

Fred Lewis' Brief Response to the Development Lobby's Memo of November 4, 2015

The Development Lobby's memo of November 4, 2015 is long on lawyer rhetoric and short on constructive suggestions. Basically, their position is that there are no real problems with the city lobby law's registration, reporting or enforcement, and that the current law, which provides little transparency, is just fine. They point to ineffective lobby laws in other Texas cities as the laws they like. They argue that the proposal will result in doomsday scenarios, but ignore or misunderstand the limitations and exceptions in the proposed resolution that narrow the scope of the proposed resolution.

Lobby law reformers believe the current 40 year old law is ambiguous and loophole-ridden. See Rockwall, "Austin Lobby Laws Often Unheeded and Unenforced", Austin American Statesman (March 28, 2015). We want a model city lobby law for our great city based on best practices in the Texas' lobby law and major cities across the country. We believe Texas' lobby law works relatively well, its operations are well- known, should serve as guidance for reforming the city's law.

After more than two months, the Development Lobby now proposes only these specific changes: eliminate the incidental exception and replace it with a \$2000 and 26 hour a quarter threshold and add an amorphous exception to the definition of municipal question. The rest of their memo is mainly suggesting we follow weak laws in other cities and arguing over whether a resolution provision is similar to other city's law. The resolution, however, relies mainly on state law and makes clear it is adapting it to the city: "The State of Texas' more modern and effective lobbying laws and regulations provides *guidance* for improving Austin's law." (emphasis added). The resolution's lobby exceptions and other provisions are similar to state law but also seek to improve it based on problems at the state level.

The resolution incorporates and adapts these major state law provisions that the Development Lobby complains about:

1) Eliminating Austin's incidental exception to regular employments. Tex. Gov. Code, Section 305.003(b) states "Subsection (a)(2) requires a person to register if the person, as part of his regular employment, has communicated directly with a member of the legislative or executive branch to influence legislation or administrative action on behalf of the person by whom he is compensated or reimbursed, *whether or not the person receives any compensation for the communication in addition to the salary for that regular employment.*" (emphasis added)

2. Removing Austin's high level employee exception. Texas. Gov. Code, Section 305.002(4) defines "member of the executive branch" for lobbying purposes to mean "an officer, officer-elect, candidate for, or *employee of any state agency*, department, or office in the executive branch of state government." (emphasis added)

3. Reporting expenditures in detail. Tex. Gov. Code, Section 305. 006(b): "The expenditures must be reported in the following categories:(1) transportation and lodging;(2) food and beverages;(3) entertainment;(4) gifts, other than awards and mementos;(5) awards and mementos; and (6) expenditures made for the attendance of members of the legislative or executive branch at political fund-raisers or charity events."

4. Listing specific matters lobbied on. Tex. Gov. Code, Section 305.006 (d) provides: "The report must also contain a list of the specific categories of subject matters about which the registrant... communicated directly with a member of the legislative or executive branch ... The list must include the number or other designation assigned to the administrative action, if known."

5. Reporting Compensation within ranges. Tex. Gov. Code, section 305.005 (g) states "Compensation or reimbursement required to be reported under Subsection (f)(6) shall be reported in the following categories unless reported as an exact amount..."

6. Lobbying Exceptions. The resolution cites to state law and regulations, which have a long list of specific exceptions. The Lobby Resolution recommendation No 20 provides: "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 for activities directly related to service on appointed city boards and Commissions. Tex. Gov. Code 305.004 (a)(4); 1 Tex. Adm. 34.5."

The Development Lobby complains that the resolution doesn't have any exceptions for communications with staff, such as filing required city documents, exchanging information, or achieving compliance with existing law. These exceptions, however, exist in the state law and regulations and are specifically referenced in Recommendation No. 20. In addition, the resolution proponents promulgated weeks ago a two page list of what these exceptions to lobby compensation and activities might look like. While the Development Lobby may want the suggested exceptions to be broader, that is wholly different than saying the exceptions do not exist. In fact, most of these resolution's proposed lobby compensation exceptions do not exist in the current city law.

The Development Lobby also complains that the state and other cities do not use the concept of discretionary decision. It is true that Texas doesn't make such a distinction, for *all actions and decisions* are covered within the ambit of state lobbying, not just discretionary decisions. Tex. Ethics Op. No. 89(1992) states: "An employee of an engineering firm...is engaged in lobby activity if the purpose of doing so is to influence the agency official in regard to *any matter that may be the subject of agency action.*" (emphasis added). The resolution seeks to narrow the breadth of the state's lobby law by using the concept of discretionary decision.

San Antonio and other cities do utilize the concept of discretionary decision, but do not provide as much clarity as in the Austin resolution. For example, San Antonio's law, Section 2-62(k), provides: "*Municipal question* means a public policy issue of a *discretionary nature* pending or impending before City Council or any board or commission, including, but not limited to, proposed action, or proposals for action, in the form of ordinances, resolutions, motions,

recommendations, reports, regulations, policies, nominations, appointments, sanctions, and bids, including the adoption of specifications, awards, grants, or contracts. *The term "municipal question" does not include the day-to-day application, administration, or 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.* Austin's proposed definition of municipal question has these similar provisions to San Antonio's law:

- "Amend 'municipal question' in Austin City Code, Section 4-8-2 (9) to explicitly require the city officials' decision or action to be discretionary."
- "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)."
- "However, technical decisions, whether appealable or not, in Chapter 25-12 (the Technical Code) are considered non-discretionary."
- "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 project or development."

While the Austin definition has additional provisions for clarity, it utilizes a similar approach to San Antonio and other jurisdictions.

The Development Lobby proposes adding to our current law's definition of municipal question only and additional exception: "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 matter related to or in connection with a specific project or development." With no further guidance than "day to day" administration being excluded from municipal question, the Development Lobby's proposed vague and overbroad exception will be the loophole that swallowed lobby reform.

The Development Lobby argues that better enforcement is all that is needed, without acknowledging the current law is out-of-date and poorly written. Later, they complain about the resolution's proposed enhancements to enforcement, claiming that the resolution "exposes Austin's citizens and professional to selective enforcement and improper use of the ordinance." It doesn't appear they want enforcement either.

In conclusion, the Development Lobby fails to recognize that lobby reform is needed and that Austinites want transparency and a model lobby law.

Sincerely,



Fred I. Lewis

