Essential Hour: Your First Ordinance or Resolution

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Housekeeping Notes

• This session is being recorded. The recording will stop at the time of Q&A.
• Attendees are muted.
• Question and Answer is available throughout the webinar.
• To write in a question, select the Q&A button on your tool bar.
• Following the presentation, the slides and paper will be shared with attendees.
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YOUR FIRST ORDINANCE OR RESOLUTION

(AVOIDING) THE PITFALLS OF DRAFTING AND PREDICTING THE FUTURE AND AVOIDING UNINTENDED CONSEQUENCES
The Presenters

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Disclaimer

- This presentation expresses the views of the presenters only. It is not individual legal advice. It does not necessarily represent the views of any city or other entity.
- Facts and circumstances matter – seek the advice and counsel of your colleagues, agency staff, and other experts.
  - Common sense matters too
- Disagreements are welcome. Let’s get them out and discuss them during the session (rather than by comment on the review form).
- There will be plenty of time for Q&A at the end of this presentation. We encourage questions and comments!
  - In the meantime, you can post these during the presentation.
The Agenda

• Finding and identifying the pitfalls
  ▪ *10 tips for things you should always do when drafting an ordinance or resolution*

• Avoiding the pit
  ▪ *Some tips for things to avoid when drafting*
Ordinance or Resolution

• Please see *The California Municipal Law Handbook 2023* at §§ 1.230 – 1.249 for a discussion of the similarities and differences

• Ordinance
  ▪ Adopts new law or amends or repeals an existing law
    ▪ More formal procedure
    ▪ Usually subject to referendum
    ▪ Only means to impose a criminal fine or penalty

• Resolution
  ▪ Usually implements an existing law
  ▪ Less formal adoption process
    ▪ Generally valid if adopted by requisite number of votes even if there is a procedural defect
  ▪ Usually not subject to referendum
Primary Warning

• Plan your whole trip before you embark
  ▪ *Think the whole thing through before you embark*
• Don’t travel alone
  ▪ *Rely on staff and others along the way*
Ready? Let’s go!
Do list: Tip 1 – Understand the “problem”

• Do I have a clear understanding of what the ordinance or resolution is intended to accomplish?
  ▪ *Have I thoroughly discussed the “problem” with staff?*
  ▪ *Have I reviewed the facts? Do they reveal a “problem” to be solved?*
  ▪ *Have I identified the stakeholders?*
  ▪ *Have I considered the Council’s reaction?*

• Is the “problem” susceptible to legislative solution?
  ▪ *Does the solution really need a new ordinance?*
  ▪ *If so, how will the ordinance be enforced (and will it be enforced)?*

• Can I describe the ordinance or resolution’s purpose in one sentence and how it accomplishes that purpose in another?
Do list: Tip 2 – Consider the relationship to existing city policies

• How does the proposed solution to the identified “problem” relate to existing city policies?
  ▪ *E.g.*, does it implement the General Plan or other adopted policy document?

• Is the “problem” addressed by existing city ordinances?
  ▪ Can the solution be accomplished by administrative interpretation of an existing ordinance?
  ▪ Can the solution be accomplished by amendment to an existing regulation?

• If a new regulation is required, how should it be integrated into the municipal code?
  ▪ *Has staff told you how it plans to enforce the new regulation and whether it has the resources to implement that plan?*
Do list: Tip 3 – Review the (potentially) applicable legal authority

- Substantive authority
  - Cal. Const. art. XI §§ 5 (home rule), 7 (police power), 9 (utilities)
  - Government Code § 37100 (The legislative body may pass ordinances not in conflict with the Constitution and laws of the State or the United States.)
  - Local Charter
  - Other

- Substantive limitations
  - Federal or State constitution
  - Federal or State preemption
  - Specific State mandates (e.g. housing legislation, sidewalk vendors, etc.)
  - Other statutory authorizations or limitations (may be more applicable to special districts than cities)

- Procedural limitations
  - Notice, public hearing, supermajority vote requirement, finding requirement
  - CEQA?
Do list: Tip 4 – Look to what others have done

- As a starting point, not as a finished product
- Google
- Cal Cities Community
- Model Ordinances
Do list: Tip 5 – Consider the rules of statutory construction

- What are some of those rules? (Next slide please.)
What are some of those rules?

• Clear and unambiguous language is generally applied as written
• Words are generally given their common meaning
  ▪ But purpose may prevail over plain meaning
• Each word should be considered significant
• Each sentence should be read in context and harmony, not isolation
• Context matters (both grammatical context and context in relationship to the legislative purpose
• If more than one possible interpretation, the reasonable one prevails
• Judicial review is based on independent judgment of the court giving deference to the agency’s interpretation as appropriate to the circumstances
Do list: Tip 6 – Consider applicable remedies

• Possible remedies
  ▪ *Criminal* – *Misdemeanor? Infraction? Both?*
  ▫ *Civil remedies*
    ▪ Administrative Citation? Civil penalties? Private cause of action?
    ▪ Nuisance abatement
  ▪ *California Municipal Law Handbook* - Chapter 12 – Code Enforcement

• Enforcement
  ▪ *City Attorney Prosecution*
  ▪ *Agreement with District Attorney? – Is that realistic for your city?*
  ▪ *Administrative process*
    ▪ Does your city have the staff resources?
    ▪ Contract with third party for administration and hearing?
  ▪ *Designation of code enforcement responsibility?*
Do list: Tip 7 – Carefully consider definitions

- Are definitions needed? (Remember the common meaning rule.)
- Is a term already defined in your Municipal Code?
  - *Avoid using different definitions in different parts of the code*
  - *General definitions in the code can be a helpful timesaver*
  - *Define offices and positions to include subordinates exercising delegated authority*
- When you define terms, use them and use them consistently
- Don’t use definitions to establish substantive regulations
Do list: Tip 8 – Consider express rule-making authority

• Should the ordinance delegate clear authority to make administrative interpretations or to adopt implementing regulations to the City Manager/Administrator, Department Head, Police Chief, or other officer or employee?
• Draft with enough detail to make the ordinance clear and enforceable but leave details to future administrative interpretation or supplemental regulation
• Consider whether an administrative “variance” process is appropriate, e.g., when strict application of a rule might require modification to avoid a Constitutional issue or it might not make reasonable sense because of community transitions
Do list: Tip 9 – Write clearly

- Use plain English, short sentences, active voice
- Use the Oxford comma
- Follow the format of the existing code
- Avoid making verbs from nouns
- Avoid redundancies (e.g., cease and desist, unless and until, passed, approved, and adopted, twenty (20)
- Avoid pronouns
- Consider “It is unlawful to” instead of “No person shall”
  Consider “must” over “shall”
- Understand the difference between “that” and “which”
Do list: Tip 10 – Review your work

• Comprehensively review the entire ordinance
  ▪ Are the sections and subsections correct?
  ▪ Is the punctuation correct?
  ▪ Are capitalizations consistent?
  ▪ Are there any unwanted duplications?
  ▪ Are the cross-references correct?
  ▪ Is the language clear?
  ▪ Does the ordinance actually do what you intend it to do?

• Have the affected staff member(s) check your work

• Don’t rely on spell check
  ▪ Proof reading is more than just checking for spelling and grammar
Thoughts about severability clauses and findings

• May be included when appropriate, but consider:
  ▪ Whether severing some provisions would defeat the intent
  ▪ Whether a statement of legislative intent is more appropriate (if the intent is not obvious from the language itself)
  ▪ Whether written findings are mandated by statute (e.g., building code modifications)
  ▪ Whether including findings in the ordinance could limit defense of the ordinance in the event of a challenge
  ▪ Whether, if findings are included, they have some evidentiary support
Things to avoid: Tips 1-5

• Using a model ordinance or ordinance from another jurisdiction without adapting it to your local situation – one size may not fit all
• Drafting an indefensible (or unenforceable) ordinance because of political expedience
• Ambiguity, legalese, run-on sentences, the passive voice
• Recitals in general and “whereas” clauses in particular
• Failing to include staff at every stage of the process
Things to avoid: Tips 6-9

• Trying to write your way around clear legal restrictions by brilliant and clever drafting
• Failing to consider how the regulated community (or staff) will twist your language
• Failing to consider the practical implications of ordinance requirements
  ▪ For example, sometimes deadlines are required by statute, but otherwise they may create unreasonable burdens on staff
  ▪ Is staff truly capable to determining the percentage of shelf space dedicated to hard liquor?
• Failing to take your time
Final thoughts about temptation and value of words

• “Do not be tempted by a twenty-dollar word when there is a ten-center handy, ready, and able.” – William Strunk Jr. & E.B. White, The Elements of Style

• Same thought, fewer words – “Don’t use a five-dollar word when a fifty-cent word will do.” – Mark Twain

• Plain English for Lawyers
  Richard C. Wydick & Amy E. Sloan
QUESTIONS?

Discussion?
THANK YOU

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