

November 4, 2015



Dear Mayor Adler and Austin City Council Members,

The design, development, and building community, as reflected by our signatures below, have joined together to review the proposed changes to the lobbying ordinance. As the professional community tasked with compliance with City ordinances and codes, these groups, representing thousands of professionals, have serious concerns with the proposal.




Attached is our analysis of the proposed Resolution currently being considered by the Ethics Commission and Audit and Finance Committee. All large Texas cities, including, Dallas, Houston, San Antonio, Corpus Christi, Laredo and El Paso, and the State, limit the lobbying registration and reporting requirements through a combination of threshold applicability requirements, a limited definition of lobbying and lobbying activities, and explicit exclusions of the day-to-day communications necessary for the plan approval process. As set forth in the analysis, not only does the proposed Resolution not contain any such limitations, it also wholly misrepresents the substance of other municipal ordinances and falsely implies that the suggested changes are supported by the language of those ordinances.

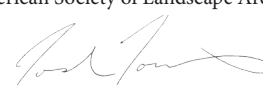
The proposed Resolution would not serve the intended purpose of promoting Austinites' ability to monitor true lobbying activities or improve the City of Austin's ability to enforce a lobbying ordinance. Moreover, it would require thousands of professionals to register and report their day-to-day communications with City staff as "lobbying," and would automatically and by operation of law disqualify those individuals from serving on any City boards and commissions, not only for the time period that they are registered, but for three years thereafter.

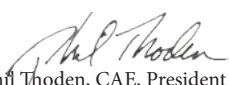
Our group proposes specific changes to the current lobbying ordinance which would eliminate the incidental exemption and thereby provide more transparency and accountability to the current ordinance, but would preserve the ability of professionals to engage in the interactive process with City staff necessary for permitting and plan approval. Our draft Resolution, and draft redline of the current ordinance reflecting our proposed changes, is attached.

Sincerely,

  
Stuart Sampley, AIA, President  
American Institute of Architects Austin (AIA Austin)

  
Steven Spears, PLA, AICP, Central Texas Chair  
American Society of Landscape Architects (ASLA)

  
Josh Tompkins, President  
Associated Builders & Contractors, Austin (ABC)

  
Phil Thoden, CAE, President and CEO, Austin Chapter  
Associated General Contractors (AGC)


  
Amy Casto, Executive Director  
American Council of Engineering Companies Texas (ACEC)

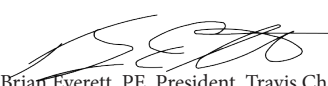
  
Michele Yule, Executive Director  
Greater Austin Contractors & Engineers Association (ACEA)

  
Tony Buonodono, PE, PMP, Stakeholder Committee Chair  
American Society of Civil Engineers, Austin Branch (ASCE)

  
Walter Elias, President  
Home Builders Association of Greater Austin (HBA)

  
Ward Tisdale, President  
Real Estate Council of Austin (RECA)

  
Jonathan L. Poole, Ph.D, PE, President, Austin Chapter  
Structural Engineers Association of Texas (SEAoT)

  
Brian Everett, PE, President, Travis Chapter  
Texas Society of Professional Engineers (TSPE)

A COALITION OF DESIGN, ENGINEERING, BUILDING, AND DEVELOPMENT  
PROFESSIONALS, AS SET FORTH BELOW, PROVIDES THE FOLLOWING  
COMMENTS, IN RED, TO THE PROPOSED RESOLUTION ADVOCATING  
AMENDMENTS TO AUSTIN’S LOBBYING ORDINANCE

American Institute of Architects Austin

American Society of Landscape Architects Central Texas

Associated Builders & Contractors, Austin

Associated General Contractors, Austin Chapter

American Council of Engineering Companies Texas

Greater Austin Contractors and Engineers Association

American Society of Civil Engineers, Austin Branch

Home Builders Association of Greater Austin

Real Estate Council of Austin

Structural Engineers Association of Texas, Austin Chapter

Texas Society of Professional Engineers, Travis Chapter

**COALITION COMMENTS TO THE PROPOSED RESOLUTION**

**WHEREAS**, Austinites have a fundamental constitutional right to petition and to seek changes to their city government;

**WHEREAS**, Austinites have a right to and need for disclosure of the activities of all persons paid appreciably to seek to influence the decisions of their government;

**WHEREAS**, comprehensive, timely and accessible disclosure of persons compensated appreciably to influence government promotes government transparency and public faith in the City of Austin’s government; and

**WHEREAS**, the City of Austin’s current lobbying ordinances, Chapter 4-8, Regulation of Lobbyists, are outdated, ambiguous, and contain numerous gaps in transparency; and

- The current Austin lobbying ordinance is similar to, and in fact more inclusive than, the lobbying ordinances of Texas’ ten largest municipalities.
- As set forth below, the Proposed Resolution misstates, misquotes, and wholly misrepresents the substance of the lobbying ordinances of both other Texas municipalities and the state. The Proposed Resolution seeks to expand the reach of the lobbying statute far beyond any other municipal or state lobbying law.
- The effect of the proposed changes would be to require hundreds, if not thousands, of professionals who must communicate with City staff as part of their duties to ensure compliance with Austin’s regulations and codes, to register as lobbyists, and to disqualify such individuals from serving on any Austin boards or commissions, where their expertise is essential to the formulation and implementation of Austin’s policies on growth, infrastructure, environmental protection, compatibility, roads, mass transit, sustainability and affordability.
- Design professionals did not go to school to be, did not intend to be, and are not paid to be “lobbyists.” The City of Austin permitting, platting and plan approval process requires communications with City staff. It is a dynamic, interactive process regarding the proper interpretation of and application of Austin City Codes. This Proposed Resolution would label such communications as lobbying, require onerous and costly registration and reporting, and disqualify these professionals from civic service. Flooding the City with lobbyist registration and reports not only fails to increase transparency, it exposes these groups to selective enforcement and potential use of ethics and criminal complaints as a tool by opposition groups to advance their political agenda.

**WHEREAS**, a number of individuals who appear to be paid appreciably to influence through direct communications Austin city employees on discretionary municipal matters are currently not registering and reporting as lobbyists; and

- There is no support for this statement, which fails to identify any specific individuals or groups who are not required to register, or fail to register, under Austin's current ordinance. More stringent enforcement of Austin's current lobbying ordinance would address the concerns raised by advocacy groups.
- While this Coalition could support changes to the Austin lobbying ordinance that promote transparency and faith in Austin's city processes, it is rightly concerned that the changes proposed in the Resolution will not only fail to promote these goals, it will also result in an unworkable system that will unduly hinder and delay the already difficult task of compliance with Austin's complex city codes and regulations, harm Austin's competitiveness, and deny Austin's boards and commissions of badly needed expertise.

**WHEREAS**, individuals should be required to register and report as lobbyists in Austin who satisfy all of these criteria: 1) they are compensated; 2) over a specified minimum threshold amount; 3) to influence; 4) through direct communications; 5) a city employee; 6) on a discretionary; 7) municipal matter.

- While the Coalition generally agrees with this statement, the changes proposed in the Resolution, including the elimination of the incidental exemption and the broadening of the definition of City official and municipal matter, expand the reach of the ordinance far beyond lobbying activities and far beyond the reach of any other lobbying ordinance or statute.

**WHEREAS**, Austin's lobbyist laws, unlike Texas' state laws, do not require lobbyist to disclose essential information, such as the amounts they are paid, the specific matters they are lobbying on, details of their expenditures, or the names and pay of the persons assisting them; and

- As set forth below, no other municipal statute requires the reporting of compensation. Moreover, the current ordinance already requires the disclosure of the registrant, the client, the municipal question on which they will or have lobbied, and lobbying expenditures.

**WHEREAS**, the City’s enforcement of Austin’s lobbyist laws has not been effective; and

- There is no support for this statement. There have been no reported issues of improper influence or other violations that should have been addressed under the current Austin lobbying ordinance.

**WHEREAS**, the State of Texas’ more modern and effective lobbying laws (Tex. Gov. Code, Chapter 305) and regulations (1 Tex. Admin. Code, Chapter 34) provide guidance for improving Austin’s laws, as referenced below; and

- The Proposed Resolution misstates, misquotes, and wholly misrepresents the substance of the state lobbying statute, which contains both minimum thresholds and specific exemptions that are neither referenced or included in the Proposed Resolution.
- Further, the state lobbying statute is not an appropriate model for a municipal lobbying ordinance, for it fails to take into account the full range of communications necessary for the day-to-day administration of a growing municipality.

**WHEREAS**, consideration by the Audit and Finance Committee of revisions described in general terms below (and in detail in the attached tracked amendments to Chapter 4-8) will provide an opportunity for the City of Austin to make substantial improvements to its lobbyist disclosure laws:

- 1) Eliminate incidental employment as a lobbyist exception to the definition of “compensation” and “expenditures” for lobbying in Austin City Code, Section 4-8-2(2), (3).

- The incidental exemption in the Austin ordinance is similar to the exemptions found in the Dallas, San Antonio, Laredo, Corpus Christi and El Paso ordinances. The El Paso language tracks the Austin language, and the others similarly state that “compensation” does not include payments made to an individual regularly employed by a person if:

(1) the payment ordinarily would be made regardless of whether the individual engaged in lobbying activities; and

(2) lobbying activities are not part of the individual's regular responsibilities to the person making the payment.

*See Dallas City Code § 12A-15.2(3)(B), (6)(B); San Antonio City Code § 2-62 (c), (d); Laredo City Code § 2-356; Corpus Christi City Code § 2-316B(c); see also El Paso City Code § 2.94.020 (same incidental exemption as Austin).*

- The Texas lobbying statute does not contain the same exemption as the municipalities, but has an hours threshold that accomplishes the same purpose:

(b-3) Subsection (a)(2) does not require a person to register [as a lobbyist] if the person spends not more than 26 hours, or another amount of time determined by the commission, for which the person is compensated or reimbursed during the calendar quarter engaging in activity, including preparatory activity as defined by the commission, to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action. *Tex. Gov't Code § 305.002 (b-3).*

- Eliminating the incidental requirement in the Austin ordinance, without exemptions for communications necessary to the platting, permitting and plan approval process, would require hundreds, if not thousands, of design engineering and development professionals to register as lobbyists.
- Labeling design professionals and others as lobbyists would also automatically disqualify them from serving on any City boards or commissions during the time they are registered and for **three years** after:

A person who is registered or is required to register as a lobbyist under Chapter 4-8 (Regulation of Lobbyists) or who is employed by a person registered or required to register under that chapter is not eligible to serve on a board until the expiration of three years after

the date that the person ceases to be registered, required to be registered, or employed by a person registered or required to register. *Austin City Code*, § 2-1-21.

A “board” is defined as “a permanent advisory or decision-making body described in Article 2 (*Boards*) and includes a commission, committee, council, or agency.” § 2-1-2(A).

2) Encompass all city employees and agents within the scope of city personnel who may be subject to being lobbied on a discretionary matter, by redefining “city official” in Austin City Code, Section 4-8-2(1), to include all city employees, consultants, agents and representatives. Similarly, revise the Austin lobby law’s applicability in Austin City Code, Section 4-8-3 to include all city employees. See Tex. Gov. Code Section 305.002(4), (7)

- No other large municipality in Texas does this; all have definitions of city official that are limited to high level staffers. *See Dallas City Code* §§ 12A-15.2(1), (10); *Houston City Code* §§ 18-71, 72; *San Antonio City Code* § 2-62(a); *El Paso City Code* § 2.92.0; *Corpus Christi City Code* § 2-316B(a); *Laredo City Code* § 2-356.
- Unlike Austin, most large municipalities further limit the definition of lobbying activities by specifically exempting permitting, platting and plan approval communications: “***The term [administrative action] does not include the day-to-day application, administration, and execution of city programs, policies, and procedures such as permitting, platting, plan approval, and technical matters related to or in connection with a specific project or development.***” *Houston Code* Section 18-71; *Dallas City Code* § 12A-15.2(12)<sup>1</sup>
- The state lobbying statute also contains exemptions from the definition of “lobbying” that include the following:

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<sup>1</sup> See also *San Antonio City Code* § 2-62(k) (excluding the “day-to-day application, administration or execution of city programs, policies, ordinances, resolutions or practices, including matters that may be approved administratively without consideration by a board, a commission or the city council”); *Laredo City Code* § 2-356 (same); *Corpus Christi City Code* § 2-316B(e) (excluding the “day-to-day application, administration or execution of city programs and policies”).



- (2) preparation or submission of an application or other written document that merely provides information required by law, statute, rule, regulation, order, or subpoena, or that responds to a document prepared by a state agency;
- (3) communicating for the purpose of achieving compliance with existing laws, rules, policies, and procedures, including communications to show qualification for an exception of general applicability that is available under existing laws, rules, policies, and procedures;

*1. Tex. Admin. Code § 34.5 (“Certain Compensation Excluded”).*

3) Amend “municipal question” in Austin City Code, Section 4-8-2 (9) to explicitly require the city officials’ decision or action to be discretionary. Include specifically in the definition of municipal question both municipal legislation and administrative action of a discretionary nature that are subject to any action or decision by a city official and that is pending or may in the future be subject to a discretionary action or decision. See Tex. Gov. Code, Section 305.002 (1), (6).

- Tex. Gov. Code Section 305.002 (1) **actually** states that “administrative action” includes “any other matter that may be the subject of action by a state agency or executive branch office...”
- Tex. Gov. Code Section 305.002(6) **actually** states that “legislation” includes “any matter that may be the subject of action by either house or by legislative committee....”
- **The term “discretionary” is not used in any part of the Texas statute, and is only used in the San Antonio, Houston and Dallas codes as follows:**

MUNICIPAL QUESTION means a public policy issue of a discretionary nature that is pending before, or that may be the subject of action by,<sup>2</sup> the city council or any city board or commission...The term does not include the day-to-day

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<sup>2</sup> The Dallas code uses “pending or impending” rather than “pending before, or that may be the subject of”



application, administration, and execution of city programs and policies such as permitting, platting and design approval matters related to or in connection with a specific project or development.<sup>3</sup>

A matter is considered discretionary per se if it can be appealed to a city commission, city board, or to the council, or if it is an administrative variance or alternative compliance in the Land Development Code (Titles 25 and 30). Decisions on building permits and site plans are discretionary per se. However, technical decisions, whether appealable or not, in Chapter 25-12 (the Technical Code) are considered non-discretionary.

- These distinctions are not made in any other municipal code, nor in the state statute.
- This expands the reach of the ordinance beyond that of any other large Texas municipality, or the state. The other large Texas municipalities all contain an incidental exemption excluding compensation if lobbying activities are not a part of the individual's regular responsibilities, and/or specific exemptions for permitting, platting and design approval matters. Similarly, the state statute, which is not an appropriate model for a municipal ordinance, contains an hours threshold and a specific exemptions for "communicating for the purpose of achieving compliance with existing laws, rules, policies, and procedures, including communications to show qualification for an exception of general applicability that is available under existing laws, rules, policies, and procedures."

Subject to the above, discretionary excludes the non-discretionary day-to-day, routine application, administration, and execution of city programs and policies such as routine, non-discretionary permitting and design approval matters in connection with a specific

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<sup>3</sup> The San Antonio code exception states: "The term 'municipal question' does not include the day-to-day application administration, and execution of existing City programs, policies, ordinances, resolutions or practices, including matters that may be approved administratively without consideration by a board, a commission, or the City Council. The term 'municipal question' does include all discretionary matters before the Board of Adjustment, the Planning Commission and all advisory committees and subcommittees thereof. "

project or development. See City of Houston Code, Section 18-71 (administrative action, municipal legislation); City of Dallas Code, Section 12A-15.2(12).

- The Houston and Dallas Codes **actually** state:

“The term does not include the day-to-day application, administration, and execution of city programs, policies, and procedures such as permitting, platting, plan approval, and technical matters related to or in connection with a specific project or development.”

- Thus the Resolution does not reference the fact that it made the following changes to the Houston (and Dallas) Code language:

The term ~~does not include~~ excludes the non-discretionary day-to-day application, administration, and execution of city programs, policies, and procedures such as routine, non-discretionary permitting and design approval ~~platting, plan approval, and technical~~ matters related to ~~or in connection with~~ a specific project or development.

(emphasis added to reflect differences from Proposal)

- These changes to the definitions, as worded, expose the City to a void-for-vagueness Constitutional challenge, for it is difficult, if not impossible, for City employees or Austin citizens to determine whether communications will meet this “discretionary” v. “non-discretionary” standard. There is a constitutional requirement of definiteness for any law that carries criminal penalties—requiring that the law give “a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.”<sup>4</sup> A law “which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential element of due process of law.”<sup>5</sup>

Define “municipal legislation” as (1) An ordinance, resolution, motion, amendment, nomination, or any other matter pending before the city council, council committee, city-created entity, or city commission; or (2) Any matter that is or may be the subject of action by the city council, council committee, city-created entity, or city commission,

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<sup>4</sup> *U.S. v. Harriss*, 347 U.S. 612, 617 (1954).

<sup>5</sup> *Connally v. General Constr.*, 269 U.S. 385, 391 (1926).

including drafting, placing on the agenda, consideration, passage, defeat, approval, timing or tactics, or countersignature of the matter. See City of Houston Code, Section 18-71 (municipal legislation)

- The **actual** language of Houston Code Section 18-71 is as follows:

*Municipal legislation* means

(1) An ordinance, resolution, motion, amendment, nomination, or any other matter pending before the city council, ~~council committee, city-created entity, or city commission~~; or

(2) Any matter that is or may be the subject of action by the city council or a council committee, ~~city-created entity, or city commission~~, including drafting, placing on the agenda, consideration, passage, defeat, approval, ~~timing or tactics~~, or countersignature of the matter.

(emphasis added to reflect differences from Proposal)

Define “administrative action” as rulemaking, licensing, or any other matter that is or may be the subject of decision or action by a city official, including the proposal, consideration, or approval of the matter. See City of Houston Code, Section 18-71 (administrative action).

- The **actual** language of Houston Code Section 18-71 is as follows:

*Administrative action* means rulemaking, licensing, or any other matter that may be the subject of action by a city official, city department or other city agency, including the proposal, consideration, or approval of the matter. The term does not include the day-to-day application, administration, and execution of city programs, policies, and procedures such as permitting, platting, plan approval, and technical matters related to or in connection with a specific project or development.” (emphasis added to reflect difference from Proposal).

- The Proposed Resolution therefore completely omits the explicit exclusion that is key to the Houston definition.

4) Raise the lobbyist registration compensation thresholds in Austin City Code, Section 4-8-4 to \$2000 a quarter from \$200 a quarter and the expenditure threshold to \$500 from \$200. Add a subsection in Section 4-8-4 specifying that a person who meets a threshold in this section is required to register if the person, as part of his regular employment, communicates directly with a city official to influence a municipal question, whether or not the person receives any compensation or reimbursement for the communication in addition to their salary for that employment. See Tex. Gov. Code 305.003(b).

Require the registrant to make a reasonable allocation of compensation, between compensation for lobby activity and compensation for other activities, for all reported persons. See 1 Tex. Admin. Code 34.43(c). Require the Ethics Review Commission to recommend to the Council for consideration every four years a modification in the registration compensation and expenditure thresholds to maintain a substantially equivalent threshold after 4 years of cost of living and other relevant changes.

- It is not clear from this language or the other proposed changes whether the proposed \$2,000 threshold is a total compensation threshold, or only applies to compensation received from a particular client.
- All design professionals must communicate with city employees to get a permit, plat or design plan approved. Further, the proposal defines “City official” as any non-ministerial city employee, removes the incidental exemption, and requires professionals to allocate a portion of their fees and/or salary to these communications. Finally, under the proposal communications regarding any proposed decision on an administrative variance, alternative compliance in the Land Development Code, building permits or site plans (which are considered “discretionary per se”) are considered lobbying.

- As a result, even with a higher compensation threshold, this would require virtually all design professionals to register as lobbyists, especially if the \$2,000 threshold is intended to apply to total compensation in a quarter, from one or more clients.

5) Increase the current lobbyist registration fee of \$300 to \$350 to reflect the cost of living, in Austin City Code, Section 4-8-6(C). Tie the fee to the cost-of-living index and having it revised automatically every year in increments of \$10 at the time of the City budget's adoption. Lower the registration fee for regular employees of 501(c)(3) nonprofit organizations, that are not retained or compensated by others to lobby, to \$50 a year.

- Raising the fee and tying it to the cost of living, rather than the cost of administering the ordinance, violates the First Amendment. "Legislative lobbying is an activity protected by the First Amendment, and a state may only charge a fee as a precondition for lobbying where that fee is 'calculated to defray the expense' of lobbying regulation."<sup>6</sup>

6) Require lobbyist reports, pursuant to Austin City Code, Section 4-8-7(A), to include lobbyist compensation ranges for each client. See Tex. Gov. Code, Section 305.005(g). In addition, the Code in Section 4-8-6 (A) should include the following information on lobbyist preparers or aides: their name, compensation, client, and specific subject matter. Tex. Gov. Code, Section 305.005(f)(5).

- No other large Texas municipality requires any reporting of compensation. *See Dallas City Code § 12A-15; Houston City Code § 18-74; San Antonio*

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<sup>6</sup> *The ACLU of Illinois v. White*, 692 F.Supp.2d 986, 992 (N.D.Ill. 2010) (finding that the State Secretary did not meet its affirmative burden to "establish [a] reasonable fit" between the \$1,000 lobbying registration fee and the cost of administering the act"); *see also Moffett v. Killian*, 360 F.Supp. 228 (D. Conn. 1973) (\$35 registration fee held unconstitutional because "it is clear that the sums received by the State...which were paid into the State's general fund, were far in excess of the amounts actually needed to administer the registration provisions"); *Fidanque v. State*, 969 P.2d 376 (Or. 1998) (striking \$50 registration fee because the language of the statute did not tie the fee to the costs associated with registering lobbyists).

*City Code § 2-65(e); Laredo City Code § 2-360; Corpus Christi City Code § 2-316C; El Paso City Code § 2.94.070.*

- The state requires reporting of compensation in ranges, but excludes from lobbying “communicating for the purpose of achieving compliance with existing laws, rules, policies, and procedures, including communications to show qualification for an exception of general applicability that is available under existing laws, rules, policies, and procedures.” *1. Tex. Admin. Code § 34.5 (“Certain Compensation Excluded”)*.

7) Require all lobbyist registration forms and reports to be filed in an electronic format that allows for a downloadable, searchable database, which will be placed with 2 business days on the City website with common queries for publicly accessibility, such as total compensation for a particular lobbyist, all clients of a particular lobbyist, and all lobbyists and their compensation for a particular municipal matter or client.

8) Require in Austin City Code, Section 4-8-6(A)(3) more detailed reporting of the specific municipal matters lobbied on so that the lobbyist reports contain a description by each client of every real property (an address or legal description) and/or a description of each subject matter being lobbied. Require the City Clerk to develop checkoff boxes for a comprehensive list of specific subject matter descriptions. See Tex. Gov. Code, Section 305.005(f)(4).

- Tex. Gov. Code 305.005(f)(4) **actually** states that a registrant must report: “the subject matter of the legislation or of the administrative action that is the subject of the registrant’s direct communication.”
- No mention is made in the state statute of a requirement to report a description of the real property.

- No other municipal code specifically requires the reporting of a description of real property involved in any communications with any City employee or agent.

9) Require lobbyists to update their city registration forms within 5 business days when a new client or new municipal matter is added. See Tex. Gov. Code, Section 305.0065.

- Tex. Gov. Code Section 305.0065, titled “AMENDED REGISTRATION DURING LEGISLATIVE SESSION” **actually** states that it requires amended registration “only during the period beginning on the date a regular legislative session convenes and continuing through the date of final adjournment.”
- This requirement for updating forms when a new “municipal matter” is added would require continual updating of registration or activity forms rather than the quarterly reporting now required. No other large Texas municipality requires anything more than quarterly reports. *See Dallas Code § 12A-15.6; Houston Code §18-75; San Antonio Code § 2-66; Laredo City Code § 2-360; Corpus Christi City Code § 2-316C; El Paso City Code § 2.94.070.*

Change Austin City Code, Sections 4-8-2(2) and 4-8-6 to have lobbyist registration or amended registration triggered simply by the first day of direct communication with a city official, rather than under current law, which is triggered by the latter of their first day of direct communication or entering into a lobby contract.

10) Include lobbying preparation by lobbyists and their assistants for directly communicating to the definition of “compensation” in Austin City Code, Section 4-8-2(2) for lobbying. See 1 Texas Administrative Code Sections 34.3, 34.63.

11) Redefine lobbying in Austin City Code, Section 4-8-2 (6) to include “communicating directly” or communicating through intermediaries with city officials. See Tex. Gov. Code Section 305.002(2).



- Tex. Gov. Code 305.002(2) **actually** states:  
 “ ‘Communicates directly with’ or any variation of the phrase means contact in person or by telephone, telegraph, letter, facsimile, electronic mail, or other electronic means of communication.”
- The Texas statute does not reference or include communicating “through intermediaries” as is implied by the Resolution.

12) Eliminate the overbroad dispute exception to lobbying in Section 4-8-5(7) and add additional exceptions, such as for lobbyist assistants that do not directly communicate with city officials and are reported by the lobbyist (See 1 T.A.C 34.63), and for a person whose only lobbying communication is public testimony at a public hearing regardless of whether they are compensated. See Tex. Gov. Code, Section 305.004 (2). Add an exception for persons who are appointed to city boards and commissions and their sole activities relate directly to that public service. Tex. Gov. Code, Section 305.0041(a)(4).

13) Require all registered lobbyists, by amending Austin City Code Section 4-8-9, at the beginning of all their direct communications with city employees to state their name and the client(s) for whom they are lobbying.

- Section 4-8-9 already requires that each person or registrant appearing before the council or an official body identified in 4-8-3 (*Applicability*) to “orally identify himself and the person or interest the person represents before beginning the person’s address.”
- Given the proposed expansion of the ordinance to potentially apply to virtually any communication with any City staff, this proposal raises serious confidentiality concerns. If future development prospects know that even the most basic discussions about the applicability and operation of Austin’s codes and ordinances must be publicly reported as “lobbying,” they may choose to avoid Austin altogether.

14) Amend the Austin lobby law to explicitly subject all lobby filings to state perjury and false statement penal provisions, by amending Austin City Code, Sections 4-8-6 (A) and 4-8-7 (A). Amend City Code Section 4-8-11 to provide that each and every failure to properly register, file or disclose information under Chapter 4-8 is a separate violation and is subject to a separate Class C Misdemeanor.

- Given the proposed expansion of the ordinance to potentially apply to virtually any communication with any City staff, the increased penalties and enforcement proposals expose Austin's citizens and design professionals to selective enforcement and the use of ethics and criminal complaints as a tool by opposition groups to advance their agenda.

15) Mandate in Section 4-9-11 that lobbyists that violate the City lobby law after two prior adjudicated violation occurrences shall be banned from lobbying the City of Austin for 60 to 365 days for each subsequent adjudicated occurrence.

- Given the proposed expansion of the ordinance to potentially apply to virtually any communication with any City staff, this not only exposes Austin's citizens and professionals to selective enforcement and improper use of the ordinance, it additionally could result in banning professionals from communications that are a necessary part of their work in providing engineering, architectural, construction and development services to clients.

16) Require the City Clerk, pursuant to Austin City Code, Section 4-8-7 (E), to facially review all lobbyist registration and activity report forms for timeliness and completeness within 30 days. Require all findings of possible violations to be forwarded by the City Auditor to the Ethics Review Commission within 10 business days.

17) Change Austin City Code, Section 2-7, Article 3, to require that complaints for alleged violations of Austin City Code, Article 4-8, that the Ethics Review Commission shall hold only a preliminary hearing, and not a final hearing, and that the

Commission be required to refer all complaints for which there is a reasonable basis to believe that there may be a possible violation for municipal prosecution. Require an Ethics Review Commissioner to fully recuse themselves from any decision or participation in any lobbyist or ethics complaint before the Commission involving an alleged violation by the Council member that nominated them.

18) Require, in Section 4-8-7, the City Auditor to annually conduct a complete audit at random of a sufficiently large sample of lobby registrants to be representative, but not less than 5% of registrants, to ensure registrants' filings are in compliance. All possible violations shall be referred to the Ethics Review Commission within 14 days.

19) Delineate the expenditure categories more specifically. Tex. Gov. Code, Section 305.006(b). Require itemization for specific items over \$50.

20) Add narrow and limited exclusions to the definition of compensation in Section 4-8-2(2), similar to those provided by Texas State Law, including for activities directly related to service on appointed city boards and commissions. Tex. Gov. Code Section 305.0041(a)(4); 1 Tex. Adm. Code 34.5

21) Add additional minor clarifying language as appropriate to modernize Chapter 4-8.;

**NOW, THEREFORE,**

**BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:**

The City Manager is directed to provide a legal review of the draft ordinance in Exhibit A, attached, implementing the above considerations within 60 days, and provide

comment and recommendation for review and consideration by the Audit and Finance Committee.

- A draft ordinance has not been circulated or available for review by the public. In the interest of transparency, the public should have the opportunity to review and comment on a draft ordinance prior to it being proposed to the Committee.

**FURTHER, BE IT RESOLVED:** The City Manager is directed to analyze and report back to the Audit and Finance Committee within 90 days alternative approaches to ensure the diligent and independent City prosecution of alleged lobbyist law violations.

**ADOPTED:** \_\_\_\_\_, 2015      **ATTEST:** \_\_\_\_\_  
Jannette S. Goodall  
City Clerk

## **RESOLUTION NO.**

**WHEREAS**, Austinites have a right to a lobbying ordinance that promotes the goals of transparency and faith in our city officials and processes; and

**WHEREAS**, the Austin lobbying ordinance should provide clear guidelines to all citizens regarding what type of interactions with city officials require registration and reporting as a lobbyist, and should reflect standards that promote consistent compliance and enforcement;

**NOW, THEREFORE**, the Audit and Finance Committee is directed to review and consider potential changes to the Austin lobbying ordinance, which should include a full review of the ordinances of other large Texas municipalities, and the State, and as part of such review should specifically consider the following recommendations:

- 1) Eliminate the “incidental employment exclusion” in the definition of “compensation” and “expenditure” and replace it with a more objective and verifiable standard, such as an hours requirement as used in the State statute, in order to promote compliance with the registration and reporting requirements;
- 2) Consider whether changes need to be made to the definitions of “lobbying” and “municipal question” in order to fully capture lobbying activities that should be tracked and reported to the community, so as to allow our citizens access to information regarding lobbying activities; and
- 3) Add language excluding day-to-day communications regarding platting, permitting and plan approval, similar to the language found in the ordinance of all other large Texas municipalities, from the definition of lobbying, in order to ensure that the City of Austin can track and report true lobbying activities to its citizens while preserving the ability of citizens to engage in the dynamic and interactive process with City staff that is necessary for compliance with City laws and codes.

**NOW, THEREFORE, BE IT RESOLVED BY THE AUDIT AND FINANCE COMMITTEE OF THE CITY OF AUSTIN:**

The City Manager is directed to analyze the issues raised above and report back to the Audit and Finance Committee within 90 days.

## CHAPTER 4-8. - REGULATION OF LOBBYISTS.

### § 4-8-1 - PURPOSE.

The council declares that the operation of responsible democratic government requires that the fullest opportunity be afforded to the people to petition their government for the redress of grievances and to express freely to any city officials their opinions on pending municipal questions and on current issues; and that to preserve and maintain the integrity of the governmental decision-making process in the city, it is necessary that the identity, expenditures, and activities of certain persons who engage in efforts to influence a City official on matters within their official jurisdictions, either by direct communication to the official, or by solicitation of others to engage in such efforts, be publicly and regularly disclosed.

Source: 1992 Code Section 8-16-1; Ord. 031023-12; Ord. 031211-11.

### § 4-8-2 - DEFINITIONS.

In this chapter:

- (1) CITY OFFICIAL means the mayor, a councilmember, or a member of the City staff or a board, commission, and committee described in Section 4-8-3 (Applicability).
- (2) COMPENSATION means money, service, facility or other thing of value or financial benefit that is received or is to be received in return for or in connection with services rendered or to be rendered. ~~Compensation shall not include compensation paid to an individual regularly employed by a person if the compensation paid to the individual is ordinarily paid regardless of whether the individual engages in lobbying activities and lobbying activities are an incidental part of the individual's regular responsibilities to the person paying the compensation.~~ Compensation shall not include the financial gain that an person may realize as a result of the determination of a municipal question, unless that gain is in the form of a contingent fee. Compensation shall be considered received on the date on which the contract or agreement for the compensation is made or on the date lobbying commences, whichever is later.
- (3) EXPENDITURE means a payment, distribution, loan, advance, reimbursement, deposit or gift of money or anything of value, including a contract, promise or agreement to make an expenditure, regardless of whether the promise or agreement is legally enforceable. ~~Expenditure shall not include an expenditure paid to an individual regularly employed by a person if the expenditure paid to the individual is ordinarily paid regardless of whether the individual engages in lobbying activities and lobbying activities are an incidental part of the individual's regular responsibilities to the person paying the expenditure.~~
- (4) GIFT means a payment, subscription, advance, forbearance, rendering or deposit of money, services or anything of value, unless consideration of equal or greater value is received. Gift shall not include a political contribution otherwise reported as required by law, a commercially reasonable loan made in the ordinary course of business, ordinary social contacts, ordinary business meetings (including meals), or a gift received from a member of a person's immediate family or from a relative within the third degree of consanguinity of a person or of the person's spouse, or from the spouse of an relative described in this subsection.
- (5) IMMEDIATE FAMILY means a spouse residing in the person's household and dependent children.
- (6) LOBBY or LOBBYING means the solicitation of a City official, by private interview, postal or telephonic communications, or any other means other than public expression at a meeting of

City officials open to the public under Chapter 551 (Open Meetings Act) of the Texas Government Code, directly or indirectly by a person in an effort to influence or persuade the City official to favor or oppose, recommend or not recommend, vote for or against, or to take action or refrain from taking action on a municipal question. The term lobby or lobbying shall not include a mere request for information or an inquiry about a municipal question, matters, or a procedure or communication to a City official which is incidental to other employment not for purpose of lobbying.

- (7) LOBBY EMPLOYER means a person who compensates another person to lobby on a municipal question of interest to the person.
- (8) LOBBYING ENTITY means a corporation, association, firm, partnership, committee, club, organization or group of persons who are voluntarily acting in concert that is compensated by a lobby employer to lobby.
- (9) MUNICIPAL QUESTION means a proposed or proposal for an ordinance, resolution, motion, recommendation, report, regulation, policy, appointment, sanction, and bid, including the development of specifications, an award, grant, or contract for more than \$2,000. The term does not include the day-to-day application, administration, and execution of city programs, policies, and procedures such as permitting, platting, plan approval, and technical matters related to or in connection with a specific project or development.
- (10) PERSON means an individual, corporation, association, firm, partnership, committee, club, organization, or group of persons who are voluntarily acting in concert.
- (11) REGISTRANT means a person required to register under Section 4-8-4 (Persons Required to Register).
- (12) SUBSTANTIAL ECONOMIC INTEREST means holding stock worth \$5,000 or more in, or five percent or more ownership of any business, corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, or other legal entity which is not publicly traded.

Source: 1992 Code Section 8-16-2; Ord. 031023-12; Ord. 031211-11.

#### § 4-8-3 - APPLICABILITY.

This chapter applies to a person who lobbies the mayor, a council member, their aides, a member of a board governed by Chapter 2-1 of the Code, a member of a board, task force, or other bodies established by council and listed by the city clerk in accordance with Section 2-1-3(C) of the Code, and the following city staff: the city manager, an assistant city manager, their aides, the city attorney, an assistant city attorney, a department or assistant department director, and, where no assistant department director serves, the first principal assistant of the department.

Source: Ord. 20101209-003.

#### § 4-8-4 - PERSONS REQUIRED TO REGISTER.

Excepted as provided in Section 4-8-5 (Exceptions), a person must register with the city clerk if the person:

- (1) receives compensation of \$200 or more in a calendar quarter for lobbying;
- (2) receives reimbursement of \$200 or more in a calendar quarter for lobbying;
- (3) expends \$200 or more in a calendar quarter for lobbying; or
- (4) lobbies as the agent or employee of a person who:
  - (a) receives compensation of \$200 or more in a calendar quarter for lobbying;



- (b) receives reimbursement of \$200 or more in a calendar quarter for lobbying; or
- (c) expends \$200 or more in a calendar quarter for lobbying.

Source: 1992 Code Section 8-16-4; Ord. 031023-12; Ord. 031211-11.

#### § 4-8-5 - EXCEPTIONS.

The following persons are not required to register under this chapter:

- (1) a person who spends not more than 26 hours for which the person is compensated or reimbursed during the calendar quarter engaging in activity, including preparatory activity, in activities that constitute lobbying.
- (2) A person who owns, publishes or is employed by a newspaper, another regularly published periodical, a radio station, a television station, a wire service or another bona fide news medium that in the ordinary course of business disseminates news, letters to the editor, editorial or other comment or paid advertisement that directly or indirectly oppose or promote municipal questions if the person does not engage in further or other activities that require registration under this chapter and does not represent another person in connection with influencing municipal questions. This subsection does not exempt a person whose relation to the news media is only incidental to a lobbying effort or when a position taken or advocated by a media outlet directly impacts, affects, or seeks to influence a municipal question in which the media outlet has a direct or indirect financial interest.
- (3) A person whose only activity is to encourage or solicit a member, employee, or stockholder of an entity by whom the person is reimbursed, employed, or retained to communicate directly with one or more City official to influence a municipal question.
- (4) A person whose only activity to influence legislation or administrative action is attendance at a meeting or entertainment event attended by one or more City officials if the cost of the meeting or entertainment event is not paid, in whole or in part, by the person or anyone on whose behalf the person is lobbying.
- (5) A governmental entity, its officers and employees, provided they are solely engaged in matters of governmental interest concerning their respective governmental bodies and the City.
- (6) A person whose only expenditure is the cost of photocopies of City documents or the cost of purchasing council or board and commission agendas.
- (7) A person who does not know and has no reason to know whether a municipal question is pending at the time of contact with a City official. This subsection shall not apply if the existence of a municipal question is discovered during contact with a City official and the person then engages in additional lobbying of the same or other City officials.
- (8) A person whose contact with a City official is made solely as part of the process of resolution of a dispute between a person or the City and another person, provided that the contact is solely with City officials who do not vote on or have final authority over a municipal question involved.
- (9) A lobbying entity if each registrant who lobbies as an agent of the lobbying entity reports, in cooperation with the lobbying entity, the lobby expenditures made by the lobbying entity that were effected by the registrant.
- (10) A lobby employer who would only be required to register under Section 4-8-4 (Persons Required to Register) because of an expenditure to compensate a registrant to lobby on a municipal question of interest to the lobby employer.

Source: 1992 Code Section 8-16-5; Ord. 031023-12; Ord. 031211-11.

§ 4-8-6 - REGISTRATION.

- (A) Each registrant shall file annually with the city clerk a registration form signed under oath not later than two working days after becoming a lobbyist. If the registrant is not an individual, an authorized officer or agent of the registrant shall sign the form. A registrant must file a registration form for each person from whom he receives compensation or reimbursement. The registration shall be on a form prescribed by the city clerk and shall include:
- (1) the registrant's full name and permanent street address;
  - (2) the name and address and nature of business of each lobby employer on whose behalf the registrant will lobby;
  - (3) the municipal question on which the registrant will lobby; and
  - (4) if the registrant is the agent or employee of a lobbying entity, the name, address, and nature of business of the lobbying entity.
- (B) Each registrant shall file a notice of termination within 30 days after the registrant ceases the activity that required registration; however, this will not relieve the registrant of the reporting requirement of Section 4-8-7 (Activity Reports) for that reporting period.
- (C) At the time of registering, a registrant shall pay to the City and the city clerk shall collect an annual registration fee of \$300. All lobbyist registration fees shall be deposited into a separate account within the general fund, which account shall be used to offset the costs of administering the City's lobbying ordinance, the costs of handling disclosure filings, and the costs of administering Chapter 2-2 of the Code (Campaign Finance).
- (D) A registrant must file a registration required by this section and an activity report required by Section 4-8-7 electronically as determined by the city clerk.
- (E) The city clerk shall post the registrations required by this section, activity reports required by Section 4-8-7, no later than the next business day after the date that the city clerk receives the registration or the report.

Source: 1992 Code Section 8-16-6; Ord. 031023-12; Ord. 031211-11; Ord. 20120426-087; Ord. No. 20120927-091, Pt. 1, 10-8-12.

§ 4-8-7 - ACTIVITY REPORTS.

- (A) Each registrant shall file with the city clerk between the first and tenth day of April, July, October and January a report signed under oath concerning the registrant's lobbying activities during the previous calendar quarter. If this registrant is not an individual, an authorized officer or agent of the registrant shall sign the form. A registrant must file an activity report for each person from whom the registrant receives compensation or reimbursement. The report shall be on a form prescribed by the city clerk and shall include:
- (1) a complete and current statement of the information required to be supplied pursuant to Section 4-8-6 (Registration);
  - (2) total expenditures on lobbying broken down into the following categories, provided that each expenditure of \$500 or more shall be itemized by the date, name and address of the recipient, amount and purpose:
    - (a) office expenses;
    - (b) advertising and publications;
    - (c) compensation to other than a full-time employee;

- (d) reimbursement to others;
  - (e) personal sustenance, lodging and travel, if reimbursed; and
  - (f) other expenses;
- (3) each expenditure, gift or honorarium of \$100 or more made by the registrant or anyone acting on behalf of the registrant to benefit a City official shall be itemized by date, beneficiary, amount and circumstances of the transaction; also, the aggregate of all expenditures under this paragraph that are less than \$100;
  - (4) each business entity in which the registrant knows or should know that a City official is a proprietor, partner, director, officer, manager, employer, employee, or has a substantial economic interest and with which the registrant has engaged in an exchange of money, goods, services, or anything of value if the total of the exchanges is \$500 or more in a calendar quarter shall be identified by its name and address, the official, the date, amount and nature of each exchange under this paragraph; and
  - (5) the mayor, a councilmember, or their immediate family who are employed by the registrant shall be identified by name and nature of employment.
- (B) Each registrant shall obtain and preserve all accounts, bills, receipts, books, papers, and documents necessary to substantiate the activity reports required to be made under this section for two years from the date of filing of the report containing the items.
  - (C) Each person about whose activities a registrant is required to report by Subsection (A) of this section shall provide a full account of the activities to the registrant at least five days before such registrant's report is due to be filed.
  - (D) All reports filed under this chapter are public records and shall be made available for public inspection during regular business hours.
  - (E) The city clerk shall review each report for compliance and maintain a record of all registrations and activity reports. Complaints of violations of this chapter will be forwarded to the city clerk for review. If investigation determines a violation may have occurred, the complaint will be forwarded to the city attorney for appropriate action.
  - (F) No quarterly activity report will be required if there is no activity during the preceding quarter and there are no other changes to items required to be reported.

Source: 1992 Code Section 8-16-7; Ord. 031023-12; Ord. 031211-11.

#### § 4-8-8 - RESTRICTED ACTIVITIES.

- (A) No person who lobbies or engages another person to lobby, nor any other person acting on behalf of the persons shall give to a City official or immediate family gifts that exceed \$100 in value in the aggregate in any calendar year.
- (B) No person who lobbies or engages another person to lobby, nor any other person acting on behalf of such persons shall knowingly or willfully make any false or misleading statement or misrepresentation of the facts to a City official, or knowing a document to contain a false statement, cause a copy of the document to be received by a City official without notifying the official in writing of the truth.
- (C) No person shall retain or accept employment to lobby on a contingent fee basis or in any manner engage in lobbying activities on a contingent fee arrangement. This restriction shall not apply to a person whose compensation is to be paid upon events other than the passage or defeat of a municipal question and whose contact with a City officer on a municipal question is incidental to the primary purpose (which is for other than lobbying) of the person's employment, provided that a contingent fee is a standard and customary method of payment for the employment of the person.

Source: 1992 Code Section 8-16-8; Ord. 031023-12; Ord. 031211-11.

§ 4-8-9 - APPEARANCE.

Each person or registrant appearing before the council or an official body identified in Section 4-8-3 (Applicability) shall complete a speaker identification card prior to that appearance and orally identify himself and the person or interest the person represents before beginning the person's address.

Source: 1992 Code Section 8-16-9; Ord. 031023-12; Ord. 031211-11.

§ 4-8-10 - TIMELINESS OF FILING REGISTRATIONS AND REPORTS.

A registration or report filed by first-class United States mail or by common or contract carrier is timely if:

- (1) it is properly addressed with postage or handling charges prepaid; and
- (2) it bears a post office cancellation mark or a receipt mark from a common or contract carrier indicating a time within the applicable filing period or before the applicable filing deadline, or if the person required to file furnishes satisfactory proof that it was deposited in the mail or with a common or contract carrier within that period or before that deadline.

Source: 1992 Code Section 8-16-10; Ord. 031023-12; Ord. 031211-11.

§ 4-8-11 - PENALTY.

A person who lobbies in violation of a provision of this chapter, or who shall knowingly obstruct or prevent compliance with this chapter, or who shall fail to meet the reporting provisions of this chapter shall be guilty of a Class C misdemeanor.

Source: 1992 Code Section 8-16-99; Ord. 031023-12; Ord. 031211-11.