AIA Wisconsin
A Society of The American Institute of Architects

**CITY OF MADISON LOBBYING ORDINANCE**
**SPECIAL MEETING**
**COMMON COUNCIL ORGANIZATIONAL COMMITTEE**
**AUGUST 8, 2005**

President Van Rooy & Common Council Organizational Committee Members:

Thank you for the opportunity to comment on the City of Madison lobbying ordinance. My name is William Babcock. I am the executive director of AIA Wisconsin, the state society of The American Institute of Architects.

I am the lobbyist authorized to represent the Wisconsin Society of Architects, Inc., which does business as "AIA Wisconsin," regarding proposed City of Madison legislative or administrative action. Somewhat ironically, we registered with the City Clerk as a principal employing a lobbyist because we anticipated having to make lobbying communication about the lobbying ordinance.

I am an association manager and a lobbyist registered with the Wisconsin Ethics Board. I also serve without compensation as the executive director of the Wisconsin Architects Foundation, Inc., which owns our historic office building and provides scholarships for architectural education, and as the publisher and agent for Wisconsin Architect, Inc., a wholly-owned for-profit subsidiary that publishes our magazine. I am not an architect or an attorney and do not pretend to practice either of these professions.

With approximately 1,500 individual members, AIA Wisconsin represents architects in private practice, business, industry, government and education, as well as architectural interns, students and allied design and construction industry professionals. Our mission is to serve members, advance their value and improve the quality of our built environment.

**HISTORY**

The City of Madison somehow got along without a lobbying ordinance for its first 145 years. It also seemed to survive and maintain the integrity of its decision-making processes during the last four years when the lobbying ordinance was largely ignored.

As I recall from news stories back in 2000, the current ordinance was proposed in response to concerns about activities that took place during the debate on a proposed city smoking ordinance. It morphed into the very complex and confusing lobbying ordinance in place today.

To be honest, back in 2000 when I reviewed the proposed ordinance, I didn't read past sec. 2.40(2)(e), which states that "lobbying" does not include the practice of architecture. The ordinance obviously would not apply to architects and that was good news because I had plenty of more important issues to deal with at the time.

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In response to questions from member architects who were now being asked to fill out new and peculiar registration forms at public hearings, AIA Wisconsin representatives met with City Attorney Gibson and Alderperson Verveer in September 2001 to discuss the ordinance and its implications for architects appearing before city boards and commissions. We learned that the City Attorney had an extremely narrow interpretation of the statutory definition of the practice of architecture. It was an interpretation very different from that of our members who felt they were practicing architecture when responding to questions and providing their professional opinions at Urban Design Commission and Plan Commission meetings. AIA Wisconsin published an article about the meeting and encouraged members to advise their clients about the lobbying ordinance. We also had the impression that no one was paying much attention to the lobbying ordinance, including the requirement for annual workshops.

Last fall, I was encouraged when I saw a news article indicating that the City Attorney thought the lobbying ordinance should be enforced or repealed. Naively, I believed the Common Council would reach the logical solution and repeal the ordinance. Instead, several months were spent negotiating a compromise for an amended lobbying ordinance, which failed to gain Common Council approval in March. Since that time, the City Attorney proposed additional amendments in May and apparently, according to a news article, a new compromise proposal has been developed in the last few days.

**RECOMMENDATION**

AIA Wisconsin encourages the Common Council Organizational Committee to recommend that the City of Madison lobbying ordinance be repealed.

The ordinance is so complex and confusing that it is practically impossible to fully understand and comply with its requirements. Rather than encouraging greater openness and transparency in city affairs, the ordinance works to intimidate citizens and discourage involvement, participation and debate. At best, the enforcement of the ordinance will be uneven and arbitrary. At the worst, the enforcement could become selective and targeted. In our opinion, the lobbying ordinance is fundamentally flawed and should be repealed.

**COMPLAINTS**

Following up on complaints submitted to the City Clerk this spring, a number of AIA Wisconsin members received a letter from the City Attorney in June. The letter indicated that they needed to either register in compliance with the lobbying ordinance or demonstrate why they are not subject to the ordinance. The letter acknowledged that the City Attorney had not done any independent investigation of the alleged lobbying ordinance violations.

Later in June, the City Attorney sent what appears to be a two-page form letter to architects who had replied to his earlier request by indicating that they did not believe they were required to register. A copy of this letter is attached for your reference. It is my understanding that the same letter was sent regardless of the specific circumstances involved and information provided by the architect.

I have talked with the City Attorney about several questions and concerns that I have about his letter. These include:

- The examples used to illustrate how narrowly the City Attorney interprets the "practice of architecture" exclusion. While the letter indicates it is an illustration provided in training since November 2001, I wondered why I had never seen it before. In my opinion, the illustration creates an impossible situation to interpret consistently and is demeaning to the roles of the Urban Design Commission and Plan Commission. In addition, it is my understanding that questions about the load strength of a roof or truss are typically part of the plan review process, which is considered a ministerial task not covered by the lobbying ordinance.

- Fee agreements in relation to sec. 240(4)(a)3. In his letter, the City Attorney indicates that "many architects' fee arrangements are contingent upon the project receiving approval from the municipality." To the best of my knowledge and belief, I do not believe this is correct. Architects enter into agreements to provide a wide range of professional services, from pre-design to post-occupancy analysis and everything in between. By their very nature, professional services to be provided in the later phases of a building project are contingent on earlier phases, including financing, material availability, construction bids and numerous other items. Architects are compensated in a number of different ways, including flat fee, hourly rate, percentage of construction costs and a combination of all of these. The standard AIA owner-architect agreement states under "project administration services" that: "The Architect shall assist the Owner in connection with the Owner's responsibility for filing documents required for approval of governmental authorities having jurisdiction over the Project."

In addition, the City Attorney's letter refers to an opinion prepared by attorney Tom Pyper. This opinion letter was prepared for use by AIA Wisconsin members as background in replying to the City Attorney's initial request. A copy of this opinion letter is attached for your reference. There appears to be a difference of opinion between attorneys. The opinion letter prepared for AIA Wisconsin concludes as follows:

> "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."

In talking with the City Attorney, I also discussed a couple of scenarios that were not addressed by his letter.

- In one case, an architect appeared before the Urban Design Commission, along with their consultants and University of Wisconsin–Madison staff, regarding a new dormitory project. The UW–Madison employees were advised by the City Attorney that they were in compliance with the lobbying ordinance because they are public officials. The architect, meanwhile, received the two-page form letter for architects and is left hanging out to dry because his contract is with the Wisconsin Department of Administration. It is my understanding that the City Attorney has not contacted the DOA to advise the state that, according to the city lobbying ordinance, it must register as a principal employing a lobbyist and authorize the architect to lobby the city on the state's behalf.

- In another case, I have been told by several architects working on different City of Madison projects that they have been told by city employees that they do not have to register as lobbyists. While the lobbying ordinance may have an exemption for public officials, there does not appear to be an exemption for city projects or for non-employees representing the city before various commissions, committees, alderpersons, etc. The City Attorney agreed to look into this situation.

These two scenarios illustrate that it is not necessarily what you do that is the critical factor under the lobbying ordinance, but rather who you represent.

## COMMENTS, CONCERNS & QUESTIONS

Reading the lobbying ordinance is a mind-numbing experience. Just when you think you may have it figured out, the next paragraph throws you for a loop. The following are additional comments, concerns and questions about the ordinance.

- State statutes and related administrate rules require buildings of 50,000 cubic feet or more to be designed by an architect or professional engineer to protect the health, safety and welfare of the public. State administrative rules also require an owner of a building of this size to have an architect or professional engineer involved as the "supervising professional" during the construction phase. This threshold established by state statute helps to define the "practice of architecture" and should be reflected in how the lobbying ordinance is interpreted.

- The definition of "administrative action" is too broad and includes actions that should be considered ministerial. The nomenclature is from state lobbying statutes related to the development of state administrative rules. While the city has ordinances, it is my understanding that it has nothing similar to state administrative rules, which have the force of law. Transplanting this terminology and nomenclature to a local lobbying ordinance just doesn't seem to work.

- The City Attorney seems to have the authority to draw the line and be the final arbiter in determining what is lobbying and what's not . . . short of taking the issue to court. Should there be another way to resolve differences of opinions?

- In talking with city officials and appearing before city commissions and committees, if an architect started all his remarks with something like "as an architect practicing architecture, it is my professional judgment that . . ." would that qualify for the exclusion provided in sec. 2.40(2)(e)? It would be illegal for an unregistered person to make such a statement.

- What should an architect do if their client is a non-profit organization and refuses to register as a principal employing a lobbyist for fear or jeopardizing its federal tax-exempt status?

- The City Attorney indicates that the exemption provided in sec. 2.40(3)(f) for furnishing information at the request of a city employee does not apply to responding to questions at a commission or committee meeting. Why not?

- Why does the city need all of the information required by sec. 2.40(10)? The expense statement requirements add significant complications.

- If the City of Madison determines that it really must have a lobbying ordinance, why not adopt sec. 2.40(5) and leave it at that?

On behalf of members of AIA Wisconsin, thank you for your time and consideration of our recommendations regarding the City of Madison lobbying ordinance. I would be pleased to try to respond to any questions that you may have.

Attachments

Madison

**Office of the City Attorney**

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LITIGATION ASSISTANT
Patricia Gehler

June 30, 2005

RE: Lobbying Law and Architects - Your Letter Dated: 6/17/2005

Dear :

Thank you for your response to my recent letter and the lobbying complaint that this office received from Alderperson Brenda Konkel.

You assert that your contacts with City Staff and elected officials do not constitute the practice of lobbying because, as an architect, your activities are exempt from regulation under the provisions of the Madison Lobbying Ordinance, sec. 2.40 M.G.O. More specifically, you claim that your activities are exempt from regulations pursuant to sec. 2.40(2)(e) which, in pertinent part, reads as follows:

> ...The term 'lobbying' does not include actions by licensed attorneys, the performance of which is prohibited under Sec. 757.30, Wis. Stats., to persons not licensed as attorneys; it 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.

The provision you rely upon is very narrow in scope. It does not provide a "safe haven" for architects to engage in all sorts of activities that are regulated by the ordinance, without registration and reporting under the ordinance. The only time that an architect may rely upon this narrow exemption is when the activity that can only be lawfully engaged in by virtue of the architect's license and profession and for which it would be a crime for an unlicensed person to engage in. In training provided to the Madison community as early as November of 2001, this office has provided the following illustration of how narrow this exemption is:

> An Architect who appears before the Plan Commission to discuss the load strength of a roof or truss is not engaged in lobbying. (Architect or Engineering license required to perform such calculations).
>
> An Architect who appears before the Plan Commission and who advocates that his client's proposed building is pleasing to the eye and should be built is lobbying. (No license required to offer such an opinion).

While the definition of "practice of architecture" in sec. 443.01(5), Wis. Stats., is broad, glaringly absent from the list of activities is any reference to seeking to obtain approval from governmental bodies. The case of *Herkert v. Stabuer*, 106 Wis. 2d 545, 317 N.W. 2d 834 (1982) supports this narrow reading. In that case, the Wisconsin Supreme Court ruled that activities such as seeking financing and obtaining non-ministerial approval from governmental bodies did NOT constitute the practice of architecture. To quote the language in *Herkert* (at 566):

> The language used in sec. 443.01(2), Stats., [now sec. 443.01(5)] cannot be interpreted so broadly as to include assistance in securing financing or body politic approval for a construction project within the definition of "practice of architecture."

I don't see how the court could be more clear. Seeking governmental approvals of a project is NOT the practice of architecture. The court goes on in a footnote to distinguish between policy decisions and "ministerial" approvals by the governmental body, suggesting the latter may be the practice of architecture. Since ministerial actions are not covered by the Madison lobbying ordinance in any event, sec. 2.40(2)(a), MGO, there is no need to report activity related to, for example, design of a project to meet the building code. This is similar to the example cited by the Wisconsin Supreme Court, 106 Wis. 2d at 566 n. 4.

The *Herkert* Court went on to say (at 567-68):

> ...we point out that where an architect also involves himself in the business of securing governmental financing as well as approval of a body politic, a breach of the contract to provide those **nonarchitectural** services is not a basis for person liability where the breach does not relate to "professional architectural services" rendered. (Emphasis supplied).

Again, the Wisconsin Court made it clear that seeking governmental approval is normally not considered in the nature of architectural services. We believe the opinion prepared by attorney Tom Pyper, to the extent it says otherwise, is simply wrong.

Thus, when reflecting upon whether your past activities constituted lobbying, you should ask yourself whether your architects license provided you with the exclusive privilege to engage in those activities or whether anyone, architect or not, could have engaged in those same activities. If your activities fall into this latter camp, you may not claim the exemption provided under sec. 2.40(2)(e) M.G.O.

It has also come to my attention that many architects' fee agreements are contingent upon the project receiving approval from the municipality. If an architect has such a fee arrangement and then engages in lobbying efforts, then that architect is engaging in a prohibited practice under the Madison Lobbying Ordinance. Section 2.40(4)(a)3, M.G.O., specifically forbids lobbyists from "contract[ing] or receiv[ing] compensation dependent in any manner upon the success or failure of any legislative or administrative action." (Emphasis added). See also, Wis. Stat. sec. 13.625(1)(d).

Finally, to the extent that you may claim that your appearance did not constitute lobbying because you merely appeared to answer questions (exemption provided at sec. 2.40(3)(f)), please be advised that this exemption only applies if the information you provided was solicited by a City employee or officer. If you appeared on your own behalf or on your client's behalf, made a presentation and then took questions, the exemption does not apply.

Since there appears to be a widespread misunderstanding of the application of this ordinance within your profession, I do not intend to initiate any enforcement actions for past violations. However, as we begin to enforce the terms of this ordinance, it is imperative that architects fully understand and fully comply with its requirements. Any violations of this ordinance that occur after January 1, 2005 will be subject to prosecution.

Sincerely,

Michael P. May
City Attorney

MPM:RAA:jmb

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June 16, 2005

Mr. William Babcock
AIA Wisconsin
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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 action[1] 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.

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> 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)(c). 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 appearances[4] 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.

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[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.

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,

Thomas M. Pyper