

Austin City Council meeting 6-14-18

Item 56. Repealing and replacing Chapter 2-7, Article 6 of the City Code (Anti-Lobbying Ordinance)

Steve Adler: Councilmember Alter?

Allison Alter: For Item 56 I would like to move as the base motion the staff resolution as in backup, please.

Steve Adler: Councilmember Alter moves the motion of Item #56. Is there a second to that? Mr. Flannigan seconds that. Is staff here on this? I think Councilmember Pool, you had an amendment to offer. Did you want to offer that so we can just get that out?

Leslie Pool: Yeah, I'm assuming it's the same version though. I don't know. I think it's the same version. My amendments are on page 6. We need to... it says in there that there is a review committee and I apologize. I'm really, really tired. Within the Ethics Review Commission we wanted to make it a sub-quorum subcommittee so I would insert the two words 'a subcommittee' on line 191 after the words "appeal such disqualification to" a subcommittee of the Ethics Review Commission so we don't have any issues with quorum. The next item is really simple. In B, line 196 again on page 6 change 'may' to 'shall' and...

Steve Adler: On which line?

Leslie Pool: 196. B. "The purchasing officer *shall* waive a violation." And then the last change is a similar 'may' to 'shall' on page 7, line 226, and this is "respondents," really should be "*who* violate Section 2-7-101 three or more times during a five year period *shall* be subject to debarment." And so I offer those three amendments. I hope they're considered friendly and if I might just say as the chair of the Work Group from a year ago maybe this really does finish up the work that we needed to do at long last.

Steve Adler: Is there a second to those? Is there any objection to those changes being...?

Allison Alter: I would like to hear from staff.

Steve Adler: Okay. So we'll lay out those amendments after we talk about them.

James Scarboro: Mayor and councilmembers, James Scarboro, Purchasing Office. Would you like me to kind of tee up the item?

Steve Adler: I'm sorry?

Greg Casar: Give some context for the item overall.

James Scarboro: As you'll recall, Mayor, councilmembers, and City Manager, the revision of the Anti-Lobbying Ordinance was initiated as a result of a recommendation last June 2017 from the Waste Management Policy Working Group established by Council and chaired by Councilmember Pool. Staff brought an earlier version of this item to Council in September of 2017 at which time Council referred the item to the Ethics Review Commission for their recommendation. After receiving the Ethics Review Commission's recommendation in November of 2017, staff requested additional time to vet the Ordinance revisions with a wider population of the City's registered vendors, to revise the Ordinance further, and to get feedback from those revisions from the Audit and Finance Committee. Since that time staff had issued multiple notices to the City's thousands of registered vendors, developed two subsequent versions of the Ordinance and presented these versions to the Audit and Finance Committee on three separate occasions. While staff has considered all feedback received and attempted to incorporate much of this feedback where advisable, the version of the Ordinance before you is staff's professional recommendation and was regarded favorably by most of the vendors, citizens, and organizations that provided feedback. With that, staff and I are glad to answer any questions you have in this regard.

Steve Adler: Here's the speakers that have been noted to be on this. Do you want to hear from the speakers? Let's go ahead and do that. Is Michael Whellan here? Mr. Whellan, you have three minutes.

Michael Whellan: Thank you. Michael Whellan on behalf of Texas Disposal Systems. Unfortunately today we have to ask you not to give your support to staff's draft. Instead, we ask that you adopt a redlined version of staff's draft that was circulated to you last week and I believe is being circulated, handed out now by the clerk. The redline of staff's proposal that we're handing out and we circulated last week addresses key concerns identified by the City Council's Waste Management Policy Working Group.

Steve Adler: Can you hang on one second? I don't see being handed out anything. It's Pool's?

Michael Whellan: We handed out the.... there it is. No, it's a redline that we circulated last Friday. I think the clerk's coming up now with it. It's a Texas Disposal Systems redline that was circulated to councilmembers last Friday.

Steve Adler: Okay. Please proceed.

Michael Whellan: The redline of the proposal addresses key concerns identified by the City Council's Waste Management Policy Working Group and other stakeholders and ensures that a revised Ordinance would be constitutional, fair, and promote transparency. Specifically, the redline eliminates broad, ambiguous language and restrictions to ensure the ALO is constitutional and includes a provision for appeal of staff decisions beyond staff themselves, eliminates staff discretion to enforce or not enforce penalties, eliminates vendor debarment as a penalty and allows solicitation respondents to communicate with City officials about the solicitation for some period at the beginning and at the end of each solicitation process to accommodate policy dialogue and promote transparent contracting practices. This began more than a year ago when Council waived the ALO, the Anti-Lobbying Ordinance, for all waste solicitations to let stakeholders participate in the Waste Management Policy Working Group process. The Working Group then issued specific recommendations for reforming the ALO. Since then you have received recommendations from the Ethics Review Commission, Zero Waste Advisory Commission, Texas Campaign for the Environment, and others. What's extraordinary is that there was a broad agreement on key reforms among nearly all of these groups and yet almost none... none of those reforms.... almost none of those reforms are included in staff's draft. This includes creating a third party appeal process, thank you, Councilmember Pool, for adding that so if a respondent is disqualified they can appeal to someone other than the staff that disqualified them. Also, there was a recommendation by all of these different groups, almost all of them, that the administrative rules for the ALO be reviewed and approved by Council. That, too, is nowhere to be seen and yet many things are left to the rules. Another area of agreement had to do with narrowing the definition of prohibited communications and the timing of the restricted contact period to ensure the ALO is preventing lobbying without preventing policymakers from getting information. Amazingly, staff's draft actually expands rather than narrows the definition of prohibited communications. We are very concerned that after nearly a year-long process, staff's proposed ALO has mostly ignored input from the advisory groups and stakeholder's on key reforms and ultimately, by staff's own admission in their cover memo, differs only very little from the current Ordinance. Please vote no to staff's version and vote to adopt the redline version which tightens up ambiguous language to ensure free speech protection and addresses important stakeholder inputs. Thank you very much.

Steve Adler: Thank you. Next speaker is Adam Gregory. You have time donated from Ryan Hobbs. Is Ryan Hobbs still here? You have five minutes, Mr. Gregory.

Adam Gregory: Thank you Mayor, Mayor Pro Tem, councilmembers. I'm Adam Gregory with Texas Disposal Systems. I know you are frustrated with this issue. We've all spent a great deal of time on it. And now that staff has proposed an ALO that by their statement consists mostly of consolidation and clarification, I'm afraid that time and effort will have been wasted, and it is very frustrating. I want to remind you that past Councils, this Council, the Waste Management Policy Working Group, the ERC, the ZWAC, numerous stakeholders, and a federal judge have found significant problems with the ALO and staff's interpretation of it. Staff themselves conceded in the early 2017 Working Group process that numerous substantive changes were necessary and appropriate. Many of them were even proposed by staff in previous

iterations, but here we are with a proposed ordinance that does not explicitly resolve the issues of ambiguity that have plagued this ordinance for a long, long time. With this ordinance, we are mostly asked to trust the word of staff that the Ordinance will not be abused as it has in the past. Given our long and sometimes painful history with staff we believe it would be foolish for us to do so. Now as you know, most of the controversy surrounding the ALO has come from the solid waste, recycling and organics industry. Why is that? I imagine staff would tell you that it's because it's the industry that TDS is in. I'm asking you to consider something else. Could it be that this industry is unique and that the City actually has under federal and state law the power to seize full control over the entire industry and even reserve it for themselves? The staff has attempted it several times in the past. Could it be the businesses in this industry are regulated by a competitor of theirs, ARR? Could it be that sometimes drastic policy changes have been imbedded surreptitiously into numerous solicitations within this market segment? Could it be that the staff has revealed its willingness to abuse the ALO in the context of this industry, improperly disqualifying TDS, who has never violated the ALO? A federal judge held that this occurred. I want to assure you that our position is not about a desire to unfairly secure contracts for TDS. Nothing could be further from the truth. Our advocacy on this issue has only been an effort to prevent the kind of abuse that has occurred in the past, to protect our constitutional rights, and maintain a voice in policy development and we will continue that advocacy regardless of the action tonight. The proposed Ordinance is not a sufficient modification to address the problems that have been part and parcel of this Ordinance's administration for the past eight years. I find it interesting that the full exemption from the ALO for real estate transactions has been maintained in this version. So if there's a solicitation about the McKalla Place, for instance, which has been discussed, there will be no limitation on lobbying. I find that very interesting. Given that the solid waste and recycling industry is regulated by staff, staff competes with the private sector, that staff has sought full control of our industry, and attempted to set and change policy by RFP. Why should that staff be the sole conduit of information to the decision makers? Does the solid waste and recycling and composting industry have a far more reasonable claim to an exemption from the ALO than the real estate business? I think so. I respectfully request that whether you adopt staff's version or not, I don't think you should, I request that you include a full exemption for all solicitations concerning solid waste, recycling and organics management. It may seem counterintuitive to you but I can assure you that you'll hear less from TDS under such an exemption. I'm happy to answer any questions. Thank you for your time.

Steve Adler: Thank you. Next speaker is Andrew Dobbs. Is he here? Okay. What about Nikelle Meade? You have three minutes.

Nikelle Meade: Mayor and councilmembers, Nikelle Meade with Husch Blackwell. You know, we are here tonight after working on this for a very, very long time. It's not a perfect draft but we feel like it has incorporated... the draft that staff has brought forward incorporates some of the concepts that we heard from not only the Council Working Group but also the ERC and it's probably about the best result that we're going to get. I know that we... everybody, I think, all the stakeholders felt like there should be a third party process. I think we've addressed that in Councilmember Pool's amendment. There were some legal questions about that, I think we were able to work those out tonight to get that to where it can be in the Ordinance and works just fine and I also think that we heard from TCE, Andrew Dobbs, a few other changes that were able to be incorporated and I think it's time for us to move this on. We believe, and we have clients who participate in competitions for City work in the solid waste industry, and we would wholeheartedly ask the Council to not exempt the industry from anti-lobbying. You all have anti-lobbying regulations for a reason. We need to keep these procurement processes on an even, level playing field and that's what these regulations are for. So we would ask that you all adopt the staff recommendation with the amendments that have been brought forward throughout the day today, not to adopt the TDS draft, and I will say I've never even seen it and I'm a stakeholder. There are also lots of other stakeholders who've been involved in this process and I think they're not here tonight to fuss at the Council because they're happy with the draft that staff has brought forward and so we would ask that you adopt that draft, not the draft that TDS is proposing. And I did hear Mr. Whellan say that he would want the rules that accompany this Ordinance to come forward to Council and that's something I don't think any of the stakeholders really would object to, but we feel like that's the Council's prerogative to either do that or not. We'd be happy with it either way. Thank you.

Steve Adler: Thank you. We're now back up to the dais.

Leslie Pool: Mayor?

Steve Adler: Yes.

Leslie Pool: Just to clarify, when I was reading my amendments I was reading from the document that has 'Item 56 6-14-18 Revisions Initiated by CM Pool' and they're all there on page... the main change is on page 6 which goes to enforcement and that's what Ms. Meade was speaking to. My staff has worked really closely with Purchasing and the attorneys and they can speak to this but my understanding is that they were fine with these additional changes.

Steve Adler: You want to talk to us? You've run out of time, I'm sorry.

Chris Weema: Good evening Mayor and Council, Chris Weema, Assistant City Attorney. Councilmember Pool, I approached just to ask to clarify your motion, so you beat me to that, and so just to clarify it's section... the proposed motion is to amend Section 2-7-109(A) of the staff proposal to strike the entirety of section A, is that correct? And to replace it with substitute language?

Leslie Pool: Yes, do you have the copy that is my revisions that was sent? Yes.

Chris Weema: I believe I do.

Leslie Pool: All right, and then a further amendment to my striking of A and then inserting the new language and just the two words 'a subcommittee' is added to line 191 after 'appeal such disqualification to' a subcommittee of the Ethics Review Commission...

Chris Weema: Okay.

Leslie Pool: And then two 'mays' turn into 'shall,' line 196 in B and on page 7, that one is line 226 in E. That's it.

Leslie Pool: Okay.

Anne Morgan: I have a question about that last one, Councilmember Pool. Is your intent then that respondents that violate the section 2-7-104(1) three or more times during a five year period will be disbarred? Because if you take 'may' out it says 'may be subject to disbarment.'

Leslie Pool: I see that. Rather than 'shall be subject to disbarment' you want me just to say 'shall be disbarred'?

Anne Morgan: Is that your intent? 'Shall be disbarred?'

Leslie Pool: I don't think we're going quite that far. It would be subject to disbarment but would not summarily be disbarred.

Anne Morgan: Well then I think it would be 'may' if it says 'subject to'.

Leslie Pool: Very good. Thank you.

Steve Adler: So you're not urging that one? You're keeping it as 'may'?

Leslie Pool: I've been persuaded by our city attorney.

Steve Adler: Okay.

Leslie Pool: So that was on page 7 line 226.

Anne Morgan : I'm actually just trying to figure out what your intent is.

Leslie Pool: Yeah, so that one does not change. That remains 'may'.

Steve Adler: So no changes to E. So then just those two changes.

Leslie Pool: Thank you.

Steve Adler: Councilmember Alter.

Allison Alter: I'm not sure if this is a question for Mr. Scarborough or for Legal, but this wasn't the staff's original recommendation and as a member of the Working Group and a member of Audit & Finance and having worked closely with my Ethics Review Commissioner when this came before them, I understand there was a very lengthy process. Can you speak to why this wasn't your original recommendation and what is optimal and what is suboptimal and why, both from a Purchasing standpoint and from a Legal as necessary?

James Scarborough: Sure. Councilmember, thank you for the question and to the extent that we touch on Legal issues, I'll hand it over to my colleague from the Law department. The recommendation to include a secondary body to review protest and/or appeals has been a fairly common element of the feedback that we received from the Working Group and from ERC and from other sources and in concept, we're not opposed to that. In fact, a common approach for handling protest is just that – a protest that is handled by the staff who conduct the solicitation. It gives them a chance to review their process, to make sure they've touched all the bases, and then to respond to the protest whether to deny or sustain it and then appeal to a higher level. So you would hand the documents to the higher level and have them review it. That particular process has historically not been done here. It just hasn't developed historically. As these recommendations were received with regard to the ALO, we would actually benefit globally by having a protest and appeal process raised to the City ordinance level, codified in City code, so that we can address all procurement protests and appeals. It would allow us some procedural expertise, some institutional knowledge development, and it would allow us to gain expertise and speed of processing of protests and appeals. If we implement that change in how we handle administrative processes within one piece of procurement, then we'll still have a separate protest process that applies to all the rest of the City's procurement processes and so we would end up maintaining multiple processes for like administrative actions, further complicating how we handle procurement activities and greatly lengthening them as well. That is part and parcel of our recommendation to the Audit and Finance Committee and some of the charge that we heard from them as we brought this item to Council was to proceed, after we gain approval on the Anti-Lobbying Ordinance, is to proceed with the development of procurement code that would address protests and appeals globally to handle all administrative processes associated with procurement and we would handle protests and appeals of anti-lobbying violations similarly. So while the staff stands behind its current recommendation, we think that the change that is proposed by Councilmember Pool is a little bit better than the previous contemplation that we had heard about sending these items to the ERC in general. There's some legal issues possibly associated with it. There's some timing issues and Chris can speak to some of these things, but that's why it wasn't in our recommendation. We believe that we would be better served, staff and the City, and our vendors, if we had a more established protest and appeals process that you will see largely used across the country and we would like to pursue that to address not only procurement protest but to address ALO violations as well. So that's the reason why inclusion of ERC was not included in the staff's recommendation.

Allison Alter: Can you address the legal issues of the proposed amendment?

Chris Weema: Certainly. As previously contemplated which would have subjected disqualifications to review by the full Ethics Review Commission, the Ethics Review Commission is subject to the Open Meetings Act. The City, under Chapter 252 of the local government code, when it takes in proposals that contain confidential, trade secret, or proprietary information the City is obligated to maintain the confidentiality of that information because there's no exception under the Open Meetings Act that would permit the Ethics Review Commission or any other body that's subject to open meetings to review the contents of proposals and because there is the distinct possibility that a violation of the Anti-Lobbying Ordinance resulted from a communication related to a proposal or related to the contents of that proposal, there may be an inability to maintain confidentiality of that confidential material if that went to the full Ethics Review

Commission. As modified to a subcommittee of the Ethics Review Commission, there's no Open Meetings implication provided that that subcommittee does not form a quorum of the Ethics Review Commission.

Allison Alter: What about how long you think that process would take if it went to a subcommittee of the Ethics Review Commission that's not familiar with procurement rules and... are there any concerns about that process and the speed with which that would be able to move forward?

James Scarboro: We don't know. To the extent that the appeal that is being contemplated is going to a subcommittee and not the entire ERC, the matter would not be dealt with in a public meeting and there may be some controls regarding confidential information, but this is an approach that was not contemplated by staff so we would have to work out procedurally how protests would be dealt with and incorporate the use of an ERC subcommittee in the administrative rules and lay out those procedures with them. We're not sure at this moment how that would work but if that's what Council passed then we would try to find a way to make it work.

Allison Alter: So I may have some... sorry, my voice is weird today. I may have some other questions but with respect to the part B where the purchasing officer shall waive a violation, do you have any concerns about that? This says 'shall waive a violation if it was solely the result of communications initiated by a City official or a City employee.'

James Scarboro: Sure. A couple of the changes that were proposed were there was a move away from the 'may' to the 'shall' creates a procedural obligation, a rigidity, that may include some risk. Any time we're reviewing a violation there may be elements of it that need to be taken into consideration: the timing of it, the circumstance in which it occurred. But if the definition of the violation is met, under the prescriptive language, under the 'shall', we would have no ability to do anything other than to apply the disqualification. You might recall last year there was a situation before you where we had no ability to consider anything other than disqualifying a vendor for a violation where there may have been circumstances associated with it. By inserting the 'shall', we would effectively be in the circumstance that we are now. Like the current Ordinance, if you violate the Ordinance there is no ability to take any circumstances into consideration. You must find the violation.

Allison Alter: So I think it was that they were waiving a violation in this case. So I just want to make sure...

James Scarboro: Right. It would be equally prescriptive. I would have no option to take circumstances into consideration. I would have to waive the violation no matter how the violation may have been initiated or the circumstances associated with the initiation. The waive of the violation is associated with communications, improper communications that were initiated by City officials or City employees and if a City official or a City employee initiated an improper communication under the Ordinance and the 'shall' is there I would have no ability to apply the disqualification. I would have to waive this disqualification.

Allison Alter: And would that be true even if they violated it in some other manner?

James Scarboro: Yes.

Ann Kitchen: Mr. Mayor?

Steve Adler: Mr. Flannigan.

Jimmy Flannigan: Thank you. The Part C that talks about impartial hearing process, so without the Ethics Review Commission involvement, and I do have a second question about that, is there a process that is not just the person who made the decision reviewing their decision?

James Scarboro: Currently, the way we handle all protests as we would a violation or an alleged violation of the Anti-Lobbying Ordinance or disqualification, we would receive the protest and if there was a legal question or a complexity to the protest, then we could refer it to an independent hearing officer for a hearing and for their recommendation. But ultimately the determination of the denial or the sustainment of the protest would be with the purchasing officer.

Jimmy Flannigan: I see, so the hearing process is just a recommendation to the staff.

James Scarboro: Yes sir.

Jimmy Flannigan: I could see how that might be different. And then maybe this is a legal question... when we talk about a subcommittee of the ERC as Councilmember Pool's included in her amendment, is there a definition of subcommittee? Who picks the subcommittee? Is 10 of the 11 considered a subcommittee? Is 1 of the 11 considered a subcommittee? Is there a minimum number? You get my point of the question here.

Chris Weema: Right, in the absence of something specific the ERC may designate a subcommittee that may still be subject to open meetings and so if the intent is to avoid the confidentiality issue, the fact of a less than a quorum would have to be reflected somewhere and if it's not reflected in the Ordinance it would have to be reflected by the procedures that the Ethics Review Commission adopted in order to handle these.

Jimmy Flannigan: So the decision who sits and the size of that subcommittee would rest with the ERC?

Chris Weema: That's right.

Jimmy Flannigan: And in a question of anti-lobbying there would be no prohibition of the person who is seeking this protest from lobbying the members of the Ethics Review Commission on the makeup of that subcommittee?

Chris Weema: Well there may be. If the solicitation is still subject to anti-lobbying, the members of the Ethics Review Commission are considered City officers for the purposes for the Anti-Lobbying Ordinance. They would still be subject to the Anti-Lobbying Ordinance as it related to that solicitation. So, if the communication related to that solicitation, it related to their response to the solicitation... they may still be subject to anti-lobbying. I can't say categorically but it may depending on the content of the communication.

Jimmy Flannigan: Okay. I'm more comfortable with the staff recommendation as a whole but I'm a big fan of a procurement code process moving along as quickly as we can. Big fan of that.

Chris Weema: Yes sir.

Steve Adler: So I have... we have a couple more people that haven't had a chance to speak yet.

Leslie Pool: I just... if I could, on the amendment that I'm making with regard to whether it is intended to be less than a quorum, that is the intent and I can simply add 'a subcommittee of less than a quorum' in there...

Chris Weema: Certainly.

Leslie Pool: And that is the intent. So I will make that change.

Steve Adler: So I have questions. It appears like there's two things here and one is the appeal question and then the other one is this prescriptive nature here on line 196. I understand that what you're saying is that an appeal process may very well be appropriate if the staff is trying to develop an appeal process, which I understand, but if it's an appropriate thing then it sounds like there should be an appeal process here. If we were to adopt an appeal process here, it possible for us to adopt something that would then fall off at such time as the City did a general procurement appeal process, so that we didn't have a balkanized appeal process here that was different than the general appeal process? Not that it would be used but then we would at least have an appeal process in this in the interim period of time.

Chris Weema: The most appropriate way to address that may be at the time that the subsequent procurement code that involved a holistic and comprehensive appeal process was adopted, this could then be rolled off at that time.

Steve Adler: Okay. It seems to me that that's one solution to this. We clearly, I think, do not want to have a different appeal process here than we have anywhere else in the procurement process. But this was an issue that's been coming up and it seems as if we could adopt something. What's been proposed by Councilmember Pool in this case, if it goes to

a subcommittee that's not a quorum, it then becomes something that's not subject to meeting notices or public hearings so it sounds like something that could happen very quickly and you would have the ability to adopt the rules associated with that to ensure that it did... not that it would ever be used, because hopefully before this would ever come up you're going to come back with a general procurement appeals process which would then preempt this. So, it sounds like that's one possible solution. With respect to the purchasing officer 'may' versus 'shall', we ran into the problem before when it was prescriptive when we said if there was any contact that was... any contact, you had to disqualify, which left open the possibility, or it was this fact. It was where the contact wasn't initiated by the company, it was initiated by the staff and we all looked at that and said well that shouldn't be held against the person. So the 'shall' in that other case seemed to be too prescriptive because we could imagine the situation where there would be a contact that we wouldn't want the 'shall' to apply so let me ask the question here. Describe for me a scenario where a violation was solely the result of a communication initiated by the City official or City employee that we would not waive the violation. Give me a scenario where that might happen.

James Scarboro: Certainly if the communication was initiated by a City official or a City employee on their own volition and...

Steve Adler: Solely by that person, right?

James Scarboro: Right. To the extent that there was an initiation and one question was asked and then that question included a response and then a response and then a response and then a response, that might be a consideration. To the extent that there were earlier communications that were non-substantive in nature that may have led to the communication that was initiated by the City employee or City official that may be a circumstance...

Steve Adler: I didn't catch the second one.

James Scarboro: If the communication... if the City official or City employee had had other non-substantive communication with one of the respondents over matters that did not pertain to the solicitation but in those exchanges they get closer and closer and closer to the solicitation and the frequency of those exchanges may have then elicited the initiation by the City employee or the City official, that might be a circumstance that we need to take into consideration. 'Mays' allow us to address unknown or analogous circumstances. 'Shalls' just lock us in a little bit more. Certainly we will live with the 'shall' if that is the case. 'May' just gave us a little bit more latitude procedural-wise to find the violation if the violation occurred and do so in the rules.

Leslie Pool: Mayor? Mayor? If I could speak...

Ann Kitchen: Mayor?

Steve Adler: Hang on a second.

Ann Kitchen: I haven't had a chance to say anything.

Steve Adler: Ms. Kitchen.

Ann Kitchen: I'm listening to the scenario that you're talking about but I think it's handled by the language. The language says, 'If the violation was solely the result of communications initiated.' I mean, I really cannot imagine a circumstance in which we would want to hold someone responsible for something that a City official did, and that's what this is. It's very narrowly stated. It says 'solely the result of communications initiated.' So I think it's designed to do just what it says and that is that there isn't any discretion. In those circumstances a violation should be waived.

Leslie Pool: Mayor if I could just weigh in...

Steve Adler: Hang on a second. Are you done?

Ann Kitchen: Pardon?

Steve Adler: Were you done?

Ann Kitchen: Well I have one different kind of question, if I may, and that relates to the review process. Did I hear you say that the Ethics Review Commission is only a recommendation? It's not a determination?

Steve Adler: You're saying under the existing appeal process.

Ann Kitchen: No, no, I'm reading this language here.

Steve Adler: What they said was under the existing appeal process they would bring in an independent hearing officer that would only be a recommendation to procurement.

Ann Kitchen: Okay.

Steve Adler: He wasn't speaking about this.

Ann Kitchen: Okay, but what's the understanding of this language? Because it's silent.

Steve Adler: That's a good question that hasn't been asked yet.

Ann Kitchen: So okay, if this is a good time, I would suggest that the language of 109A needs to be clear because it doesn't say. It needs to be clear that the Ethics Review Commission is making a determination. So if Councilmember Pool is amenable to that, I would think of language to add for that purpose.

Leslie Pool: Can I respond?

Steve Adler: All right. Okay, Councilmember Pool.

Leslie Pool: That would be fine. It does appear not to speak to that. I'm wondering though if staff had anticipated that might have been discussed in procedures, so I don't know... the operating procedures.

Chris Weema: Councilmembers, I believe the intent that the Ethics Review Commission would be... that their determination be binding is subsumed in the word 'appeal.' If it's preferable to express that, that can be done as easily as a third sentence added to the amended language in subsection A or something similar.

Leslie Pool: And the decision shall be binding...

Chris Weema: That's right, yep.

Leslie Pool: ...on all parties. And maybe Councilmember Kitchen can... it looks like she's working on that, too. I did want to go back to the point about the purchasing officer waiving the violation if the violation was solely the result of communications initiated by the City official. The point there was to clear up the confusion that had happened previously where a party had handed a business card, for example, to a City official and then was given a violation for transgressing the Anti-Lobbying Ordinance and we were trying to avoid that so this clearly... and then it got confused as to who had initiated and who hasn't. So this was an attempt to clear up the fact that if Mr. Scarboro, for example, as a purchasing officer, or any of his staff speak, City official or City employee, speaks with any of the folks then that does not in and of itself create a violation and there were charges that that was happening. So this is to speak to that directly. And then the last thing I'd just say, the reason why it is important to have a third party reviewing these appeals is because the purchasing officer makes a decision and then it's appealed and then he makes the decision on the appeal and that we were trying to send to a different body so that he's not put in the position of having to make a decision on a complaint and then also a decision on an appeal to the complaint.

James Scarboro: Just a point of clarification. That's not inaccurate, but the way we process protests of disqualifications under the ALO is that we... the disqualification is actually made by staff and then the protest is then submitted to me.

Leslie Pool: Okay, but it stays within your office right?

James Scarboro: Yes, ma'am.

Leslie Pool: Yeah and so... thank you for that clarification. So we're trying to move it out and away to allow him to be more objective and not subject to complaints which seem to be happening probably more frequently than was good.

Steve Adler: Councilmember Alter.

Allison Alter: I was wondering if you could respond to the interpretation of Councilmember Kitchen for B? As I understand the way that she read it, it might address the concern of somebody violating in another way in addition to a councilmember or a staff member initiated thing. Legally, is that how it reads in that case?

Chris Weema: I believe it does.

Allison Alter: 'Cause I'm not sure if we have the example where the 'shall' is problematic. I understand in general 'may' is better than 'shall' from the flexibility standpoint, but in this case I think that we generally we initiate it by accident that the vendor shouldn't be liable for that. But that if they did something else that violated it they should be and they shouldn't have a loophole. Is that...?

James Scarboro: That is correct. The 'may' is more of a common approach to regulating to give some latitude to taking into consideration or mitigating or other circumstances but of the changes contemplated, this would be of the minor of them all. So we certainly would be able to accommodate it.

Allison Alter: Okay and then what do other cities do with respect to this process of reviewing a disqualification? Do they send it to an Ethics Review Commission? What do they do?

James Scarboro: When we looked at other cities very few of them had as extensive an ordinance regarding the communication during solicitation as we did. But when there was an allowed communication during a solicitation they would treat it like they would a protest. So they would disqualify or disallow the company who communicated inappropriately from the process and if they protested, then that protest would be handled like a procurement protest. So just like if a company was disqualified for not having minimum quals or if they were found to be non-responsive for not meeting the specifications and we notified them before we were done with the solicitation or done with the remainder of the evaluation, they could then protest that decision. This would just be another decision that would be subject to protest. But the same protest process would apply to that violation or some other decision that was made by the procuring entity.

Allison Alter: So what do they do for those protests? Like, what's the process?

James Scarboro: Typically there's going to be a typical administrative review of the complaint. So there would be a submission of the protest and a review of the basis of the protest and a determination of whether the protest had grounds or not. If there were no grounds the protest would be denied. If... and we didn't looking into the protest and appeals procedures for the other cities in Texas but what you'll commonly see, what you'll see in the federal government and what you'll see in the ABA Model Procurement Code is a protest process that is done at the procurement officer level and an appeal process that's done at a higher level of authority. And that is what we're contemplating pursuing with the establishment of a procurement code to address protests and appeals. That's really the basis of our recommendation is that we develop those regulations, but I understand that this recommendation would be an interim measure to cover concerns until we were able to establish those regulations.

Allison Alter: So the protest, this is saying an appeal, not a protest. Is it appropriate that if it were an Ethics Review Commission subcommittee that it's an appeal or a protest? What is the language that's appropriate?

James Scarboro: In my interpretation, and Chris, please correct me if I'm wrong, in my interpretation this actually reads more like a protest. So the complaint would then not go to the procuring... the staff. The complaint, rather, would go to the subcommittee of the ERC. Is that correct?

Chris Weema: Well, I think that protest is how we define it, it is not necessarily defined and appeal is likewise not defined. To discuss the holistic procurement code, protest and appeal would likely be defined in there. In this instance and in the case of what the City's practice is... the City's practice is normally, with procurement matters, that the issues are protestable to the purchasing officer. Here the wording is 'appeal.' I don't know that there is a meaningful distinction other than what the Council chooses to give it.

Steve Adler: Wait a second, this says this only takes place if there's been a disqualification.

Chris Weema: That's right.

Steve Adler: And if someone's appealing a disqualification.

Chris Weema: That's right.

Steve Adler: So if someone files a complaint, you still handle the complaint. If at the end of the complaint it results in disqualification, someone who is disqualified has an appeal, not a complaint. And it would go to the Ethics subcommittee of the Ethics so it doesn't run into any of the confidentiality things and it only comes into play when there's a disqualification and it's an appeal and you could add at the end of the first sentence, 'the Ethics Review to a subcommittee,' add 'a subcommittee' as Councilmember Pool does, 'to the Ethics Commission established in Chapter 7... comma whose decision on appeal will be binding.'

Chris Weema: It would be the disqualification.

Steve Adler: Only the disqualification that is currently... *(inaudible)*

Chris Weema: It's an appeal of a disqualification. As currently written it doesn't contemplate the ordinary protest process, which would first go to the hearing officer...

Steve Adler: Right.

Chris Weema: ...and then be appealed. As currently written it is just the disqualification is made and it is appealed to the subcommittee of the Ethics Review Commission.

Steve Adler: So if we took Councilmember Pool's thing and we added the words 'a subcommittee of the Ethics Review Commission' and at the end of that sentence we put a 'comma, whose decision on appeal will be binding.' We know what the appeal is because we've referred to the appeal. That would seem to be an interim solution with respect to appealing a disqualification with the understanding that when you come up with your appeal process which is going to be broader than this, as concerns disqualification make sure you preempt this so that we don't have a special rule here that's different than anywhere else. Does that make sense? Does anybody have any objection to having an interim appeal process for a disqualification before staff... until staff has a chance to come up with an omnibus thing? Does anybody have any objection to that? Mr. Flannigan?

Jimmy Flannigan: I still object to deviating from the staff recommendation.

Steve Adler: Okay. So can we take that and put that to a vote? Ms. Houston?

Ora Houston: When you all get through with that, I have a question on page 1 under Applicability.

Steve Adler: Okay, let's get there in just a second. Councilmember Kitchen?

Ora Houston: It's almost midnight.

Steve Adler: We'll get there.

Ann Kitchen: I have just a quick question. So how many appeals... the appeals are not very often right? For disqualification? I mean, you don't have that many disqualifications, right?

James Scarboro: I would say that we process anywhere from a low of maybe 1-2 upwards of 3-4 per year.

Ann Kitchen: Okay.

James Scarboro: And that would be across all city procurement. That would include Purchasing Office and CCO.

Ann Kitchen: Okay. Mr. Mayor, I'm wondering whether you would consider allowing an appeal to Council instead of stopping at the review commission level.

Steve Adler: I think they're concerned about the timing of the issue and it's gonna be interim and I would urge staff to come back as quickly as they can with an omnibus thing that would cover this.

Ann Kitchen: Okay.

Steve Adler: So I would suggest that we take Councilmember Pool's deal, we make the changes if that last phrase sounded good to you, and let's take a vote on it.

Ann Kitchen: Okay.

Steve Adler: We're adding the words 'a subcommittee'. We're adding the words 'whose decision on appeal will be binding' in that section A.

Leslie Pool: Did you want to include less than a quorum?

Ann Morgan: I think that would be helpful.

Steve Adler: Okay, a subcommittee of less than a quorum.

Ann Morgan: ...of the Ethics Review Commission.

Leslie Pool: Thank you.

Ann Morgan: ...and that the ERC decision is final.

Steve Adler: Yes. Those two changes. Are those changes okay to your amendment? Okay. Yes, Councilmember Alter.

Allison Alter: I'm not sure that I agree with this amendment but it does not yet include any language that makes it temporary until the procurement code is in place.

Steve Adler: I asked counsel the best way to handle that and was advised that the best way to handle that was to be very specific about the intent from the dais so that when the Ordinance comes back and we approve the general Ordinance that Ordinance will contain a provision that says that this takes precedence over or repeals... it would say it repeals this section.

Allison Alter: Is that correct? It's after midnight. I'm trying to keep all these things in line here.

Chris Weema: That would accomplish the intent.

Steve Adler: And that's how Ann said to do it.

Allison Alter: I'm just trying to make sure that I have some...

Steve Adler: It's okay.

Allison Alter: ...some clarity. Mr. Scarboro, can you speak to any further reservations you have about this? I'm still... you know, we went through a very long process and there were lots of reservations that were expressed and I'm also... would also like to know how long you think it would take to get the procurement code.

James Scarboro: I can address that second part first, if I could. Luckily there is a model for us to look towards. Model Procurement Code has been around since 1979. I'm very fortunate that one of my early mentors was a co-author under the Procurement Code so I've been exposed to the regulation for a long time and have worked under it in other governments. So we have an existing regulation to look towards and would not necessarily have to create from scratch but certainly we would want to adjust it for Texas and for Austin. So, I would anticipate that we could use the break this summer, the remainder of this summer to start putting together a draft in that regard and hopefully sometime in the early fall, early to mid-fall start bringing back copies of the proposed regulation. What form that we would bring it back and to which body we would bring it back I couldn't really say right now but we are very incentivized to move on this quickly.

Allison Alter: Thank you.

James Scarboro: The earlier part of your question... there was a comment earlier tonight about the recommendation being similar to... the recommended version being similar to the existing code and I reiterate that's not largely accurate. We received feedback from a number of sources. We reached out to thousands of vendors and those that responded back were largely satisfied with the current Ordinance. We don't, as of normal practice, receive concerns about the Anti-Lobbying Ordinance. It seems to satisfy a need by most vendors for the process to be fair and transparent. It has been a consistent concern associated with waste management solicitations over the last year. So I certainly understand your direction for us to take it under consideration and to revise and make a proposal, but we don't hear these concerns to this extent throughout the remainder of our vendor community. So we're glad to bring this recommendation forward and we did look in some areas to make some changes that were a little closer to those that were recommended by some of the stakeholders and we heard quickly from other vendors that they didn't like the shortening of the no-contact period and they did not like the removal of the debarment consequences. So they are back in this recommendation. So what you see before you is a consolidated, more clear, and we feel more easily applied and understandable ordinance, and we think ultimately a more effective regulation. And we certainly will take and comply with any revisions that you make to it but we feel like we have left the regulation better than when we have found it.

Allison Alter: Are you able to give us a specific timeframe? I mean, this seems like a rather imperfect intermediary thing that's going to demand a lot of a few people who are volunteers on the Ethics Review Commission. I don't know, maybe we won't have any protests in that period, but can you give us a little more specific timeframe on the procurement code? I mean, is it just like a model that's on the shelf and then, you know, there's gonna be some tweaks to it or is it...?

James Scarboro: No, there will be a fair amount of tweaks to it. Texas has procurement statutes that apply to municipal government that will need to be accommodated. There are lots of consistent elements to the model procurement code but there are some very different elements and so we will need to make sure that those are accommodated and there will be a fair amount of review. Historically procurement has been an element of the executive and has been pretty extensively under the authority of the City Manager's office so I want to recommend the amount of regulation that preserves that authority and supports the operations of the City without overregulating. So, we want to look to the industry and look to our colleagues but at the same time we want to apply something that is effective and practical in Austin. So, I can't tell you how long that's going to be, but I will tell you this is our priority. We want to establish this particular body of regulations quickly. So we would be moving on it for the remainder of the summer and we would hope to have some early drafts come fall.

Allison Alter: Thank you.

Steve Adler: It looks to me that these two proposed changes are minor changes and we can take a vote on them. The first one is just to say only in the case of kind of the death penalty, a disqualification is going to be an interim deal. You

guys are going to look at it. When we come up with a big thing it's going to preempt this. Whatever it is that you decide to do, but it doesn't mess with appeals on initial complaints or any of those kinds of things. It's only concerning a disqualification. And then the second one is putting in a 'shall' instead of a 'may' because, as we said here, we can't come up with a scenario where if it came solely from the initiation we wouldn't want to say you can't do that. Let's put those to a vote. Councilmember Pool moves an amendment to do those two things. Is there an objection to those two things? Mr. Flannigan objects to them. Those in favor please raise your...

Allison Alter: Can you divide them?

Steve Adler: What?

Allison Alter: Can you divide the question please?

Steve Adler: Yes, we can divide them. Let's do the first one first. It adds the words... the concept of a subcommittee of the Ethics Review that doesn't have the quorum whose decision of appeals are binding. Those in favor of that amendment please raise your hand. It is Pool, Casar, the Mayor Pro Tem, me, Ora, Kitchen. That's six. Those opposed, raise your hand. Mr. Flannigan, Councilmember Alter, and Mr. Renteria abstains. It passes. Now look at the second one. It's in D section, it changes the 'may' to a 'shall'. Ready to take a vote? Those in favor please raise your hands.

Allison Alter: Hold on, sorry.

Steve Adler: Okay, it's Pool, Alter...

Allison Alter: Hold on, hold on. I'm totally confused on what we're voting on now because I thought we were voting on the first amendment which I voted no to. The second amendment I was voting yes to. Now what are we voting on?

Steve Adler: No, we're now voting on the second one.

Allison Alter: Okay, I want to be no on the first one.

Steve Adler: You were no on the first one. You were no on the first one. Now we're voting on the second one which is changing may to shall. Those in favor please raise your hand. Councilmember Pool, Alter, the Mayor Pro Tem, me, Pio Renteria, Ms. Houston, Ms. Kitchen. That's 7. Those opposed to that? Mr. Flannigan and Mr. Casar. That one passes. Now we have the ALO Ordinance, it's the staff version with those changes to it. Any further discussion? Page 1. Ms. Houston.

Ora Houston: I just have a question for Mr. Scarboro. On Applicability, I'm sure this has been in there for a long time, but why are these... now I can understand why federal, state, and city block grant funding would not be... would be an exception to the Anti-Lobbying Ordinance. Why have those others been in there all the time, 1, 2 and 4?

James Scarboro: Sure.

Ora Houston: 'Cause we get more lobbying from those folks than we do from...

James Scarboro: Yes, ma'am. Councilmember, I can start from the bottom. Interlocal contracts or agreements. Because they don't meet the definition of solicitation, oftentimes these are...

Ora Houston: No, I'm looking at your... at Councilmember Pool's draft. It just says the sale of rental properties, city cultural arts funding, and city social services funding.

James Scarboro: Right. The first exempted type of solicitation was city social service funding. That was not in the original Anti-Lobbying Ordinance. Council actually requested that be added into the Ordinance back in...

Chris Weema: 2011.

James Scarboro: 2011.

Ora Houston: And cultural arts funding?

James Scarboro: I'm not familiar with the history of that particular one. I don't know if that was in the original version of the Ordinance or not.

Ora Houston: And the sale or rental of real property?

James Scarboro: Typically because the sale of rental property is not subject to Chapter 252, it may or may not be competed. Typically they like to compete but they don't have to compete and so when there is no solicitation the definition of solicitation and therefore the Ordinance doesn't apply. The Ordinance applies when there's a competitive process and when there's no competitive process the Ordinance wouldn't apply. This may or may not be a competitive process. I believe that might have been some of the rationale for an exemption. But that's more early history of the Ordinance.

Ora Houston: Okay. Thank you. It's early morning. I just was interested to see those.

Steve Adler: Obviously not the time to deal with that now, because that would be something that would be a longer conversation but I'd be interested in looking at whether or not we should maintain the exception for social service funding because it seems to me that it ought to apply to that as it does to other vendor contracts that we send out. But now's not the time for us to be dealing with that. Okay? We are now back to the main motion, the ALO Ordinance. Does anybody have any further? Mayor Pro Tem?

Kathie Tovo: Yeah, I would like to... Mayor, I think I just need to be sure I understood what you just said. Were you suggesting that social service contracts... that we might want to revisit whether social service contracts should be subject to the no solicitation?

Steve Adler: Correct.

Kathie Tovo: I would just suggest that... that caused a great deal of concern in the community several years ago and that's one of the reasons why it was changed and so I would want to really explore that history as a Council before we dive into that issue.

Steve Adler: Which is why I was saying we shouldn't do it now.

Kathie Tovo: That's right. I know, I just want to prevent us from causing grave concern tomorrow in the social service community.

Ora Houston: But the question is still valid, is that why was that decision made in 2011 because the lobbying is... lobbying does happen. So it'd be nice to have that history if you have it.

Kathie Tovo: Sure and I would ask staff, too.

Ora Houston: We're not doing that for today...

Kathie Tovo: Yeah, yeah. Definitely, great.

Ora Houston: But I'm just saying that's an interesting way that's been developed.

Steve Adler: So to that end, in your free time, if you could provide us the background for that I would like to see it. All right, we are now to the main motion on the Anti-Lobbying Ordinance. Councilmember Alter?

Allison Alter: I'd just like to reconsider the second amendment. I don't know what the final vote total was but with everything we were doing I got a little bit confused there.

Steve Adler: It was 7-2.

Allison Alter: Okay, I'd like to be registered as voting no on that.

Steve Adler: Okay, you'll be registered as voting no. Passes 6-3. All right, now we're to the main motion on the ALO Ordinance. All those in favor please raise your hand. Those opposed? Okay, Councilmember Alter votes no, the others voting aye. We have Garza and Troxclair off the dais. It passes.

Allison Alter: I want to just say that I wanted to stand with staff's best judgment on this. I very much look forward to the procurement code and I want to thank the staff who have worked tirelessly on this and worked with the ERC, with all of the stakeholders on a very elaborate process and you know, we need to have a strong ALO and procedures that apply to everyone so that our City is transparent and that we have a code that works well for all vendors. I appreciate the work that went into it but I'm voting no to stand with what the original was which is my preference.

Steve Adler: Got it.

Leslie Pool: And Mayor, I'd like to thank our staff, Ms. Willett, Mr. Scarborough, and Mr. Weema for sticking with us so late tonight. Thank you for working very closely with my staff this afternoon to craft these final changes and I also wanted to give a shout out and a going away thank you. I believe Mr. Weema, is this your last day working at the City?

Chris Weema: Today is my last day, yes, by the clock.

Steve Adler: Oh wow. Thank you so much for your service.

Chris Weema: Thank you.

Leslie Pool: What a way to go out, right?

Ora Houston: Is it today, Friday?

Chris Weema: It is Friday, yes.

Steve Adler: All right, so we're done with this one.