

ORDINANCES AND RESOLUTIONS: PRACTICE TIPS FOR EFFECTIVE LEGISLATION

Morgan L. Foley, City Attorney, El Cajon

- I. Overview of Presentation:
 - A. Legislative Powers of City Councils
 - B. Role of City Attorney
 - C. Common Problems and Suggested Remedies
 - D. Avoiding the Common Problems and Recommendations for Your Council to be Effective Legislators

- II. Authority by Ordinance, Resolution or Motion
 - A. Absent statutory or charter provisions to the contrary, legislative actions may be by ordinance or resolution (*Crowe v. Boyle* (1920) 184 Cal. 117.).
 - B. Ordinances vs. Resolutions.
 - 1. General Rule: When providing a permanent rule of government or conduct – ordinance; when dealing with temporary or special matters and involving only a factual determination that conditions necessary for the operation of a statute or ordinance have been met – resolution.
 - 2. The “legislative” and “adjudicative” distinctions.
 - (a) Impact on challenges to action taken.
 - (i) Legislative actions subject to referendum as well as traditional mandamus, CCP §1085.
 - (ii) Adjudicative actions subject to legal challenge through writ of mandate and/or prohibition, CCP §§1085, 1094.5.
 - C. Minute orders are simply motions made at the meeting to take certain actions not requiring an ordinance or resolution. For example, to approve the warrants, to approve minutes of a prior meeting, to accept a report, give direction to city staff, etc.

III. Effective Legal Representation

- A. City Attorney is charged with responsibility to draft all ordinances. (Government Code §41802)
- B. Educating city staff can save your client time and money, as well as keeping exposure to litigation to a minimum.

Practice Pointer: Take an active role in drafting ordinances and resolutions. By developing a procedure of assisting staff you develop a better working relationship, avoiding surprises at the time of the council meeting and presenting a unified approach. Many resolutions are repetitious in nature and form, and having staff follow your forms can reduce the “surprises” in the proposed document. This also allows you to present those findings necessary to defend your work.

IV. Ordinances

- A. “That the King can do no wrong, is a necessary and fundamental principle of the English Constitution.” -- Blackstone.
 - 1. Constitutional authority – Article 11, section 7. Police powers.
 - 2. Government Code section 37100. Must not conflict with Constitution and laws of California or United States.
 - (a) Conflict where State law “occupies the field” and there is no room for local legislation, even “supplementary” local regulations;
 - (b) Conflict where State law “preempts” subject matter by full and complete coverage with general laws, making additional, local, requirements invalid;
 - (c) Analyze statute and facts upon which the State law was intended to operate.

Practice Pointer: When your city is considering an ordinance which might be in conflict with State or Federal laws, obtain a copy of the complete legislative history and intent of the pertinent State or Federal legislation from a reputable research consultant. Fees incurred can be recovered as part of costs of suit. (Van de Kamp v. Gumbiner (1990) 221 Cal. App. 3d 1260.)

- 3. Effect of ordinance – same force within its corporate limits as a statute. May be penal or non-penal in nature; will effectively substitute for resolution, where resolution required by statute, but converse not true.

(For example, see Revenue Bond Law of 1941 (Government Code §54300) – requires approval of issuance of bonds by resolution, but charter might require approval by ordinance; in contrast, the adoption of sewer fees by resolution instead of by ordinance may be invalid (Health & Safety Code §§5470, *et seq.*.)

- B. Even if the King is wrong, protect the crown by severability provision.
 - 1. Properly drafted ordinance, with severability clause, can save the unconstitutional portions of the ordinance.
 - 2. Criteria for severability.
 - (a) Grammatical
 - (b) Functional
 - (c) Volitional
- C. The King is dead, long live the Queen. Changed circumstances (and majorities in councils) may result in the amendment or repeal of ordinances.
 - 1. Power to legislate includes power to amend or repeal.
 - (a) Rule of “equal dignity” – Repeal or amendment of ordinance by ordinance; repeal or amendment of resolution by resolution.
 - (b) An unconstitutional amendment will leave ordinance in its original form.

Practice Pointer: Consider amendments by repealing the entire ordinance and replacing it with those portions to be maintained in original form along with changed provisions. Together with a proper severability clause you may keep constitutional amendments to an existing ordinance in place. You will also avoid a “patchwork” ordinance where a series of amendments leaves the ordinance of questionable interpretation and enforceability.
 - (c) An existing ordinance might be implicitly repealed by a subsequent ordinance in conflict with the earlier one.
 - 2. Motive of individual member of city council, in passing ordinance, is irrelevant to determination of its validity, so long as city council has power to enact legislation, and further so long as the official is not motivated by unconstitutional concerns (e.g., racially discriminatory animus). (National Independent Business Alliance v. City of Beverly)

Hills (1982) 128 Cal. App. 3d 13; City of Fairfield v. Superior Court (1975) 14 Cal. 3d 768; *see, also*, County of Butte v. Bach (1985) 172 Cal. App. 3d 848.)

Practice Pointer: Even though “motive” of an individual council member is irrelevant, intent and purpose of the council as a legislative body, or the electorate in an initiative measure, is relevant in determining whether certain laws, such as land use laws, are discriminatory. Including a recital of existing facts and circumstances in the ordinance might serve as a valuable tool in a court’s interpretation of the ordinance if challenged. Remember, however, that an ordinance adopted by initiative cannot be amended without a vote of the electorate.

D. Procedures for adoption of Ordinances

1. Government Code §36931 provides mandatory form. *Charter cities, however, might have a different version in their charters.*
2. Titles, although not necessary, allow for expedited reading if properly waived. (Government Code §36934.)
3. Alterations (other than for typographical or clerical errors) prior to second reading require re-introduction for all non-urgency ordinances.
4. Require at least three (3) affirmative votes for passage. When two council members are absent a unanimous vote is required. (But charter cities should check their charter in the event some approvals require more.)
5. Two (2) readings required except for urgency ordinances. Must be adopted at a regular meeting or a regular adjourned meeting not earlier than five (5) days following introduction.

Practice Pointer: When ordinance fails to meet the test of “urgency”, or when an ordinance is required to issue bonds, consider introduction at a special meeting six days prior to the regular meeting, or regular adjourned meeting, or calling a regular meeting with appropriate notice on the sixth day following introduction to hasten the effective date of the ordinance.

6. Generally effective on the 31st day following adoption. Except:
 - (a) Urgency ordinances.
 - (i) Require a statement of valid, constitutional and persuasive facts to justify the determination.

- (ii) When prohibiting land uses which might be in conflict of contemplated general plan, specific plan or zoning ordinances which are being studied, or intended to be studied in a reasonable time, Government Code §65858 interim ordinances may be adopted as urgency measures, becoming effective immediately.
- (iii) Be certain to calendar the expiration of the initial interim ordinance, as well as any extensions.
- (iv) Extensions take effect immediately as well, although they require notice and public hearings, under Section 65090, where the initial urgency ordinance does not.
- (v) Attachment A – examples of initial urgency ordinance as well as two extensions.

Practice Pointer: Consider the adoption of an identical “back up” ordinance by way of the usual procedure (two readings), if there is any doubt regarding the defensibility of the urgency clause. If the urgency clause is successfully challenged, the non-urgency version of the ordinance will already be effective. Only those actions taken or citations issued during the “gap” are then vulnerable to challenge.

- (b) Ordinances relating to an election.
 - (c) Ordinances relating to street improvement proceedings.
 - (d) Ordinances relating to taxes for the usual and current expenses of the city.
 - (e) Interim land use ordinances (usually combined with the “urgency” provisions).
 - (f) Ordinances covered by other provisions of law which prescribe the manner of its passage and adoption
7. Following adoption, entire ordinance required to be published.
- (a) Within 15 days in a newspaper of general circulation, published in city, or
 - (b) If no such newspaper, posting in three (3) public places, or publication in newspaper of general circulation published in county, circulated in city.

- (c) In lieu of publishing the entire ordinance within 15 days of adoption the city council may instead publish a summary of the proposed ordinance (with a certified copy of the entire ordinance posted at the city clerk’s office), not less than five (5) days before adoption, with a second publication of the summary, complete with the votes cast, similarly posted and published within 15 days following adoption. (Government Code §36933(c)(1).) The summary must be deemed “fair and adequate”. If the designated city official cannot prepare a “fair and adequate” summary, the city council can order the publication of a one-quarter page display advertisement indicating the general nature of the ordinance or amendment, with information sufficient for the public to obtain copies of the complete text of the ordinance. Such an advertisement must be published both five (5) days prior to adoption and within 15 days following adoption (with votes cast).
- (d) *Charter cities: Check your charter!* Some charters pre-date Section 36933 and mandate publication of the complete ordinance.

E. Adopting Ordinances or Codes by Reference

- 1. County ordinances; State regulations – Different procedures. The first reading is by title only, along with the title of the secondary code. The public hearing is then scheduled, with the adoption to occur following the public hearing. See Government Code sections 50022.1, *et seq.*
- 2. Exceptions exist when adoption of code is expressly required or permitted as a condition of compliance with a state statute (e.g., Uniform Codes). Government Code §50022.2.

*Practice Pointer: Be careful to adopt, separately, penalty provisions in your adopting ordinance, and not rely on uniform codes. (Government Code §50022.4.) Be especially careful not to simply adopt fees for building permits under the Uniform Building Code, unless your fee study supports the level of such fees. For those fees, follow Government Code sections 66000, *et seq.**

F. Penalties – Misdemeanors, Infractions and “Wobblers”

- 1. Violations are misdemeanors unless ordinance makes it an infraction.
- 2. Ordinance can be adopted to allow city attorney to use discretion when filing.
- 3. Attachment B – City of El Cajon Municipal Code §1.24.010.

Practice Pointer: Make certain your municipal code allows the city attorney the discretion to file criminal complaint as, or reduce filed complaint to, an infraction (i.e., a “wobbler”). This avoids costly jury trials for minor offenses, but allows flexibility for those “persistent violators” of such minor offenses.

V. Resolutions

- A. Used to express the opinion of the legislative body, or to reflect the action taken. Sausalito v. County of Marin (1970) 12 Cal. App. 3d 550; Central Manufacturing District, Inc. v. Board of Supervisors (1960) 176 Cal. App. 2d 850.
- B. Where a subordinate body is charged with making certain decisions as delegated by the city council, which decisions the city council are authorized to make. The decisions must be truly administrative and not legislative. The power to delegate such authority implies the authority of the subordinate commission to adopt resolutions. The adoption of a resolution with findings creates a record of action taken to be reviewed by the city council.
 - 1. Planning commissions created by the city council
 - 2. Design review boards created by the city council
 - 3. Zoning appeals boards
 - 4. Personnel commissions charged with decision-making authority on appeals of decisions of the hiring authority
- C. Statutory authorization for action by resolution (non-exhaustive list of examples):
 - 1. The payment of money (Government Code §36935)
 - 2. Initiation of condemnation action (Code of Civil Procedure §1245.220)
 - 3. Correcting deeds of property conveyed by the city (Government Code §37114)
 - 4. Guaranteeing payments under lease or lease-purchase financings (i.e., certificates of participation or lease revenue bonds) (Government Code §37351.5)
 - 5. To sell city-owned building and site dedicated to public use (Government Code §37420, *et seq.*)
 - 6. Discontinuance of parks (Government Code §§38404, 38443 and 38503)

7. Issuance of revenue bonds under Revenue Bond Law of 1941 (Government Code §54380)
8. Abatement of public nuisances caused by weeds, rubbish, refuse, and dirt (Government Code §39561)
9. Acceptance of dedications or property (Government Code §27281)

Practice Pointer: To avoid delays in the acquisition of property consider the adoption of a resolution authorizing a city official to accept and consent to deeds or grants of property on behalf of the city and its redevelopment agency, with specified limitations of authority (Government Code §27281). Title companies and county recorders will accept certificates of the designated official in lieu of acceptance certificates or resolutions approved by the city council especially for the acquisition.

D. Procedures for adoption of resolutions less formal than ordinances.

1. Do not require two readings
2. Do not require reading in full or even by title
3. Effective immediately (unless otherwise provided by the resolution)
4. No publication (except for fixing tax rates or revenue amounts Government Code §36936.)

E. Findings required for certain resolutions, suggested in others.

1. Land use decisions, including approval or denial of conditional use permits or variances.
2. Decisions on administrative appeals.
3. Approval of environmental documents (i.e., negative declarations, EIRs).
4. A good source of explanations of findings found in, “Findings 101: Explaining a Public Agency Decision,” *Western City*, May 2000, p. 13.

VI. Minute Actions and Motions

A. Adopted Procedural Rules to Exercise Authority Without Ordinance or Resolution.

1. Avoid unnecessary debates over conduct of city council meetings

2. Establish conduct of administrative hearings, appeals, revocations of permits, etc.
3. May be useful to avoid repetitious efforts to re-visit prior actions
4. Will provide a template to ensure procedural due process of law (especially when the city council might need that gentle reminder)
5. Attachment C – Sample Procedural Ordinances from City of El Cajon, City of Poway

B. Use of *Robert's Rules of Order*.

1. If procedural rules are not established, or charter or ordinance requires
2. Requires diligence in application

Practice Pointer: Adopt your own procedural rules and avoid having to become an expert in parliamentary procedure under Robert's Rules of Order or other parliamentary rules. Robert's Rules of Order are convoluted, difficult to follow, and susceptible to misinterpretation. Didn't you ever wonder why the brainy students in Future Farmers of America had so many of the medals on their blue corduroy jackets?

C. Minute Orders or Motions Where Other Action Not Required.

1. Where action is non-penal in nature
2. Where action not intended as local law
3. Where neither ordinance nor resolution is specifically required
4. Where no formal document reflecting city council's action is necessary

VII. Conclusion

- A. Avoid the traps of the unknown by properly preparing yourself and your client for effective governance. Know the laws and know the procedures. Assume that your council members know more than you do about municipal law because chances are, they do.
- B. When all else fails, however, heed the advice of Governor Mario Cuomo, "People expect Byzantine, Machiavellian logic from politicians. But the truth is simple. Trial lawyers learn a good rule: 'Don't decide what you don't have to decide.' That's not evasion, it's wisdom."