



# Drafting Ordinances to withstand Constitutional Challenges

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# Initial Framework

- ▶ Lot depends on type of city (general law v home-rule)
- ▶ Going to talk about regulations and not one-offs
- ▶ 2 Primary Keys
  - ▶ Gov Purpose
  - ▶ Statutory Construction

# Keep in Mind Texas Mentality



# Key #1 – Governmental Purpose

- ▶ Ask “why do we need this ordinance”
- ▶ Need a government reason and ordinance must be targeted to reason
- ▶ The more important the constitutional right at issue, the stronger the reason needs to be
- ▶ And the more targeted the ordinance should address

# Whereas Clauses

- ▶ Legislative findings
- ▶ Backup documents (avoid arbitrary and capricious determinations)
- ▶ Judicial deference

# Example – City of Euphoria

- ▶ Ten residential subdivisions in City
- ▶ Code of Ordinances reads:
  - ▶ “No property owner within the residential subdivisions of Alpha and Beta may park or stand or may allow to be parked or stand any vehicle on the public right-of-way adjacent to their property at any time, with the only exceptions being:
    - ▶ A. a delivery vehicle which is left standing, with engine running, and is standing no longer than ten minutes.
    - ▶ B. a transportation vehicle which is left standing, with engine running, and is standing only so long as needed to allow the loading and unloading of passengers.

# Does this make sense?

- ▶ Citizens in the 2 subdivisions raised equal protection concerns
- ▶ Raised arbitrary and capricious concerns
- ▶ Raised discrimination and oppressive concerns
- ▶ Just to name a few

# But – code does not list whereas clauses

- ▶ Explained Subdivisions Alpha and Beta are oldest in the City
- ▶ Roads are more narrow than any others (only subdivisions that narrow)
- ▶ Fire chief measured width of new fire trucks and ambulances
- ▶ Measured average width of personal vehicles
- ▶ First responder vehicles cannot get through if cars are on both sides of the road
- ▶ Have to drive through people's lawns



# Measurements of Truck When Alpha & Beta Were Built



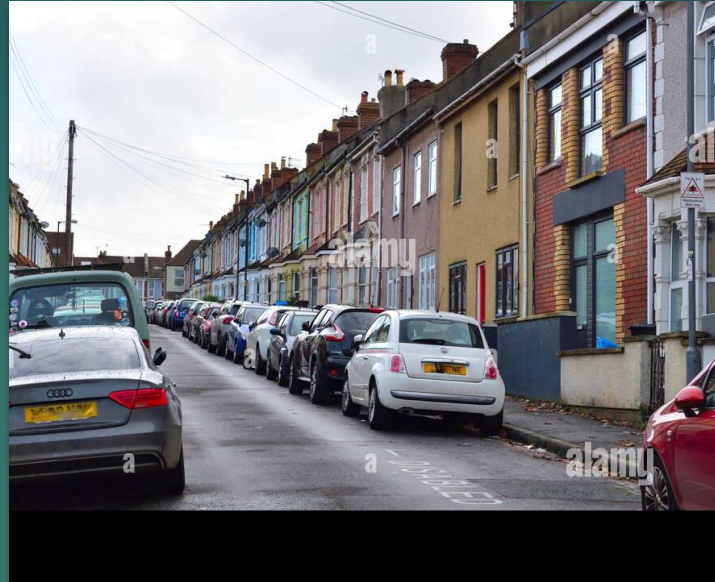


13 Feet Minimum Height



Today's Trucks

# Streets & Cars





Funny Pictures Help

# Now how many think that makes sense

- ▶ Explain authority in Whereas clauses
- ▶ Explain reasons you need the ordinance
- ▶ Balance general vs specific whereas findings

# A word about motive

- ▶ Courts do not ask whether the legislator subjectively believed or was improperly motivated, but rather whether an objective lawmaker could have concluded the purpose of the law legitimate, supported by an actual basis for the conclusion.
- ▶ Data, data, data
  - ▶ Empirical studies
  - ▶ Citizen comments
  - ▶ Department reports

# Have backup

- ▶ Legislative findings are arbitrary and capricious if they have no foundation in law or fact
- ▶ Relationship connections (rational basis, intermediate scrutiny, strict scrutiny)
- ▶ The evidence does not need to be overwhelming, but does need to be present in the record.

# Some Cities Take It More Seriously Than Others







Careful of Constitutional Arenas



Balance with Public Good

## 2<sup>nd</sup> Key Issue – Statutory Construction

- ▶ Draft ordinance consistent with statutory construction
- ▶ Structure ordinance to avoid ambiguity when possible
- ▶ Remember the main statutory construction principals and restate them, when necessary

# Code Construction and Civil Code Construction Acts

- ▶ Texas Gov't Code chapter 311
- ▶ Texas Gov't Code chapter 312
- ▶ Texas Code of Criminal Procedure Art. 1.03
- ▶ Texas Penal Code § §1.02, 1.03
- ▶ Texas Penal Code §1.05 (no strict construction)

# How Will You Enforce It

- ▶ General Penalty Provision
- ▶ \$500 vs \$2,000 fine
  - ▶ Proof
- ▶ Disclaim Application – then what?

# Examples out of 311/312

- ▶ Presumptions (presumed valid, presumed prospective, presumed result is not absurd, presumed public interests are favored over private)
- ▶ Specific controls over general
- ▶ Savings/severability/repealer
- ▶ Use of plain and ordinary meaning
- ▶ Statute read as a whole

# Intent controls

- ▶ Courts primary objective is to give effect to the Legislature's intent. *Colorado Cnty. v. Staff*, 510 S.W.3d 435, 444 (Tex. 2017)
- ▶ Courts presume every word in the ordinance is used for a purpose and give effect to each sentence, clause, and word if reasonable and possible. See *Texas Workers' Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex.2000).
- ▶ If a statute defines a term, a court is bound to construe that term by its statutory definition only. TEX. GOV'T CODE § 311.011 (b); *Transp. Ins. Co. v. Faircloth*, 898 S.W.2d 269, 274 (Tex.1995); *Tijerina v. City of Tyler*, 846 S.W.2d 825, 827 (Tex.1992).


# Surest Way to Know Intent is the Words Chosen

- ▶ The task of statutory interpretation begins and, if possible, ends with the language of the statute.”  
*Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 486 (5th Cir. 2013).
- ▶ Courts take statutes as they find them.  
*RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex.1985)



# Major Principals

- ▶ A cardinal principle of statutory construction is to save and not to destroy.’ *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30, 57 S.Ct. 615, 621, 81 L.Ed. 893. It is our duty ‘to give effect, if possible, to every clause and word of a statute,’ *Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 395, 27 L.Ed. 431,
- ▶ The canon is thus a means of giving effect to congressional intent, not of subverting it.
- ▶ In construing statutes, we ascertain and give effect to the Legislature's intent as expressed by the language of the statute. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008)
- ▶ When construing statutes, one cannot divorce text from context. *Pape Partners, Ltd. v. DRR Family Properties LP*, 645 S.W.3d 267 (Tex. 2022).

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- ▶ To determine a statutory term's common, ordinary meaning, we typically look first to their dictionary definitions and then consider the term's usage in other statutes, court decisions, and similar authorities.” *Tex. State Bd. of Exam'rs of Marriage & Family Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 35 (Tex. 2017)
  - ▶ To construe an unambiguous statute, we do not resort to extrinsic aids like legislative history. *Tex. Health*, 569 S.W.3d at 135 (recognizing “that section 311.023 of the Code Construction Act permits courts to consider a statute's legislative history ‘whether or not the statute is considered ambiguous on its face,’ ” but adding that “[c]onstitutionally, it is the courts’ responsibility to construe statutes, not the legislature’s”); *Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012).
  - ▶ Consider statutes as a whole rather than their isolated provisions. *Shinogle v. Whitlock*, 596 S.W.3d 772, 776 (Tex. 2020).

# Texas Code of Criminal Procedure

- ▶ Ordinances enforced as codes (general penalty provision)
- ▶ Art 1.03 (presumptions) –
  - ▶ intended to prevent commission of criminal acts,
  - ▶ Exclude hope of a voidance/escape
  - ▶ Insure trial with as little delay as possible
  - ▶ Insure fair and impartial trial

# Texas Penal Code

- ▶ § 1.02 Presumptions
  - ▶ Deterrent influence;
  - ▶ Punishment;
  - ▶ Limit official discretion (avoid arbitrary and capricious)
- ▶ § 1.03 (effect of code) (does not bar civil liability, damages, etc.)
- ▶ § 1.05 (no strict construction and adopts sections from 311)

# Helpful Techniques

- ▶ Use Official Comments (i.e. footnotes). *Fetter v. Wells Fargo Bank Texas, N.A.*, 110 S.W.3d 683, 687 (Tex.App.–Houston [14th Dist.] 2003, no pet.); *Lockhart Sav. & Loan Ass'n v. RepublicBank Austin*, 720 S.W.2d 193, 195 (Tex.App.–Austin 1986, writ ref'd n.r.e.).

## **Sec. 1.06.002 Preparation, contents and posting of agenda**

- 1) For City Council:** The agenda will be prepared by the city manager or designee, under the direction of the Mayor.<sup>1</sup> Any member of the city council, including the Mayor, may place an

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<sup>1</sup> Official Comment: The City Charter §3.01 states, in part, that the Mayor shall be responsible for the preparation of the agenda for each city council meeting. However, such does not prevent the responsibility from being delegated but subject to the direction of the Mayor.

- ▶ Draft with subsections, not sentences (rule of last antecedents)
  - ▶ “No person shall own a red truck, house with no windows, or lawnmower.”
  - ▶ “No person shall own a red:
    - ▶ Truck
    - ▶ House with no windows
    - ▶ lawnmower
- ▶ Express exclusion rule (*expressio unius est exclusio alterius* )

# More hints

- ▶ Provide some level of due process (appeal)
- ▶ List your darn good reasons for the ordinance
- ▶ Draft for normal humans (to the extent possible)

