

Webinars for Cities

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Strengthening California Cities
through Advocacy and Education

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.
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The Essential Hour

August 18, 2023



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YOUR FIRST ORDINANCE OR RESOLUTION
(AVOIDING) THE PITFALLS OF DRAFTING AND
PREDICTING THE FUTURE AND AVOIDING UNINTENDED
CONSEQUENCES

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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

- Ordinances follow the same rules as statutes. *Harrington v. City of Davis* (2017) 16 Cal. App. 5th 420, 434
- 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

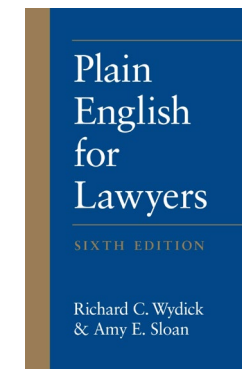
- Using a model ordinance or ordinance from another jurisdiction without adapting it to your local situation – one size may not fit all
- Drafting an indefensible (or unenforceable) ordinance because of political expedience
- Ambiguity, legalese, run-on sentences, the passive voice
- Recitals in general 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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