

# DRAFTING ENFORCEABLE ORDINANCES OUTLINE

## Texas City Attorneys Association Riley Fletcher Basic Municipal Law Seminar

### 1. Draft ordinances with affirmative defenses, not exceptions

- a. Overview of affirmative defenses, defenses, 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). Affirmative defenses are preferable to exceptions and defenses because the defendant must prove the requirements of an affirmative defense by a preponderance of the evidence. PC § 2.04(d).
- 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

- a. This drafting suggestion makes ordinances easier to understand and enforce.

### 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. 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 an ordinance violation is \$1-\$500; however, the fine range for an ordinance governing fire safety, zoning, or public health and sanitation can be \$1-\$2,000; and the fine range for an ordinance governing the dumping of refuse can be \$1-\$4,000. Tex. Local Gov’t Code § 54.001(b).
  - ii. City ordinance may not dispense with a CMS if the offense is punishable by a fine exceeding \$500. PC §§ 6.02(f), 12.23. If a CMS is not alleged and proven at trial, the penalty is limited to \$500, regardless of the ordinance penalty provision. *O’Reilly v. State*, 501 S.W.3d 722, 728-30 (Tex. App.—Dallas 2016)
  - iii. Three options for penalty provisions – see paper for examples

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

- a. The City Council or State Legislature may reorganize, renumber, or amend the referenced provisions, resulting in the references and cross-references becoming out of date and confusing.

See Texas Local Government Code chapters 51, 52, 53 and 54 for legal requirements relating to ordinance adoption, publication, codification, and enforcement.