Ordinance and Policy Drafting:

How to Avoid Making a Problem Worse

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I. INTRODUCTION: Preparation is more Important than Drafting

Drafting and adopting local government ordinances is one of most routine tasks of local governments, yet one of the most challenging. When an ordinance is drafted, every word is crucial. It is important to avoid drafting ineffective or ambiguous ordinances because of the unintended consequences that may result. For example, ordinances that are poorly drafted can result in an inability to enforce the law, litigation, a void ordinance, or a misapplication or misinterpretation.¹ The goal for drafting an ordinance is to ensure that it is understandible, easily interpreted, and most importantly, a court will likely uphold the ordinance if challenged.²

A. Learn Your Current Ordinance Structure and Make Sure You Know What Has to be Changed and or Repealed.

The first step in drafting a new law is to make sure you know your current laws. Is your new ordinance going to amend, replace or add to your existing laws? Do you need to repeal and replace what is on the books? Do not forget, each of these issues arises in creating any resolution or other policy. Only the specific requirements of creating a law are solely applicable to ordinances.


As you look at solving a problem, brainstorm with experts in the field and find out how other people have solved the problem. Is the issue you have a problem that has been solved before?

C. Do Not Reinvent the Wheel.

If it is possible to adopt an ordinance that has been implemented elsewhere successfully, then adopt a similar ordinance. It is very helpful if an ordinance from another town has been

¹ Drafting a Local Government Ordinance, Practical Law Public Sector, Practice Note w-002-2499.
² Id.
reviewed and upheld by a court. Look at how other communities solve the problem, you may find a solution you never considered.

**D. Do Not Create a New Ordinance if You Can Enforce What is Already in Place.**

A more robust enforcement strategy may solve a problem without amending an ordinance. Make sure you know what authority you already have.

**II. Drafting a Law is like Washing Your Dog in a Mud Slide**

**A. It is Difficult to Create a Clean Ordinance.**

When each of us communicates, we are sure we know what we are talking about, but does your audience understand your intended meaning. If I tell you that you look hot, I could be complimenting you, flirting inappropriately or noticing that you are beet red and sweating. In an ordinance how do you know those reading it are interpreting it the same way you are? Some examples are in order.

1. **TBCH, Inc. v. City of Albuquerque**

The City of Albuquerque’s Zoning Code contained a provision that addressed the zoning of adult amusement establishments. The relevant definition that controlled whether a business was an adult amusement establishment was whether the business that provides amusement or entertainment is distinguished or characterized by an emphasis on material depicting, describing, or relating to… specified anatomical areas. If the “Specified anatomical areas” are not “completely and opaquely covered”, a business would be an adult amusement establishment and need to meet distance requirements. TBHC ran TDs Night Club featuring female dancers. TDs began applying opaque makeup to the dancers to cover the specified anatomical areas of the female dancers.

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The City informed TDs that it was in violation of the Zoning Code. The zoning manager ordered TDs to comply with the Zoning Code by placing opaque clothing on the performers because the lack of clothing caused TDs to be defined as an Adult Amusement Establishment, and it was too close to a residential zone. TDs argued that opaque makeup satisfies the “completely and opaquely covered” language of the code. The zoning manager stated the intent of the Code was clear: Completely and Opaquely Covered meant covered by opaque clothing. TDs appealed the ruling to the City’s Environmental Planning Commission, but the EPC agreed with the zoning manager. TDs appealed the ruling to the City Council, and the Council also denied the appeal and found that makeup did not satisfy the Zoning Code because the intent of the Code section was to completely cover specified anatomical areas with opaque clothing. The District Court also dismissed the appeal. TDs, appealed to the Court of Appeals of New Mexico.

Shockingly, the Court of Appeals agreed with TDs that they were in compliance with the Zoning Code. The court explained that TDs presented unrebutted evidence that the makeup was in fact opaque, and the makeup was used on the areas of the dancers specified in the Zoning Code. The City argued that the makeup did not serve the intent of the Code. The Court then looked to determine how “covered” was defined in the Code. There was no definition. The court reasoned that legislative intent is determined by the language of the act and statutory construction is proper only when there is ambiguity. The Court held that the language was unambiguous and the standard definition for “cover” supported TDs interpretation of the ordinance. The Court concluded that all the law required was opaque covering, and heavy makeup was such a covering. Good intentions along with a City assumption resulted in a very interesting enforcement issue until the language was amended many years later.

How do you avoid such an unwanted result?
2. **High Ridge Hinkle Joint Venture v. City of Albuquerque**

High Ridge Hinkle appealed a zoning decision by the City of Albuquerque Council. Hinkle owned a tract of land subject to C-2 zoning under the Albuquerque Zoning Code. The owner, Hinkle, sought to improve a portion of the property by building a miniature golf and arcade with go karts and bumper boats. The Zoning Enforcement Officer and the Environmental Planning Commission ruled that the bumper boats and go karts are a legitimate outside activity and therefore a conditional use of the property. However, the City of Albuquerque Council reversed the ruling. The ordinance allowed “outside storage or other outside activity, except as specifically made a permissive use.” Hinkle argued the ordinance allowed any other outside activity while the City Council held it allowed only outside activity related to outside storage.

After City victories up through the Court of Appeals, the Supreme Court found five years later that the City Council’s interpretation of the Zoning Code was incorrect. The Court applied three rules of statutory construction. First, the plain language of the ordinance is the primary indicator of legislative intent. Second, persuasive weight must be given to the long-standing administrative constructions of ordinances by the agency charged with administering them (in this case the Zoning Enforcement Officer). Third, where several sections of an ordinance are involved, they must be read together so that all parts are given effect. When applying the three rules the court found that the interpretation given by Hinkle revealed no inconsistency with the ordinance’s plain meaning. Thus, the Court found that deference to the contrary interpretation of the City Council was improper and the Court of Appeals was reversed.

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4 1998-NMSC-050, 126 N.M. 413, 970 P.2d 599.
B. Define Important Concepts.

In the TDs case and the Hinkle case the Court looked at how the City defined the terms used in its ordinance and disagreed. The Court was allowed to decide the issue because the terms were not defined in the Ordinance. Define important terms in clear concise language.

III. RULES OF INTERPRETATION

Not all terms can be defined. It has been a long-standing rule that “ordinances are construed by the same rules as the statutes of the legislature.”5 When drafting an ordinance it is important to understand the rules of interpretation. In other words, the rules of interpretation will govern how the court will interpret the ordinance, if the ordinance is challenged.6 In New Mexico, statutes are interpreted in accordance with common law and the Uniform Statute and Rule of Construction Act.7 Thus, an ordinance will also be interpreted in the same fashion. The applicable rules the court considers when interpreting an ordinance include:

1. In the absence of a contrary indication from the enacting body, the Courts must look to the plain language of an ordinance and give the words their ordinary meaning. If the language is clear or unambiguous, there is no need to employ the rules of construction;

2. Courts will give persuasive weight to long-standing administrative constructions of statues by the agency charged with administering them.

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6 § 20:45. Applying rules of statutory construction, Validity and Construction of Ordinances, 6 McQuillin Mun. Corp. § 20:45 (3d ed.)
7 N.M.S.A. 1978, Section 12-2A-1 et. seq.
3. If multiple sections of the ordinance come in to play, the court will consider the relevant sections together so all sections are given effect.8

VI. PRECAUTIONARY MEASURES

It is important to take the necessary steps to ensure the ordinance is carefully drafted to ensure it will have its intended effect. The following steps can and should be utilized to ensure that the ordinance will not have unintended consequences.

A. Have Experts Review the Ordinance.

Experts in the field like subject matter experts or the Municipal League, or attorneys specializing in the field are up to date on the current law. Experts may assist with whether the government has the authority to adopt the ordinance. The expert may help ensure that the ordinance is consistent with current law, specifically state and federal law, and state and federal constitutions, and ensure that the adoption of the ordinance will be consistent with the local government’s existing code and other laws.

Consulting with experts is essential to drafting an ordinance and ensures that the ordinance will serve its purpose and avoid expensive and time consuming litigation. In addition to the sources above, it would also be helpful to consult with those who have hands-on experience with drafting, reviewing and adopting ordinances, like an experienced clerk city, councilor or other local government official or staff. In any event, it is a very good process to work with all of your resources throughout your ordinance drafting and adoption.

B. Get Public Opinion to Anticipate Public Concerns.

Involving the public in considering whether to adopt an ordinance can have its difficulties, but can also be useful. Usually the adoption of public ordinances have a significant impact on the

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8 Lantz, 2004-NMCA-090 at ¶ 7.
community which can involve different opinions and disagreement. One of the most useful ways to avoid opposition is to involve the public up front. Some members of the public most often react emotionally when an ordinance addresses:

1. Land Use;
2. Changes to public services;
3. Involuntary actions,
4. Increases to rates and fees; and
5. Large projects.  

C. Once again, Define Words and Terms Used in the Ordinance.

When ordinances are challenged, usually the validity of the ordinance and ordinary, common sense, and practical meanings are given preference by the court. However, the cardinal objective in construing ordinances is to ascertain and give effect to the legislative intent. Thus it is important to define words that the ordinance intends to give another meaning other than the common sense meaning of the word. Most of the time when an ordinance defines particular words, the court will construe those words in accordance with the ordinance definitions. As a result, the clearer an ordinance is, the more likely the ordinance will be given its intended effect.

V. ADOPTING THE ORDINANCE

In addition to the importance of drafting an ordinance, it is also crucial to know how to correctly pass and adopt an ordinance. Such processes are governed by state and local law. To avoid the unfortunate result of a void ordinance, these laws should be followed.

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9 Considerations Before Drafting an Ordinance, Practical Law Practice Note, w-001-4982.
10 § 20:44. Overview and scope, Validity and Construction of Ordinances. 6 McQuillin Mun. Corp. § 20:44 (3d ed.)
11 Id.
A. State and Local Laws Governing the Passage and Adoption of an Ordinance.

Usually a state statute gives local government the authority to adopt an ordinance. The statute delegates power to the governing body of the local government to adopt ordinances or resolutions that are not inconsistent with state law. Broadly, municipal powers are governed by Chapter 3 of State law.

B. The Process to Adopt an Ordinance.

First, it is essential to have the ordinance go through a thorough review process with multiple drafts and review by one or more experts. The first step in the approval process on an Ordinance is to ensure the statutory process of adoption is followed. Section 3-17-1 et seq NMSA 1978 provides for the process of adoption and the content of the Ordinance and they are attached hereto in pertinent part. The first issue to check is whether a municipality has the authority to legislate the area sought to be regulated? Begin with the core powers of legislation in the first section of Chapter 17. Essentially, a municipality may exercise its police powers for the benefit of its citizens if it is not directly in conflict with a state law. Spend time reviewing the cases decided by the courts interpreting this section. As we know there are other municipal powers enumerated throughout the statutes and each issue that arises needs to be reviewed for underlying authority to regulate.

The governing body shall vote by roll call vote to adopt an ordinance.\textsuperscript{12} A motion must be made by one of the members. The ordinance shall also be validated by the mayor endorsing “approved” upon the ordinance and signing the ordinance.\textsuperscript{13} The Ordinance must be properly published at least two weeks prior to consideration and the clerk must record in the meeting

\textsuperscript{13} Id.
minutes the vote which adopted the ordinance. Ordinances in municipalities are effective after five
days. All ordinances must be published upon adoption or codified and they become a permanent
record and must be kept in accordance with state law.14

C. Practical Challenges of Small Municipalities with Uncodified Ordinances.

I began municipal work in Albuquerque, where I had over 30 colleagues to help keep track
of all aspects of municipal law. Representing smaller municipal bodies presents many challenges
unknown to the vast army of lawyers in Albuquerque. Relevant to our discussion is when asked
by your client who does not have codified ordinances how do you ascertain what laws are on the
books? What resolutions, policies and rules? How about if your Clerk has been in office for only
a few months?

Once you discover what laws are in effect, do you amend a prior ordinance or repeal and
replace it even if you are only making minor changes? How do you keep track of amendments?
The Clerk is probably your records custodian as well. Make sure they have the policies in place
to properly track records, have a retention schedule and know how to find the laws then in effect
in their municipality. The bottom line is the Clerk is your best friend and if she or he does not
have a good handle on the “book” of ordinances and public records then they need your help to
get it in order.

14 § 3-17-3; § 3-17-5
; See also § 16:1. Necessity for Proper Enactment, Enactment of Ordinances. 5 McQuillin Mun.
Corp. § 16:1 (3d ed.)
CONCLUSION

As you draft changes in your laws, always keep it simple. Do your homework and ensure that you are enacting a law that will fulfill your intended purpose while attempting to minimize unintended consequences.