DRAFTING ENFORCEABLE ORDINANCES
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Texas City Attorneys Association
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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, 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, 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.[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 with "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 can be 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 an affirmative defense, instead of an exception.

When an ordinance provides for an affirmative defense, the person charged (the defendant) can still claim the affirmative defense in an attempt to escape culpability, but the prosecutor is not shouldered with the burden of proving that the affirmative defense does not apply.[4] In fact, in order to be found not guilty at trial through an affirmative defense, the defendant must establish and prove all requirements of the affirmative defense by a preponderance of the evidence.[5] The prosecutor is also not required to negate defenses.[6] Please note, however, that with defenses, the defendant is not required to prove all requirements of the defense (as with an affirmative defense); there must only be a reasonable doubt on the

[1] Tex. Penal Code §§ 1.03(a), 1.07(a)(30), 12.41(3); Tex. Loc. Gov't Code § 54.001(b).
[2] Tex. Penal Code §§ 2.01, 1.07(a)(22).
[3] *Id.* at §§ 2.01, 2.02(b), 1.07(a)(22)(D).
[4] *Id.* at § 2.04(b).
[5] *Id.* at § 2.04(d).
[6] *Id.* at § 2.03(b).

issue for the defendant to be found not guilty.[7] Accordingly, for purposes of criminal prosecution, affirmative defenses are preferable to defenses and exceptions.

Complaints and Trial in Municipal Court

There is another good reason to avoid exceptions when drafting an ordinance. In the criminal prosecution of a Class C misdemeanor offense, the prosecutor must file a complaint.[8] The complaint is the charging instrument that describes the unlawful conduct and charges the defendant with the crime.[9] Although the citation may serve as the complaint initially, a formal complaint must be filed under certain circumstances.[10] A formal complaint generally describes in one long sentence the offense committed by the defendant, most commonly by listing all elements of the offense.[11] When an ordinance is drafted to include exceptions, a formal 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 formal 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 that is 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, 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, please see *Example A* below, which is based on state law.

[7] *Id.* at § 2.03(d).
[8] Tex. Code Crim. Proc. arts. 12.02(b), 27.14(d).
[9] *Id.* at art. 45.018(a).
[10] *Id.* at art. 27.14(d)
[11] *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

TEXAS TRANSPORTATION 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,"[12] which evokes the question, "Are the situations in Section 601.052(a) exceptions or defenses?" Case law holds 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.[13] In this example, the offense provision and "exceptions" are in different sections and the special exception language from Texas Penal Code § 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.[14]

[12] Tex. Penal Code § 2.02(a).
[13] *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).
[14] *Also see* Tex. Penal Code §§ 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 formal 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 formal complaint, the resulting language 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 Section 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 formal complaint. If, for example, the City and its witnesses 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 formal 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 formal complaint, the 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. <u>Dispense with culpable mental states</u>

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.[15] 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.

<u>General Culpable Mental State Requirement and Key Exception to the Rule</u>
Generally, a criminal offense under state law or city ordinance requires proof of a culpable mental state.[16] 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.[17] If the law explicitly dispenses with a culpable mental state, it is often called a "strict liability offense." Other offenses may still be "strict liability offenses" even if the law is silent regarding the culpable mental state. In *Aguirre v. State*,[18] 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.[19] 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.

<u>Fine Ranges and Culpable Mental States</u>
The general fine range for a city ordinance violation is $1-$500; however, a city can create a fine range up to $2,000 for ordinances governing fire safety, zoning, or public health and sanitation; and up to $4,000 for ordinances related to the dumping of refuse.[20] One restriction on these higher fine offenses is that a city ordinance cannot dispense with the culpable mental state requirement if the offense is punishable by a fine of more than $500.[21] Additionally, if a culpable mental state is not alleged and proven at trial for an ordinance-based offense, the penalty is limited to $500, regardless of the penalty provision in the ordinance.[22] These statutes and case law do not necessarily mean that a city must draft a culpable mental state into all ordinances that are punishable by a fine in excess of $500.

[15] Tex. Penal Code §§ 6.02-6.03.
[16] *Id.* at § 6.02(a).
[17] *Id.* at § 6.02(b).
[18] *Aguirre v. State*, 22 S.W.3d 463, 472 (Tex. Crim. App. 1999).
[19] *Aguirre*, 22 S.W.3d at 472-76.
[20] Tex. Loc. Gov't Code § 54.001(b).
[21] Tex. Penal Code §§ 6.02(f), 12.23.
[22] *O'Reilly v. State*, 501 S.W.3d 722, 728-30 (Tex. App.—Dallas 2016).

In light of state statutes and case law, there are essentially three options for cities when drafting penalty provisions in ordinances:

1. For all offenses, the penalty is $1-$500. The ordinance may dispense with a culpable mental state.

2. For offenses related to fire safety, zoning, or health and sanitation, the penalty is $1-$2,000. For offenses related to the dumping of refuse, the penalty is $1-$4,000. A culpable mental state is required for these higher fine offenses. Additionally, for all other offenses, the penalty is $500, and the ordinance may dispense with the culpable mental state.

3. For all offenses, the general penalty is $1-$500. The ordinance may dispense with the culpable mental state. Although not required, if the State alleges a culpable mental state in the charge and: (A) the offense relates to fire safety, zoning, or public health and sanitation, the penalty is $1-$2,000; or (B) the offense relates to the dumping of refuse, the penalty is $1-$4,000.

While Options 1 and 2 above are straightforward, Option 3 may require further explanation. This option codifies one of the holdings in *Roark & Hardee L.P. v. City of Austin*, where the Federal District Court for the Western District of Texas held that the City of Austin 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.[23] Although part of the district court's opinion was reversed and part 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.[24]

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

A. plead in the complaint and prove at trial a culpable mental state, thus providing the opportunity to recover a fine over $500, or
B. 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 plead and prove the case under Item A above. A remote property owner may not actually 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 plead and prove the case under Item B. 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.

Each city should carefully consider the relevant statutory and case law authority as well as the needs of their specific situation when drafting the penalty provision into an ordinance. Additionally, if desired, cities may establish a penalty that is less than the maximum allowed by law, e.g. $1-$200. *Example C* below illustrates how penalty provisions could be drafted under each of the three options listed above.

[23] *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).
[24] *Id.*, 522 F.3d at 538, 556.

Example C - Penalty Provisions for Ordinances

Option 1 – Penalty Provision

A. Any person, corporation, association, or entity who violates any of the provisions of this Code of Ordinances commits an offense that is considered a Class C misdemeanor and each day the violation continues shall be a separate offense.

B. If the definition of an offense under this Code of Ordinances does not prescribe a culpable mental state, then a culpable mental state is not required. Such offense shall be punishable by a fine not to exceed Five Hundred Dollars and No Cents ($500.00).

Option 2 – Penalty Provision

A. Any person, corporation, association, or entity who violates any of the provisions of this Code of Ordinances commits an offense that is considered a Class C misdemeanor and each day the violation continues shall be a separate offense.

B. If the definition of an offense under this Code of Ordinances does not prescribe a culpable mental state, then a culpable mental state is not required. Such offense shall be punishable by a fine not to exceed Five Hundred Dollars and No Cents ($500.00).

C. If an offense governs fire safety, zoning, or public health and sanitation, then a culpable mental state is required and such offense shall be punishable by a fine not to exceed Two Thousand Dollars and No Cents ($2,000.00). If an offense governs the dumping of refuse, then a culpable mental state is required and such offense shall be punishable by a fine not to exceed Four Thousand Dollars and No Cents ($4,000.00).

Option 3 – Penalty Provision

A. Any person, corporation, association, or entity who violates any of the provisions of this Code of Ordinances commits an offense that is considered a Class C misdemeanor and each day the violation continues shall be a separate offense.

B. If the definition of an offense under this Code of Ordinances does not prescribe a culpable mental state, then a culpable mental state is not required. Such offense shall be punishable by a fine not to exceed Five Hundred Dollars and No Cents ($500.00).

C. Although not required, if a culpable mental state is in fact alleged in the charge of the offense and the offense governs fire safety, zoning, or public health and sanitation, such offense shall be punishable by a fine not to exceed Two Thousand Dollars and No Cents ($2,000.00). Although not required, if a culpable mental state is in fact alleged in the charge of the offense and the offense governs the dumping of refuse, such offense shall be punishable by a fine not to exceed Four Thousand Dollars and No Cents ($4,000.00).

D. If the definition of an offense under this Code of Ordinances prescribes a culpable mental state and the offense governs fire safety, zoning, or public health and sanitation, then a culpable mental state is required and the offense shall be punishable by a fine not to exceed Two Thousand Dollars and No Cents ($2,000.00). If the definition of an offense under this Code of Ordinances prescribes a culpable mental state and the offense governs the dumping of refuse, then a culpable mental state is required and the offense shall be punishable by a fine not to exceed Four Thousand Dollars and No Cents ($4,000.00).

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.

State laws governing ordinances

There are several notable statutes in the Texas Local Government Code that may prove helpful when drafting ordinances:

- Chapter 51 addresses the general powers of cities including the grounds for which a city can pass, amend, or repeal an ordinance.
- Chapter 52 addresses the style of an ordinance as well as the requirements for approval by the mayor and publication in an official newspaper.
- Chapter 53 addresses the subdivision of a city's code of ordinances into different chapters, titles, articles, or sections; as well as amending and repealing ordinances.
- Chapter 54 addresses the various ways that ordinances may be enforced, including criminal enforcement as well as other enforcement options in more serious situations, which include filing a civil lawsuit, using a building and standards commission, and an alternative administrative hearing procedure.

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