

**DRAFTING ENFORCEABLE ORDINANCES OUTLINE**  
**TCAA Riley Fletcher Basic Municipal Law Seminar**

**1. Draft ordinances with affirmative defenses and defenses, not exceptions**

- a. Affirmative defenses and defenses vs. exceptions
  - i. Affirmative defenses, defenses, and exceptions all establish circumstances in which the ordinance does not apply.
  - ii. Prosecution must prove all elements of the offense beyond a reasonable doubt, which includes negating exceptions, Tex. Penal Code (PC) §§ 2.01, 2.02(b), 1.07(a)(22). This can be a very difficult burden. Prosecution is not required to negate affirmative defenses and defenses. PC §§ 2.03(b), 2.04(b).
- b. Complaints and trial in municipal court
  - i. Complaints describe unlawful conduct and charge the defendant with an offense. Tex. Code of Crim. Proc. art. 45.018(a).
  - ii. Complaints must list all elements of the offense. *Villarreal v. State*, 729 S.W.2d 348, 349 (Tex. App.—El Paso 1987); PC § 1.07(a)(22).
  - iii. Because exceptions are elements of an offense, drafting exceptions into an ordinance can make the trial complaint very lengthy, complicated, and difficult to prove.

**2. Clearly label affirmative defenses, defenses, and exceptions**

- a. Do use the following clear, legal wording from PC §§ 2.02-2.04:
  - i. It is an affirmative defense to prosecution ...
  - ii. It is a defense to prosecution ...
  - iii. It is an exception to the application of ...
- b. Do not use the following wording to signify affirmative defenses, defenses, or exceptions:
  - i. “Unless ...”; or “Except as provided by ...”; or “This section does not apply to ...”

**3. Draft ordinances with separate subsections for the offense, affirmative defenses, defenses, and exceptions**

**4. Dispense with culpable mental states (CMS)**

- a. Culpable mental states: intentional, knowing, reckless, criminal negligence. PC §§ 6.02-6.03.
- b. General CMS requirement and key exception to the rule
  - i. General Rule: a CMS is required for an offense, even if the law defining the offense does not mention a CMS, unless the law explicitly dispenses with the CMS, thus making it a strict liability offense. PC § 6.02(a), (b), (c).
  - ii. Exception: many city ordinance violations may actually be strict liability offenses even if the law is silent as to the CMS. There is a multi-prong test to determine if an ordinance-based offense is actually a strict liability offense under these circumstances. *Aguirre v. State*, 22 S.W.3d 463, 472-476 (Tex. Crim. App. 1999).
- c. Fine ranges and culpable mental states
  - i. The general fine range for a city ordinance violation is \$1-\$500, however, the fine range for a city ordinance governing fire safety, zoning, or public health and sanitation can be \$1-\$2,000. Tex. Local Gov’t Code § 54.001(b).
  - ii. “An offense defined by municipal ordinance ... may not dispense with the requirement of a [CMS] if the offense is punishable by a fine exceeding [\$500].” PC §§ 6.02(f), 12.23.
  - iii. A city is not required to draft a CMS into all ordinances carrying a fine exceeding \$500. See Example Penalty Ordinance in the attached paper.
  - iv. Prosecution may dispense with the CMS for an ordinance violation that would otherwise carry a fine exceeding \$500, if at trial, the Prosecution requests a maximum fine of \$500. *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).
  - v. Two-part option for ordinance violations with no CMS explicitly provided:
    1. Plead in the complaint and prove at trial a CMS, which allows for the possibility of recovering a fine exceeding \$500; or
    2. Exclude a CMS from complaint and proceed as a strict liability offense, which allows for the possibility of recovering a fine up to \$500.

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

**NOTE: See Tex. Local Gov’t Code chapters 51, 52, 53 and 54 for legal requirements relating to ordinance adoption, publication, codification, and enforcement.**