Texas City Attorneys Association
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DRAFTING ENFORCEABLE ORDINANCES

City attorneys serve their clients well by considering how enforcement and prosecution challenges can be diminished through careful drafting. To manage several basic enforcement and prosecution challenges, consider the suggestions below, which are explained below under the heading "Drafting Suggestions."

1. Draft affirmative defenses and defenses, not exceptions;
2. Clearly label affirmative defenses, defenses, and exceptions;
3. Draft each of these into separate subsections: offense, affirmative defenses, defenses, and exceptions;
4. Dispense with culpable mental states; and
5. Avoid ordinance cross references and references to specific state law provisions.

Drafting Suggestions

1. Draft affirmative defenses and defenses, not exceptions

Most ordinances include language describing situations in which the ordinance requirements do not apply. These exclusions are commonly drafted as either affirmative defenses, defenses, or exceptions. The choice of whether to draft an ordinance with affirmative defenses, defenses, or exceptions is significant in prosecution of an ordinance offense.

Here is an explanation of the significance of the distinction between affirmative defenses, defenses, and exceptions. Remember that most city ordinance violations are criminal offenses, enforceable as a Class C misdemeanor initiated through issuance of a ticket.[1] In a criminal case, including those based on city ordinances, the prosecutor must prove all elements of the offense *beyond a reasonable doubt*, the highest burden established by law.[2]

In the prosecution of a case based on an ordinance drafted to include "exceptions," the prosecutor must negate all exceptions and do so by proof beyond a reasonable doubt, in addition to proving up the elements constituting the offense itself.[3] This is a difficult burden. Failure to negate all exceptions beyond a reasonable doubt will result in a finding of not guilty for the defendant. However, the difficult burden created by including exceptions in the ordinance can usually be alleviated in the drafting stage by including in the ordinance a defense or an affirmative defense, instead of an exception.

When an ordinance provides for a defense, the person charged (the defendant) can still claim the defense in an attempt to escape culpability, but the prosecutor is not shouldered with the burden of proving that the defense does not apply.[4] An option even better than drafting an ordinance with a defense (as opposed to an exception) would be to draft an ordinance with an affirmative defense, which puts the burden on the defendant to establish and prove the elements of the defense by a preponderance of the evidence.[5]

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[1] Tex. Penal Code (PC) §§ 1.03(a), 1.07(a)(30); Tex. Code of Crim. Proc. art. 14.06(b).
[2] PC §§ 2.01, 1.07(a)(22).
[3] PC §§ 2.01, 2.02(b), 1.07(a)(22)(D).
[4] PC § 2.03.
[5] PC § 2.04.

Complaints and Trial in Municipal Court

There is another good reason to avoid exceptions when drafting an ordinance. When a case is prepared for trial, the prosecutor must file a formal complaint. The complaint is the charging instrument that describes the unlawful conduct and charges the defendant with the crime.[6] A complaint describes in one long sentence the offense committed by the defendant, most commonly by listing all elements of the offense.[7] When an ordinance is drafted to include exceptions, a complaint based on an alleged violation of the ordinance can become very lengthy and complicated because each exception is an element of the offense that must be disproved by the prosecutor at trial; therefore, each exception must be described in the complaint.
See Example A in Part 2 below.

Conclusion

An ordinance drafted to include exceptions places the highest burden on the prosecutor and increases the likelihood that a defendant will be found not guilty. Additionally, including exceptions in an ordinance is likely to result in a formal complaint lengthier and more complex than a complaint based on an ordinance drafted with defenses and affirmative offenses rather than exceptions. Given these facts, the likelihood of successful enforcement is enhanced by drafting ordinances with affirmative defenses or defenses, and not exceptions.

2. Clearly label affirmative defenses, defenses, and exceptions

Clearly label affirmative defenses, defenses, and exceptions by using the proper phrases outlined by Texas Penal Code §§ 2.02-2.04:

- "It is an *affirmative defense* to prosecution …"
- "It is a *defense* to prosecution …"
- "It is an *exception* to the application of …"

Sometimes an ordinance describes a situation where the ordinance does not apply in terms such as "Unless," "Except as provided by," or "This section does not apply to." Using these phrases can lead to confusion for judges, prosecutors, defendants, and attorneys as to whether an ordinance should be interpreted as including affirmative defenses, defenses, or exceptions; thereby establishing what burden of proof applies, and who has the burden of proof at trial. Much uncertainty can be avoided by clearly labeling affirmative defenses, defenses, and exceptions when drafting an ordinance. To better explain the value of clearly labeling defenses and exceptions in ordinances, here is an example based on state law.

[6] Tex. Code of Crim. Proc. art. 45.018(a).
[7] *Villarreal v. State*, 729 S.W.2d 348, 349 (Tex. App.—El Paso 1987), *citing Toliver v. State*, 254 S.W.2d 388 (Tex. Crim. App. 1953).

Example A - State Law without clearly labeled exceptions and resulting complaint text

TEX. TRANSP. CODE
Sec. 601.051. REQUIREMENT OF FINANCIAL RESPONSIBILITY.

A person may not operate a motor vehicle in this state unless financial responsibility is established for that vehicle through:

(1) a motor vehicle liability insurance policy that complies with Subchapter D;
(2) a surety bond filed under Section 601.121;
(3) a deposit under Section 601.122;
(4) a deposit under Section 601.123; or
(5) self-insurance under Section 601.124.

Sec. 601.052. EXCEPTIONS TO FINANCIAL RESPONSIBILITY REQUIREMENT.

(a) Section 601.051 does not apply to:

(1) the operation of a motor vehicle that:

(A) is a former military vehicle or is at least 25 years old;

(B) is used only for exhibitions, club activities, parades, and other functions of public interest and not for regular transportation; and

(C) for which the owner files with the department an affidavit, signed by the owner, stating that the vehicle is a collector's item and used only as described by Paragraph (B);

(2) the operation of a golf cart that is operated only as authorized by Section 551.403; or

(3) a volunteer fire department for the operation of a motor vehicle the title of which is held in the name of a volunteer fire department. …

Section 601.051 describes the offense of "Failure to Maintain Financial Responsibility" (car insurance). Section 601.052 describes situations in which the financial responsibility requirement does not apply. Note that the title of Section 601.052 is labeled "*Exceptions* to Financial Responsibility Requirement;" however, the first phrase of subsection (a) does not track the special wording used to label an exception, i.e. "It is an exception to the application of,"[8] which evokes the question, "Are the situations in Section 601.052(a) exceptions or defenses?" Case law has held that an exception is not really an exception, and therefore does not have to be negated by the prosecutor at trial, unless it appears in the same section as the offense provision.[9] In this example, the offense provision and "exceptions" are in different sections and the special exception language from PC § 2.02(a) is not used, so although the word "exceptions" is used in the title, it is likely that the situations described in Section 601.052(a) are actually defenses.[10]

[8] PC § 2.02(a).
[9] *Hicks v. State*, 18 SW.3d 743, 744 (Tex. App.—San Antonio 2000), *citing Bragg v. State*, 740 S.W.2d 574, 576 (Tex. App.—Houston [1st Dist.] 1987).
[10] *Also see* PC §§ 2.02-2.03.

Using the steps and case law cited above, a prosecutor could draft a complaint for a "Fail to Maintain Financial Responsibility" offense and exclude the defense provisions in Section 601.052. However, the language of Section 601.052 is somewhat ambiguous and a defense attorney could challenge the complaint before trial, arguing that Section 601.052 actually contains exceptions. Upon such a challenge, if a judge ruled that they were exceptions and were therefore required to be pleaded in the complaint, the resulting complaint might read …

> *In the name and by the authority of the State of Texas:*
> *Before me, the undersigned authority, personally appeared Affiant, known to me to be a credible person, who, being by me duly sworn, upon oath deposes and says: Affiant has good reason to believe, and does believe, and charges that, on or about February 1, 2013 and before the making and filing of this complaint, Bob Smith (the "Defendant") within the territorial limits of the City of Arlington, Tarrant County, Texas, did*
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> *operate a motor vehicle at or near 100 E. Abram Street without financial responsibility established for that vehicle as required by the Texas Transportation Code through a motor vehicle liability insurance policy that complies with Subchapter D, a surety bond filed under Section 601.121, a deposit under Section 601.122, a deposit under Section 601.123, or self-insurance under Section 601.124, and Defendant was not operating a motor vehicle that was a former military vehicle or was at least 25 years old, and that was used only for exhibitions, club activities, parades, and other functions of public interest and not for regular transportation, and for which the owner files with the Department of Public Safety an affidavit, signed by the owner, stating that the vehicle is a collector's item and used only as described above, and Defendant was not operating a golf cart that is operated only as authorized by Transportation Code § 551.403, and Defendant was not a member of a volunteer fire department and operating a motor vehicle the title of which is held in the name of a volunteer fire department,*
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> *said charge having been presented in the Court within two years from the date of the commission of the offense and not afterward and Affiant further states that Affiant believes the aforesaid statement is based upon information personally read by your Affiant and provided by Officer Andy Griffith, an authorized city official who reported personally observing and or investigating such conduct by the Defendant as set out above, said conduct being against the peace and dignity of the State,*

In this example, the prosecutor would have the duty to prove every element outlined in this very lengthy complaint. If, for example, the City and its witness(es) failed to establish that the vehicle was not owned by a volunteer fire department, the verdict would be "Not Guilty."

On the other hand, if a defendant challenged the complaint, but the court agreed with the prosecutor that Section 601.052 contained a list of defenses, which are not required to be pleaded in the complaint, the trial complaint might read …

> *In the name and by the authority of the State of Texas:*
> *Before me, the undersigned authority, personally appeared Affiant, known to me to be a credible person, who, being by me duly sworn, upon oath deposes and says: Affiant has good reason to believe, and does believe, and charges that, on or about February 1, 2013 and before the making and filing of this complaint, Bob Smith (the "Defendant") within the territorial limits of the City of Arlington, Tarrant County, Texas, did*
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> *operate a motor vehicle at or near 100 E. Abram Street without financial responsibility established for that vehicle as required by the Texas Transportation Code through a motor vehicle liability insurance policy that complies with Subchapter D, a surety bond filed under Section 601.121, a deposit under Section 601.122, a deposit under Section 601.123, or self-insurance under Section 601.124,*
>
> *said charge having been presented in the Court within two years from the date of the commission of the offense and not afterward and Affiant further states that Affiant believes the aforesaid statement is based upon information personally read by your Affiant and provided by Officer Andy Griffith, an authorized city official who reported personally observing and or investigating such conduct by the Defendant as set out above, said conduct being against the peace and dignity of the State,*

In summary, when drafting ordinances failure to label affirmative defenses, defenses and exceptions may lead to uncertainty and may result in a heavy burden of proof for the prosecution.

3. Draft each of these into separate subsections: offense, affirmative defenses, defenses, exceptions

Ordinances can be difficult to understand when they are drafted so that the offense, affirmative defenses, defenses, and exceptions are all lumped together. Separating the ordinance into different subsections for each category of the offense will ultimately make the ordinance easier to understand and enforce. The ordinance in Example B below illustrates one way that the offense provision and affirmative defenses could be drafted into separate subsections.

Example B - Ordinance with Offense and Affirmative Defenses drafted in separate subsections

ARLINGTON ANIMALS CHAPTER
Section 4.10 Riding, Driving or Herding of Certain Animals

A. A person commits an offense if he rides, herds or drives any horse, cow, sheep, goat, pig or llama:
   1. On a public sidewalk; or
   2. On any private or public property without the effective consent of the owner of such property.

B. It is an affirmative defense to prosecution under this section that the person was a peace officer or animal services officer in the performance of his official duties; or the person was assisting a peace officer or animal services officer in the performance of his official duties.

4. Dispense with culpable mental states

As explained in more detail below, it is advisable when drafting an ordinance to clearly dispense with culpable mental states, unless it is the desire of the governing body enacting the ordinance to require a culpable mental state for the particular offense.

The term "culpable mental state" is the element of the crime related to what was going on in the defendant's mind related to committing the offense. There are four culpable mental states defined in Texas law: intentional, knowing, reckless, and criminal negligence.[11] For example, in a *Theft* charge, the prosecutor must prove that the defendant "intentionally or knowingly" stole someone else's property. Frequently, a culpable mental state is difficult to prove with regard to city ordinance violations. For example, assume a person owns a rental property in a city, but lives out of town and rarely visits the property. The property has fallen into disrepair and has numerous code violations. If the ordinances on which these violations are based require a culpable mental state, the city can get a guilty verdict at trial only if the city can prove the owner committed these violations with a culpable mental state, for example, that he "knowingly" committed the violations, meaning that he was actually aware of the violations.

General Culpable Mental State Requirement and Key Exception to the Rule

Generally, a criminal offense under state law or city ordinance requires proof of a culpable mental state.[12] If the law defining the offense does not include a culpable mental state, proof of one is still required, unless the law explicitly dispenses with it.[13] If the law explicitly dispenses with a culpable mental state, it is a "strict liability offense."[14] Other offenses may still be "strict liability offenses" even if the law is silent regarding the culpable mental state. In *Aguirre v. State*,[15] the Texas Court of Criminal Appeals held that, despite these rules described above, many ordinance-based offenses may actually be strict liability offenses even if the law is silent as to the culpable mental state and does not clearly dispense with it. The *Aguirre* court described a multi-prong test to determine if an ordinance-based offense is actually a strict liability offense, even though the ordinance is silent about a culpable mental state.[16] This multi-prong test analysis is not required if the ordinance clearly dispenses with the culpable mental state, a step that can be taken at the drafting stage to prevent future enforcement problems.

Fine Ranges and Culpable Mental States

The general fine range for a city ordinance violation is $1-$500; however, a city can create a punishment up to $2,000 for ordinances governing fire safety, zoning, or public health and sanitation.[17] One restriction on this higher fine is that a city ordinance violation cannot dispense with the culpable mental state requirement if the offense is punishable by a fine of more than $500.[18] Does this mean that the city must draft a culpable mental state into all of its ordinances that are punishable by a fine in excess of $500? Not necessarily. In *Roarke & Hardee L.P. v. City of Austin*, the Federal District Court for the Western District of Texas held that the City could dispense with the culpable mental state in the charge of an offense under an ordinance that carried a punishment exceeding $500 as long as the city requested a maximum fine of $500 at trial upon a guilty verdict.[19] Although part of the district court's opinion was reversed and part

[11] PC §§ 6.02-6.03.
[12] PC § 6.02(a).
[13] PC § 6.02(b).
[14] PC § 6.02(c).
[15] *Aguirre v. State*, 22 S.W.3d 463, 472 (Tex. Crim. App. 1999).
[16] *Aguirre*, 22 S.W.3d at 472-76.
[17] Tex. Local Gov't Code § 54.001(b).
[18] PC §§ 6.02(f), 12.23.
[19] *Roarke & Hardee L.P. v. City of Austin*, 394 F.Supp.2d 911, 920 (W.D. Tex. 2005); *aff'd in part, rev'd in part, vacated in part by* 522 F.3d 533, 538, 556 (5th Cir. 2008).

was vacated, the rest of the opinion, including this part about culpable mental states, was affirmed by the U.S. Court of Appeals for the Fifth Circuit.[20]

This holding gives cities a choice when prosecuting ordinance violations that carry a fine range exceeding $500:

(1) plead in the complaint and prove at trial a culpable mental state, thus providing the opportunity to recover a fine over $500, or
(2) exclude a culpable mental state from the complaint and recover a fine up to $500.

With a local property owner who knows about the violations at his property, proving a culpable mental state may not be an issue, so the city could choose the first option. A remote property owner may not know about the violations at his property (or the city may not be able to prove that he knows about the violations), so the city could choose the second option. A guilty verdict with a fine of $500 or less is better than a verdict of not guilty for failure to prove a culpable mental state. Remember that the fine assessed is always in the hands of the judge or jury, not the city.

The ordinance in Example C below illustrates how a penalty ordinance could incorporate holding of *Roarke & Hardee L.P. v. City of Austin* and accomplish the goal of giving the city a choice in enforcement.

Example C – Penalty Ordinance Dispensing with Culpable Mental State

ARLINGTON GENERAL PROVISIONS CHAPTER
Section 1.05 General Penalties; Continuing Violations.
In this Code or in any ordinance of the City:

A. Where no specific penalty is provided for an offense or a misdemeanor, the violation shall be punishable by a fine not exceeding the maximum amount allowed by law, in particular,
    1. not exceeding Five Hundred Dollars and No Cents ($500.00) for offenses where no culpable mental state is required, including offenses governing fire safety, zoning, or public health and sanitation, including dumping of refuse, and
    2. not exceeding Two Thousand Dollars and No Cents ($2,000.00) for offenses which include a culpable mental state and which govern fire safety, zoning, or public health and sanitation, including dumping of refuse.
B. If the maximum penalty provided for any offense is greater than the maximum penalty provided for the same or a similar offense under the laws of the State of Texas, then the maximum penalty for the violation as provided by State statute shall be the maximum penalty under this Code.
C. If the definition of an offense does not prescribe a culpable mental state, then a culpable mental state is not required. Although not required, if a culpable mental state is in fact alleged in the charge of the offense, such offense may be punishable by the maximum penalty allowed by law.
D. *Each day that a violation continues shall constitute a separate offense.*

[20] *Id.*, 522 F.3d at 538, 556.

5. Avoid ordinance cross references and references to specific state law provisions

If possible, avoid drafting ordinances that have: (1) cross-references to other ordinance provisions in the City Code, and (2) references to specific state law provisions. The main reason for these recommendations is that the City Council and the State Legislature may reorganize, renumber or amend the referenced provisions, thus making the references and cross-references out of date and confusing.

If a decision is made to reference a specific ordinance or provision of state law in a new ordinance, consider adding the phrase "as amended" after the state law or ordinance reference, which will capture any subsequent amendments.

CONCLUSION

There is no way to create a perfect ordinance; however, city attorneys can prevent problems with enforcement of their city's ordinances by thinking about issues that may arise "down the road" relating to the prosecution of cases in municipal court and by implementing some of the suggestions described above.

Additional Resource: "Epic Fail – The Terribly Drafted Criminal Ordinance," a presentation from the 2010-2011 *Texas Municipal Court Education Center* Prosecutors Conference