

The Legalities of Lobbying for Land Trusts

An increasing number of land trusts are getting involved with "advocacy"; promoting town open space bond initiatives, opposing proposed developments before land use commissions, or joining statewide lobbying coalitions. As a result, many are becoming concerned about how the Internal Revenue Service's lobbying regulations affect them as tax-exempt 501(c)(3) public charities. Although most land trusts probably have little to worry about, these regulations deserve attention, and professional legal or accounting advice.

It should be stressed that the whole concept of limiting lobbying by non-profits is an important one, deserving of support. It was developed to stop abuses by organizations with far more resources and very different objectives than those of most land trusts. The word "limit" is crucial, however. Congress and the IRS have no intention of prohibiting lobbying by charities. Within the limits, lobbying is an appropriate and legitimate activity by non-profits.

It should also be stressed that lobbying activities are very different than political ones. Political activity is virtually any action by a group which can be construed as assisting or opposing a specific candidate for public office. Such actions are clearly forbidden for 501(c)(3) organizations, and could lead to loss of tax-exempt status.

By the way, any article purporting to give advice on matters as complicated as these should include the phrase "consult a professional on this point" in every paragraph. For the sake of brevity, this article will count on the reader to keep that caution constantly in mind.

WHAT IS CONSIDERED LOBBYING?

Lobbying is defined as any activity intended to influence legislation. "Legislation" includes any action by Congress, the state legislature, a local legislative body, and in the case of ballot initiatives or referendum, the general public. Taking out an ad in a newspaper urging voters to approve a local open space bond referendum, for example, would be considered lobbying.

Generally, executive agencies, such as the DEP or a town department, and administrative bodies, such as P&Z Commissions and other special purpose boards, are not considered legislative bodies. Therefore, while attempting to influence a town council to pass a land use regulation would be considered lobbying; trying to get a town agency to enforce an existing law, or commenting to a local commission on a development proposal would not be.

The IRS defines two types of lobbying. "Direct" lobbying is any attempt to influence a member or staff of a legislative body about a specific legislative proposal. Asking your members to lobby or contact legislators about a specific bill is also considered direct lobbying. "Grassroots" lobbying is any activity which explicitly encourages the general public to contact legislators about a specific bill. In most cases, if a newsletter article merely describes a bill, but does not actually ask members to contact legislators, it is not considered lobbying.

SECTION 501(h) EXPENDITURE TEST

Many terms - "Electing," "Conable Option", and "Safe Haven" - are used to refer to the expenditure test, a standard by which charities that engage in lobbying may elect to be judged. This standard specifies a percentage of a group's exempt expenditures which may be spent to influence legislation. The other standard is the "insubstantial part test", which only states that "no substantial part of a charity's activities" may be devoted to influencing legislation.

For most land trusts there are considerable advantages to electing the expenditure test:

1. Activities are much more clearly defined as either lobbying or not under the expenditure standard. Guidelines are much more vague, and dependent on IRS discretion, for non-electing groups.

2. For electing groups, the expenditure test only applies to expenditures; volunteer activities, such as testifying as an individual at a public hearing, do not count towards the limit. For non-electing groups, volunteer activities may count as lobbying in some cases.
3. Consistent limits for lobbying expenditures for non-electing groups have never been established. "No substantial part" has generally, but not always, been interpreted as no more than 5% of a group's annual budget. Electing groups can spend up to 20% of their first \$500,000 in exempt expenditures on direct lobbying, and up to 25% of that direct lobbying limit amount on grassroots lobbying.
4. The chances are much greater for a non-electing group to lose their tax-exempt status for exceeding their limits by even a small amount for one year. Electing groups are more likely to be subjected to an excise tax, and generally would lose their exempt status only if they exceed the limits for four years. Only the organization is liable for penalties in an electing group, whereas individuals can be liable in non-electing groups.

HOW TO ELECT

First consult an attorney or accountant to be sure that this is the right step for your land trust. Then file IRS Form 5768 before the end of the tax year for which you wish it to apply. The election remains in effect for future years, but is revocable by filing a subsequent form, before the beginning of the targeted tax year. Any group not actively electing this status will be judged by the insubstantial part test.

JOINING A COALITION

How does contributing to the Connecticut Land Conservation Council (CLCC) or a local alliance of groups, affect a land trust's status? In most cases, the same as any other lobbying expenditure. Any non-profit organization contributing money to the CLCC should note so on its tax return and count that contribution towards its lobbying limit. For example, a land trust with an annual budget of \$5,000, which elects the expenditure test, could contribute up to \$1,000 per year to the Coalition if it had no other lobbying expenditures.

In the case of a local coalition formed to lobby on one issue or proposal, contributions by a non-profit organization would be counted in the same manner as above. If, however, an existing non-profit administers the new alliance, by serving as treasurer, for example, all of the money collected to be used for lobbying would count against that group's limit. It may be better to simply have one trusted individual serve as a treasurer or officer, and not have a non-profit involved with administering the group.

CONNECTICUT LAW

State law requires that any group or individual that spends \$2,000 or more, in a calendar year, lobbying the state legislature or a state agency, must register for that year with the state Ethics Commission. As long as a coalition registers, those making contributions to that coalition, even of \$2,000 or more, do not have to register, unless they also spend that much in their own direct state lobbying efforts.

It must be noted that if two or more individuals or groups organize to promote or oppose a local referendum measure, they have to register as a political action committee with the state Elections Enforcement Commission. If the parties are spending less than \$1,000, it's very easy and you can fill out a very brief exemption form available at:

www.ct.gov/seec/lib/seec/SEEC6_Fillin.pdf . Or call the Commission at 860-256-2940

FINDING PROFESSIONAL HELP

To find legal advice, either ask around in your community for the names of lawyers or accountants who have had experience in non-profit tax law, or call the CLCC. We do not endorse specific firms, but we do maintain a list of professionals who have some experience in this field or have expressed an interest in working with land trusts. For information, or to ask questions about this article, please call David Sutherland or Sarah Pellegrino at 860-344-0716.