



AMERICAN COUNCIL OF ENGINEERING COMPANIES
of Wisconsin

The American Council of Engineering Companies of Wisconsin

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the business voice of the Wisconsin consulting engineering industry

July 6, 2005

President Paul J Van Rooy
Common Council Organizational Committee
City of Madison
210 Martin Luther King Jr Blvd
Madison, WI 53703

RE: Regarding Madison Lobby Law

Dear President Van Rooy and Organizational Committee Members:

The American Council of Engineering Companies of Wisconsin (ACEC WI), formerly known as the Wisconsin Association of Consulting Engineers (WACE), is the business voice of the Wisconsin consulting engineering industry. We represent more than 70 firms that employ over 4,000 engineers, architects, planners, surveyors, geologists, and other highly educated and experienced professionals. Our members are obligated to protect the health, safety, and welfare of the people of Wisconsin. Many of these firms work in the City of Madison.

I am the executive director of this 47-year-old organization. I am registered as a lobbyist for both Wisconsin and the City of Madison. I am also a resident and, more importantly, a taxpayer of the City of Madison. I am extremely upset about the amount of time and effort required to comply with the current lobbying ordinance as well as the tax dollars required to administer this law.

I, personally and as executive director of ACEC WI, agree government must be transparent. The intent of the ordinance is to identify those seeking to **influence** city government. When this organization came before the city to seek changes in contract language for city contracts, we were lobbying and I therefore registered as a lobbyist.

However, engineers do not typically come before the council or city officials to influence; they come to provide technical information, to educate, and to demonstrate the functionality of various aspects of a project. They participate in administrative actions and **public** meetings and clearly identify whom they are representing.

As pointed out in a legal opinion from Whyte Hirschboeck Dudek to AIA Wisconsin, attached, the current city ordinance is in direct conflict with the Wisconsin Supreme Court Stauber decision. The practice of architecture and engineering includes such activities as obtaining permit approvals, zoning code compliance, confirming with municipal engineering design standards, etc. If the design professional approaches the

city to meet required procedure, but is not there to request changes to current ordinances, this is not lobbying.

The city ordinance is inconsistent with Wisconsin State Statutes. The ordinance states individuals must be registered under ss.443.02(2). Section 443 pertains to architects, landscape architects, professional engineers, designers, and land surveyors. This specific section applies to **both architects and engineers**. The ordinance must be clarified to include professional engineers. The current ordinance states it does not pertain to the practice of architecture as defined under ss.443.01(5). To be consistent it must also apply to the practice of engineering, ss.443.01(6)

There may also be a way to more clearly define what is meant as lobbying and influencing. ACEC WI member firms participate at various city proceedings, such as coming before the plan commission. They are not there to influence, but to provide information and respond to questions. Those who speak at the meetings are required to complete a form indicating whom they represent and if they are speaking in favor of, against, or to answer questions. There is clear delineation between those attempting to influence and those providing information only, not lobbying. Those individuals attending to respond to questions should be exempt from the ordinance.

The lobbying ordinance's required reporting is extensive, confusing, and ultimately may discourage firms from doing business with this city. It will hurt our local economy that is increasingly relying on the private sector for growth. As a taxpayer, this is important to me. The reporting is much more complicated than the reporting I do for my organization and as a lobbyist with the State Ethics Board, which regulates state lobbying. The extensive city efforts will come with a price for administration and that cost will be either placed on the taxpayer or the lobbying entity, which will further discourage business growth in Madison.

Another issue of concern is identifying who might be deemed a "city official." My members frequently meet with various city departments. The ordinance is unclear regarding when a city employee is just that, an employee, and when the person is a city official, subject to the lobby law. This leads to confusion and potentially unintentional noncompliance.

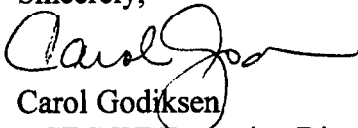
Further, when working with various city departments, including Engineering, Planning and Development, and Transportation, the contact is not intended to influence. The expertise my members bring in the areas of new technology and practices is invaluable to Madison. The lobbying law harms the city and prevents the free flow of education and knowledge between the engineering community and city employees and officials.

When this law first went into effect, the design community made requests for educational outreach to the city attorney's office. Those requests have never been granted. ACEC WI has a letter on file from then City Attorney Eunice Gibson to that effect. This left a message within my organization that, while the ordinance was on the books, it would not be enforced.

Finally, the employees of my member firms are licensed professionals. They are not, and do not intend to become, lobbyists. They are guided by a code of ethics that requires them, above all else, to protect the health, safety, and welfare of the people of Wisconsin, including those who reside in the City of Madison. Failure to do so would result in the loss of their license and their livelihood. Exempting design professional, practicing in the field as defined by state statute, is in the best interest of the citizens of this city.

Thank you for allowing ACEC WI and me an opportunity to comment on this issue.

Sincerely,



Carol Godiksen
ACEC WI Executive Director

Home address:
4821 Marathon Dr
Madison, WI 53705

Attachment: Whyte Hirschboeck Dudek SC

Cc: Members of the Common Council Organizational Committee
ACEC WI Board of Directors
Peter Kammer, Essie Consulting



Whyte Hirschboeck Dudek S.C.

Thomas M. Pyper
608-258-7122
tpyper@whdlaw.com

June 16, 2005

Mr. William Babcock
AIA Wisconsin
321 S. Hamilton Street
Madison, WI 53703-4000

Re: Application of the City of Madison General Ordinance § 2.40 to Architects

Dear Mr. Babcock:

The City of Madison ("City") General Ordinance § 2.40 regulates the lobbying of City officials (hereinafter the "Lobbying Ordinance"). You have asked us whether architects must comply with the registration and filing requirements set forth in the Lobbying Ordinance.

In general, the Lobbying Ordinance requires both "lobbyists" ("an individual who is employed by a principal, or contracts for or receives economic consideration, other than reimbursement for actual expenses, from a principal and whose duties include lobbying on behalf of the principal...," Lobbying Ordinance § 2.40(2)(h) and "principals" ("any person who employs a lobbyist," Lobbying Ordinance § 2.40(2)(k)) to register, file authorizations and, if more than \$500 in expenditures are spent on lobbying, file expense reports with the City of Madison Clerk, among other requirements. Lobbying Ordinance §§ 2.40(6)-(10).

Lobbying is defined as follows:

...the practice of attempting to influence legislative or administrative action¹ by oral, written or electronic communication

¹ "Administrative action" is defined as, "the proposal, drafting, development, consideration, or issuance of staff recommendations, whether those recommendations are required by ordinance, or requested by the Mayor or by a board, committee, commission or the Common Council." Lobbying Ordinance § 2.40(2)(a).

"Legislative action" is defined as follows:

...the development, drafting, introduction, consideration, modification, adoption, rejection, review, enactment or defeat of any ordinance,



with any City official,² and includes time spent in preparation for such communication and appearances at public hearings or meetings or service on a committee in which such preparation or communication occurs.

Lobbying Ordinance § 2.40(2)(e). However, “[t]he term ‘lobbying’ does not include . . . the practice of architecture, as defined in Sec. 443.01(5), Wis. Stats., and forbidden to unregistered persons under Sec. 443.02(2), Wis. Stats.” Lobbying Ordinance § 2.40(2)(e). As such, a registered architect engaging in the practice of architecture is not required to comply with the Lobbying Ordinance. Lobbying Ordinance § 2.40(2)(e) (hereinafter referred to as the “Architecture Exemption”).

The “practice of architecture” is defined as:

...any professional service, such as consultation, investigation, evaluation, planning, architectural and structural design, or responsible supervision of construction, in connection with the construction of any private or public buildings, structures, projects, or the equipment thereof, or addition to or alterations thereof, in which the public welfare or the safeguarding of life, health or property is concerned or involved.

Wis. Stat. § 443.01(5). “No person may practice architecture . . . in this state unless the person has been duly registered . . .” with the Examining Board of Architects, Professional Engineers, Designers and Land Surveyors. Wis. Stat. §§ 443.02(2) and 443.03.

resolution, amendment, report, nomination or other matter by the Common Council or by any board, committee or commission or committee or subcommittee thereof, or by a Common Council member acting in an official capacity. “Legislative action” also means the action of the mayor in approving or vetoing any ordinance or resolution, and the action of the mayor or any department, board, committee or commission or committee or subcommittee thereof in the development of a proposal for introduction to the Common Council.

Lobbying Ordinance § 2.40(2)(d).

² “Official” is defined as “elected officials, members of boards, committees and commissions, department, division, and unit heads, assistants to the Mayor, and commissioned police officers holding the rank of lieutenant or above and commissioned fire department officers holding the rank of captain or above.” Lobbying Ordinance § 2.40(2)(i).

The Wisconsin Supreme Court interpreted the statutory definition of the “practice of architecture” in Herkert v. Stauber, 106 Wis. 2d 545, 548-53, 317 N.W.2d 834 (1982). In Stauber, two defendant architects were found personally liable for breaching a contract between the defendant corporation, which was owned by the defendant architects, and the plaintiff. The alleged breach of contract resulted when the defendants failed “to provide all the necessary documents required to complete the application for an FmHA loan” for a low-income residential apartment structure. Id. at 552. The Supreme Court held that the definition of the practice of architecture set forth in Wis. Stat. § 443.01(2) “cannot be interpreted so broadly as to include assistance in securing financing or body politic approval for a construction project...” Id. at 566. The Supreme Court explained the difference between “body politic approval” and routine municipal building and zoning code approvals:

We have used the term “body politic approval” to describe the kind of political approval for a construction project from a village board, city council, town board or other governmental entity which represents the policy decision of that body politic to favor a certain project. This type of approval must be sought before HUD low income housing can be built in a specific community. This political policy approval is to be distinguished from the governmental approval for a project which relates to conformance with a building code or zoning requirements which are frequently characterized as ministerial acts.

Id. at n. 4 (emphasis added).

The “practice of architecture” is exempt from the Lobbying Ordinance.³ Lobbying Ordinance § 2.40(2)(e). The “practice of architecture” includes “any professional service . . . in connection with the construction of any private or public buildings, structures, projects, or the equipment thereof . . . in which the public welfare or the safeguarding of life, health or property is concerned or involved.” Wis. Stat. § 443.01(5) (emphasis added). Based on the Stauber

³ The Architecture Exemption provides that “[t]he term ‘lobbying’ does not include . . . the practice of architecture, as defined in Sec. 443.01(5), Wis. Stats., and forbidden to unregistered persons under Sec. 443.02(2), Wis. Stats.” Lobbying Ordinance § 2.40(2)(e). Wis. Stat. § 443.02(2) forbids a person from the “practice of architecture” unless the person is a registered architect. As such, the second clause makes it clear that someone who is not a registered architect cannot claim to be exempt because he or she is providing the types of services that would fall within the definition of the practice of architecture. Only registered architects who are engaged in conduct falling within the statutory definition of the practice of architecture, as interpreted by the Stauber Court, are exempt.

Court's interpretation of the statutory definition of the practice of architecture, a registered architect whose professional services include appearance before a City commission, board or other entity or individual relating to permit approval, zoning code compliance/review and any other municipal approvals/requirements for "the construction project of any private or public building . . . in which the public welfare or the safeguarding of life, health or property is concerned or involved" is engaged in the "practice of architecture." Wis. Stat. § 443.01(5); Stauber, 106 Wis. 2d at 566 and n. 4. An architect engaged in such professional services is seeking a ministerial action by a body politic and, therefore, should be exempt from the Lobbying Ordinance, pursuant to the Architecture Exemption. Id.

In contrast, seeking municipal financing for a project, pursuing a change to a zoning regulation so as to make an otherwise impermissible construction project permissible (such as seeking a change to allow mixed-use or low-income housing in an area not zoned for such use, as in Stauber, supra), and filing a permit application for something other than a "construction project of any private or public building . . . in which the public welfare or the safeguarding of life, health or property is concerned or involved" are examples of conduct that is likely not the "practice of architecture." Id. Such activities are seeking a body politic to make policy discussions, which the Stauber Court excluded from the practice of architecture statutory definition. Therefore, an architect engaging in such activities would have to comply with the Lobbying Ordinance.

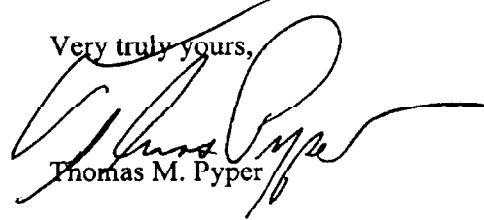
We are aware that the City has taken the position that an architect seeking plat approval from the Plan Commission for a construction project is not exempt from the Lobbying Ordinance because the practice of architecture "doesn't include appearances⁴ before the Plan Commission and the Common Council." (May 30, 2000 Memorandum from City Attorney Eunice Gibson to Mayor Susan J. M. Bauman.) The City's position directly conflicts with Wisconsin Supreme Court's Stauber decision in which the Court determined that the practice of architecture includes activities such as acquiring permit approvals, zoning code compliance, and the like. Stauber, 106 Wis. 2d at 566 and n. 4. If no appearance before the Plan Commission, the Common Council or other City official by architects were the "practice of architecture," the Architecture Exemption would be meaningless.

⁴ "Appearance" is not defined by the City. We have assumed that the term "appearance," as used by the City, is the equivalent of a lobbying communication, which is defined by the Lobbying Ordinance as, "oral, written or electronic communication with any City official that attempts to influence legislative or administrative action." Lobbying Ordinance § 2.40(2)(f). We have also assumed that submitting and pursuing a permit application, submitting a plat for approval, requests for zoning variances, requests for building permits, and all requests for and pursuit of all other municipal approvals necessary for a construction project to proceed within the City constitute attempts to influence legislative or administrative action.

Mr. William Babcock
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In summary, it is our opinion that, when a registered architect's professional services require him/her to appear before City officials for permit approvals, plat approvals, variance or other zoning requests, or the myriad of other City approvals that are necessary for a construction project to commence, the architect should be found to be engaging in the practice of architecture and, therefore, should not have to comply with the Lobbying Ordinance.

Very truly yours,

A handwritten signature in black ink, appearing to read "Thomas M. Pyper", with a long horizontal flourish extending to the right.

Thomas M. Pyper