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THE GOOD, BAD, AND UGLY: DRAFTING CLEAR REGULATIONS AND AVOIDING UNINTENDED CONSEQUENCES

by

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"When you are writing laws you are testing words to find their utmost power…they 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…"

Wolf Hall, by Hillary Mantel, p. 533.

DRAFTING GOOD REGULATIONS: MATCHING THE WRITTEN WORD WITH THE DESIRED OUTCOME

As lawyers, we are all taught the necessity of clear and concise writing. Our livelihoods depend on our ability to analyze the issue and come up with the words to implement a client's policy goals. Every year, our 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 certain specific contexts.

In the context of land development, local regulations are no different. Every year, local regulations--zoning and subdivision, sign, landscaping, parking, impact fee, drainage and floodplain standards, building standards, rules of procedure for land development appointed boards, subdivision or historic preservation design standards, and a multitude of other regulatory tools—are rewritten. Note that this previous sentence has blown approximately six rules of good writing, or many of the readers' pet peeves. However, this is not a guideline on good grammar or punctuation; it is not the author's intent to make you hearken back to your elementary or high school English teachers. The goal of this article is to encourage critical thinking and review in ordinance drafting, to help insure that the end result says what you want it to say.

This article will review some basic concepts about ordinance drafting, particularly in the land use or development regulation context. It will consider major issues that can arise post-drafting, and will examine the legal implications of trends, buzzwords in planning and local government circles, and what challenges those pose for drafting and implementation.

BASIC CONCEPTS

An ordinance is a formal expression of legislative authority by a city. They constitute a city's laws, laying out standards of behavior, building, requirements for permits, approvals, land uses and allowable or prohibited development. They provide for penalties for violation.

Texas Local Government Code, §51.001 provides:

> The governing body of a municipality may adopt, publish, amend, or repeal an ordinance, rule, or police regulation that:
>
> (1) is for the good government, peace, or order of the municipality or for the trade and commerce of the municipality; and
> (2) is necessary or proper for carrying out a power granted by law to the municipality or to an office or department of the municipality.

Great deference is given to ordinances, and the burden of proof is on the challenger to establish their invalidity. (FN) Local ordinances are presumed valid after the passage of three years, if no lawsuit has been filed to challenge the act, and the action was not otherwise void, pre-empted, governed as criminal conduct by the state or the federal government, or an invalid incorporation or annexation. See Tex. Loc. Gov't Code, §51.003. Texas Local Government Code Chapters 51 through 54 provide further guidance for various types of municipalities on ordinance authority and enforcement.

Enabling statutes provide specific authority for cities to adopt certain types of regulation. In the land use and land development context, these are generally contained in Title 7, Regulation of Land Use, Structures, Businesses and Related Activities, and Title 12, Planning and Development, of the Local Government Code. There are additional areas of enabling authority scattered elsewhere in the Local Government Code, as well as the Water Code, Natural Resources Code, Transportation Code, Alcoholic Beverage Code.

Adopting ordinances are the documents to which, in this discussion, land development regulations are included or attached, and generally contain the following elements:

1. Number and Title/Caption. It's 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 also generally states elements of each major change, and 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 there will be a reference to a separate document containing the regulations, which is attached to the adopting ordinance. If attached, reference must be made within the adopting ordinance for the regulations to be valid.

5. Effective Date. The effective date should be stated, following any limitations in the city charter, if adopted by a home rule city. State law provides different notice and publication requirements for ordinances in Tex. Loc. Gov't Code, Chapter 52.

6. Severability Clause. Particularly in complex ordinances such as land development regulations, a provision providing for severability of provisions that may be found to be

invalid by a court. The invalidity of some portions should not render the entire ordinance invalid, and this provides a clear message of intent that the legislative body intended it to be so.

7. Other clauses sometimes included. 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), 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 from out of state, or may be required by home rule charter.

8. Penalty. If a city has adopted a municipal code, the first or second chapter often contains a general penalty clause. Sometimes the penalty clause only allows penalties up to $500.00 per day of violation, whereas ordinances regulating the public health, safety and welfare are eligible for fines up to $2,000.00 per day. A city may have a local preference to not ever have the option of the maximum penalty, or the prosecutor may prefer having only one place to look for it. However, if a penalty is not specifically spelled out in a particular ordinance, the general code penalty provision should be inclusive of all types of ordinances.

9. Signatures. Ordinances generally contain a sentence certifying "Passed, adopted and approved by the City Council of the City of Greenacres on ___day of _____, 2012", above signature lines. Signature lines are generally for the mayor and city secretary, who attests to the action and the Mayor's signature. Some cities have their city attorney sign off on each ordinance, often just "As To Form." Other cities require the department head or city manager to also sign.

If drafting an adoption ordinance for a home rule city, careful attention must be paid to the requirements of the home rule charter. 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. The Texas Municipal League has several papers available online regarding ordinance drafting, and covers it in their Handbook for Councilmembers and Mayors, Chapter 7.[1] Other states have similar publications available online.

Cities often pass ordinances adopting regulations that have additional 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 the 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 appendices outside of the 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. Home rule charters sometimes prescribe two or three readings of an ordinance, and may impose additional reading requirements if the ordinance is amended in any way between readings.

Often these are technical documents, prepared by, in the examples above, historic preservation experts, or licensed engineers, and the detail in them is really not a policy matter. The ordinance language referencing these additional documents should be carefully written, and some review and

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1 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.

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:

1. Historic Preservation District Design Guidelines. Ideally, the historic preservation ordinance should have clear policy direction for the elements of district standards. If the city council truly wishes the landmarks commission to regulate paint colors, the ordinance should say so. Often council adopts a broad concept of appointing a commission with broad regulatory expertise, and lets them set the exact agenda and standards. How far the commission may legally go before it crosses a line into law making is the ultimate question.
2. Subdivision design standards. Beyond the policy questions of how wide sidewalks should be, and whether they should meander or not, their thickness, material, and soil testing issues are largely accepted to be technical and governed by standard or generally acceptable engineering practices. There is often less dissent generated by these non-subjective standards than in other areas of land development.

Even subdivision 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 further revisions be likewise provided.

ORDINANCE REVISIONS—DRAFTING AND PROCESS

Cities decide to revise ordinances for several reasons:

–It doesn't implement the goals and objectives of the comprehensive plan.

–Actual practice doesn't follow what's in the existing code sections.
–The stack of amending ordinances is thicker than the original code.
–The ordinance is older than the Planning Department's youngest staff member.
–The neighborhoods AND the developers are mad.
--other reasons: a lack of clarity in current regulations, changing use patterns, insufficient funds or staff time to undertake a revision project.

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

In drafting regulations, the drafter should always be cognizant of why they are using certain terms and language. Many times, drafters will start from another city's regulations—a fine starting point—maybe. It is important to remember that one size does not fit all, and that using another city's regulations is only a good option if their drafter was clear, thorough and consistent. Another common issue is looking to scale—for example, the City of Houston subdivision regulations are probably not the ideal model for a city of 1000. Knowledge of another city's planning staff size and expertise is another measure for comparability.

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. These all help an ordinance, this is true. Rules of construction must be considered, 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 planners and lawyers. There are some parts of ordinances that lawyers will never want to draft; there are parts planners shouldn't because they involve truly legal concepts. Lawyers probably won't draw pictures, planners are generally more used to the visual. I start an ordinance project with this checklist:

--Does the city has a standard format for ordinance drafting, including numbering and capitalization conventions?

--What does the charter say and require in the context of the project?

--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.

--For non-defined terms (e.g., perhaps "Commission" is not yet a defined term), what standards do we want to set now for consistency? Often a major rewrite project will have multiple drafters, and final compilation and review is easier if these are set at the start of the project.

--What is the interest in, and staff capacity for, administrative decision-making? If used, this will require careful delineation of standards for staff or an appointed board.

--Remember to remove placeholders put in while drafting. A final consistency review is critical to the final document.

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 down make logical sense, is this how the process will really occur?

There is a trend in the literature and among planners' pitches that a rewrite of land development regulations will "streamline" and "simplify" processes. There is often a belief that city processes move too slow 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 other reason. I invite you to consider that "bureaucracy" is not a bad word. Land use regulations, in particular, because they deal with property rights, 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.

Three major areas appear to be the most popular to streamline: definitions, use tables, and administrative review of various applications or minor variances. Each of these, as the examples in the presentation show, can generate interpretation issues that lead to litigation.

I recommend that the calendar for adoption be considered in strictest compliance with the procedural requirements in Chapter 211, Texas Gov't Code, particularly for the initial adoption of a complete or major revision of land development regulations. Consider this: Section 211.007(b) requires a multi-step 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 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 three required steps for the planning commission in this section: (1) a preliminary report, (2) at least two public hearings, (3) 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. I suspect few cities follow separate steps for a preliminary report and few hold more than one public hearing on a matter, unless it is controversial. Generally, no one objects to a "streamlined" process because it moves it 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. There are practical ways of dealing with the administration of at least step one and three, by staff information and preparation of the memoranda going to Council.

In conclusion, ordinance re-write projects require the participation of a wide range of individuals. Planners and lawyers should not overlook each others' roles. Lawyers may often remind planners they shouldn't be practicing law without a license, but lawyers probably shouldn't practice

planning 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 land use and development is minimized, if not removed. A careful, thought out process will ultimately resolve this and keep regulations out of the court.