Legislative Drafting

Chuck Thompson

Of Counsel

International Municipal Lawyers Association



This program based on and copies portions of previous programs by:

- Daniel Mandelker, FAICP
  - Washington University - St. Louis, Missouri
- Kimberley Mickelson, AICP
  - Olson & Olson - Houston, Texas
- David Silverman, AICP
  - Ancel Glink *et al.* - Chicago, Illinois
- Cathy Cunningham
  - Thomson Reuters Practical Law

Core problems for legislative drafters

- Planners, Engineers, Code Officials and other administrative staff write documents without understanding legal issues;
- Lawyers write documents without understanding the underlying issues associated with planning, engineering, code, etc.
- Everyone reads ordinances differently to suit their own interests.
- Affected members of the public and their attorneys interpret ordinances differently from the intent—which sometimes could match the actual text.

Critical Questions to answer before you begin

- Does your government have the authority to adopt legislation regulating the activity?
  - What is the source of that authority?
  - Are there limits on the authority?
    - State or federal preemptions or state delegation of authority limited.
    - Dillon's Rule, Home Rule limited to local matters
    - Federal Constitutional limitations – Commerce Clause, Bill of Rights, etc.

Thinking through the details

- How must the authority be exercised?
  - Ordinance or Resolution?
  - Open Meetings.
  - Public Hearings and Notice
- What is the goal or issue to be addressed?
  - Does the regulation have a basis for believing there's a problem that needs to be addressed and how will the ordinance solve the problem (without creating others)?
- Understand the policy behind an ordinance.
- Who will administer the ordinance once enacted.
- Consider whether Criminal or Civil Infraction – Injunction authority.

Copy with Caution

- Using another city's regulations without tailoring it to your city's needs. The limits of Google and municode "all searches".
  - One size does not fit all.
  - State enabling laws and terminology vary.
- Ordinances drafted by commission or staff, or developers, with little or no input from the city attorney.
  - Ultimately an ordinance is a legal document.
  - City attorney has to look at the city's interests: weigh policy goals with legal risks
  - Use of numbers and formulas

Avoiding Confusion

- Involve the important players in drafting and reviewing the legislation.
  - Prosecutors who will need to enforce the legislation, planners, engineers, etc., who understand the problem being addressed, members of the public who might be affected.
    - Examples: Massage Parlor regulation, State's Attorney, Leashing cats
  - Don't be invested in your draft or approach.

Putting words on the page

- Eliminate these words from your vocabulary:
- Same
- Said
- Such
- And/or
- Herewith, hereas, herein, hereafter, insofar
- Shall (use sparingly)
- Etc.

Clear Drafting - Definitions

- Because many words have multiple meanings or multiple interpretations when used in specific business activities, such as land development, legislation that intends a specific definition for a word ought to define it.
- Define only words that are actually used in the text.
- Define only words that need to be defined.
- Don’t assume everyone knows what you mean or intend.
- Check consistency with other code sections.

Final Word on Definitions

- Keep substantive requirements out of the definitions; i.e, don't regulate in the definition.
- Let common usage define terms where appropriate.
  - If a defined term is also generally used, make sure the difference is clear.
- Don't include definitions for words not used in the ordinance.
  - This often happens after language is removed from earlier drafts, so do a final proof reading.

Grammar

- Active voice is preferred, but it may not always be possible in ordinances.
- What is active and passive voice and how do you tell?
- Active voice (the subject is performing the action): “I read the book.”
- Passive voice (the subject is being acted upon): “The book was read.”

COMMAS SAVE LIVES

- Let's eat Grandma.
  - Let's eat, Grandma.
- How to cook crack and clean crabs.
  - How to cook, crack, and clean crabs.
- Mary likes cooking her family and her dog.
  - Mary likes cooking, her family, and her dog.

The Oxford Comma

- You should care about the Oxford comma, Also called the serial comma. It is a comma between the last two items (and before the word "and") in a list of three or more items.
- "The Bureau is a law enforcement agency within the Department of Justice. About the Bureau of Alcohol, Tobacco, Firearms and Explosives, https://www.atf.gov/ (last visited Mar. 17, 2020). The Court takes issue with the lack of an **Oxford comma** after "Firearms" in the Bureau's name. **Oxford commas add clarity and cost nothing.** For example, can the Bureau regulate firearms independently from explosives, or does the lack of a comma in between those two words indicate they can only be regulated when found together? These and others are big problems tiny commas can solve." Lane v. United States, 2020 WL 1513470 (N.D. Tex. Dallas Div. March 30, 2020). Footnote 6. [Bolding added.]
- "The Court recognizes that the proper construction of the warranty provision is elusive because of the inconsistent use of the **Oxford comma, of which this Court is a fan**, . . ." Sourceone, Inc. v. John Zink Co. LLC, 2021 WL 1626256 (E.D. Virginia, Richmond Division, April 27, 2021). Footnote 3 [Bolding added.]
- Lack of an Oxford comma affects how courts interpret statutes (O'Connor v. Oakhurst Dairy, 851 F. 3d 69 (1st Cir. 2017) and ordinances (Quinn v. City of Newport, 2019 WL 1989837 (D. Rhode Island May 6, 2019).

Be concise whenever possible

- Use fewer words.
- Except when you need more words to be clear.
- Short concise sentences.

Understanding Statutory Interpretation

- Plain and ordinary meaning. Courts interpret legislation using the common meanings of the language used. The rule also requires the court to interpret legislation as a whole.
- Words are construed in context, not in isolation.
- Expression of one thing is the exclusion of another (expressio unius est exclusion alterius). This rule presumes that drafters of legislation intended to exclude items omitted from a list. For example, an ordinance prohibiting "guns, bows and arrows, and knives longer than four inches" does not prohibit knives four inches or less.
- Derive the meaning of general terms from the specific (ejusdem generis). Courts interpret a general catchall at the end of a list of specifics consistent with the specific list. For example, an ordinance prohibiting "guns, bows and arrows, knives, clubs, and similar weapons" also prohibits a baton even though it is not listed.

Who or what are you regulating?

- No dog may leave its owner's property without being on a leash.
  - An owner must not allow the owner's dog to leave the owner's property without being properly leashed. (repeatedly using "owner" avoids gender specific terms)
- Trucks must not be driven in the left lane unless passing another vehicle.
  - A person must not drive a truck in the left lane of a highway except when passing another vehicle that is not moving or is moving at a speed below the posted speed limit.
- A sidewalk may not be used by a delivery robot.
- Grass may not be higher than six inches in any residential area.

Problems of Enforcement

- An owner may not allow an unneutered cat to leave the owner's property.
  - How can an animal control officer know the cat is unneutered without seizing it?
  - Does Terry vs. Ohio apply?
- No more than 3 unrelated persons may live in a single family home.
  - How do you know their relationship status?
  - Are there observable facts that accrue from overuse of the property that can be observed and regulated?

Planning Consultant Draft

- Nonresidential uses with loading docks and delivery entrances that front a Collector Street or Arterial Street shall require the Developer to erect a minimum ten-foot (10') tall masonry screening wall to screen views of loading docks and loading spaces intended for tractor/semi-trailer delivery.

Questions raised

Nonresidential uses with loading docks and delivery entrances that front a Collector *Street* or Arterial *Street* **shall require the Developer to erect** a minimum ten-foot (10') tall masonry screening wall to screen views of loading docks and loading spaces intended for tractor/semi-trailer delivery.

The Draft Revised

- Loading docks or delivery entrances that front on a Collector or Arterial Street must be screened from view from the public right-of-way by a minimum ten foot (10') tall masonry wall.

The problem with adopting codes by reference.

- Example: International Fire Code 807.5.2.2: "Artwork and teaching materials shall be limited on the walls of corridors to not more than 20 percent of the wall area. Such materials shall not be continuous from floor to ceiling or wall to wall. Curtains, draperies, wall hangings, and other decorative material suspended from the walls or ceilings shall meet the flame propagation performance criteria of NFPA 701 in accordance with Section 807 or be noncombustible. Exception: Corridors protected by an approved automatic sprinkler system installed in accordance with Section 903.3.1.1 shall be limited to 50 percent of the wall area."

The problem with adopting codes by reference.

- Most local governments just adopt it.
- First Amendment. Why does it discuss content of the material? What is added by saying "artwork" or "teaching materials"? Why not just say "combustible materials, such as paper"?
- Overinclusive – what about artwork that is not flammable? A metal sculpture– not flammable. Why would it be a problem to hang those all over the wall? Or, does the code mean to include this within "wall hangings" and not limited to 20% of the surface?
- Under-inclusive – what about flammable materials that are not artwork or teaching materials? Could put blank paper, or required notices all over the walls.
- Did your government adopt this code by reference without changes? – or at least without changes that fixed these problems?

An aberrant idea.

- The UCC uses "official comments" effectively to express intent and clarify the language of the code.
- Could this work for you?
- Example: Official Comment: By defining a person who harbors an animal as the owner of the animal, this code attempts to bring within the ambit of its regulation persons who may disclaim a "property interest" in an animal while actively engaging in feeding and otherwise exercising control over the animal and intends to avoid questions of whether the animal is the property of the person who feeds, shelters, or otherwise provides for the animal by making a person who "harbors" an animal an "owner" for purposes of this ordinance.

Similar Concept

- Include in the legislative preamble to the Ordinance matters of intent and the basis for adopting the ordinance to help establish authority for its adoption, a legislative basis for the action and intent.

Wrapping up

- Start with the end in mind: consider the adoption schedule early.
- Start with writing style and numbering guidelines.
- Write in plain English.
- Define terms that need to be defined.
- Walk through the ordinance with staff to make sure it works and is clear.
- Think IMPLEMENTATION and ENFORCEMENT.

Final Review

- General repealer clauses vs. repealing specific ordinances or parts of ordinances.
- All forms and ordinances: Inconsistencies between Code Chapters, required forms, policy documents, and the ordinance.
- Drafters' imaginations will never match the creativity of those who wish to find the loophole. BUT TRY to catch them all!
- The benefit of extensive recitals and legislative history.

Toothless Tiger

The authority to regulate is meaningless without the ability to enforce it.