

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. *Roark & 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, but penalty provision in excess of \$500:
 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.