ATTACHMENT 4

Council Member Sally Greene
Council Committee on Lobbying Follow-up Report
March 24, 2004

On consulting with the Town Attorney, I think that we should let him propose a draft ordinance that would apply to commercial entities, not state agencies. Then our committee would confer with him about it and bring something forward. There are some legal issues with imposing a lobbyist registration ordinance on a state agency, and we can ask Ralph to talk about those in a few minutes. I want to take some time now to outline the legal context for these ordinances.

Lobbyist registration began in Washington in the mid-1800s after newspapermen and former congressmen were noticed to be swarming about the Capitol for various reasons. The early campaign contribution disclosure laws followed hard on the heels of this. Lobbyist registration in state legislatures followed suit. (*See Associated Industries of Kentucky v. Commonwealth of Kentucky*, 912 S.W.2d 947 (Ky. 1995).)

The First Amendment says, "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." The founding fathers considered this right a cornerstone of the new democracy; it has its roots in the Magna Charta. Our record of honoring this right is not perfect. In the 1830s, crowds of abolitionists who flooded the halls; their petitions were tabled without notice. John Qunicy Adams pitched a hissy fit about that. (*See Fritz v. Gordon*, 517 P.2d 911 (Wash. 1974).)

Then of course we have freedom of speech and a right not so much talked about, freedom of association. The Supreme Court case of *NAACP v. Alabama* in 1958 established that a private association cannot be required to make its membership list public. You can imagine why the NAACP in the 1950s might not want to do that. The court said, "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." (Discussed in *Associated Industries of Kentucky*, *supra*.)

But the Supreme Court has also said that, with caution, the government may *regulate* the exercise of the protected right of political associations when it can show an important enough interest, and when the regulation is drawn narrowly enough. They said that in *Buckley v. Valeo*, in 1976, when they struck down campaign spending limits—a decision that four Justices are now on record as being willing to reexamine, according to the National Voting Rights Institute. (John Paul Stevens said money is property, not speech.) (*See Associated Industries of Kentucky*; also the National Voting Rights Institute, www.nvri.org/.)

With lobbyist registration, the compelling interest is in ensuring the proper operation of a democratic government, as well as avoiding the appearance of corruption. This, courts have said many times, is important enough to justify some limitations on freedom of association and burdens on freedom of speech. When a governing body does not prohibit lobbying but "provide[s] modestly for a modicum of information" from those people

who, *for compensation*, attempt to influence legislative decisions, this is justifiable as "self-protection" for the integrity of the process. (*Associated Industries of Kentucky.*)

Upholding a federal lobbyist registration act in 1954, the Supreme Court said,

> Present-day legislative complexities are such that individual [lawmakers] cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. . . .
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> Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much.

United States v. Harriss, quoted in *Fritz v. Gordon*, 517 P.2d 911 (Wash. 1974).

As the Washington state Supreme Court put it,

> Informed as to the identity of the principal of a lobbyist, . . . public officials and also the public may more accurately evaluate the pressures to which public officials are subjected. [The officials may then] appropriately evaluate the "sales pitch" of some lobbyists who claim to espouse the public weal, but, in reality, [do not]. (*Fritz v. Gordon.*)

It's about openness, and it's about money.

In 1871, the Kansas Supreme Court said,

> Money may be used properly to influence legislation. It is used properly in paying for the distribution of circulars or otherwise for the collection or distribution of information, openly and publicly, among [public officials]. It may also be used improperly in . . . working up a personal influence among [lawmakers], and conciliating them by suppers, presents, or any of that machinery used by lobbyists to secure a member's vote without reference to his judgment. (*Kansas Pacific Railway Co. v. McCoy*, 8 Kan. 538 (Kan. 1871).)

The more things change, the more they stay the same.

As I said Monday night, I don't think ACS is an anomaly. *See* Sharon Beder, "Public Relations' Role in Manufacturing Artificial Grass Roots Coalitions," *Public Relations Quarterly* 43.2 (Summer 1998): 21-23. Gone are the days of abolitionists storming the halls. Things are more subtle now.

The professional manufacturing of volunteer organizations is an $800 million industry. Corporations have learned it's a lot more effective to look green—as in grassroots but particularly on environmental issues. When the electric utilities wanted to influence the Endangered Species Act they formed the benign-sounding "National Endangered Species Act Reform Coalition." (*See* Beder.) The Sierra Club is threatened with a hostile takeover by interests not aligned with its true mission.

All this may sound far away from our little village on the Hill, but let's ask ourselves why ACS went to so much trouble here. We're a progressive community. Other cities look to us for guidance. We have environmental regulations stronger than anywhere in the state. We welcome citizen participation, as we should—when it is truly that. I think we are an easy mark. Personally I think we are well served to be proactive on registration of paid lobbyists.

There are still important limitations to consider.

Going back to *NAACP v. Alabama*, the government may not force a lobbying organization to disclose the names of its individual members. (*Pletz v. Sec'y of State, Michigan*, 337 N.W.2d 789 (Mich. App. 1983).)

Lobbyist registration may not be applied to religious organizations because of concerns about entanglement of church and state. (*Pletz.*)

When the state already regulates a professional activity, lobbyist registration may be "preempted." That's the case with lawyers. We would not be able to require the registration of lawyers representing clients in quasi-judicial settings in town government, like the Board of Adjustment or probably even a hearing with sworn testimony. But when lawyers are simply acting as lobbyists and being paid to lobby, they can be regulated. (*Baron v. Los Angeles*, 469 P.2d 353 (Cal. 1970).)

I'm going to ask Ralph to share with us his preliminary views on what legal hurdles there may be to requiring the disclosure of contacts by UNC lobbyists. We know already that the University of Wisconsin voluntarily does so in Madison; I've learned also that the SUNY system in New York complies with a statewide municipal registration requirement. I hope we can come up with something in a spirit of cooperation and collegiality and good citizenship that will serve this important interest.