

ANIMAL LAW IN TEXAS:
State Laws, City Ordinances, and Enforcement

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Texas Municipal League
Summer Conference 2018, Bastrop, Texas

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I. INTRODUCTION

The purpose of this paper is to outline the various ways in which cities play a role in regulation of animals and to outline the tools available for addressing animal related issues. Depending on the size of the population, the character of the land, wildlife in the area, and of course politics, the approach to animal regulation will vary from location to location. State law provides a framework for addressing a fair number of issues, and smaller cities (especially general law cities) will be governed primarily by these laws. But cities that have specific issues to address can adopt ordinances to strengthen or expand state laws or cover other areas altogether. This paper provides examples and guidance for adopting those ordinances. The last section of the paper includes laws and regulations related to animal departments, including animal control officers and city run shelters. Finally, the appendix provides guidance for attorneys about drafting ordinances.

II. ABOUT THE AUTHORS

Leela Fireside is a Senior Assistant City Attorney in the City of Austin Law Department. Her areas of practice include review of bond and other financial transactions, contracts, budget, tax-related matters, fees, public-private partnership agreements, hotel occupancy taxes, and ordinance review. She has a B.A. in Philosophy from Ithaca College in Ithaca NY and a J.D. from the University of Texas at Austin. Before coming to the City of Austin, she worked in environmental law and consumer law with the State of Texas for 17 years. She has been a speaker at multiple conferences on the process for cities to adopt the budget and the property tax rate, at GFOAT regarding general municipal finance, and at TCAA regarding city fees.

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Jonathan Koury is the assistant City Attorney for the City of Bryan. After graduating from Austin College with a B.A. in Political Science and French, he received his J.D. from the SMU Dedman School of Law. His primary practice has been in public service, working for private firms as well as governmental entities prior to joining the City of Bryan's legal team. His areas of expertise include code enforcement, animal control, real estate, economic development, and "other duties as assigned". In 2011, he assisted with the creation and operation of the City of Animal Center, which included receiving certification in shelter management. He has spoken at TCAA on animal law and other topics. Jonathan lives in Bryan with his wife and three dogs.

III. ENFORCEMENT OF STATE LAWS

For cities that have not adopted ordinances to actively engage in the regulation of animals, there are still a number of tools available, although primarily for law enforcement. Most cities without animal control officers typically rely on peace officers when issues arise requiring the city's involvement.

A. Wildlife

The Texas Parks & Wildlife Code regulates hunting and wildlife management generally and empowers the Department of Parks and Wildlife to act on behalf of the state. While cities will not typically have much influence or involvement, the Code requires permits and provides regulations for special circumstances including:

- the power to destroy dangerous wildlife;¹
- ownership or transportation of non-indigenous snakes; and²
- trapping and relocating game animals (including deer).³

Failure to obtain required permits constitutes a criminal violation. The code also criminalizes some conduct, for example it is a violation to hunt exotic big game (e.g. lions, tigers, and bears oh my).⁴ Each of these regulations specifically provide penalty provisions stating whether conduct is a misdemeanor or felony.⁵ Citations for these violations are handled in the same manner as other criminal citations.⁶

There are federal laws that are similarly related to wildlife control, but in those cases they limit the power of cities as well as citizens. The federal Migratory Bird Treaty Act requires a person to obtain a permit before killing, injuring, owning, or transporting (or any other related

¹ TEX. PARKS & WILD. CODE § 43.151 et seq

² *Id* at § 43.851 et seq.

³ *Id* at § 43.061 et seq.

⁴ *Id* at § 62.101 et seq.

⁵ *E.g. id* at § 62.107.

⁶ *Id* at § 12.401.

verb you can think of) a migratory bird, egg, or nest.⁷ The federal Endangered Species Act similarly prohibits ownership, control, transport, import, or export of endangered species.⁸ The Secretary of the Interior (or Commerce or Agriculture) creates the list of endangered species and adopts regulations to protect and promote their rehabilitation.⁹ Again, since both of these laws are federal and not state matters, local law enforcement is not typically involved.

B. County Responsibility

For cities without an existing animal control department, the County is generally going to be held responsible, whether through a county animal control office or through the sheriff's department. Different state laws that govern the regulation and treatment of animals will delegate responsibility to the sheriff, in the absence of an office of animal control specifically. In the case of dealing with dangerous dogs, under Chapter 822 of the Health & Safety Code, Animal Control Authority is defined as the municipal or county animal control office with authority over the area in which the dog is kept or the county sheriff in an area that does not have an animal control office. With regards to stray livestock, under Agriculture Code Chapter 142, the sheriff is responsible for the impoundment, redemption, and disposition of strays caught on public and private property.¹⁰ The statute and interpretative attorney general opinions indicate that this is a duty of the sheriff.¹¹ The Health & Safety Code permits counties to have an election to register and license dogs (only in counties that do not register dogs pursuant to Chapter 826 Rabies Control, discussed below).¹² Most of the state laws granting cities the authority to

⁷ 16 U.S.C. § 703(a).

⁸ 16 U.S.C. § 1538.

⁹ 16 U.S.C. § 1533.

¹⁰ Type A municipalities can ban horses, mules, cattle, sheep, swine, or goats running at large in the city, allow for the capture, impoundment, disposition, and penalties for the owner. TEX. LOC. GOV'T CODE § 215.026.

¹¹ TEX. AGRIC. CODE § 142.003; Tex. Att'y Gen. Op. MW-588 (1982).

¹² See TEX. HEALTH & S. CODE Ch. 822, subchapter C.

regulate animals have similar provisions for counties, so if your city does not have an animal control department, the county might have taken on that responsibility.

C. Animal Cruelty

Under state law, cities can address animal cruelty in several ways, including both criminal penalties for specific conduct as well as a civil action for seizure.

1. Criminal prosecution

The Texas Penal Code makes it an offense to torture, neglect, or intentionally injure animals.¹³ Livestock management practices are given a fair amount of latitude to prevent farmers and ranchers from being prosecuted.¹⁴ Additionally, recent legislation was passed as an effort to increase the penalties for injury to non-livestock animals.¹⁵ While these two statutes cover a broad range of animal cruelty, there are specific statutes to address specific conduct

- Dog-fighting – it is illegal to participate in, possess implements for, or be a spectator of dog fighting.¹⁶
- Cock-fighting – it is illegal to participate in, possess implements for, or be a spectator of dog fighting.¹⁷
- Bestiality – shockingly, it was not (strictly speaking) illegal prior to 2017, when a law was passed to make it expressly illegal and remove the requirement that sex with animals had to be in public to be illegal.¹⁸
- Unreasonable restraint – there is a provision of the Health and Safety Code that prohibits restraint of a dog outside at night, within 500 feet of a school, or during adverse weather conditions (e.g. too hot, too cold, hurricane, etc.).¹⁹ The restraint is unreasonable if it is a pinch, prong, or choke collar; is too short (ten feet or five times the length of the dog, whichever is more); or if it is unsafe/injurious.²⁰

¹³ See TEX. PEN. CODE § 42.09 (livestock); *id* at § 42.092 (non livestock).

¹⁴ *Id* at § § 42.09(f), § 42.092(f).

¹⁵ Acts 2017, 85th Leg., R.S., Ch. 576 (S.B. 762), Sec. 1, eff. September 1, 2017.

¹⁶ TEX. PEN. CODE § 42.10.

¹⁷ *Id* at § 42.105.

¹⁸ *Id* at § 21.09.

¹⁹ TEX. HEALTH & S. CODE § 821.077.

²⁰ *Id*.

2. *Civil seizure*

The other process afforded by state law is the civil seizure process in Health and Safety Code Chapter 821. A peace officer (or animal control officer) can petition a justice court to issue a warrant authorizing the officer to seize a cruelly treated animal.²¹ Upon a showing of probable cause, the court will issue the warrant authorizing the immediate seizure and schedule a hearing within ten days.²² The purpose of the hearing is only partially to give the owner an opportunity to raise a defense, a conviction under Penal Code sections 42.09, 42.092, or 21.09 is prima facie evidence of cruelty.²³ Additionally, a conviction for bestiality is prima facie proof that all animals in the owner's possession have been cruelly treated and can be seized.²⁴ Due process requires that the hearing be held to determine if the animal was being cruelly treated, and if not, the animal will be returned to the owner.²⁵ Upon a finding that the animal was cruelly treated, the court will determine the disposition of the animal in one of three ways 1) sold at auction, 2) given to a shelter, or 3) humanely destroyed.²⁶ The city, or other enforcing agency, can recoup the costs of the sale, seizure, care, treatment, and disposition of the animal by providing the court evidence of those costs, which can be assessed against the former owner.²⁷ The owner can appeal to the county court by filing a notice of appeal and a cash bond within ten days.²⁸ The county court must hold a hearing within ten days, and it can be a jury trial on request.²⁹ The reason for haste is because the animals are being held in a shelter, which is an unhealthy

²¹ *Id* at § 821.022.

²² *Id.*

²³ *Id* at § 821.023(a)-(a-1).

²⁴ *Id* at (a-1).

²⁵ *Id* at (g).

²⁶ *Id* at § 821.023.

²⁷ *Id.*

²⁸ *Id* at § 821.025.

²⁹ *Id* at (d).

environment in the long term, even under the best circumstances. County courts are statutorily granted jurisdiction over these cases, but their decision is final.³⁰

3. Overlapping issues

Under Texas law, any dog or coyote that has attacked or is about to attack livestock, fowl, or domestic animals (i.e. pets) can be summarily killed by any person witnessing the attack.³¹ The owner of the animal being attacked, or someone acting on his or her behalf, does not need to be a witness but need only have knowledge of the attack.³² As an alternative, the dog or coyote can be detained and/or delivered to the local animal control authority.³³ This provision has been used as an affirmative defense to prosecution for animal cruelty in a case where the owner of a dog injured in a fight went back to the scene of the fight and killed the other dog.³⁴

D. Dangerous Dogs

The Health & Safety Code provides a procedure for regulating dangerous dogs. A city with an animal control office is the animal control authority for the purposes of this regulation; otherwise the county sheriff has the authority.³⁵ Again, state law provides two different tracks depending on the circumstances.

1. Serious Bodily Injury or Death

If a dog causes serious bodily injury or death of a person, they will either be euthanized or released, and there is no third option. A dog that has killed a person shall be humanely euthanized.³⁶ A dog that has caused serious bodily injury to a person, shall be humanely

³⁰ *Id* at (e) and (g).

³¹ *Id* at § 822.013(a).

³² *Id* at § 822.013(a)(2).

³³ *Id* at § 822.013(c).

³⁴ *See Chase v. State*, 448 S.W.3d 6 (Tex. Crim. App. 2014).

³⁵ TEX. HEALTH & S. CODE § 822.041(1).

³⁶ *Id* at § 822.003(d).

euthanized, unless certain exceptions apply.³⁷ Upon the sworn complaint of any person, including city/county attorney or a peace officer, that a dog has caused serious bodily injury or death of a person, and a showing of probable cause, a justice/county/municipal court shall order the animal seized and shall schedule a hearing to be held within ten days.³⁸ The animal control authority shall seize the dog and impound it humanely until disposition is order by the court.³⁹ A dog may not be destroyed if it only caused serious bodily injury (i.e. not death) of a person and:

- “(1) the dog was being used for the protection of a person or person's property, the attack, bite, or mauling occurred in an enclosure in which the dog was being kept, and:
 - (A) the enclosure was reasonably certain to prevent the dog from leaving the enclosure on its own and provided notice of the presence of a dog; and
 - (B) the injured person was at least eight years of age, and was trespassing in the enclosure when the attack, bite, or mauling occurred;
- (2) the dog was not being used for the protection of a person or person's property, the attack, bite, or mauling occurred in an enclosure in which the dog was being kept, and the injured person was at least eight years of age and was trespassing in the enclosure when the attack, bite, or mauling occurred;
- (3) the attack, bite, or mauling occurred during an arrest or other action of a peace officer while the peace officer was using the dog for law enforcement purposes;
- (4) the dog was defending a person from an assault or person's property from damage or theft by the injured person; or
- (5) the injured person was younger than eight years of age, the attack, bite, or mauling occurred in an enclosure in which the dog was being kept, and the enclosure was reasonably certain to keep a person younger than eight years of age from entering.”⁴⁰

Unlike with the process below, a dog that meets the above exceptions must be released to the owner, the person from whom it was seized, or any other person authorized to take the dog.⁴¹

³⁷ *Id* at (e).

³⁸ *Id* at § 822.002(a).

³⁹ *Id* at (b).

⁴⁰ *Id* at § 822.003(f).

⁴¹ *Id* at (e); *see Romano v. State*, No. 09-13-00250-CV 2013 Tex. App. LEXIS 14277, WL 6145782, (Tex. App.—Beaumont, Nov. 21 2013) (identifying the two outcomes of a hearings as destruction or release of the dog).

2. *Dangerous Dog Declaration*

However, in other circumstances, a dog can be declared dangerous, but will not be ordered destroyed if the owner meets certain conditions.⁴² Generally speaking, a dog can be declared dangerous if it:

“(A) makes an unprovoked attack on a person that causes bodily injury and occurs in a place other than an enclosure in which the dog was being kept and that was reasonably certain to prevent the dog from leaving the enclosure on its own; or
(B) commits unprovoked acts in a place other than an enclosure in which the dog was being kept and that was reasonably certain to prevent the dog from leaving the enclosure on its own and those acts cause a person to reasonably believe that the dog will attack and cause bodily injury to that person.”⁴³

An attack on a non-human, e.g. dog attacks livestock or pets, will satisfy subsection (2)(B), but only if a person can say they reasonably believed they would be attacked.⁴⁴ If a person reports such an incident, the animal control authority may investigate the incident, collect witness statements, and make a determination.⁴⁵ The city must notify the owner, who has fifteen days to file an appeal with a justice, county, or municipal court of competent jurisdiction.⁴⁶ If the dangerous dog determination is upheld or not appealed, the owner has thirty days to:

- 1) register the dog with the city;
- 2) restrain the dog at all times on a leash in the immediate control of a person or in a secure enclosure;
- 3) obtain liability insurance (or show financial responsibility) in an amount of at least \$100,000 to cover damages resulting from an attack by the dog causing bodily injury to a person and provide proof to the city; and
- 4) comply with any applicable municipal or county regulation, requirement, or restriction on dangerous dogs.⁴⁷

⁴² *Id* at § 822.041 et seq.

⁴³ *Id* at § 822.041(2).

⁴⁴ Tex. Att’y Gen. Op. No. LO 93-13 (holding that section (2)(B) is redundant *unless* it is intended to account for non-human attacks).

⁴⁵ TEX. HEALTH & S CODE § 822.0421.

⁴⁶ *Id.*

⁴⁷ *Id* at § 822.042 (a)

If the owner cannot comply, they must deliver the dog to the city.⁴⁸ If the owner fails to do so, any person (including the city) can petition a justice, county, or municipal court to issue notice, conduct a hearing, and issue a warrant ordering the city to seize the dog and provide for the impoundment of the dog in secure and humane conditions.⁴⁹ If the owner does not comply with the registration and insurance requirements, the dog will be humanely destroyed and the owner assessed for the costs related to the seizure, acceptance, impoundment, and destruction of the dog.⁵⁰ The owner of the dog may appeal the decision of the justice, county, or municipal court in the same manner as other appeals from that court.⁵¹

3. *Criminal citations*

In addition to consequence for the dog, there are criminal citations for subsequent attacks by a dog that has been declared dangerous. If the dog makes an unprovoked attack that causes death or serious bodily injury of a person, the owner is guilty of a felony of the second or third degree, respectively.⁵² If the dog makes an unprovoked attack that just causes injury, but not a serious one, it is a class C misdemeanor.⁵³ In either case, the dog may be ordered humanely destroyed.⁵⁴ There are defenses to these charges for veterinarians, law enforcement, service dogs, etc.⁵⁵ Additionally, it is a class C misdemeanor for the owner of a dog that has been declared dangerous to fail to comply with the requirements to own a “dangerous dog” (i.e.

⁴⁸ *Id* at § 822.042(b)

⁴⁹ *Id* at (c).

⁵⁰ *Id* at (d).

⁵¹ *Id* at § 822.0423(d).

⁵² *Id* at § 822.005.

⁵³ *Id* at § 822.044.

⁵⁴ *Id* at § 822.005(c) and § 822.044(c).

⁵⁵ *Id* at § 822.006 and § 822.046.

registration, restraint, insurance, etc.).⁵⁶ It is a class B misdemeanor if there was a previous conviction.⁵⁷

IV. MUNICIPAL ORDINANCES

A. Dangerous Dogs

Cities may adopt more stringent regulations regarding the registration, care, and treatment of dangerous dogs.⁵⁸ However, cities are specifically prohibited from passing breed-specific regulations.⁵⁹ There is a heated debate between people who want to ban “dangerous” breeds and advocates who argue that the breeds are misunderstood. Typically the regulations are proposed by opponents of breeds with demonstrated propensities towards aggression and violent behavior.⁶⁰ This typically includes Pit Bulls, Chows, Rottweilers, German Shepherds, Doberman Pinschers, and others.⁶¹ Opponents of such legislation argue that banning a breed just creates a moving target, because trainers will just switch breeds.⁶² They also argue that the problem of dangerous dogs stems from the training or neglect by irresponsible owners, not from a particular breed or mix.⁶³ Since Texas law currently bans breed-specific regulation by cities, the issue could be considered settled, however city attorneys will continue to get proposals from citizens and public officials who are concerned that these breeds pose an inherent risk. Some acceptable municipal regulations related to dangerous dogs would include:

- A color collar that must be worn to designate a “dangerous” dog;
- An impoundment requirement for any dog in rabies quarantine, retaining the dog until disposition is ordered by a court; or

⁵⁶ *Id.* at § 822.045.

⁵⁷ *Id.* at (c).

⁵⁸ TEX. HEALTH & S. CODE § 822.047.

⁵⁹ *Id.*

⁶⁰ Linda Weiss, “Breed-Specific Legislation in the United States” Michigan State University College of Law, Animal Legal and Historical Web Center (2001).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

- Specific requirements for enclosures, such as height, length, or distance from schools, day cares, or other residences.

B. Animal Cruelty

Some cities will adopt cruelty regulations similar to state law, for the purpose of providing a citation with a lower range of punishment. Under the Penal Code, the penalty for cruelty is typically a Class A misdemeanor, or higher.⁶⁴ This means that these citations will not be prosecuted by cities and it also means that in some situations, prosecutors will not be willing to take the case because the conduct does not seem to warrant jail time or fines in the thousands of dollars. By adopting seemingly redundant ordinances, a city can punish conduct that is cruel, per the statute, but to a lesser degree. Additionally, cities can prohibit specific instances of cruel conduct, for example:

- A person commits an offense if, either through his action or omission, he:
 - (1) Docks the tail or removes the dew claws of an animal over five (5) days of age, or crops the ears of an animal of any age, unless he is licensed to practice veterinary medicine in the State of Texas;
 - (2) Transfers ownership or otherwise physically removes from its mother any dog, cat, ferret, or rabbit less than six (6) weeks old, or any other animal that is not yet weaned, except as advised by a licensed veterinarian;
 - (3) Dyes or otherwise artificially colors any animal;
 - (4) Displays, transfers ownership, or offers to transfer ownership of any dyed or otherwise artificially colored animal;
 - (5) Abandons any animal that they have possession of at the Animal Services Facility, any other business, on public property, or with any other person that has not agreed to be responsible for the care of the pet;
 - (6) Fails to reclaim any animal that he owns from the person who had temporary possession of the animal;
 - (7) Fails to notify the Division when any motor vehicle that he is in control of strikes an animal;
 - (8) Euthanizes his own animal in a manner other than one defined in this chapter;
 - (9) Carries or transports an animal in any vehicle or conveyance and fails to effectively restrain the animal so as to prevent the animal from leaving or being accidentally thrown from the vehicle;

⁶⁴ TEX. PEN. CODE § 42.09(c) and §42.092(c)-(c-2)

- (10) Places or confines an animal, or allows the animal to be placed or confined, in a motor vehicle or trailer under conditions which may endanger the health of the animal due to temperature, lack of food or water, or under other circumstances which may cause bodily injury, serious bodily injury or death of the animal;
- (11) Causes, allows, or permits any animal to remain in its own filth;
- (12) Owns any animal having an infestation of ticks, fleas, or other parasites which has not been treated by a veterinarian or with appropriate commercially available treatments;
- (13) Owns any animal having any obvious illness, or injury, or any communicable illness transmittable to animal or human without having followed a proper treatment regimen for the infestation or illness;
- (14) Fails to provide basic grooming for any animal;
- (15) Causes, allows, or trains any animal to fight another animal; is in possession of any animal fighting paraphernalia or training equipment;
- (16) Fails to provide, at all times, any animal under his care with adequate wholesome food, potable water, and shelter;
- (17) Transfers ownership or offers to transfer ownership of any chickens, ducklings, or rabbits younger than sixteen (16) weeks of age in quantities of less than twelve (12) to a single purchaser;
- (18) Mutilates any dead animal for reasons other than food preparation or taxidermy. Dissection in compliance with medical or veterinary research, medical or veterinary necropsy, and bona fide educational use of dead animals shall not be considered mutilation;
- (19) Attaches a collar or harness to an animal that is of an inadequate size so that it restricts the animal's growth or causes damage to the animal's skin;
- (20) Attaches a tether that is not appropriately sized for the animal and so heavy as to restrict or burden the animal's movements;
- (21) Displays, transfers ownership or offers to transfer ownership of any turtle with a carapace of less than four (4) inches in length;
- (22) Teases or taunts any animal and provokes an aggressive reaction from an animal.⁶⁵

C. Zoning

Chapter 211 of the Texas Local Government Code allows cities to regulate development within their boundaries and to promote health, safety, and welfare of their citizens by regulating the size of buildings, size of lots, and uses within different areas of the city.⁶⁶ It is the definition of uses, conditional uses, and accessory uses that most directly relates to the regulation of animals. Some cities will classify livestock (or other large animals), poultry, etc. as a specific

⁶⁵ *City of Plano Code of Ordinances* § 4-26 Inhumane treatment of animals.

⁶⁶ TEX. LOC. GOV'T CODE § 211.003.

kind of use, and them will specify which districts in which it is a permissible use.⁶⁷ Often this is a use only permitted in agricultural districts, but sometimes it is allowed in other districts under certain restrictions or with a CUP. Sometimes domestic animals (e.g. dogs, cats, birds, fish, hamsters, etc.) will similarly be defined as a use and permitted in specified districts.⁶⁸ Alternatively, some cities classify which animals are excluded from a particular district, for example: horses, goats, cows, and pigs are typically not allowed in residential districts.⁶⁹ In some cases, regulations relating to animals will be found in a separate ordinance but will refer back to the districts as defined by the zoning ordinance.⁷⁰ Cities often using zoning to limit the number of animals allowed in a particular district or as an accessory use. For example, in a residential district, four pets would be an accessory use for a residence, any more pets and you are deemed to be operating a kennel. In this manner a city can allow breeders or even volunteer shelters to exist, but only if they do so in a manner that does not conflict with the comprehensive plan for the city.

There is an emerging trend to change, or at least be more flexible, in some of these restrictions. There are arguments for green friendly regulations and sustainable development that support more locally grown produce and farm products. In particular, some cities are allowing chicken coops on residential property, with certain conditions (e.g. waste removal, design standards for coops, set backs from property lines, etc.). Cities can achieve this by adding conditional overlays to residential zones that allow certain uses, provided that permission is obtained from the city. A similar trend is to allow bee keeping (under certain conditions and up

⁶⁷ See e.g. *City of Forth Worth Code of Ordinances* § 9.101 (large animals defined as horses, cows, etc.); § 4.602 (large animals only permitted in agricultural districts).

⁶⁸ See e.g. *City of Cedar Park Code of Ordinances* § 11.12.002 (defining Domestic Animals); § 11.02.036 (Domestic animals allowed in single family residential district).

⁶⁹ See e.g. *City of College Station Code of Ordinances* § 2-3(a), (b) (keeping of livestock and poultry is not permitted except in agricultural open and rural residential subdivision districts).

⁷⁰ *Id.*

to specific standards). Even livestock are being allowed in residential districts, provided that the animal is strictly for the personal use of the residents (e.g. milk cow/goat).

D. Nuisance Regulations

The tool that provides cities with the most flexibility with regards to addressing specific concerns are the nuisance statutes in Chapter 217 of the Local Government Code. Home rule and Type A cities are permitted to define by ordinance what constitutes a nuisance and abate those nuisances within their city.⁷¹ Home rule cities can exercise that authority up to 5,000 feet beyond their boundaries.⁷² Because of the flexibility these statutes provide, cities have taken a variety of approaches to animal control regulation. The following are some examples of typical provisions:

- An owner or handler shall promptly remove and sanitarly dispose of feces left on public or private property by a dog or cat being handled by the person, other than property owned by the owner or handler of the dog or cat.⁷³
- The owner or keeper of any animal in the city is responsible for the behavior and conduct of that animal at all times including the creation of a public nuisance. Violations of the following acts or omissions are public nuisances:
 - (a) The owner or keeper shall keep the animal (except cats) restrained at all times and insure that the animal (except cats) does not roam or run at large at will;
 - (b) The owner or keeper shall not keep any dog which barks or whines in such a manner, with such intensity, or with such continued duration, or keep any other animal, fowl, or bird, which makes frequent or long, continued noise, so as to annoy, distress or disturb the quiet comfort or repose of persons of normal nervous sensibilities within the vicinity of hearing thereof;
 - (c) The owner or keeper shall prevent his animal from biting or injuring without provocation, any animal or person;
 - (d) The owner or keeper shall prevent his animal from damaging or destroying public property or property other than its owner's private property;
 - (e) The owner or keeper shall not keep more than the number of animals allowed under this chapter;
 - (f) An owner or keeper creates an animal nuisance by the keeping, frequent feeding or harboring of any poisonous or inherently dangerous or prohibited animal.⁷⁴

⁷¹ TEX. LOC. GOV'T CODE § 217.002; § 217.042.

⁷² *Id* at § 217.042.

⁷³ *City of Austin Code of Ordinances* § 3-4-6 Defecation by Dog or Cat.

Often you will find that nuisance regulations and zoning regulations tend to dovetail. A particular activity or use that is appropriate in an agricultural district is a nuisance when located in a residential district. Some cities will pass nuisance ordinances that cross reference zoning, (e.g. it is a nuisance to have more than 4 domestic animals per household in a residential district) because the activity is only a nuisance because of the location.

E. Other Regulations

Home rule cities have even greater flexibility when it comes to regulating animals because they are not limited by statutory authority. Common ordinances include

- regulation of businesses, such as zoos, horse drawn carriages, breeders for profit, or animal trainers;
- limitations related wildlife, typically excluding keeping exotic or dangerous animals within city limits or restrictions on hunting or feeding; or
- nuisance prevention, such as a limit on the number of animals in a residence, registration of intact pets, and/or limits on litters.

V. ANIMAL CONTROL AND SHELTERS

A. Animal Control Officers

It is not necessary for a city to employ a licensed animal control officer to have an animal control department or a rabies control authority. However, if the city wants to employ someone to serve under the title Animal Control Officer, the person must be licensed by the Department of State Health Services, and must complete the basic animal control course within the first year of employment and an additional thirty hours of continuing education each following three year period.⁷⁵ The topics for the basic course and the continuing education include:

- (1) state laws governing animal control and protection and animal cruelty;
- (2) animal health and disease recognition, control, and prevention;
- (3) the humane care and treatment of animals;
- (4) standards for care and control of animals in an animal shelter;

⁷⁴ *City of San Antonio Code of Ordinances* § 5-150 Animal nuisances.

⁷⁵ TEX. HEALTH & S. CODE § 829.002.

- (5) standards and procedures for the transportation of animals;
- (6) principles and procedures for capturing and handling stray domestic animals and wildlife, including principles and procedures to be followed with respect to an instrument used specifically for deterring the bite of an animal;
- (7) first aid for injured animals;
- (8) the documentation of animal cruelty evidence and courtroom procedures;
- (9) animal shelter operations and administration;
- (10) spaying and neutering, microchipping, and adoption;
- (11) communications and public relations;
- (12) state and federal laws for possession of controlled substances and other medications; and
- (13) any other topics pertinent to animal control and animal shelter personnel.⁷⁶

Having a licensed animal control officer can be beneficial because the training involved provides information that is not necessarily part of the training of most law enforcement. Because of the increased potential for exposure to rabies, animal control officers are typically vaccinated, a somewhat involved process taking several injections over an extended period of time. The result being that most law enforcement will not be as qualified or as protected when handling dangerous animals. Because animal control officers are not required to be peace officers, they can be found in other departments, including code enforcement, health and sanitation, or environmental services.

B. Rabies Control Authority

Cities are allowed, but not required, to adopt Chapter 826 of the Health & Safety Code and create a local rabies control program.⁷⁷ The city can appoint a peace officer, health official, animal control officer, or any other qualified person or entity as a rabies control authority.⁷⁸ The rabies control authority is responsible for the two basic aspects of a rabies control program, vaccination and quarantine.⁷⁹

⁷⁶ *Id* at § 829.003.

⁷⁷ *Id* at § 826.015.

⁷⁸ *Id* at § 826.017.

⁷⁹ *Id* at § 826.001 et seq.

Quarantine is necessary when an animal is rabid, may have been exposed to rabies, or may have exposed a human to rabies.⁸⁰ Quarantine can be with a veterinarian, in the owner's home, or in a licensed rabies quarantine facility.⁸¹ A licensed facility must be inspected prior to construction, must have standard operating procedures for quarantine in place, and must meet the structural requirements established by the Department of State Health Services.⁸² These requirements can be expensive because they require specialized cages, handling, and disposition.⁸³ While there are variations possible, the goal of the regulations is to ensure that the quarantined animal comes into contact with other animals or shelter personnel as little as possible during the quarantine. Animals in rabies quarantine must be held for ten days.⁸⁴ If an animal is held in a veterinarian's office or in a licensed quarantine facility, the owner may be billed for the cost of the care and treatment of the animal.⁸⁵ If the owner does not pay the cost and take possession of the animal within four days after the end of the quarantine period, the animal can be sold, adopted, or humanely destroyed.⁸⁶ Additionally, a recent change in the law states that at the time the animal is submitted for quarantine, the owner shall be provided written notification of the date the animal will be released and a copy of their signed statement acknowledging receipt of same.⁸⁷ Furthermore, the animal may not be destroyed unless the owner has been given the owner, if available, notice of the scheduled destruction.⁸⁸ Because this can be an expensive prospect, some owners would prefer to conduct a home quarantine. That is authorized if the following requirements are met.

⁸⁰ *Id* at § 826.042(b).

⁸¹ 25 TAC, Part 1, Ch. 169, Sub. A, § 169.27(a).

⁸² *Id* at § 169.26, 169.28.

⁸³ *Id.*

⁸⁴ *Id* at § 169.27.

⁸⁵ TEX. HEALTH & S. CODE § 826.043.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

- (1) A secure enclosure approved by the local rabies control authority must be used to prevent escape.
- (2) The animal has a current vaccination or an unvaccinated animal sixteen weeks old or younger at the time of the potential exposure.
- (3) The local rabies control authority or a veterinarian must observe the animal at least on the first and last days of the home confinement.
- (4) The animal was not a stray at the time of the potential exposure.⁸⁹

The other duty of a rabies control authority is to implement the registration program, the primary purpose of which is to ensure that all dogs and cats are vaccinated against rabies.⁹⁰ In its most basic form, cities adopt an ordinance that requires all dogs and cats to be licensed, and requires that licenses may not be issued unless the animal has been vaccinated.⁹¹ Some cities contract with veterinarians to issue the licenses when they administer the vaccine. Some cities will issue the license when the owner provides them with a certificate issued by their veterinarian proving that the vaccine is current and the certificate is presented to the city so a license can be issued.⁹² There are advantages and disadvantages to either process, e.g. a two step process discourages compliance but allows the city greater control over information. In either case, the information contained on the certificates or records of licenses is confidential and not subject to release under the Public Information Act.⁹³ Having control over the information prevents breaches of that confidentiality, but also provides the city with the data for more efficient location of lost pets, especially if the city operates its own shelter. Fees charged by the city for the registration of cats and dogs may only be used to defray the cost of administering the rabies control program and issuing the licenses.⁹⁴

⁸⁹ 25 TAC, Part 1, Ch. 169, Sub. A, §169.027(a).

⁹⁰ TEX. HEALTH & S. CODE § 826.021.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at § 826.0211 and 826.0311.

⁹⁴ *Id.* at § 826.031.

C. Animal Shelter Licensing and Regulation

The State regulates the operation of animal shelters, which are defined as facilities that keep or legally impound stray, homeless, abandoned, or unwanted animals (not including veterinary clinics, a livestock commission facility, or shelters in counties with less than 75,000 people).⁹⁵ Animal shelters must comply with the housing and sanitation standards for rabies control, must separate healthy animals from sick or injured, must get an annual inspection from a veterinarian, and must maintain the records of the date and disposition of animals in its custody.⁹⁶ Shelters that serve as a rabies quarantine facility must also get a separate inspection from the state.⁹⁷ A person who operates a shelter must have the same training as an animal control officer as required by the above statute.⁹⁸

If there is a shelter within your city limits, whether public or private, the city is required to have an Animal Shelter Advisory Committee.⁹⁹ The committee must meet at least three times a year and be composed of at least one licensed veterinarian, one city official, one person whose duties include the daily operation of an animal shelter, and one representative from an animal welfare organization.¹⁰⁰ The vast majority of such committees are advisory only, and while they provide helpful guidance to the city governments that appoint them, they wield little authority. However, at least one home-rule city has given their advisory board oversight authority over animal control officers in the same way that other cities have boards or commissions related to planning, zoning, sign control, etc. which boards provide oversight of city staff decisions and an appeal process.¹⁰¹

⁹⁵ *Id.* at § 823.001-002.

⁹⁶ *Id.* at § 823.004.

⁹⁷ *Id.* at § 829.007.

⁹⁸ *Id.* at § 823.003.

⁹⁹ TEX. HEALTH & S. CODE § 823.005.

¹⁰⁰ *Id.*

¹⁰¹ See *City of Waco Code of Ordinances* Article II. Animal Welfare Advisory Board.

An animal shelter is different from a licensed breeder. Chapter 802 of the Texas Occupations Code licenses Dog and Cat Breeders. A person may not act as a dog or cat breeder unless the person has obtained a license from the Texas Department of Licensing and Regulation (“TDLR”).¹⁰² The definition of “breeder” is a person who possesses eleven or more adult intact female animals and is engaged in the business of breeding those animals for direct or indirect sale or for exchange in return for consideration and who sells or exchanges, or offers to sell or exchange, not fewer than twenty animals in a calendar year.¹⁰³ The Texas Municipal League requested clarification that the rule would not apply to animal shelters because they are not engaged in the business of breeding, however TDLR declined to do so.¹⁰⁴ There is a presumption that intact female dogs are used for breeding unless the owner establishes otherwise, to TDLR’s satisfaction.¹⁰⁵ But since publicly owned shelters are statutorily required to spay intact females before they are adopted, that should be sufficient to establish that the females are not be kept for breeding purposes. Additionally, with the high turnover in most shelters, it will not be often that a shelter will have eleven, intact, female animals at the same time.

D. Adoption and Disposition of Animals

One fundamental issue regarding animal control is that once an animal is seized, found, or rescued, it needs to go somewhere. In the absence of publicly owned shelters in the area, there are private shelters that can serve, and in some cases rescue groups will take in animals as well. Depending on the size of the city, having a designated shelter to serve as intake for animal control may be a necessity for health and safety reasons. Cities have the power to place animals in a shelter because, in addition to the general nuisance regulations discussed earlier, cities can

¹⁰² TEX. OCC. CODE § 802.101.

¹⁰³ *Id* at § 802.002(8).

¹⁰⁴ See “Dog or Cat Breeders Program: Will It Impact Cities?” Texas Municipal League Legislative Update No. 5, May 12, 2012. http://www.tml.org/leg_updates/legis_update052512f_breeder_program.asp.

¹⁰⁵ TEX. OCC. CODE § 802.004.

adopt an ordinance that requires that dogs and cats be restrained, declares strays to be a nuisance, authorizes their impoundment, and provides for their humane disposition after a period set by ordinance or rule.¹⁰⁶ In this manner, when cities pick up strays and deliver them to an animal shelter, after a certain period of time ownership transfers to the city and the animal may be adopted, fostered, or humanely destroyed. In the case of owners whose pets escaped or were lost, the city can adopt an impoundment fee that must be paid before the animal can be redeemed, but the fees can only be used to defray the cost of animal control.¹⁰⁷ Once the animal has been held by the shelter for the required period of time (commonly referred to as the “impoundment period” or the “redemption period”), the animal becomes the property of the shelter to be adopted, put into temporary foster care, or humanely euthanized. A city or shelter may set standards for adoption, but must apply those standards in a fair and equitable manner.¹⁰⁸ If the city is operating the shelter, the standards must be reasonably related to the prevention of cruelty to animals and the responsible management of dogs and cats in the interest of preserving public health and welfare.¹⁰⁹ One additional requirement before an animal can be adopted by a new owner is that it must be sterilized (i.e. spayed or neutered).¹¹⁰ In the case of an animal that has been sterilized while in the custody of a city shelter must be microchipped and tattooed.¹¹¹ The tattoo will identify for future reference that the animal has already been spayed or neutered, preventing exploratory surgery in the future.¹¹² If the animal is not already sterilized, the new owner must sign an agreement to do so, which must contain:

- (1) the date of the agreement;
- (2) the names, addresses, and signatures of the releasing agency and the new owner;

¹⁰⁶ TEX. HEALTH & S. CODE § 826.033.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at § 828.011.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at § 828.002.

¹¹¹ 22 TAC Part 24, Ch. 573, Sub. G. § 573.77.

¹¹² *Id.*

- (3) a description of the animal to be adopted;
- (4) the sterilization completion date (30 days after adoption for an adult, or 30 days after it is safe to do so for infants); and
- (5) a statement, printed in conspicuous, bold print, that sterilization of the animal is required under Chapter 828, Health & Safety Code, and that a violation of this chapter is a criminal offense punishable as a Class C misdemeanor.¹¹³

The city can extend the deadline when provided a written report from a veterinarian stating that the life or health of the animal would be jeopardized.¹¹⁴ The sterilization must be confirmed by the city, or the animal will be reclaimed.¹¹⁵ This requirement does not apply to animals being reclaimed by existing owners, animals being obtained by an institution of higher education for research/testing/teaching, or cities with population of 10,000 or less.¹¹⁶

An unfortunate part of the operation of any animal shelter, or most animal control departments, is the euthanasia of sick, injured, or unadoptable animals. For larger jurisdictions with a significant stray problem, this can be especially burdensome. Often healthy, adoptable animals must be euthanized to make room for incoming strays.¹¹⁷ Many pet owners do not spay or neuter their pets, and most litters result in more puppies or kittens than one owner wants or is allowed to own. Stray cats and dogs will have litters when they are in season, resulting in cyclical increases in the number of strays being caught by animal control departments. The unfortunate result is that some animals are euthanized simply because there must be room to accommodate the new seizures. Understandably, there are other circumstances where shelters euthanize, injured or sick animals with little or no hope of recovery, violent or aggressive animals which pose a danger, etc. There are only two acceptable methods for euthanizing a dog or cat, which is an injection of sodium pentobarbital or a gas chamber with commercially

¹¹³ TEX. HEALTH & S. CODE § 828.003.

¹¹⁴ *Id* at § 828.004.

¹¹⁵ *Id* at § 828.005, 828.009.

¹¹⁶ *Id* at § 828.013.

¹¹⁷ See Associated Press “Overcrowded Shelter May Euthanize Healthy Animals”;

<http://www.nbcdfw.com/news/local/Overcrowded-Shelter-May-Euthanize-Healthy-Animals-152529785.html>.

compressed carbon monoxide.¹¹⁸ All other animals must be euthanized in accordance with the applicable methods, recommendations, and procedures set forth in the 2000 Report of the American Veterinary Medical Association Panel on Euthanasia as modified or superseded by a subsequent report of the American Veterinary Medical Association Panel on Euthanasia.¹¹⁹ State regulations require that animals should first be scanned for microchip identification and searched for other identification and reasonable efforts to locate and notify the owner shall be made prior to euthanasia.¹²⁰ There are specific rules adopted for the administration of both methods of euthanasia, as set forth in the administrative code, for example, each animal must be monitored until death has been confirmed by examination.¹²¹ Only a licensed veterinarian or a person who has successfully completed training on the proper methods and techniques may euthanize an animal in the custody of an animal shelter.¹²² The training includes:

- (1) the pharmacology, proper administration, and storage of euthanasia solutions;
- (2) federal and state law regulating the storage and accountability of euthanasia solutions;
- (3) euthanasia technician stress management;
- (4) proper restraint and handling of an animal during euthanasia;
- (5) the procedures for administering commercially compressed carbon monoxide to an animal;
- (6) techniques for verifying an animal's death; and
- (7) the proper disposal of a euthanized animal.¹²³

Because the drugs involved are controlled substances under federal law, DEA authorization must be obtained to prescribe them.¹²⁴ The drugs should be kept in a locked cabinet or other secured storage container with limited access by staff.¹²⁵

¹¹⁸ *Id* at § 821.052.

¹¹⁹ *Id.*

¹²⁰ 25 TAC, Part 1, Ch. 169, Sub. D, § 169.83.

¹²¹ *Id* at § 169.84.

¹²² TEX. HEALTH & S. CODE § 821.055.

¹²³ *Id.*

¹²⁴ See 21 C.F.R § 1308.12.

¹²⁵ U.S. Dept. of Justice, Drug Enforcement Administration, Office of Diversion Control, Questions & Answers, <http://www.dea/diversion.usdoj.gov/faq/general.htm#sec-1>.

E. Operation of a Shelter

There are a number of practical considerations to be addressed by cities considering the creation of an animal control department that stem from the care and disposition of the animals found or seized by the department. The animals that have been seized or found must be placed somewhere and there must be a mechanism for their disposition. One option is to contract with a shelter (whether public or private) for animal sheltering services. This provides the consistency and economy of scale that would be lost if the city simply boarded animals with local veterinarians or boarding facilities. The alternative is for the city to operate its own shelter. Either of these two options (contracting with a third party or operating a public shelter) will have different implications.

When operating with another entity to provide services, the city should consider what services are going to be provided. Licensing of animals, and verification of vaccination for rabies, is an activity to be performed by the rabies control authority of the city. The city can designate a third party to provide that service, but note that the fees charged for the issuance of a city tag must be used to defray the cost of implementing the registration and rabies control ordinances.¹²⁶ Similarly, the fees charged to pet owners when they come to redeem lost pets must also be used to defray the cost of implementing the registration and rabies control ordinances.¹²⁷ A number of other considerations will also weigh heavily into the analysis of a public private partnership, cost of services, euthanasia rates, and capacity.

¹²⁶ TEX. HEALTH & S. CODE § 826.031(c).

¹²⁷ *Id* at § 826.033(d).

There are a number of other hurdles to be considered when operating a publicly owned animal shelter. One specific issue is that state law requires any animal adopted from a public shelter to be sterilized.¹²⁸ Animals cannot be released without having been sterilized, or without having a written agreement from the new owner that the animal will be sterilized within a prescribed period of time.¹²⁹ There are follow up requirements for the new owners to provide proof of sterilization or the city is required to reclaim the unsterilized animal.¹³⁰ Each adopted, sterilized animal is required to be tattooed on their thigh with the male or female symbol with a line drawn through it so as to indicate that the surgery has been performed.¹³¹ In addition, there are all the obligations associated with operating a shelter:

- The shelter is required to document the intake, treatment, and disposition of animals that are cared for by the shelter, and some of that information (personal information of adoptive owners) is required to be kept confidential.¹³²
- There are specific design considerations related to the construction of animal shelters. In particular, there are very specific requirements for rabies quarantine facilities that are necessary to ensure the safety of staff and other animals while an animal is in rabies quarantine. A poorly designed shelter can make animal care extremely labor intensive, while at the same time providing a poor environment for the animals.
- There are psychological considerations as well, especially in communities with large stray populations because shelter personnel will be responsible for euthanizing a lot of the animals that they care for, and this can take a significant emotional toll on the shelter employees.

Again, one of the principle driving factors behind the operation of a shelter is going to be the local politics. There are competing concerns of cost to taxpayers versus welfare of animals and citizens. Many public shelters have high euthanasia rates simply because there are limited resources, a surplus of animals, and no additional space to house and care for the incoming.

¹²⁸ *Id* at § 828.002; 22 TAC, Part 24, Ch. 573, Sub. G., § 573.77.

¹²⁹ *Id.*

¹³⁰ TEX. HEALTH & S. CODE § 828.009.

¹³¹ 22 TAC, Part 24, Ch. 573, Sub. G. § 573.77.

¹³² TEX. HEALTH & S. CODE § 826.0211 and § 826.0311.

Rural jurisdictions may have to contend with stray livestock, wildlife, and other difficult to control, contain, and care for animals.

VI. CONCLUSION

Cities can take different approaches to animal control depending largely upon the issues that are of concern to its citizens. State law provides a great deal of guidance for those cities that have not adopted ordinances of their own. Nevertheless, local politics and the points of view of the decision makers and concerned citizens will have a significant impact on how these laws, regulations, and ordinances are enforced.

APPENDIX A

Basic Ordinance Drafting

TCAA Conference 2018

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Introduction

When I started at the City, I had no idea what the City Code was, what a Charter was, or how the City worked. I had litigated before state court, federal court, bankruptcy court, and in administrative hearings. This was all a good background for my City work because basically the City Code is our City statutory framework, the Charter is our local constitution, and the goal of getting compliance for a functional and properly working community was the same as it was in the courtroom.

Besides understanding the legal framework of what you are doing when you are drafting Code provisions, the other important piece of your work, which you may have learned in other areas of practice, is that of listening to your client and figuring out how to put what they want into something that the law allows them to do. Sometimes you cannot get them all the way there, but you may be able to craft a Code provision that addresses the public health or safety issue that is truly the City's concern.

Another important concept to keep front and center in your work is that you, and the people who are concerned at this very moment, may not be around to investigate the violations and enforce the Code provisions. Write clearly and simply. Keep in mind the limits (both legal and practical), that your inspectors or police officers have when they investigate and document a violation. Keep in mind your prosecutors and their need to be able to write a complaint that is clear and easily understood by the person who is charged with violating the Code, and the Judge and jury who have to hear the case.

What is an Ordinance?

The goal when drafting an ordinance is to use plain, concise English that is readily understood by the average reader and is easily enforced by your City's staff. Before drafting an ordinance, first determine whether an ordinance is necessary. Under most City Charters, the council legislates by ordinance. An ordinance, therefore, is a law of the City, just like a state statute is the law of Texas.

An ordinance can only be amended by another ordinance. This is called "an action of equal dignity." Similarly, only an ordinance can "waive" another ordinance. To adopt an ordinance may require your council to do separate "readings." In Austin, an ordinance automatically passes on all three readings if it receives seven or more votes. Sometimes, Austin's Council limits approval to first or second reading if they want more time to consider the ordinance before final approval.

How an Ordinance Differs from Other Council Actions

Besides adopting an ordinance, Austin's Council takes action by adopting resolutions or by taking a simple "voice vote" regarding an item on the council's agenda. Each of these actions differs from an ordinance in important ways:

- A resolution may be used to express council's view, establish general policies, or give direction to the city manager. Most of the time, Austin's Council initiates code amendments by resolution, which essentially directs the city manager to prepare an ordinance achieving particular objectives. Unlike an ordinance, however, a resolution is not a law. Council also often includes history and policy statements in the "whereas" clause for resolutions. These can be helpful in giving guidance on the legislative purpose behind a change in Code
- A voice vote is essentially the same as a resolution, except voice votes are only memorialized in the council's minutes and resolutions are memorialized in a separate document.

When council adopts an ordinance, it is usually exercising either the municipal "police power" to protect public health, safety, and welfare, or powers delegated to the City by the State. As such, an ordinance is not a contract and is not dependent on the exchange of consideration between the City and other parties

Basic Rules of Statutory Construction

Courts follow the "rules of statutory construction" in interpreting ordinances, so it's important to be aware of these rules in order to avoid unintended meanings or conflicts with other portions of your City's Code. The primary rule is that a law should be read for its "plain meaning." If the plain meaning of the law is confusing, ambiguous, or vague, however, courts will rely on well-settled principles of interpretation to ascertain the legislature's intent

- ***The legislature meant what it said.*** It is assumed that the legislature intended every word used in a law to have meaning and that it used exactly the words it meant to use. Therefore, whenever possible, a law will always be interpreted to avoid rendering words meaningless or superfluous. In *City of Austin v. Hyde Park Baptist Church*, the court examines the language of a zoning ordinance as applied to a permit for development of a parking garage. The construction of the statute balances on the interpretation of the clause "on all or a portion of." The court rejects analysis based on the surrounding ordinances which would render the clause meaningless in favor of the plain meaning as the ordinance is written. 152 S.W.3d 162, 166 (Tex. App.—Austin 2004, no pet.).
- ***The specific trumps the general.*** If two laws conflict with one another, the law that addresses the subject matter more specifically is deemed to control over the law that deals with the subject in a more general way. For instance, in *Mayo v. State* the court ruled that Texas Local Government Code Section 243.010(b), which specifically authorized municipal to regulate sexually oriented businesses by creating a Class A misdemeanor offense, preempts Texas Local Government Code Section 54.001, which limits municipal

for imposing fines or penalties greater than \$500. 877 S.W.2d 385, 389 (Tex. App.—Houston [1st Dist.] 1994, no pet.).

- ***The presence of one word excludes any that are not present.*** If a certain word is included in a statute, a related word not included in the statute is presumed to have been left out intentionally. For example, in *Royer v. Ritter*, the court determines that the municipality does not have the power to restrict alcohol sales on specific dates because the Texas Liquor Control Act sets out five distinct provisions granting cities regulatory power over alcoholic beverages, thereby denying municipal authority to regulate under any non-specified instance. 531 S.W.2d 448, 449 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).
- ***Laws should be read together with other laws that cover the same subject.*** A law on a particular subject may be compared with earlier laws on the same subject in order to determine what is meant by the later law. In *Carlson v. City of Houston*, the court read Texas Local Government Code Section 214.216, a general grant of municipal authority to administer, enforce, and amend the municipal commercial building code, in *pari materia* with Texas Local Government Code Section 214.001, a special provision granting municipalities authority to vacate and relocate occupants of unsafe and hazardous buildings. This special provision establishes judicial review procedures for owners and other interest holders who may be aggrieved by an order of a municipality pursuant to Section 214.001. The court, by reading the laws together as the same subject, determined that the judicial review procedures also apply to Section 214.216. 309 S.W.3d 579 (Tex. App.—Houston [14th Dist.] 2010, no pet.).
- ***Words should be “of the same kind.”*** An ambiguous word should be given a precise meaning that is consistent with the other words around it. This applies most often where a list of specific terms concludes with a general, catchall term. In *University of Texas at Arlington v. Williams*, the court determines that a spectator at an outdoor sport does not fit within the intended meaning of “any other activity associated with enjoying nature or the outdoors” based upon comparison to the listed activities under the recreational use statute. 459 S.W.3d 48, 49 (Tex. 2015).
- ***Words should be understood by comparing them to words around them.*** A word is known by its associates. This is often used to determine the meaning of a specific term based on a common theme shared with surrounding words. In *Board of Adjustment of City of San Antonio v. Levinson*, the court examined an ordinance permitting ‘home occupation, such as the office of a physician, surgeon, dentist, musician, or artist’ as applied to a beauty shop operated out of a residence. The court determined that the use of ‘such as’ acted to limit and contract the broader term ‘home occupation’ requiring the operation to be similar to the listed classifications. Thus, the ordinance permits some home occupations, but prohibits many others, including the beauty shop in question. 152 S.W.3d 162, 166 (Tex. App.—Austin 2004, no pet.).

The Drafting Process

Like with any other writing, the point of writing an ordinance is to transfer a thought to the reader. Always keep in mind that the reader won't know what you know, or be aware of the backstory that may have led to the ordinance you're drafting. Be sure you are writing for a reader who doesn't know that background information. There are several essential rules to follow in order to ensure that an ordinance is clear and readable and, if an ordinance is codified, that it's stylistically and structurally consistent with the rest of the City Code.

Pre-Drafting Guidelines

Understand your Staff's Objectives

To draft an effective ordinance that achieves your City's objectives, you have to understand what those objectives are and get the full "backstory" behind the ordinance. Before you start drafting, spend time talking with staff about the purpose of the ordinance and what they want to achieve. This may require asking staff to explain things they assume you already know. Do not hesitate to keep asking questions until you understand enough to begin drafting. In some cases, staff may propose an ordinance that is unnecessary. You should always let staff know if alternatives exist for achieving their objectives that don't require an ordinance, such as an administrative rule or a change in policy.

Become Familiar with the Code and How It's Drafted

Learn the basic drafting conventions in your City Code. For example, the first chapter of Austin's City Code and in the City of Bryan's City Code, you will find basic definitions, usage conventions, and interpretive rules that apply throughout the Code. Familiarize yourself with the Code chapter that your staff has proposed to amend, as well as any related chapters or sections. Learn how the Code is drafted and structured. If your ordinance adds new provision to the Code, consider whether it makes the most sense to incorporate them into existing sections or add new sections. Suggest alternatives if you disagree with your staff's ideas on which sections to amend. Identify Code provisions that are similar or related to provisions that your staff has proposed to amend. Make sure what your staff is proposing has not already been done, whether in the chapter you're being asked to amend or in another chapter that deals with related issues.

Understand the History of a Proposed Ordinance, Including Prior Council Resolutions

Amendments to the Code often originate with a resolution by the city council "initiating" the amendment and describing the purpose sought to be achieved. In drafting the initial ordinance include any provisions required by council's resolution. Where a resolution is more general in nature, make sure the ordinance carries out the basic purpose expressed in the resolution, but defer to staff's judgment on how best to do that. Also, advise staff and council if a proposed ordinance raises legal issues, including potential conflicts with state or federal law, open government laws, and constitutional requirements. I can also be useful to search online for

history that may be relevant to an ordinance. In addition to public records, news sources and local historical centers may have relevant history. Most importantly, check with your colleagues. If an attorney who previously worked on a particular code section or chapter is still with the department, that person can be a helpful resource. For example, does your zoning or property regulating Code already define “fence?” Does the first chapter of your City Code give a good definition of “person?” Does your first chapter of your City Code state that “City Manager” means the manager or manager’s designee?

Drafting Guidelines

A few essential rules of grammar and style can ensure that you are drafting clear, readable, and unambiguous ordinances. You may need to deviate from a particular rule in rare instances, but in the vast majority of cases you should follow the following rules:

Grammar:

- **Use the present tense, third person singular.**
- **Avoid the plural.**
- **Don’t use pronouns.**
- **Do not use nouns in place of verbs.**

Style and Usage:

- **Use short, direct sentences.**
 - **Use the active voice.**
 - **Express ideas positively.**
 - **Avoid wordiness.**
 - **Always use the same word to refer to the same thing.**
 - **Use modifiers carefully and sparingly.**
- **Caution:** Always use a comma after every word or phrase in a series, including the one before “and” or “or.” Courts rely on punctuation as indicative of legislative meaning and an improperly placed or missing comma may alter the reading of the ordinance resulting in unintended interpretations. See *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016).

Structure and Form

Organization is key to drafting an effective ordinance. Appropriate organization can eliminate confusion and improve readability of an ordinance resulting in better informed citizens, contributing to more accurate interpretation by the court, and assisting with ease of enforcement. A few principles can guide you into drafting a well-organized ordinance.

- **Go from general to specific.**
 - Content within an ordinance should be set out in a logical order such as follows:
 - General provisions that relate to the text of the ordinance.
- Definitions are an example.

- Administrative provisions relating to organization, powers, and procedures within the City.
- If an ordinance establishes permitting requirements, the review and applications procedures for obtaining a permit should be grouped together.
 - Substantive provisions that impose a duty, confer a privilege, or establish regulations.
- Provisions that govern conduct or create requirements should be grouped together such as grants of authority to city officials, requirements for use of land, regulation of business activity, etc.
 - Enforcement provisions, including penalties.
- Provisions that establish administrative procedures for enforcement, declare criminal offenses, or set penalty amounts should be grouped together.
- **State the rule, then the exception.**
 - Assume that the reader will read the provision in the order as it appears. Try not to spring a concept on the reader that hasn't been explained if the reader is reading the provision in that order. State the general rule first, then set out any provisions that modify the general rule.
- **Avoid big blocks of text.**
 - The eye tends to skip over blocks of text. In addition, long passages make it easy for the reader to lose track of where he or she is in the organization of the ordinance. The idea of ordinance drafting is more than just getting the words on the page. The idea is to aid the reader in understanding the ordinance. Try to split discrete requirements into separate sections, subsections, or paragraphs. Similarly, each time an act is required or prohibited, it should have its own section or subsection.

Use of Definitions

Many code titles or chapters begin with a section defining terms that are used throughout the title or chapter. Definitions serve many legitimate functions, but are also among the most over-used and incorrectly-used elements in ordinance writing. When considering whether or not to include a definition in an ordinance, you should always adhere to the following rules:

1. The only circumstances in which to use a definition:
 - a. To establish the meaning of a word that may be misunderstood or a technical term that an average reader is not likely to know;
 - b. To limit the meaning of a common word that has multiple definitions; or
 - c. To help the ordinance read more easily by using a simple term or phrase as shorthand for a longer phrase, thereby avoiding repetition of the longer phrase
2. Never include a substantive provision or regulatory requirement in the form of a definition.
3. Guidelines for drafting a good definition:
 - a. Make sure it's clear what part of the code a definition applies to.

- b. As a general rule, a definition should be one sentence.
- c. When adopting a definition described in another section of the Code, or state or federal law, write:
 - i. “DEFINITION has the meaning assigned in Section 1-1-2.”

Findings and Purpose Statements

Legislative findings can be useful and appropriate to demonstrate occurrences or conditions required by state, federal, or constitutional law. Findings may also be helpful in establishing a legislative record if an ordinance may be subject to legal challenge or to provide background for adoption of an ordinance. Examples of ordinances where findings may be appropriate include:

- An ordinance that affects a first amendment right may benefit from findings that would satisfy the constitutional test of strict scrutiny in the event of a legal challenge.
- A code provision that establishes an action as having a health or safety effect may need findings in order to authorize a court to award a higher penalty for a violation.
- Findings may be appropriate for certain land use or environmental regulations that impact property rights or significantly affect existing development potential of land.
- If requested by Council, findings may be used to describe the public process and policy considerations that inform development of an ordinance.

Legislative findings are generally uncodified and appear in Part 1 of an ordinance. General statements of purpose, on the other hand, may be included in City Code to frame the overall objective of a title or chapter. Both legislative findings and purpose statements should appear in standard sentence form, rather than as recitals that appear in resolutions.

Legislative findings and policy statements are generally disfavored, in large part because they are often used to compensate for imprecise drafting in substantive provisions of an ordinance. Therefore, unless there is a compelling reason for including them, try to dissuade your staff from doing so. And under no circumstance should finding or policy statements be used to:

- Compensate for imprecise or careless drafting
- State a purpose or achieve a result that is not clear from the substantive provisions of the ordinance
- Make a purely political or public-relations statement, or for puffery; if staff insists on including statements of that nature, put them in an uncodified section rather than in City Code.

- **Practice Tip:** As an alternative to legislative findings, consider including a non-codified clause incorporating by reference a report by professional staff explaining the purpose of the ordinance and providing more detailed support. Particularly for regulatory ordinances, this can save space and avoid some of the pitfalls associated with legislative findings.

Offenses and Penalties

Familiarize yourself with Title 2 of the Penal Code (*General Principles of Criminal Responsibility*) and Chapter 54 of the Local Government Code (*Enforcement of Municipal Ordinances*). It is beneficial to review an ordinance creating an offense with the municipal court prosecutors as they will be able to recognize complications in the language that may hinder the enforceability of the ordinance that would not occur to someone who does not regularly enforce ordinances in the court.

Creating a General Criminal Offense and Penalty

To create a general criminal offense, use language such as “a person commits an offense if the person...” or “a person who violates this [Chapter, article, section] commits an offense.” Every offense must include a culpable mental state or expressly dispense with the need for the actor to have a culpable mental state and for the prosecution to prove one. A culpable mental state is only required if the fine is over \$500 per offense. Many city ordinance violations may actually be strict liability offenses even if the law is silent as to the culpable mental state. There is a multi-prong test to determine if an ordinance-based offense is actually a strict liability offense under these circumstances. See *Aguirre v. State*, 22 S.W.3d 463 (Tex. Crim. App. 1999).

If there is something to which the offense does not apply, consider drafting ordinances with affirmative defenses and defenses, not exceptions. Prosecution must prove all elements of the offense beyond a reasonable doubt which includes negating exceptions. This can be a very difficult burden. Prosecution is not required to negate affirmative defenses and defenses. By including affirmative defenses and defenses rather than exceptions, this puts the burden of proof for the element on the defendant instead of on the municipal court prosecutor.

Complaints describe unlawful conduct and charge the defendant with an offense. Complaints must list all elements of the offense. Because exceptions are elements of an offense, drafting exceptions into an ordinance can make the trial complaint very lengthy, complicated, and difficult to prove. Affirmative defenses, defenses, and exceptions must be clearly labeled with no ambiguous language such as unless, except as provided by, or this section does not apply to. These phrases can lead to confusion and complication in enforcement of an ordinance. Ordinances should also be clearly organized. By drafting ordinances with separate subsections for the offense, affirmative defense, defenses, and exceptions, there is less confusion in the enforcement of the ordinance.

Creating a Civil Offense and Penalty

To create a civil offense use language such as “A person who violates [the prohibition] commits a civil offense, and is civilly liable to the City in the amount of \$-- for each offense.” State law limits the dollar amount civil and criminal violation create by city ordinance. Check the statutes before setting the dollar amount for any penalty. This is an extension of municipal legislative power which requires an administrative hearing process. While administrative appeals are becoming relatively common practice, they can still face many constitutional challenges. If your city does not have staff in place to properly hear and rule on administrative appeals, think about the legal risks of doing such appeals improperly.

Conclusion

No law is perfect. However, if you write your Code clearly, addressing the public health and safety concerns of your client within the legal framework of the particular area of the law you are writing as City Code, you will help your client and your City.