. App. 185, 204, 120 A.3d 769, 780 (2015), citing *Anderson House, v. Mayor & Council of Rockville*, 402 Md. 689, 723, 939 A.2d 116 (2008) (“Comprehensive rezoning is a vital legislative function, and in making zoning decisions during the comprehensive rezoning process, the [zoning authority] is exercising what has been described as its ‘plenary’ legislative power”).

²⁰ *County Council of Prince George's County v. Zimmer Development Co.*, 444 Md. 490, 522, 120 A.3d 677, 696 (2015) (within the Maryland-Washington Regional District, comprehensive plans “are prepared by the Maryland–National Capital Park & Planning Commission [Planning Boards]... and must be approved by the local legislature of the respective county”), citing Md. Code, Land Use Art., Sections 14–101(b), 14–101(f), 21–202, and 21–208(a).

²¹ A number of individuals and firms currently register as lobbyists for the purpose of land-use plans taken up for consideration by the District Councils within the bi-county jurisdiction. See e.g. <https://www2.montgomerycountymd.gov/Lobbyist/ActivityReport.aspx> (last visited on November 5, 2021), and <https://www.princegeorgescountymd.gov/DocumentCenter/View/32308/2020-Registered-Lobbyists-and-Reports-PDF> (last visited on November 5, 2021).

²² Maryland Public Ethics Law, at Section 5-101(v) provides as follows:

(1) “Legislative action” means an official action or nonaction relating to:

In any event, and notwithstanding any technical legal ambiguity, in the interest of creating transparency and meeting the reasonable public expectations – like the one which prompted this review – we conclude that the Commission’s lobbying regulations should be revised to address these quasi-legislative processes related to land-use regulation.

Third, the Current Practice plainly does not purport to cover any sort of quasi-judicial actions or decisions by the Commission. Likewise, with perhaps a limited exception not relevant here, the lobbying provisions in the Maryland Public Ethics Law generally do not apply to proceedings of the judicial branch. As you know, apart from the category of our agency’s planning recommendations that are properly classified as quasi-legislative, the planning boards do make other decisions that are squarely quasi-judicial in nature – including decisions on preliminary plans of subdivision²³ and certain site-plan applications.²⁴

For these types of cases, contacting members of the Commission outside of a formal proceeding is improper, and planning board members are prohibited from such contacts under the rules of procedure that govern *ex parte* communications.²⁵ (The lobbying rules ordinarily do not apply in this circumstance because no communications take place at all.)

(i) a bill, a resolution, an amendment, a nomination, an appointment, a report, or any other matter within the jurisdiction of the General Assembly; (ii) a bill presented to the Governor for signature or veto; or (iii) testimony or other advocacy in an official capacity as a member of the General Assembly before a unit of State or local government.

(2) “Legislative action” includes:

(i) introduction; (ii) sponsorship; (iii) consideration; (iv) debate; (v) amendment; (vi) passage; (vii) defeat; (viii) approval; and (ix) veto.

²³ *Schultze v. Montgomery County Planning Board*, 230 Md. 76, 80, 185 A.2d 502, 504 (1962) (“an examination of the character of the lots to be resubdivided... and a decision as to whether the re-subdivision plan meets the standards required by the ordinance [is] a quasi-judicial function”).

²⁴ *See, e.g., Sheetz, Inc. v. Frederick City Planning Comm’n*, 106 Md. App. 531, 534, 665 A.2d 327, 329 (1995) (“[B]y whatever name it is called, the Planning Commission conducted a quasi-judicial, evidentiary hearing on the site plan, not to be confused with a legislative-type, public meeting.”)

²⁵ Mont. Co. Planning Board, Rules of Procedure § 3.2 et seq. (“Each Planning Board member must not communicate with any Person, other than Planning Staff or another Board member, about the merits or facts of any pending Application or alleged Violation, except during the Board meeting when the Application or alleged Violation is being considered.”), available at <https://www.montgomeryplanningboard.org/agenda/2007/documents/RulesFINAL3.21.07.pdf> (last visited November 5, 2021); Pr. Geo. County Planning Board, Rules of Procedure § 9(a) (“A member of the Planning Board may not communicate *ex parte*, or outside of the record, with any person regarding the merit of a pending contested case. The members may, however,

At the same time, however, it is a proper and essential function for the Commission's professional staff to communicate openly about those cases with the applicants and anyone else who is interested in them. In fact, depending on the type of case, this interactive process at the staff level often – not always – takes place during regularly scheduled “development review” meetings that are open for the public to attend.

Because the State lobbying rules do not directly apply to judicial or quasi-judicial decision-making, these types of cases also raise technical ambiguities about the “comparable acts” standard described above. After consulting with both Planning Directors, we ultimately recommend including these quasi-judicial cases in the agency's lobbying regulations as well. Our judgment on adding this element is based, not only on the same concerns over transparency, but also on a strong desire for simplifying the administrative demands by using a uniform compliance process.

To summarize, because the Commission undertakes various functions and responsibilities that are so legally diverse, the “comparable acts” legal standard may have been applied differently when the Current Practice was adopted in 1985. For the reasons discussed above and others, our core recommendation is to simplify our agency's rules by adopting a uniform process that covers a much broader scope to comport with current law, align better with public expectations for transparency, and also be easier to administer for compliance purposes.

Administrative Control and Procedure. The Current Practice does not adequately identify the Commission office or officials vested with an affirmative administrative authority or responsibility for its implementation. For example, although it implies that some reports may be filed with the Executive Director, the Current Practice does not say clearly whether that is the only office in which to file, or whether other offices share administrative responsibilities for coordinating, collecting, and publicizing the documents, as well as performing related tasks. In this respect, the Current Practice must be revised to enable appropriate administrative oversight and internal controls for assuring compliance.

Internal and Public Awareness. As written, the Current Practice applies to only a modest part of our agency's overall work program. For that reason, it may not be surprising that most members of the Commission's leadership team have not previously focused on, or been more generally aware of, the lobbying regulations – as the existing rules don't ordinarily expressly apply to their work.

Obviously, after the Commission adopts any of the recommendations described in this review, that situation will change. Based on our research, the Commission's website pages dealing with

communicate with each other, staff or with legal counsel.”), available at <https://www.mncppc.org/DocumentCenter/View/1371/Rules-of-Procedure-PDF?bidId=> (last visited November 5, 2021).

procurement, land use, and other agency activities do not offer a button/prompt, flag/reminder, pointer or any clear line of sight into the lobbying regulations.

In other words, as it stands now, a website visitor must already be aware of the Current Practice in order to discover it. With significant changes to the Current Practice, the Commission's website teams should incorporate more visible cues to invite and encourage compliance by lobbyists. Our agency's communications professionals also can assist in developing a concerted messaging approach for public and workforce education.

6. OTHER POLICY CONSIDERATIONS

Beyond changes required for better compliance, our agency leadership should consider making other policy enhancements as we restart the process of updating the Current Practice that actually was initiated before disruption from the COVID-19 pandemic.

CPMO Recommendations. In consultation with the department heads and executive committee, the Corporate Policy and Management Operations Division ("CPMO"), Department of Human Resources and Management, has proposed instituting fees as follows:

- **Registration Fees.** **Current policy:** M-NCPPC does not charge a registration fee.

Research of other jurisdictions: Three of the four following agencies charge a registration fee of at least \$100. Prince George's County does not charge a registration fee.

| <u>Agency</u> | <u>Fee per Registration</u> |
|------------------------|--|
| State of Maryland - | \$100 |
| Montgomery County - | \$125 |
| WSSC - | \$100 |
| Prince George's County | None; however, they may charge a fee for <i>late</i> registration. |

CPMO Recommendation: Charge an annual fee of \$100 as per State and WSSC's fee.

- **Late Fees.** **Current policy:** M-NCPPC does not charge a late fee for registration or activity reports.

Research of other jurisdictions: Three of the four following agencies charge a registration fee of at least \$100. Prince George's County does not charge a registration fee.

| <u>Agency</u> | <u>Late Fee</u> |
|--|---|
| State of Maryland - Montgomery County - | \$10 for each late day, not to exceed \$1,000 Violations of lobbying provisions are punishable with a maximum of \$1,000- or six-month imprisonment, per violation. Each day a violation continues constitutes a separate offense. |
| WSSC - Prince George's County | "Could charge" \$25 per day, not to exceed \$1,000 "May assess a late fee of \$10.00 per day up to a maximum of \$250.00 for a failure to timely file a [...] lobbyist registration or lobbyist report [...]" |

CPMO Recommendation: Establish an activity report late fee of \$10 for each day late, not to exceed \$1,000, similar to the State's fee.

It may be possible to develop a meaningful projection of the revenue expected from registration fees – based on the level of activity experienced by each county government for lobbyists who are active in overlapping cases or subject matter. The planning departments may consider undertaking this analysis.

Business Process and Online Portal. OGC also recommends establishing both written procedures and a documented business process for lobbying registration and activity reporting that are suitable for automation using one of the agency's available online platforms. In fact, we think the agency may consider devoting any revenue from new fees to a special fund targeted to support the development and maintenance of an IT application for this program. Moreover, in our view, developing an online capability is essential to streamlining and assuring future compliance.

Outreach and Education. In light of the impending changes in Commission regulations that may impact citizens, advocacy organizations, and the development community alike, it is difficult to overstate the importance of a good campaign of outreach. As indicated above, accordingly, the Commission's executive team has made a commitment to revise and adopt new, clarifying lobbying regulations before the end of the 2021 calendar year, and to launch an energetic campaign of public education to introduce the regulations once adopted. Further, even after adoption, each Commission website should be adjusted to invite compliance by lobbyists with visible buttons and abbreviated hypertext (click-through) links to the online portal mentioned above.

7. CONCLUSION

For the reasons provided above, OGC recommends that the Commission promptly complete the process for a substantial overhaul of its lobbying regulations. The Commission's executive team has made a commitment to revise and adopt new, clarifying lobbying regulations before the end of the 2021 calendar year, and to launch an energetic campaign of public education to introduce them after adoption.

Taken together, these steps should be more than sufficient to assure the public and other stakeholders of the Commission's appropriate response to the current inquiry, as well as our collective commitment to accountability going forward.

cc: The Maryland-National Capital Park and Planning Commission
 Officers/Department Heads
 Office of the Inspector General
 Corporate Policy and Management Operations Division