

## Ordinances

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## **I. What is an ordinance?**

City councils take action primarily by passing either an ordinance or a resolution. When a city council takes administrative action, it usually is done by a resolution. For instance, councils use resolutions to:

1. Approve:
  - a. Contracts;
  - b. Interlocal agreements;
  - c. Grants;
2. Authorize expenditures;
3. Award bids;
4. Settle a lawsuit;
5. Appoint the city manager, any other direct reports, or board and commission members;
6. Confirm the police chief or fire chief, if the City is a civil service city under Chapter 143 of the Texas Local Government Code; and
7. Purchase or sell real estate.

An ordinance also can be used for administrative actions, and there are instances in which a city charter or state law requires an administrative action be taken by ordinance. For instance, state law requires that a city hall or municipal building be sold by ordinance.<sup>1</sup> But the process for enacting an ordinance is usually more cumbersome than the process for a resolution; so cities tend not to use an ordinance for administrative actions unless required to do so.

Usually, ordinances<sup>2</sup> are used to enact legislation. An ordinance is the municipal equivalent of a state statute. It is meant to tell the residents of a city what rules and policies apply to them. Many ordinances have penal provisions that subject the residents to criminal prosecutions or civil lawsuits for violations. In fact, if you want to impose a fine on a person for a violation, the council enactment must be by ordinance.

## **II. Procedure for passage of ordinances**

Chapter 52 of the Texas Local Government Code establishes procedural requirements for the passage of ordinances. These procedures differ depending upon the type of city enacting the

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<sup>1</sup> Tex. Local Gov't Code § 253.001(c).

<sup>2</sup> Texas Local Gov't Code § 51.001 states that a city may adopt an ordinance that is “for good government, peace, or order of the municipality or for the trade and commerce of the municipality...” H.B. 2127 (88<sup>th</sup> Legislature. Effective September 1, 2023) added Section 51.002 which states, “Notwithstanding Section 51.001, the governing body of a municipality may adopt, enforce, or maintain an ordinance or rule only if the ordinance or rule is consistent with the laws of this state.”

ordinance. For home rule cities, there is a requirement that the caption of an ordinance and any penalty for violating the ordinance be published in the city's official newspaper.<sup>3</sup>

A city's charter may have additional requirements for passage of an ordinance. Many charters require that the caption of the ordinance be read at multiple meetings before final passage. These extra procedures make it imperative that an attorney know when an act has to be taken by ordinance. For instance, Waco's charter requires two readings of ordinances with exceptions.<sup>4</sup> When Waco sells a municipal building, the state-required ordinance has to be read at two meetings. When Waco sells other kinds of property, it is done by resolution, which only requires one council meeting. When City staff wants to sell a municipal building, they have to plan ahead for two council meetings and at least 2-1/2 weeks to get final approval of the sale, assuming that no special meeting is scheduled.

State law provides that an act of a city, including an ordinance, is "conclusively presumed to be valid" on the third anniversary of the effective date if a lawsuit to annul or invalidate the act has not been filed.<sup>5</sup> This does not apply if the ordinance was invalid at the time of its passage or pre-empted.

### **III. Drafting Ordinances**

#### **A. Process**

Very often the request to draft a new ordinance or revise an existing ordinance results from a quality of life or safety issue in a city. The person drafting the ordinance<sup>6</sup> should meet with the requestor to understand the issue and the ordinance's purpose and goals. Throughout the drafting process, the department that will be enforcing or utilizing the ordinance should be included in the drafting process. In addition, it often is useful to ask the prosecuting attorney to review the ordinance and provide suggestions to ease enforcement. On important ordinances, it might be helpful to have a group that includes all of the above-listed persons actually review drafts of the ordinance.

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<sup>3</sup> Tex. Local Gov't Code § 52.013.

<sup>4</sup> Waco Charter Art. II, § 12. The charter further provides that in cases of "preservation of public peace, health, safety or welfare" that the ordinance can be read on one day if the ordinance is approved by  $\frac{3}{4}$  vote. The Waco Charter further requires three readings for franchise ordinances and provides that the third reading cannot be done until at least 30 days after the first reading. Waco Charter Art. X, § 3.

<sup>5</sup> Tex. Local Gov't Code § 51.003.

<sup>6</sup> From this point forward, I am going to refer to the person drafting the ordinance as the attorney. Some cities do not have in house attorneys, and thus, other city staff does a lot of the drafting themselves, hopefully with review of an attorney. Even cities with in house attorneys may rely on technical staff for drafting of some ordinances. For instance, planners often are proficient in drafting zoning ordinances.

Either the attorney or the department should benchmark the ordinance -- that is research what other cities have enacted. Model ordinances from municipal law support organizations also can be very helpful. The benchmarking can be turned into a chart or menu of options for the client to consider. For instance, cities have a variety of on-street parking regulations, including differing hours for parking, resident only provisions, and restrictions on oversize vehicles in residential areas. Below is an example of a chart developed in 2013 for an oversize vehicle parking ordinance:

City	What	Prohibited from where	Exception for loading and unloading	Other unusual exceptions	Other normal exceptions	Other good provisions
<b>Amarillo</b>	motor home, truck tractor, road tractor, truck, semi-trailer, Mobile Home, Travel Trailer, boat trailer, stock trailer, pole trailer, bus, or any Commercial Motor Vehicle with a rated capacity in excess of one (1) ton	public Street, Alley, Parkway, boulevard, or Public Place (excluding the driveway of a residence) within or adjacent to any area zoned as a single-family...	Yes; allows towing upon second incident	--Can park these in front of your own house for 72 hours	-- Street repairs and construction --Public service utilities --Buses unloading passengers -- Emergency repairs	--Cannot park car on street if displaying for sale sign, washing or repairing car except if an emergency, or displaying material for sale or rent
<b>Austin</b>	...	...	...	...	...	...

Benchmarking can help the attorney and the client think of all of the options, spur creativity, and provide ideas for word choice.

But benchmarking should not be a substitute for actual research. Merely looking at other cities' ordinances cannot tell an attorney what compromises were made in that city's enactment, what provisions were enacted despite attorney advice to the contrary, or what law has changed since the enactment. An attorney should do independent research on the subject matter. The attorney may want to call city representatives (enforcing department or attorney) for the ordinance you are utilizing, especially if it is a novel or worrisome provision, to get some of this background. If you call, you may hear statements like, "We stopped utilizing that provision 5 years ago," "I told the

client that this provision is problematic,” or “We have had some problems with \_\_\_\_ and if I were drafting it today, I might ....”

Borrowing language verbatim from other cities’ ordinances is a common practice. If you practice long enough, you will see exact phrases in common ordinances all over the state/nation. When another cities’ ordinance has withstood a constitutional challenge, especially in your jurisdiction, mirroring the language is not only expedient but also smart. But again, you will not know which ordinances have withstood, or even failed, a legal challenge, without doing the research.

## **B. Required Terms**

### **1. Caption**

For many cities, publication of the caption of the ordinances is required either by state law or by the city’s charter. The purpose of a caption is to inform the public of the subject matter of the ordinance. Below are examples of two ordinance captions:

Example A:

**AN ORDINANCE ESTABLISHING ADMINISTRATIVE DEPARTMENTS OF THE CITY OF WACO, TEXAS; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH; PROVIDING A SAVINGS CLAUSE; PROVIDING FOR AN EFFECTIVE DATE; AND FINDING AND DETERMINING THAT THE MEETING AT WHICH THIS ORDINANCE IS PASSED IS OPEN TO THE PUBLIC AS REQUIRED BY LAW.**

Example B:

**AN ORDINANCE AMENDING SECTION 25-1 OF ARTICLE I “IN GENERAL” AND SECTION 25-151 OF ARTICLE VII “TRUCK ROUTES” AND ADDING SECTION 25-201 OF ARTICLE VIII “STOPPING, STANDING, PARKING” OF CHAPTER 25 “TRAFFIC AND VEHICLES” OF THE CODE OF ORDINANCES OF THE CITY OF WACO, TEXAS TO PROHIBIT ON-STREET PARKING OF OVERSIZE AND COMMERCIAL VEHICLES IN RESIDENTIAL DISTRICTS; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH; PROVIDING A SAVINGS CLAUSE; PROVIDING FOR INCLUSION IN THE CODE; PROVIDING FOR AN EFFECTIVE DATE; PROVIDING FOR A PENALTY; AND FINDING AND DETERMINING THAT THE MEETING AT WHICH THIS ORDINANCE IS PASSED IS OPEN TO THE PUBLIC AS REQUIRED BY LAW.**

### **2. Ordaining Clause**

An ordaining clause is the phrase after the “whereas” clauses but before the actual provisions that enact the ordinance. Type A General Law cities are required to include ordaining clauses in its ordinances unless the ordinance is published in a book or a pamphlet.<sup>7</sup> Many cities have a similar charter provision. For instance, the Waco Charter requires that the following phrase be included in every ordinance, “Be it ordained by the City Council of the City of Waco.”<sup>8</sup>

### **3. Penalty Provision**

If the city council wants to penalize a person for violation of the ordinance, then a penalty provision is required. Fines may not exceed \$4,000.00 for violations of ordinances governing the dumping of refuse.<sup>9</sup> Ordinances governing fire safety, zoning, or public health and safety may have a fine not to exceed \$2,000.00.<sup>10</sup> For all other ordinances, the fine may not exceed \$500.00.<sup>11</sup>

The attorney also should include a provision that states that every day or portion of a day that a violation exists constitutes a separate offense. Below is an example of a penalty clause:

SECTION \_\_. That a violation of this ordinance shall be a Class C misdemeanor and the penalty for violating this ordinance shall be as provided for in Sec. 1-14 of the Code of Ordinances of the City of Waco, which shall be a fine of not less than one dollar (\$1.00) and no more than five hundred dollars (\$500.00), and each day a violation exists shall be a separate offense.

### **4. Culpable Mental State**

The fine range and the mental state, also referred to as the culpable mental state, are connected. For ordinances with fines of \$500.00 or less, the City may dispense with the need to prove a culpable mental state.<sup>12</sup> This is sometimes referred to as strict liability. For instance, a person may be held responsible for speeding even if the person had no idea that they were speeding. Strict liability also can be very useful for code violations in which an out-of-town owner or an owner that has hired a manager will claim that they did not know the condition of the property. Although a court may interpret an ordinance to be strict liability,<sup>13</sup> it is the best practice to dispense explicitly with the culpable mental state. Many cities do this with the general provisions usually found in Chapter 1 of the Code. For instance, the Waco Code provides, “A culpable mental state is not

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<sup>7</sup> Tex. Local Gov’t Code § 52.002.

<sup>8</sup> Waco Charter Art. II, § 12.

<sup>9</sup> Tex. Local Gov’t Code § 54.001(b)(2).

<sup>10</sup> Tex. Local Gov’t Code § 54.001(b)(1).

<sup>11</sup> Tex. Local Gov’t Code § 54.001(b).

<sup>12</sup> Tex. Penal Code §§ 6.02(f), 12.23.

<sup>13</sup> *Aguirre v. State*, 22 S.W.3d 463, 472 (Tex. Crim. App. 1999)(presuming that a culpable mental state is required for a crime, analyzing the sexually oriented business regulation under a multi-prong test, and finding that a culpable mental state was required).

required for the commission of an offense under this Code of Ordinances, unless the provisions defining the conduct expressly require a culpable mental state.”<sup>14</sup>

If a city chooses to enact a fine that exceeds \$500.00, then a culpable mental state must be alleged and proven.<sup>15</sup> There are four culpable mental states defined in Texas penal law: intentional, knowing, reckless, and criminal negligence.<sup>16</sup> Even if an ordinance has a fine of up to \$2,000.00, you may be able to prosecute without a culpable mental state if you charge the person with a fine not to exceed \$500.00.<sup>17</sup>

## C. Optional Provisions

### 1. Effective Date and Publication

The governing body is required to publish in the official newspaper each ordinance required by law to be published.<sup>18</sup> The Texas Constitution requires notice of criminal offenses.<sup>19</sup> Therefore, absent an emergency, ordinances punishable by a fine are not effective until after publication. The process for publication depends on the type of city. For instance, a home rule city must publish twice absent a charter provision to the contrary.<sup>20</sup>

Waco’s charter provides that penal ordinances take effect 10 days after publication once in the official newspaper.<sup>21</sup> Because the time is prescribed by the charter, an actual provision establishing the effective date arguably is not required in every ordinance passed by Council. Nevertheless, it is the best practice to include a provision like the following:

SECTION \_\_. That this ordinance shall take effect upon its passage as provided by the City Charter of the City of Waco.

A city always may provide an effective date further out than the 10-day publication period described above. When a city is enacting a new licensing scheme or making major ordinance

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<sup>14</sup> Code of Ordinances of the City of Waco, Texas § 1-15(d).

<sup>15</sup> *O’Reilly v. State*, 501 S.W.3d 722, 728-29 (Tex. App.—Dallas 2016)(holding that the city was limited to a fine of \$500.00 for refuse ordinance violation when it had not pled or proven a culpable mental state).

<sup>16</sup> Tex. Penal Code §§6.02, 6.03.

<sup>17</sup> *Roark & Hardee L.P. v. City of Austin*, 394 F.Supp.2d 911, 919-20 (W.D. Tex. 2005); aff’d in part, rev’d in part, vacated in part by 522 F.3d 533, 538, 556 (5<sup>th</sup> Cir 2008); *O’Reilly*, 501 S.W.3d at 728-29; David Johnson, *Drafting Enforceable Ordinances*, Texas City Attorneys Association Riley Fletcher Seminar, 2013.

Proving “knowingly” or some other culpable mental state is not difficult with advance planning. For instance, when enforcing minimum housing standards, the department will send the owner notice of the violation prior to issuing the citation for the violation. At trial, the notice is evidence of the necessary culpable mental state.

<sup>18</sup> Tex. Local Gov’t Code § 52.004(b).

<sup>19</sup> Tex. Const. Art. 1, § 10.

<sup>20</sup> Tex. Local Gov’t Code § 52.013.

<sup>21</sup> Waco Charter Art. II, § 13.

amendments, there may be a concern that the city provide adequate time and notice to affected residents. For instance, when Waco enacted its pay day lending, night club, and lead-based housing ordinances, the effective dates were several months after passage to give staff time to publicize the ordinances to the newly regulated industries and to develop the necessary forms for their enforcement.

## 2. “Whereas” Clauses

More formally, “whereas” clauses are referred to as the preamble or as recitals. Although not required, they may be placed after the caption but before the ordaining clause. “Whereas” clauses can be used to give a context for the council action, establish the public purpose, establish legislative intent, and detail legal authority.

Courts utilize legislative intent when interpreting ordinances.<sup>22</sup> The council’s reasons as stated in the preamble are viewed deferentially.<sup>23</sup> Especially for ordinances for which you anticipate litigation, e.g. a sexually oriented business regulation, a preamble can bolster the ordinance. Some examples of a portion of the “whereas” clauses in a payday lending ordinance:

**WHEREAS**, certain credit access businesses engage in abusive and predatory lending practices, offering easy money to those members of our community who are in a tight spot with onerous terms and fees; and

**WHEREAS**, the practices of certain credit access businesses cause members of our community to become trapped in a cycle of short term, high interest loans resulting in large debt and huge payments; and

**WHEREAS**, the Pew Charitable Trusts, in their publication entitled *Payday Lending in America: Who Borrows, Where they Borrow, and Why*, (July 2012), wrote that “payday loans are sold as two-week credit products that provide fast cash, but borrowers are actually indebted for an average of five months per year.” The report further noted that “on average, a borrower takes out eight loans of \$375 each per year and spends \$520 on interest;” and

**WHEREAS**, the Pew Charitable Trusts, in their publication entitled *Payday Lending in America: Who Borrows, Where they Borrow, and Why*, (July 2012), also noted: “How much borrowers spend on loans depends heavily on the fees permitted by their state. The same \$500 storefront loan would generally cost about \$55 in Florida, \$75 in Nebraska, \$87.50 in Alabama, and \$100 in Texas, even if it were provided by the same national company in all those states. Previous research has found that lenders tend to charge the maximum permitted in a state;” and ...

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<sup>22</sup> *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006).

<sup>23</sup> *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488-89, 75 S.Ct. 461, 464-65 (1955).



### **3. Severability Clause**

This clause preserves parts of the ordinances that a Court has not found to be unconstitutional or otherwise illegal. Below is an example:

SECTION \_\_\_\_. That if any provision of this ordinance shall be held to be invalid or unconstitutional, the remainder of such ordinance shall continue in full force and effect the same as if such invalid or unconstitutional provision had never been a part hereof.

### **4. Repealing Provision**

If any existing ordinance provisions conflict with the new ordinance, those provisions should be repealed specifically in the new ordinance. The purpose of a repealing clause is to ensure that any conflicting provisions are repealed, especially for those provisions in other parts of the code of which you are not aware or if you make a mistake. Two examples are below:

SECTION \_\_\_\_. That all ordinances or parts of ordinances in conflict with the provisions of this ordinance are hereby repealed.

or

SECTION \_\_\_\_. That all ordinances or parts of ordinances in conflict with the provisions of this ordinance are hereby repealed, and all other provisions of the ordinances of the City of Waco not in conflict with the provisions of this ordinance shall remain in full force and effect.

### **5. Savings Clause**

If an ordinance has a penal provision or there is a possibility of ongoing civil/criminal action, then a savings clause should be included in the ordinance. A savings clause allows you to continue the prosecution/lawsuit under the old ordinance even after the new one takes effect. An example of a savings clause is:

SECTION \_\_\_\_. That nothing in this ordinance shall be constructed to affect any suit or proceeding pending in any court, or any rights acquired, or liability incurred, or any cause or causes of action acquired or existing, under any act or prior ordinance; nor shall any legal right or remedy of any character be lost, impaired, or affected by this ordinance.

Forgetting to include a savings clause can have significant results. As an inexperienced prosecutor, I had to brief and argue the savings clause issue. The City of Dallas had amended some code provisions but the ordinance had no savings clause. There were hundreds of tickets pending for

violations of the ordinance prior to the amendments. The defense attorney argued that all of the tickets should be dismissed because there was no savings clause and the enactment of revision repealed the old ordinances. Ultimately, the court did not dismiss the tickets, but it is easier and less time consuming just to include the provision.

## **D. Drafting Tips**

### **1. General Provisions for Ordinances**

Many cities enact provisions at the beginning of their codified ordinances that detail rules of construction, provide general definitions, provide for severability for all enactments, and address other general matters. For instance, the City of Dallas's code provides that no culpable mental state is required for any ordinance with a penalty of less than \$500.00 and even states that when a culpable mental state is required, then it is "knowingly" unless the ordinance provides otherwise.<sup>24</sup> This can be a very useful tool, as it provides a safe harbor in case the drafting attorney fails to include a standard provision.

### **2. Simple Language**

All legal writing should be simple and devoid of jargon and legalese. Ordinances, in particular, should be written as simply as possible. Your audience changes throughout the various stages of the ordinance drafting, enactment, and enforcement process. The council should be able to understand the ordinance when they are asked to vote on it, and the resident should be able to understand the rules that apply to them. But the ultimate audience for most ordinances is the jury.

### **3. Affirmative Defenses v. Exceptions**

Affirmative defenses, defenses, and exceptions provide for situations in which the general rule in an ordinance does not apply. How you draft these exclusions greatly affects the trial of a case. Because the state has to prove every element of an offense beyond a reasonable doubt,<sup>25</sup> the state will have to negate the exceptions using that burden. A drafting attorney can accomplish the same result, i.e. excluding some situations, without harnessing the prosecutor with this burden through the use of affirmative defenses. An example of an affirmative defense follows:

- (a) It shall be unlawful for any person to park or stand a commercial vehicle ... upon any public street ... within any part of the city classified by the zoning ordinance of the city as a single-family residence district....
- (b) It is an affirmative defense to this section that the vehicles are:
  - 1. In the act of loading or unloading passengers, freight, or merchandise;
  - 2. Publicly owned or franchised emergency or utility vehicles carrying out official duties...

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<sup>24</sup> Dallas City Code § 1-5.1.

<sup>25</sup> Tex. Penal Code §§ 2.01.

Because the excluded situations are affirmative defenses, the prosecutor only has to prove the elements in (a) above; the defendant would be required to prove the affirmative defenses. In contrast, if the items in (b) had been drafted as exceptions, the prosecutor would be required to prove beyond a reasonable doubt that the person was not in the act of loading or unloading passengers, freight, or merchandise or an emergency or utility vehicle. For a more thorough discussion of the issue, please see David Johnson, *Drafting Enforceable Ordinances*, Texas City Attorneys Association Riley Fletcher Seminar, 2013.<sup>26</sup>

### 3. Pictures, Examples, and Charts

When it is difficult to describe something in words, an attorney might want to consider a picture, chart, or example. Zoning codes often have pictures, but the pictures merely should be illustrative of the words as it is the words a prosecutor will have to use to draft the complaint. The Irving City Code has the below picture in its sign ordinance:

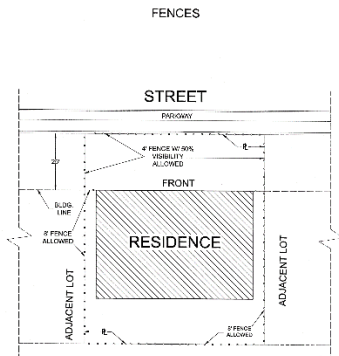


ILLUSTRATION 1.  
INTERIOR LOT

Likewise, examples can be illustrative to help a reader better understand an ordinance. Often when mathematical formulas are used in ordinances, examples that utilize the formula are included. For instance in an industrial surcharge ordinance, the following formula and example are used:<sup>27</sup>

$$SC = (Q) (8.34) [(a(BOD-250)) + (b(SS-250))(1.20)]$$

Where:

SC	=	Surcharge based on excessive concentrations of BOD and/or [suspended solids] (dollars per month)
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<sup>26</sup> [https://texascityattorneys.org/2013speakerpapers/RileyFletcher/MunicipalOrdinances\\_DavidJohnson.pdf](https://texascityattorneys.org/2013speakerpapers/RileyFletcher/MunicipalOrdinances_DavidJohnson.pdf)

<sup>27</sup> Irving City Code § 52.4.

Q	=	Estimated sewer flow (stated in million gallons per year divided by 12 months equals million gallons per month) or actual meter flow if metered
(a)	=	Monthly adjusted unit cost of treatment, chargeable to BOD (dollars per pound of BOD introduced to system)
(b)	=	Monthly adjusted unit cost of treatment, chargeable to SS (dollars per pound of SS introduced to system)

#### EXAMPLE OF FORMULA

- a. Water consumption per year = 80,000 gallons ('000)
- b. BOD = 700
- c. SS = 1,000
- d. Treatment cost for BOD and SS = \$0.02 per pound (for this example only)
- e. Estimated sewer flow = 80,000,000 — 10 percent or 72,000,000 gallons per year divided by 12 months = 6 million gallons

f.

$$SC = Q (8.34) [((a(\text{BOD}-250)) + (b(\text{SS}-250)))(1.20)]$$

$$SC = 6(8.34) [((.02(700-250)) + (.02(1,000-250)))(1.20)]$$

$$SC = 50.04 [((\$0.02(450)) + ($.02 (750)))(1.20)]$$

$$SC = 50.04 [\$9. + \$15.](1.20)$$

$$SC = 50.04 (\$24.)(1.20)$$

$$SC = \$1,441.15 \text{ per month.}$$

This ordinance also includes a chart. Unlike a picture or an example, a chart can be more than illustrative. The above ordinance defines the abbreviations in the formula using a chart that makes

it easier on the reader. These definitions are substantive. Another example of a substantive chart is a chart from a special events ordinance<sup>28</sup>:

- (c) The applicant is required to provide and pay for law enforcement services for security, crowd control, and traffic, in accordance with subsection (d) and the following schedule:

<b>Number of attendees</b>	<b>Minimum Number of Law Enforcement Officers Required</b>
0 to 250	0
251 to 1,500	2
1,501 to 3,000	4
3,001 to 5,000	6
over 5,000	6 plus 1 law enforcement officer for every 1,000 participants and spectators over 5,000 at the special event

Not only could a license be revoked if a license holder failed to maintain this level of security, but also, the license holder could be subject to criminal prosecution.

#### **4. Attachments and Administrative Materials.**

An ordinance may adopt regulations that are attachments to the ordinance and can change without further action by the council. For instance, ordinances dealing with subdivisions may refer to technical requirements like the acceptable depth of concrete/asphalt. Similarly, licensing ordinances often leave some of the administrative decisions up to staff. For instance, it is very normal for an ordinance to list the information required to be in an application but also add “such other information as required by the Chief of Police.”

Be careful how you use these tools as they can violate a city’s charter provisions on notice, publication, and readings of ordinances and can create an improper delegation of power.

#### **5. Amending v. Repealing an Ordinance**

If the attorney is rewriting an ordinance in its entirety, then the existing ordinance should be repealed by referring to the section numbers and then replaced with the new ordinance. Even if it is not a complete rewrite, it may be clearer when doing a major rewrite to repeal the existing ordinance. The portions of the old ordinance that are not rewritten can be adopted as part of the new ordinance. In either case, a savings clause needs to be included to protect existing causes of actions and prosecutions.

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<sup>28</sup> Code of Ordinances of the City of Waco, Texas § 13-486(c).

For lesser revisions, an amendment is sufficient. Now that people are so accustomed to seeing documents in redline, this may be a helpful tool not only for a council considering the amendments but also for the codifiers. For amendments, Waco often uses a redline form as seen below:

**Section 1.** That Section 25-201 of Article VIII “Stopping, Standing, Parking” of Chapter 25 “Traffic And Vehicles” of the Code of Ordinances of the City of Waco, Texas is amended to read as follows (additions, ~~deletions~~):

**Sec. 25-201. Parking of Oversize and Commercial Vehicles and Trailers, Boats, or Boat Trailers Prohibited on City Streets ~~in Residential Districts~~.**

- (d) The following words and phrases, when used in this section, shall, for the purpose of this section, have the meanings respectively ascribed to them as follows:

*Commercial Vehicle* shall mean bus, semi-trailer, pole trailer, truck tractor, house trailer, special mobile equipment, farm tractor or implement of husbandry.

*Oversize Vehicle* shall mean motor home, any motor vehicle that exceeds twenty (20) linear feet, or any commercial motor vehicle with a rated capacity in excess of one and one-half (1-1/2) tons according to the manufacturer's classification.

- (e) It shall be unlawful for any person to park or stand a commercial vehicle, oversize vehicle, trailer, boat, or boat trailer or to allow any commercial vehicle, oversize vehicle, trailer, boat, or boat trailer to park or stand upon any public street, highway, alley or public right-of-way between any street and alley, within any part of the city ~~classified by the zoning ordinance of the city as a single family residence district, two family and attached single family residence district, multiple family district, or multiple family residence district.~~
- (f) It is an affirmative defense to this section that the vehicles ~~are~~ is:  
In an M-1, M-2 or M-3 zoning district;...

The Waco council likes this form so much that staff provides a redline even for complete rewrites or major revisions. When staff creates this mostly “red” document, it is just for illustrative purposes and is not the ordinance that actually is signed by the mayor or forwarded to the codification company.

## 6. Use of Definitions

Words that are subject to interpretation and technical words should be defined. If a term is not defined, a court will define the term for you, using the common ordinary meaning.<sup>29</sup> In both ordinances and contracts, definitions can cause problems if not drafted appropriately. Defense

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<sup>29</sup> *Paxton v. City of Dallas*, 509 S.W.3d 247, 256-57 (Tex. 2017); see also *Board of Adjustment of San Antonio v. Wende*, 92 S.W.3d 424, 430 (Tex. 2002)(for ordinances, courts use same rules of construction as for statutes).

attorneys can defend very successfully a prosecution by focusing on undefined or ill-defined words. “What is a weed?” - that was the subject of a long, municipal court, jury trial in Dallas.

But you should not have to define every word with every enactment. Define “City,” “City Manager,” “days,” “property,” and “person” in the General Provisions section of the code. Most definition sections in the General Provisions begin with a phrase like:

In the construction of this Code, and of all ordinances and resolutions passed by the city council, the following definitions and rules of construction shall be observed, unless such construction would be inconsistent with the manifest intent of the city council....<sup>30</sup>

If a particular enactment needs a different meaning, then you always can provide a particular definition for that section or chapter.

If a definition section in a particular enactment is needed, then that should be a distinct section from the other sections so that they can be easily found. Defining words inside paragraphs with parentheticals and quotes should be used sparingly in contracts, but should not be used in ordinances. These parenthetical definitions are hard to find, especially for non-lawyers. When a prosecutor is trying to prove elements of an offense, it is much easier to point to a distinct definition than a parenthetical lodged in a paragraph two pages away from the operative provision.

#### **7. Other Suggestions:**

- a. Use active voice;
- b. Place the actor before the verb;
- c. Use the present tense;
- d. Avoid discretionary words like “may,” “should,” or “guidelines”
- e. Definitions – too many? Is the defined word actually used?
- f. Avoid references to state law or other provisions of municipal code because these provisions can change or be deleted;
- g. When drafting a contract, try to think like your most ill-intentioned, contracting party. When you are drafting an ordinance, try to think like a defendant trying to avoid the law or like a defense attorney arguing to the jury or judge. Thinking about loopholes, side effects, and worst case scenarios now can result in the tightening of the ordinance language and avoid future problems.

#### **IV. Preemption**

Various bills were passed in the 88<sup>th</sup> Texas Legislative Session that attempt to preempt cities’ ability to regulate the health, safety, and welfare of its residents. Instead of surgically preempting specific regulations, like plastic bag bans, these laws are very broadly written.

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<sup>30</sup> Code of Ordinances of the City of Waco, Texas § 1-2.

H.B. 2127, referred to by some as “Super Pre-Emption” and by others as “the Death Star,” was declared unconstitutional by State District Judge Maya Guerra Gamble. *City of Houston v. State*, No. D-1-GN-23-003474 (345<sup>th</sup> Civil District Court, Travis County August 30, 2023). The parties have appealed. This bill prohibits cities from adopting or enforcing rules in a field of regulation occupied by a provision of the Agriculture Code, Business and Commerce Code, Insurance Code, Natural Resources Code, Finance Code, Labor Code, Occupations Code, and Property Code with some exceptions. The bill creates a private cause of action for cities to be sued after the party gives the City three months’ notice of the violation.

Likewise, House Bills 1750 and 2308 attempt to limit cities’ ability to pass laws related to agriculture. These laws have been discussed much in 2023, so, I will not detail them here. But you need to be aware of these bills as you write ordinances and give legal advice to your clients.

## **V. Conclusion**

Like any drafting attorney, I am going to borrow my closing from David Johnson, one of the best ordinance drafters: “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 the suggestions described above.”<sup>31</sup>

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<sup>31</sup> David Johnson, *Drafting Enforceable Ordinances*, Texas City Attorneys Association Riley Fletcher Seminar, 2013. [https://texascityattorneys.org/2013speakerpapers/RileyFletcher/MunicipalOrdinances\\_DavidJohnson.pdf](https://texascityattorneys.org/2013speakerpapers/RileyFletcher/MunicipalOrdinances_DavidJohnson.pdf).