

Drafting Clear Ordinances: Do's and Don'ts

by Carolyn Braun, AICP

Many planners spend a lot of time interpreting or explaining ordinances to citizens and those representing them. Unclear language in an ordinance provides an opportunity for both confusion and legal challenges. The best way to minimize this is by writing clear, readable ordinances.

THE BEST WAY TO AVOID THE TIME AND EXPENSE OF A LAWSUIT IS TO MAKE SURE THAT ALL IMPORTANT TERMS ARE DEFINED AND EVERY DEFINITION IS CLEAR AND UNAMBIGUOUS.

TIPS ON DEVELOPING ORDINANCE CONTENT

1. Be Able to Explain the Need

Elected officials often suggest consideration of an ordinance based on what a neighboring community has adopted. Reviewing other community ordinances can be very helpful. Be cautious, however, particularly if you are adopting a small section of that ordinance. Does the ordinance language you are “borrowing” include terms not defined in your own ordinance?

Most importantly, be sure the ordinance you are drafting is tailored to meet *your* community's concerns. You should be able to explain the need for the ordinance. That understanding will also lead to clearer interpretation and enforcement, and help ensure that your ordinance is legally defensible.

2. Make Sure You Have the Authority

Before you go too far in drafting an ordinance, make sure you have the authority to enact it. Does it conform to state and federal law? Communities cannot adopt local ordinances that contradict explicit provisions of state or federal law. For example, in Minnesota there are specific provisions in state law requiring communities to allow state licensed residential facilities.

In some cases, the applicable “field of law” has been preempted by state law. For example, a state-adopted building code may preempt adoption of a local building code. In such cases, you do not

have the authority to adopt regulations. Always check with your attorney. Adoption of an ordinance by another community does not guarantee that a similar ordinance will be legally defensible in yours.

In some instances, state laws and rules can be adopted by reference, but there is a question whether any future amendments to the state law are then automatically incorporated into your previously adopted ordinance. One way to deal with this is to include the phrase “as may be amended from time to time” when you adopt an ordinance that references a state law or rule.

3. Discuss the Draft

It's good practice to discuss draft ordinance provisions in a work session (in most places, these must be noticed and open to the public). Planning commissioners can offer valuable insights and assistance, and should be involved in reviewing the draft. The meaning of the ordinance should be clear to them, not just to staff. Planning board members can also be asked to play devil's advocate and thoroughly explore various possible interpretations of the draft. This extra time and work often pays off.

If you know of any interested individuals or groups, ask them to participate. Consider how application of the ordinance will affect them. Are there any unintended consequences that may result from adoption of the ordinance?

Get input from your town, city, or county attorneys' office as early as possible. At a minimum they need to review the draft before it is scheduled for public hearing.

Finally, if there's a public hearing before your local governing body, make sure the members have been briefed in advance and given a chance to provide their feedback.

4. Use a Check List

Create a check list to review each draft. The check list should include tips from this article and the procedural requirements of your ordinance.

5. Proofread, and Proofread Again

After reading several drafts of an ordinance, it becomes difficult to see errors in typing, numbering, or other items. It can be very helpful to have someone proofread who hasn't been involved in the drafting.

6. Keep Good Records

While communities often have a wide range of discretion in adopting local ordinances, they must also comply with procedural due process requirements. Often litigants will allege violations of due process when they challenge an ordinance.

Documentation of compliance can reduce the likelihood of such litigation. It is also very helpful to record minutes from ordinance discussions that are held prior to the public hearing. This information provides background on the basis for the ordinance, and should be included in the public hearing staff report.

TIPS ON THE MECHANICS OF DRAFTING AN ORDINANCE

Ordinances – in particular zoning ordinances – can be lengthy documents. To improve readability, emphasis should be placed upon drafting a well-organized ordinance that uses plain, well-defined

language. Such an ordinance will be easier to administer and amend.

1. Make it Clear

There are several principles of clear writing. Writing in the active voice – using action verbs – is arguably the most important. The active voice makes it clear who is to perform the action required. For example, an ordinance in passive voice might say “The application must be approved.” In active voice it would say “The administrator must approve the application.”

Here are some other suggestions:

- Use action verbs that are shorter and more direct. For example, change “make payment” to “pay” or “is concerned with” to “concerns.”

- Be direct, especially when describing procedures and lists of duties. For example, say “Sign all copies.”

- Similarly, convert phrases to simpler terms. Instead of saying “failed to comply with,” use the word “violated.” Substitute simple words where possible. For example, instead of “construct” or “fabricate” use the word “make,” instead of “initiate” or “commence” use “begin.”

- Short, compact paragraphs work best. Each paragraph should deal with a single topic. Lengthy, complex, or technical provisions should be presented in a series of related paragraphs. This will help readers understand the relationship of the provisions.

- Watch out for commas. The placement of one little comma can sometimes make a big difference in meaning.¹

- Draft your ordinances in the present tense.

- If you have a choice between writing either positively or negatively, use

¹ I was reminded of this in a comment by planner Vicky Newson on a draft of this article. As she explained: “Many times the placement or omission of a comma can change the interpretation of a code section. I always use the example of ‘I have several dresses. They are red, green, blue, orange and yellow’ versus ‘I have several dresses. They are red, green, blue, orange, and yellow.’ In each case it says the same thing, but how many dresses do I have? In the first example, the last dress could be an orange and yellow dress, but in the second example it is clear that they are two separate dresses.”

² Thanks to Davis, California, Community Development Director Katherine Hess for this suggestion.

positive language. For example, instead of saying “The City Manager may not approve signage in the right-of-way unless he or she has determined that there is no public safety impact from such signage,” use “The City Manager may approve signage in the right-of-way when he or she determines that there is no public safety impact from such signage.”

- Similarly, avoid negative words or phrases. For example, don’t say “A project will not be approved unless all application requirements are met.” Instead, say “A project will be approved only if the applicant meets all requirements.”

- Simple illustrations can clarify terms or concepts – and are found in a growing number of ordinances. But first check with your municipal attorney on whether you can do this. If you include graphics, make sure they are clear and legible.

2. Language in an Ordinance Should be Consistent

Don’t use different words to denote the same thing just for the sake of variation. Using different words rather than repeating the same term simply confuses the reader and may provide opportunities for misinterpretation and litigation. For example, don’t say “Each motor vehicle owner must register his or her car.” Instead, say “Each automobile owner must register his or her automobile.”

3. Do Your Lists Right

Lists should be clear and use parallel structure. List each item so that it makes a complete thought when read with the introductory text.

If the introductory text is a complete sentence, end the introduction with a colon and make each item in the list a separate sentence. If the introductory language for the list is an incomplete sentence, end the introduction with a dash and end each item in the list except the last item with a semicolon.

After the semicolon in the next to the last item in the list, write “and” or “or” as appropriate and end the last item in the list with a period. Listing in this manner

can help avoid problems of ambiguity caused by the words “and” and “or.”

When using lists it is also helpful to have the introductory text say “at least one of the following” or “all of the following.”²

4. Be Considerate

Ordinances should avoid gender-specific terminology. For example, “draftsman” becomes “drafter,” “foreman” becomes “supervisor,” and so on. In addition, instead of using phrases such as “the administrator or his designee,” substitute “the administrator or the administrator’s designee.” Similarly, avoid archaic or potentially offensive terms.

5. Be Careful When Defining Terms

For zoning ordinances in particular, the best way to avoid the time and expense of a lawsuit is to make sure that all important terms are defined and every definition is clear and unambiguous.

In interpreting zoning ordinances, courts will attempt to find the plain and ordinary meaning of the terms. Any ambiguous language will usually be interpreted in favor of the landowner. In Minnesota, the courts have been asked to interpret undefined terms such as “lawn and garden center,” “accessory,” “subordinate,” “incidental,” “main,” and “structure.”

IT’S WORTH THE WORK

The tips in this article can help you draft a clear, legally-defensible ordinance. It may seem like a lot of work. It is. However, taking the extra time as you draft the ordinance will likely save your community even more time and resources when you administer and enforce it. ♦

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“What Planners Do” (Summer 2004) and “Planning from Different Perspectives” (Fall 1996).