Drafting Regulations: The Power of Clarity

By Kim Mickelson



When you are writing laws you are testing words to find their utmost power.... [T]hey have to make things happen in the real world, and ... they only work if people believe in them. If your law exacts a penalty, you must be able to enforce it—on the rich as well as the poor.[1]

As law students, we were taught the necessity of clear and concise writing. We were trained to identify when clarity is needed and when the absence of clarity will lead to potential legal issues. As local government attorneys we must understand and analyze a client's issue and draft a written response designed to implement their desired outcome, often through regulations. Every year, state and local bar associations, bar journals and CLE providers present courses on legal writing, how to do it better, and what constitutes good legal writing in specific contexts. Considerations for drafting legislation are not widely discussed, and aren't always a component of legal writing courses in law school.[2] Drafting laws is a form of technical writing, and for a City Attorney, local regulations are no different than state or federal statutes–every word of an ordinance may be scrutinized, interpreted in many different ways, and ultimately challenged.

Local regulations are interpreted and applied daily by city staff; drafts of new or revised regulations are written by staff, consultants, or attorneys, and are sometimes challenged—in discussions at "the counter" or moving on to various appeals hearings or court cases. The goal of this article is to outline steps in tackling regulatory drafting and interpretation, to encourage critical thinking about the desired end result, and the iterative nature of drafting and review. It will also consider issues that can arise post-adoption, and will examine some of the legal implications of trends, buzzwords in planning and local government circles, and what challenges they pose for drafting and implementation.

Basic Concepts: Ordinances

An ordinance is a formal expression of legislative authority by a city. An ordinance constitutes a city's laws, and may establish standards of behavior, requirements for permits, approvals, land uses and allowable (or prohibited) development, and provide for penalties for violation. Great deference is given to ordinances, and one who challenges an ordinance bears the burden of proof. Local ordinances are presumed valid *ab initio*. But they must be properly drafted.

First, a city must have the authority to pass an ordinance on a particular subject—either under home rule powers or other statutory authority. Second, an ordinance must "set forth with clarity some norm or standard by which all persons may know their rights and obligations thereunder."[3] (This doctrine of reasonable definiteness and certainty must be met for any legislation affecting a person's life, liberty, or property; the general rule is that a person of common intelligence must be able to understand what conduct is required or prohibited.)[4] Third, the U.S. Constitution and state constitutions impose additional protections that affect the drafting, interpretation and application of regulations—notably due process, equal protection, and specific enumerated rights.

State laws and home rule charters often impose additional conditions in order for ordinances to become effective: for example, requiring passage at a properly-posted and noticed meeting, and publication.[5]

Basic Requirements: Drafting ordinances generally requires the following:

1. **Number and Title/Caption.** It's generally a good idea to follow the "one bill, one subject" rule. The caption should indicate what chapter and section of the code is being amended and how. It should also generally state the elements of each major change, including the individual elements outlined below.

2. **Recitals.** The "Whereas" clauses outline the general legislative authority for the enactment, findings of governmental interest or police power applicability, and the process that was followed. These are sometimes adopted as stated by a provision following the ordination clauses. Recitals should evidence legislative intent, however, and not include regulatory standards or requirements.
3. **Ordaining Clause.** "Now, Therefore, be it ordained by the City Council of the City of Greenacres..."
4. **Text of the Regulations Being Adopted.** The regulations may be set out in full within the pages of the adopting ordinance, or may be referred to as a separate document attached to the adopting ordinance. If attached, specific reference must be made within the adopting ordinance in order for the attached regulations to be valid.
5. **Effective Date.** The effective date should be stated, pursuant to applicable limitations in the city charter (if adopted by a home rule city), or in accordance with State law, which may provide different notice and publication requirements for ordinances to become effective.
6. **Severability Clause.** Particularly in complex ordinances such as land development regulations, a provision should be included providing for severability of provisions that may be found invalid by a court. The invalidity of some portions should not render the entire ordinance invalid.
7. **Other Clauses.** Other provisions are sometimes included, such as a section certifying compliance with open meeting laws, number of readings, instructions to staff or the city secretary (e.g., to fill in the effective date, publish in a particular manner), certifying to the availability of documents to the public prior to adoption, or providing for prospective enforcement. These clauses may be a matter of local preference or prior practice by a city manager, or may be required by home rule charter.

A typical zoning amendment process can take between 90-120 days; if the administrative provisions are included as part of the text of the zoning ordinance, legal counsel needs to determine whether changes to the administrative provisions require compliance with the public notice and hearing requirements.

8. **Penalty.** If a city has codified its ordinances, the first or second chapter of the Code of Ordinances often contains a general penalty clause. However, if a penalty is not specifically spelled out in a particular ordinance, make sure that the general code penalty provision applies to the ordinance being drafted.
9. **Signatures.** Ordinances generally contain a sentence certifying "Passed, adopted and approved by the City Council of the City of Greenacres on ___day of _____, 2013", above signature lines. Signature lines are generally for the mayor and city secretary, who attests to the action and to the mayor's signature. Some cities have department heads or city manager, and their city attorneys sign off on each ordinance, sometimes "As To Form."

Most state municipal organizations have papers available online regarding ordinance drafting, and many cover the subject handbooks for elected officials. See, for example, the Texas Municipal League Handbook for Councilmembers and Mayors, Chapter 7.[6]

Attachments, Appendices, Administrative Implementation Materials

Cities often pass ordinances adopting regulations that have other documents referenced within them. For example, a historic preservation ordinance may reference "design guidelines," and provide that those guidelines may be adopted by and implemented by staff or the commission. Another common example is design standards for subdivision improvements, which subdivision ordinances commonly delegate to the City Engineer. What is the legal relationship of "design standards" or other "appendices" to ordinances?

Appendices such as those described above are often adopted as attachments or supplemental administrative materials to an ordinance in order to escape (staff hopes) the often lengthy process of amending ordinances that may be required by state law or local home rule charter. A typical zoning amendment process can take between 90-120 days; if the administrative provisions are included as part of the text of the zoning ordinance, legal counsel needs to determine whether changes to the administrative provisions require compliance with the public notice and hearing requirements. Home rule charters sometimes prescribe two or three readings of an ordinance, and may impose additional reading require-

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ments if the ordinance is amended in any way between readings.

Professionals or subject matter experts often prepare these technical documents, and technical details are not considered a policy matter. The ordinance language referencing these additional documents should be carefully written, and some review and oversight by council included; otherwise this can lead to a potential delegation of authority problem, limiting the efficacy of the legality or enforceability of the standards. Let's look a little more closely at the two examples:

Subdivision Design Standards. Beyond the policy questions of how wide sidewalks should be, and whether they should meander or not, the thickness, material, and soil testing issues for streets and sidewalks are technical in nature and governed by generally acceptable engineering practices. There is often less dissent generated by these non-subjective standards than in other areas of land development.

Historic Preservation District Design Guidelines. Ideally, the historic preservation ordinance should have clear policy direction for the scope and content of design standards. If the city council truly wishes the landmarks commission to regulate paint colors, the ordinance should say so. Often council appoints a commission with broad regulatory expertise, and wishes to defer to them the goals and standards. How far the commission may legally go before it crosses a line into legislating is the ultimate question.

However, technical or design regulations are not immune from challenges of arbitrary and capricious adoption or application, or usurpation of the legislative role that is filled by city council. Absent including these large documents into the text of an ordinance, the best practice is to have the city council adopt these by reference in the adopting ordinance of the regulation, and for the ordinance itself to provide that they are approved by city council, and with further revisions be likewise provided.

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Ordinance Writing—The Process

A request to draft an ordinance, or a request to review an ordinance, may land on your desk for a number of reasons:

- Current regulations no longer implement the current policy goals and objectives of the city council.
- Constituent interests have the ear of a councilmember or mayor.
- Actual practice doesn't follow what's in the existing code sections.[7]
- The stack of amending ordinances is thicker than the original.
- The ordinance is older than the department's youngest staff member.
- Everyone who uses the current regulations or lives with their effects is dissatisfied with them.
- There's a lack of clarity in current regulations, or there are changing land use or demographic patterns that need to be addressed.

any of these elements can lead to piecemeal ordinance corrections that ultimately aren't consistent in purpose or grammar, and eventually it is easier to start from scratch.

The Process: The writing process itself leads to clear, complete ordinances:

1. Think It Through. Analyze what it is that your client wants to accomplish. Discuss it thoroughly with staff and think through unintended consequences.[8] Agricultural zoning districts, for example, often don't include height limitations, leading to potentially unconsidered land uses: wind turbines, rocket launches, and large religious statues.[9] Use your imagination during this part of the process—solve the problem that hasn't come up yet.

Thinking through the elements may be the longest part of the process, if you have the luxury of time. We have all experienced the department head or city manager screaming "We need to adopt an ordinance taking care of this (issue/problem/mess/crisis) for next week's agenda!" Once the end result is understood, it is easier to figure out how to say it so that is accomplished. Also remember the ultimate audience and user: Will they read it and understand it the same way? Staff may have a shorthand way of describing something, or understand that a term means something particular to them, that it might not mean to a layperson. Do not get sidetracked by a desire "to keep the ordinance short" at the expense of clarity.

Example: The City Manager's goal in a border city was to increase the amount of landscaped, grassy, treed areas. The ordinance drafted to implement the goal stated: "All parking lots serving commercial land uses shall provide green space equivalent to 30% of the required paved parking area." One property owner balked, then painted an additional 30% of the paved area green. The judge agreed with the property owner; "green space" was not defined, and the ordinance as written did not address landscaping or trees.

2. Think About the Preferred Local Style of Writing. The temptation to draw inspiration or actual language from another ordinance can be great—why reinvent the wheel? One size does not fit all, and what's appropriate in Chicago, may "not cotton"[10] in small-town Texas. If you do use ordinance examples from other cities, be sure to dovetail them to your local situation: don't leave in references to home rule charters in a non-home rule city; don't leave in references to another state's laws if it's not the same state the city is in. (One planning commission, in a city of under 1000, told me they wanted to adopt Houston's subdivision regulations (Code of Ordinances of the City of Houston, Chapter 42). This was in West Texas, and different amounts of annual rainfall and required drainage provisions alone made this untranslatable). Also consider your city's staff size and expertise when reviewing ordinances from other jurisdictions. Form-based codes administered by a staff holding masters degrees in planning and AICP certifications will likely pose administrative problems for a smaller town with staff who may not be trained in planning.

At federal, state and local levels, the trend is away from legalistic terminology and towards clear or plain English. My experience has actually been that it is non-lawyers who tend to insert unnecessary excess words and legal terms into an ordinance, and I am trying to undo it. (Lawyers are by no means innocent of this, either) Here are a couple of simple examples written by non-lawyers:

a. The regulations contained herein are hereby adopted pursuant to the authority granted to the citizens of the State by the U.S. Constitution, the State Constitution, and the laws of the State of . . . .
   The regulations contained herein, as such may be amended from time to time, are necessary to secure the public health, safety, welfare and morals from the effects of . . . .
b. A sound interpretation of any standard contained herein cannot be ensured without a careful analysis of the end to which said regulation is directed. As such, it is the further intent of the City Council that administrators and other persons shall interpret the provisions of this Code . . . .

3. Who Should Draft the Ordinance? These examples bring me to the next point: who should draft a particular ordinance? Sometimes staff, citizens, or outside consultants do so. Regardless of who prepares the first draft, all should be reviewed by the City Attorney prior to adoption. Some cities allow staff to draft certain types of ordinances, or to draft all ordinances for review by the City Attorney. Some cities have adopted a policy that an ordinance is a legal document and makes certain legal representations; therefore, it may only be drafted by an attorney. Both approaches have their pros and cons—lawyers are guilty of using too much legalese, as well. Smaller cities, in particular, may attempt to write ordinances by staff or citizens. In one city, a citizen group undertook very extensive research in their revision—really commendable time was spent on the process. The final document contained references lifted from communities in other states, including references to "borough laws" (from Alaska), and references to "home rule charter" though it was a general law city.

4. Sometimes a 'Streamlined' Process Is Not the Best Approach. There is a trend in the literature and among consultant pitches that a rewrite of regulations (land development codes, in my experience) will "streamline" and "simplify" processes. There may be a belief that city processes move too slowly or are slow on purpose—to thwart or limit development or justify jobs, or because public staffers get too much time off or are lazy, or for some often incorrect public perception. I invite you to consider that "bureaucracy" is not a bad word. I maintain that there is nothing wrong with "bureaucracy"[11]; it has gotten a bad rap, but at its root, it establishes a process by which individual substantive and procedural due process rights are protected. Regulations dealing with property rights, in particular, , must be adopted in accordance with statutory and constitutional principles of due process. Due process takes time. Thorough review of materials by staff takes time.

Consider carefully whether "simple" or "streamlined" is really better—as in the example of "green space" above—it was simple, it was brief, but it was not clear. Other terms used in ordinance revisions include "readable", "user friendly" and similarly desirable goals. From a legal perspective, I want laypeople to be able to read, understand, and use regulations. "Streamlined" or "simplified" ordinances may pose legal problems. More detail in an ordinance means that substantive due process is better assured as well. Streamlining ordinances often leads to creating more administrative approvals, and means a tradeoff in regulatory length: standards for review must be spelled out in a clear manner that can survive a vagueness or delegation of authority challenge, and this may mean that the regulations seem longer because of the additional detail:

Not clear: "The Director of Public Works shall approve a landscaping permit if she determines that the project has adequate landscaping." [12]

Better: "The Director of Public Works shall approve a landscaping permit if the plans show that all of the following conditions will be achieved:" (with a list of the desired elements for landscaping).

Don't let your administrative official's review become a "because I said so" standard.[13]

5. Internal and External Consistency Are Important. An ordinance should be internally consistent and externally consistent with other ordinances or chapters of the City Code. Defined terms should be used consistently. Sometimes a word will be used in one chapter of the City Code and then be used in a different way in another chapter. Cross-check terms with every possible ordinance. Consistency is important as well once the ordinance is adopted and is being used. When writing fiction, or a paper, you want to keep a reader's attention—you do so by changing terms to describe the same thing. In an ordinance, alternating between "city limits" and "municipal boundaries" can lead to challenges that you must have meant different things. In drafting regulations, the drafter and reviewers should always be cognizant of why they are using certain terms and language.

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Writing in Plain English

There has been significant discussion about, and conversion to, ordinances that are written in "plain English," *i.e.,* not legal jargon, and that use tables and pictures to clarify terms.[14] These all help an ordinance, this is true. Consider your state rules of construction, and remember that words control over pictures—so the drafting of the regulations must still be clear and understandable.

Drafting should ideally start with a team of both staff and lawyers. There are some ordinances or parts of ordinances that lawyers will never want to draft and probably should not; there are portions staff shouldn't draft because they involve truly legal concepts. Lawyers probably won't draw pictures, staff may be more inclined to the technical or the visual. Whoever drafts any portions of an ordinance should start with a checklist of basic conventions that everyone should follow:

- Does the city have a standard format for ordinance drafting, including numbering and capitalization conventions? Do you capitalize "City Council" or do you always use "council"? Ditto for other staff and boards.
- What does the charter and state law say and require in the context of the project? What pre-legislative processes must be followed, and who must be included in reviews?[15]
- What do other code chapters include about the subject? Chapter one of a city code will often contain general definitions used throughout various chapters. Don't reinvent the wheel and redefine a term that is already defined. Chapter two is often an administrative section, and may contain provisions for plan commission, zoning board of adjustment, and planning staff. Other chapters may impact, and potentially conflict with, the current assignment.
- For non-defined terms (e.g., perhaps "Commission" is not yet a defined term—is there more than one City Commission?), what standards do you want to set now for consistency? A complex or multi-phased project may have multiple drafters, and final compilation and review is easier if these are set at the start of the project.

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- Remember to remove placeholders put in while drafting. A final consistency review is critical to the final document.
- Avoid colloquialisms or abbreviations unless they have been clearly defined or spelled out previously—say what you mean to say:
- This Legend explains the initials. "SF" districts are "single-family" residential districts; "LR" districts are "local retail" districts, etc.[16]

Drafting is an iterative process. A draft regulation may go through many, many drafts, and should be carefully vetted by staff and legal counsel to determine if it really works as written. Read it out loud. Walk through an imaginary permit process—do the steps as written make logical sense, is this how the process will really occur?

Timing of adoption

I recommend that the calendar for adoption be considered early in the process and be in strictest compliance with the procedural requirements applicable to your jurisdiction and the type of regulation. Ordinances requiring certain procedural steps may be declared invalid if the steps are not taken.[17] Texas Local Government Code Section 211.007(b) establishes the process for planning commission review of zoning regulations:

> The zoning commission shall make a preliminary report and hold public hearings on that report before submitting a final report to the governing body. The governing body may not hold a public hearing until it receives the final report[18] of the zoning commission unless the governing body by ordinance provides that a public hearing is to be held, after the notice required by Section 211.006(a), jointly with a public hearing required to be held by the zoning commission. In either case, the governing body may not take action on the matter until it receives the final report of the zoning commission.

I identify four requirements for the planning commission in this section: (1) a preliminary report, (2) and (3) at least two public hearings, and (4) a final report. The statute is silent as to whether these may be done at the same meeting or must be done at separate meetings. When I have mentioned this in presentations, I am inevitably questioned after, by planners or local government attorneys asking "did you say hearings?" Few may object to a "streamlined" process because it moves a project along—imagine your planning staff telling developers who have been used to a one-step process (*e.g.*, one planning commission hearing/meeting) that it will now take three. A controversial case will often be conducted over more than one public hearing, just because of the controversy.

Implementation and Future Interpretation

In the long run, it will be helpful to develop an operating procedure regarding the function and availability of development manuals, departmental interpretive materials and historical documents. In interpretive contexts, the original intent of a regulation may be at issue. Records retention laws for your local jurisdiction may have led to documents being discarded

over time. Useful tools that should be considered, with separate retention rules, include development manuals and departmental interpretations. I have advised staff on a unified development code project to compile explanatory commentary contained in the draft into an internal manual to guide and explain the intent to future users, rather than including the information within the regulation, when it really had no regulatory effect. The consultant team prepared a draft regulation that included definitions, examples and explanations, or references to outside material, often parenthetically:

> Grant a change of occupancy from one nonconforming use to another, provided the new use is within the same or higher (more restricted) use classification as the original nonconforming use.
>
> Fulfill responsibilities assigned to the City Engineer under these Land Development Regulations regarding certain activities which must be authorized by specific use permit (excavations, concrete casting facilities).

Many cities already utilize and maintain a file or a system for retrieving prior interpretations so that staff may continue to be guided by those. This may include interpretations by the administrative department, the City Attorney's office, or the board of adjustment. In the computer age, compiling and being able to reference these has gotten simpler.

Some cities are also considering adoption of a process to formalize the executive officer's understanding and intent of the effect of local ordinances. The practice originates in the concept of presidential signing statements, a practice that was widely used in the Reagan administration.[19] Signing statements are used at the federal level to set out likely effects of legislation, identify issues or concerns, and explain how a bill will be put into effect, and may include what the President believes the law means. It is not clear that such statements would have any legal effect, though some appellate courts have considered signing statements in interpreting laws.[20] Legislative history in any form can certainly be helpful in determining legislative intent when the text is unclear. But that's our first job as local government lawyers—to make sure it is clear.

In conclusion, ordinance drafting requires the participation of a wide range of individuals. City staff and lawyers should not overlook each others' roles. Lawyers may often remind staff that they shouldn't be practicing law without a license, but lawyers probably shouldn't practice in some technical areas without the requisite training and skills, either. The desired end result is clear, legally sound regulations that can be understood by users, and easily applied and enforced. If the regulations are not clear, the ability to enforce is removed to the courts, and the ability of a local government to regulate in the area is minimized, if not eliminated. A careful, well thought-out process will ultimately resolve this problem and keep regulations out of the courtroom.

Notes

1. Hilary Mantel, *Wolf Hall*, p. 533 (Henry Holt & Co. 2011)
2. Lorri Unumb, an attorney and law school professor, now Vice President of Autism Speaks, Inc., in South Carolina, spoke about her experience writing a bill for consideration by the South Carolina legislature: "I did not really know how to write a bill. I had watched 'Schoolhouse Rock' before, and that was kind of my inspiration and guidance." "Walking the Tightrope on Mental Health Coverage," *The New York Times*, Saturday, December 22, 2012, B1, at B5.
3. Sea Isle City v. Vinci, 34 N. J. Super. 273, 274; 112 A2d 18, 19 (1955).
4. This may have contributed, in small part, to the clear language initiatives at all levels of government.
5. Failure to comply with charter requirements can void an ordinance. See, City of New Braunfels v. WWGAF, Inc., et al., 2012 WL 423919, No. 11-10-00009—CV, Feb. 2, 2012; Village of Gulfport v. Buettner, 114 Ill.App.2d 1 (3rd Dist. 1969) (adoption of resolution not sufficient where state law calls for ordinance).
6. Where it states: "drafting of ordinances is best left to the city attorney," (TML Handbook, (2010) p. 52, a concept that will be discussed later in this paper.
7. A planning director explained to me that, though the city had recently gone through an 18- month process to have a unified development code prepared and adopted by Council, because staff didn't understand all of it, they were following only the provisions they understood, and otherwise defaulting to how they did it before.
8. The large boot in front of the LLBean store in Freeport, Maine, was challenged over whether it was a "sign" or a "site feature."
9. All real cases. As to rocket launches, Augusta County, Virginia wrestled with Valley Aerospace Team's practices until a new site was located: outside of Tulsa, Oklahoma, a 49-foot tall statue of Quan Am was erected at a Buddhist Temple in an agricultural zone with no height limits.
10. In Texan: sit well; be liked or accepted.
11. I also believe that my clients wear the white hats, and we work for the good guys.
12. Another of my favorites is: "Each subdivision plat shall provide for adequacy of traffic circulation." This is a clause I have argued gives planning commissions some discretion in denying plats, so I can't claim to be successful always in achieving total clarity or in not using vagueness to my client's advantage. As Louis XIV said: "In every treaty, insert a clause which can easily be violated, so that the entire agreement can be broken in case the interests of the State make it expedient to do so." Maximes pour le Dauphin Louis, XIV, King of France (1638-1717).
13. *Cf.* Juracek v. City of Detroit, No. 13-CV-10190 (E.D. Mich. Jan. 18, 2013), reported in IMLA Legal Team eNews Issue 2, Jan. 24, 2013. (Protesters challenged a police order to move across the street for "safety" reasons, which was not codified (nor defined) in an ordinance, was unconstitutionally vague and was based on "nothing more than 'because I said so' logic."
14. *See* Exec. Order 12866, Regulatory Planning and Review, Sept. 30, 1993; Exec. Order 12988, Civil Justice Reform, Feb. 5, 1996.
15. Texas's takings statute, the Real Property Preservation Rights Act, Ch. 2006, Tex. Gov't. Code, requires that certain regulatory actions be put through a takings impact analysis, with the potential outcome that compensation be paid to affected property owners. See also, Tex. Loc. Gov't Code §212.131, *et seq.*, which requires that certain moratoria actions are subject to pre-adoption procedures.

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Clean Water Act

18. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559, 112 S.Ct. 2130 (1992).
19. 33 U.S.C. § 1365(g).
20. *Laidlaw*, 528 U.S. 181.
21. *Id.* at 176-77.
22. *Id.* at 181-83.
23. *Id.* at 201.
24. *Id.* at 494.
25. *Id.*
26. *Id.* at 495.
27. *Laidlaw*, at 189.
28. *Id.*
29. *Id.* at *7-8.
30. *Id.*
31. *Id.* at 1021.
32. 33 U.S.C. § 1365(b).
33. 40 C.F.R. § 135.3(a).
34. *Hallstrom, supra*, 493 U.S. at 33.
35. The United States Court of Appeals for the Ninth Circuit has repeatedly stated that the 60-day notice requirement is jurisdictional. Center for Biological Diversity v. Marina Point Development Co., 535 F.3d 1026, 1031 (9th Cir. 2008) ("the giving of a 60-day notice is not simply a desideratum; it is a jurisdictional necessity"); Waterkeepers Northern California v. A.G. Industrial Manufacturing Inc., 375 F.3d 913, 916 (9th Cir. 2004) ("In our circuit, compliance with this notice provision is required for jurisdiction").
36. *Center for Biological Diversity, supra* at 1033-34.
37. *Id.* at 1034.
38. *Id.*
39. *Id.* at 1034-35.
40. *Id.* at 1142.
41. *Id.* at 1143.
42. *Id.*
43. 33 U.S.C § 1319(g)(6)(A)(ii).
44. 33 U.S.C. § 1365(b)(1)(B) (emphasis added).
45. *Laidlaw, supra*, 890 F. Supp. at 478-79.
46. *Id.* at 486-87.
47. *Id.* at 489-90, 490-92.
48. 33 U.S.C. § 1365(b)(1)(B) (emphasis added).
49. *Chesapeake, supra*, 769 F.2d at 208.
50. *Id.*
51. 33 U.S.C. § 1319(g)(6)(B)(ii) (brackets added).
52. *Black Warrior Riverkeeper, supra*, 548 F.3d at 991. ML

FLSA Myth Busters *Cont'd from page 13*

63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 766-767.
69. *Id.* at 765 & 767-771.
70. *Id.* at 767-768.
71. *Id.* at 768.
72. *Id.*
73. *Id.* (internal quotation marks omitted).
74. Hartman v. Arlington County, 720 F.Supp. 1227, 1228 (E.D. Va. 1989).
75. *Id.* at 1229.
76. *Id.*
77. *Id.*
78. *Id.*
79. Anunobi v. Eckerd Corp., No. SA-02-CV-0820-XR, 2003 WL 22368153, 2003 U.S. Dist. LEXIS 18535, at *5 (W.D. Tex. Oct. 17, 2003).
80. *Id.* at 2003 U.S. Dist. LEXIS 18535, at *1.
81. *Id.*
82. *Id.* at *2-*17.
83. *Id.* at *5.
84. *Id.*
85. *Id.* at *9.
86. *Id.*
87. *Id.* at *10.
88. *Id.* at *12-13.
89. *Id.* at *5.
90. *Id.*
91. D.O.L. Wage & Hour Division Opinion Letter, 1997 WL 998013 (March 17, 1997).
92. *Id.* (emphasis in original). ML

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16. In the author's opinion, "etc." in an ordinance is universally a bad idea. It creates no boundaries or limits.
17. Cosmopolitan Nat'l Bank of Chicago v. City of Chicago, 27 Ill. 2d 578 (1963).
18. This is a fairly standard provision in many state laws, stemming from the Standard Zoning Enabling Act. Sometimes local regulations refer to a "final recommendation" which may require more than a "report." This leads to lively city attorney discussions about what constitutes a recommendation: Is a memo from a planning commission that states, "we have no recommendation (but please get this off our plates)" sufficient? What about a tie vote?
19. Walter Dellinger, Assistant Attorney General, "The Legal Significance of Presidential Signing Statements," Memorandum for Bernard N. Nussbaum, Counsel to the President (November 3, 1993).
20. *See, e.g.*, Berry v. Dept. of Justice, 733 F.2d 1343 (9th Cir. 1984) (citing President Lyndon Johnson' signing statement regarding the Freedom of Information Act, Public Law 89-487 on July 4, 1966.). It is not clear that the Supreme Court would give any weight to such statements; there are five opinions that reference signing statements, perhaps the most interesting being Justice Scalia's mention in his concurrence in Hamden v. Rumsfeld, 548 U.S. 547, at 666 (2006), where he appears to chastise the majority for not considering it part of the legislative history. ML

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Held - The appeal was allowed.

The defence of qualified privilege applies to the occasion when a defamatory statement is made and not to the statement itself. In this case, a response to a community activist about an issue of municipal taxation, in the context of an ongoing public debate on the issue, fell squarely within the ambit of qualified privilege for an elected municipal official. For qualified privilege to apply, a defendant must have some interest in making the statement and those to whom the statement is made must have some interest in receiving it. The trial judge considered that qualified privilege did not apply because the communication itself was malicious.

This was not the correct analysis. The first step in the analysis is to determine whether the occasion in which the statement is made is one in which qualified privilege applies. If it does, then the court must decide whether the defence of qualified privilege is defeated because the impugned words are published maliciously. The trial judge's factual findings were not sufficient to enable the court to apply the correct law to the facts to arrive at a judgment. This necessitated a new trial to determine whether the council member's