

Drafting Ordinances to withstand Constitutional Challenges

By Ryan Henry

Municipalities in the state of Texas act by and through their ordinances and resolutions.¹ No big surprise there. A city council, in passing an ordinance, is acting as a legislative body making laws which govern the citizens of its city. As with any law, an ordinance must know its place. The hierarchy of laws in Texas goes: 1) a. United States Constitution as applied to the states through the 14th amendment and b. Texas Constitution, 2) State Statute and 3) Municipal Ordinance.

A city's ordinance is at the bottom of the totem pole, so to speak. This position exists irrespective of whether the city is a home-rule or general law municipality. The ordinance must yield to the legislative powers above it and cannot be inconsistent with the mandates of its superiors.²

Whenever a citizen does not particularly appreciate the way a specific ordinance is applied to him or her, one common reaction is to attempt to hold the ordinance void or invalid. As rude as that may seem to many city attorneys,

¹ *Stirman v. City of Tyler*, 443 S.W.2d 354, 358 (Tex. Civ. App.--Tyler 1969, writ ref'd n.r.e.).

² *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982), *cert. denied*, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1982) (stating that an ordinance of a city that conflicts or is inconsistent with state legislation is impermissible); TEX. LOC. GOV'T CODE. ANN. § 51.012.

it is nonetheless very common. There are numerous ways to go about this method of attack and, dependent upon the specific nature of the individual ordinance, different legal tests apply. To do a comprehensive analysis of every single way to challenge a municipal ordinance and the proper counters to thwart such challenges would require an article comparable in size to *War and Peace*.³ As I am sure no one is particularly interested at the moment in reading *War and Peace: a battle between the U.S. Constitution and your ordinance*, I will refrain from publishing it at this time. Instead, let us try the Cliffs-Note version.⁴

Regardless of the variety of legal tests and methods to hold an ordinance invalid or unconstitutional, there are several common elements and themes which can be used to support any municipal ordinance. Constitutional challenges often come about when a court compares the purpose and intent of the ordinance with its effect on the individual challenging it. The effect has to "fit" with the purpose.

The standard constitutional tests (i.e. rational basis, intermediate scrutiny, and strict scrutiny) all balance, at different levels, the purpose of the ordinance, the words of the ordinance, and the actual impact of the ordinance on the plaintiffs' purported constitutional right. To cut down on the changes your ordinance will be held unconstitutional,

³ Leo Tolstoy, *War and Peace* (1865)

⁴ The scope of this paper is designed with a city attorney in mind. It assumes you already know the standard elements of ordinances and are already familiar with the most common types of constitutional challenges.

try to make your “fit” as conforming as possible.

The most common themes to remember when drafting constitutional ordinances to accomplish this fit are:

- Remember to include legislative findings (both factual determinations and policy decisions)
- Remember to support your legislative findings with some back-up
- Remember to tailor your ordinance to accomplish its stated purpose
- Use common terms to avoid vagueness issues
- Avoid granting unbridled discretion to city staff or enforcement personnel

While the above bullets are by no means all inclusive, they give a good starting point to avoid constitutional challenges to your ordinances.

The city controls the foundation of an ordinance.

The city has the ability to control the intent, purpose and scope of an ordinance. This is the foundation of the regulation and the basis of the comparison with all other prongs of any constitutional challenge.⁵ Take advantage of the deference given to this foundation.⁶ This foundation includes

⁵ Defining the purpose is the building block. This is your “legitimate” or “compelling” governmental interest. It is what everything else is compared to. Since the City has the ability to define the purpose, do so in a manner which allows for the best fit to accomplish that purpose.

⁶ One of the most important things to remember when drafting any municipal ordinance is that

both legislative determinations of fact as well as legislative determinations of policy.

A great amount of deference is given to a legislative body when making legislative fact findings and determinations as to the need or legitimacy of a particular ordinance.⁷ As a result, one of the most powerful methods of strengthening any ordinance is to make sure the ordinance is supported by legislative fact findings. Legislative findings are presumed valid by the courts unless they are arbitrary or capricious.⁸ In fact, deference is so substantial that to successfully challenge legislative judgment, a plaintiff “must convince the court that the legislative facts on which the [decision] is apparently based could not reasonably be conceived to be true by the governmental decision-maker.”⁹

The judiciary cannot act as super legislature to determine whether or not the city council made the “right” or the “correct” call on a particular legislative

the ordinance itself is an act of legislation and a law. The city must have the power to enact such legislation either via general grant from a home-rule charter or from power granted by the Texas Legislature or Constitution. However, even with a grant of power, the legislative body must be able to demonstrate a legitimate governmental interest in creating the legislation.

⁷ *Hunt v. City of San Antonio*, 462 S.W.2d 536, 538 (Tex. 1971).

⁸ *Hunt*, 462 S.W.2d at 538; *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167, 175 (5th Cir. 1996).

⁹ *FM Properties Operating Co.*, 93 F.3d at 175 (quoting *Shelton v. City of College Station*, 780 F.2d 475, 49 (5th Cir.) (en banc), cert. denied, 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 and 479 U.S. 822, 107 S.Ct. 89, 93 L.Ed.2d 41 (1986); see also *Vance v. Bradley*, 440 U.S. 93, 110-11, 99 S.Ct. 939, 949-50, 59 L.Ed.2d 171 (1979)).

finding.¹⁰ State legislatures and city councils, who deal with specific situations from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation. The legislative conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.¹¹ It is actually a violation of the separation of powers doctrine not to accept the factual findings of a legislative body absence of showing of arbitrary and capricious actions.¹²

For example, take the situation where the city council is presented with information revealing a large number of wild dogs exist within the city limits and stronger animal control ordinances are needed. However, the city council is also presented with information from citizens contesting this factual conclusion and asserting there are not a large number of wild dogs within the city. It is the city council's prerogative to determine who to believe and what facts are true. A legislative body acts similarly to a jury in making factual determinations. As a result, as long as the determinations made by the

legislative body are fairly debatable, the legislative findings of the city council must be taken as true.

Likewise, the determination that particular objectives are necessary for the health, safety, and welfare of its citizens are typically left up to the discretion of the governing body. As long as the policy addressed does not unnecessarily infringe upon constitutional rights, the decision to endorse such a policy is up to the legislative body.

However, it is important to note that the deference given to the city council is not absolute. Different levels of deference apply dependant upon whether the legislative findings are related to a determination of fact or whether, based on the facts, a particular policy decision is made. The judiciary will defer to a city's factual determinations as long as they have some support and the determination is not arbitrary or capricious.¹³ Regardless of what facts are true, the policy needs of the city must still be consistent with the Texas and U.S. Constitution.

In *Esperanza Peace and Justice Center v. City of San Antonio*, the city council, via a budget ordinance, voted not to continue to fund several organizations engaged in the arts, including the San Antonio Lesbian & Gay Media Project.¹⁴ The Plaintiffs brought an Equal Protection and First

¹⁰ *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976)(holding that the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.)

¹¹ *Gorib v. Fox*, 274 U.S. 603, 608, 47 S.Ct. 675, 677, 71 L.Ed. 1228 (1927).

¹² *City of Brookside v. Comeau*, 633 S.W.2d 790, 792796 (Tex. 1982)(Judicial review of a municipality's regulatory action is necessarily circumscribed as appropriate to the line of demarcation between legislative and judicial functions.); see also *Hunt v. City of San Antonio*, 462 S.W.2d 536, 539 (Tex.1971) (the courts have no authority to interfere unless the ordinance is unreasonable and arbitrary-a clear abuse of municipal discretion.)

¹³ *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)(A legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data.)

¹⁴ 316 F.Supp.2d 433 (W.D.Tex. 2001)

Amendment claim against the City because of its budget decision.

Since this was a budget ordinance, no specific legislative findings were present. However, based on the evidence presented, the court found that a majority of the council was motivated, at least in part, by plaintiffs' views on gay and lesbian, political, and social issues, and that their constituents' objected to funding because of such views. The City's primary argument for the differential treatment was that "strong opposition against homosexuality as immoral and unacceptable provides a rational basis for the City's action." The court noted that while the judiciary gives great deference to the policy making body and will not judge the wisdom or desirability of legislative policy determinations, the interest at issue must be for legitimate governmental purposes.¹⁵ Citing *Romer v. Evans*, the court held that public opposition to homosexuality did not justify governmental action and could not be a legitimate governmental interest.¹⁶ As a result, the action was held unconstitutional.

Even though a court must defer to a legislative decision it must still examine how the classification adopted relates to the object to be attained.¹⁷ It needs to be properly tailored to fit a legitimate purpose.¹⁸ A court must review the "fit" between the ends and the

¹⁵ *Id.* at 467.

¹⁶ *Id.* at 468 (citing 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996)).

¹⁷ *Id.* at 468; *Romer*, 517 U.S. at 632, 116 S.Ct. 1620.

¹⁸ Tailoring will be addressed later on in the paper.

means when judging the rationality of government acts.¹⁹

In short, the judiciary cannot challenge legislative facts or policies as long as there is some support for them and they are properly tailored to accomplish a legitimate goal. In determining a "legitimate interest" just make sure your stated purpose and the facts supporting it pass the "smell" test.

A word about motive

It is important to make sure that legislative findings are within the ordinance itself as the intent and purpose should be taken from the legislation itself.²⁰ Intent behind the enactment of legislation can not be challenged based upon statements of a single legislator, such as a city council member, since a legislative body can only act through a majority vote and as a body as a whole.²¹ In the *Esperanza* case, the court found that a *majority* of the city council did vote on the action based on viewpoint.²²

¹⁹ *Id.* (citing *Brennan v. Stewart*, 834 F.2d 1248, 1259 (5th Cir.1988))

²⁰ *State v. Dyer*, 145 Tex. 586, 590, 200 S.W.2d 813 (Tex. 1947)(The intention of the legislature in enacting a law is the law itself); see also *Calvert v. British-American oil Producing Co.*, 397 S.W. 2d 839, 842 (Tex. 1965)(Where the Intent is apparent from the words of the statute it is not necessary for the court to make an analysis of the extrinsic evidence of legislative intent)

²¹ *Sosa v. City of Corpus Christi*, 739 S.W.2d 397, 405 (Tex.App.--Corpus Christi 1987, no writ)(an individual city council member's mental process, subjective knowledge, or motive is irrelevant to a legislative act of the city, such as the passage of an ordinance); *Stirman v. City of Tyler*, 443 S.W.2d 354, 358 (Tex.Civ.App.--Tyler 1969, writ ref'd n.r.e.)(an ordinance expresses the collective will of the City Council acting in its official capacity at a duly assembled meeting.)

²² 316 F.Supp.2d at 454.

Since no legislative findings were present on the face of the ordinance, the intent was derived from other evidentiary sources.

A city can only act by and through its governing body as a whole.²³ Statements of individual council members are not binding on the city, although they can hurt you in front of a jury.²⁴ As a result, the purpose of the legislation and the factual findings supporting the need for the legislation must be contained on the face and in the wording of the legislation itself to avoid inferences as to the motive behind the ordinance.²⁵ Do not give a plaintiff, jury or a court to opportunity to consider extrinsic evidence by making sure the legitimate motive is clear in the legislative findings.

²³ *Stirman v. City of Tyler*, 443 S.W.2d 354 (Tex.Civ.App.--Tyler 1969, writ ref'd n.r.e.); *Cook v. City of Addison*, 656 S.W.2d 650 (Tex.App.--Dallas 1983, writ ref'd n.r.e.).

²⁴ *Cook v. City of Addison*, 656 S.W.2d at 657; *Alamo Carriage v. City of San Antonio*, 768 S.W.2d 937, 941-42 (Tex.App.--San Antonio 1989, no writ); *City of Farmers Branch v. Hawnco, Inc.*, 435 S.W.2d 288, 292 (Tex.Civ.App.-- Dallas 1968, writ ref'd n.r.e.). See also *Austin Neighborhoods Council v. Board of Adjustment of Austin*, 644 S.W.2d 560, 564 (Tex.App.--Austin 1982, no writ); *Stirman v. City of Tyler*, 443 S.W.2d 354, 358 (Tex.Civ.App.--Tyler 1969, writ ref'd n.r.e.); *Driggs v. City of Denison*, 420 S.W.2d 446, 449 (Tex.Civ.App.--Dallas 1967, no writ).

²⁵ *Commissioner's Court of El Paso County v. El Paso County Sheriff's Deputies Association*, 620 S.W.2d 900, 902 (Tex.App.--El Paso 1981, writ ref'd n.r.e.) (A statute is an act of the legislature as an organized body and expresses the collective will of that body. No single member can be heard to say what the meaning of the statute is. It must speak for and be construed by itself.)

To avoid an “arbitrary or capricious” holding, attach proper evidence and information in the record.

Even though the specific intent of individual legislators is not to be considered in determining the legitimate motive behind an ordinance, practically many plaintiff’s attorneys attempt to challenge ordinances through single acts or omissions of individual legislators. While preventing depositions of individual legislators in litigation is possible, courts are going to typically look beyond the face of the ordinance if the intent is not clear. The next place to look is in the city council minutes, attachments, transcripts and information presented during public hearings. As a result, it is advisable to make sure the record supports the legislative findings which are presented and support at least one objective and legitimate basis for making the determination.²⁶

One of the best ways to do this is to have presented to the city council, either via staff or outside consultants, an objective study or other information supporting the legislative facts and the reason why the ordinance needs to be

²⁶ Courts are not to ask whether the legislator subjectively believed or was motivated by other concerns, but rather whether an objective lawmaker could have concluded the purpose of the law legitimate, supported by an actual basis for the conclusion. Legitimate purpose may be shown by reasonable inferences from specific testimony of individuals, local studies, or the experiences of other cities. *Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss.*, 973 F.2d 1255, 1259, fn2, 61 USLW 2222 (5th Cir.(Miss.) Oct 05, 1992)(citing *11126 Baltimore Blvd. v. Prince George's County*, 886 F.2d 1415, 1420 (4th Cir.1989) (intent as set out in legislation's preambles relevant to determination of content neutrality), *vacated on other grounds*, 496 U.S. 901, 110 S.Ct. 2580, 110 L.Ed.2d 261 (1990).

passed.²⁷ Empirical studies are always helpful (although not always absolutely necessary.)²⁸ A city does not have to always do its own study, but can rely upon studies done by other cities, if the cities are comparable.²⁹

For example, with regard to the regulation of sexually oriented businesses (“SOBs”), the U.S. Supreme Court has held that reasonable time, place, and manner restrictions can be applied specifically and only to SOBs in an effort to reduce the specific adverse and secondary effects which accompany such establishments such as crime, deterioration of retail trade, sexually transmitted disease and a decrease in property values.³⁰

In *Lakeland Lounge of Jackson, Inc. v. City of Jackson*, the United States Court of Appeals for the Fifth Circuit noted that the preamble to the SOB ordinance, which included findings related to the secondary negative effects of SOBs, as well as minutes and other evidence that staff and the City’s planning boards, considered such secondary negative effects, adequately supported the legislative findings.³¹

²⁷ *Vance v. Bradley*, 440 U.S. 93, 11, 99 S.Ct. 939, 949, 59 L.Ed.2d 171, (1979) (empirical proof is powerful proof for sustaining a statute, although not absolutely required).

²⁸ *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812, 96 S.Ct. 2488, 2499, 49 L.Ed.2d 220 (1976). (The State is not compelled to verify logical assumptions with statistical evidence)(emphasis added)

²⁹ *City of Renton v. Playtime Theatres*, 475 U.S. 41, 46, 106 S.Ct. 925, 928, 89 L.Ed.2d 29 (1986)

³⁰ *City of Renton v. Playtime Theatres*, 475 U.S. at 46, (citing *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, , 49 L.Ed.2d 310 (1976))

³¹ *Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss.*, 973 F.2d at 1259 (city planning

In *SDJ, Inc. v. City of Houston*, another SOB regulation case, the Fifth Circuit again addressed the need for support in the record.³² The court specifically held that it would not take naked assertions made by a legislative body.³³ Rather, it would intrude into the regulatory decision process only to the extent necessary to “insist upon objective evidence of purpose--a study or findings. Insisting upon findings reduces the risk that a purported effort to regulate effect is a mask for regulation of content. That is, evidence of legitimate purpose is supported by proof that secondary effects actually exist and are the result of the business subject to the regulation.”³⁴

In *SDJ, Inc.*, the court noted that the city council carefully considered the relationship between sexually oriented businesses and neighborhood effects. The City formed a special Committee on Sexually Oriented Businesses, which heard public testimony from both supporters and opponents of the ordinance, as well as experts. The committee also considered studies conducted by other cities such as Detroit, Boston, Dallas, and Los Angeles.³⁵ As a result, the court was satisfied that sufficient support existed to justify Houston’s ordinance as constitutional.

board held a public meeting at which the planning director and other city staff members and citizens discussed secondary effects and the work that had gone into the preparation of the proposed ordinance. testimony and the official minutes of the meeting show the discussion and information presented).

³² 837 F.2d 1268 (5th Cir. 1988).

³³ *Id.* at 1274.

³⁴ *Id.*

³⁵ *Id.*

When supporting evidence of concerns for the secondary negative effects is present, such regulations have been upheld.

Compare *Lakeland Lounge of Jackson* and *SDJ, Inc.* to the case of *J & B Entertainment, Inc. v. City of Jackson, Miss.*³⁶ In this case, the City of Jackson's ordinance criminalized persons physically present in public places from appearing in a state of nudity. The owner of an adult establishment brought suit challenging the constitutionality of the ordinance. The preamble clauses to the ordinance provide that the City enacted the ordinance because of its interests in protecting order and morality and in combating secondary effects associated with public nudity. However, the court was quick to note that the record did not indicate whether the City considered any studies on secondary effects prior to enacting the ordinance. No explanation of what specific secondary effects motivated Jackson to enact the ordinance and the city council failed to make any specific legislative findings prior to enactment. No evidence was presented supporting the need for the ordinance. As a result, the court reversed the grant of a summary judgment and sent the case back down for trial holding that without such evidence, the ordinance could be held unconstitutional.

Fifth Circuit precedence demonstrates that cities must be able to present some supporting evidence of the purpose of an ordinance and the need for it. The evidence does not need to be overwhelming, but does need to be present in the record. As articulated in *SDJ* as well as *J & B Entertainment*, a

³⁶ 152 F.3d 362 (5th Cir. 1998).

city may establish its "substantial interest" in an ordinance by compiling a record with evidence that it may be reasonably believed to be relevant to the problem that the city addresses. Legitimate purpose may be shown by reasonable inferences from specific testimony of individuals, local studies, other cases or the experiences of other cities.³⁷ The City must demonstrate "a link between the regulation and the asserted governmental interest," under a "reasonable belief" standard.³⁸

In short, you should try and show in the record why your city needs the ordinance, possible negative results if the ordinance is not passed, and that the ordinance is passed specifically to address your stated need.

Tailoring

Once you have your foundation down in the ordinance, properly supporting both your legislative facts and your legitimate governmental purpose, you need to make sure your ordinance is properly tailored to address the stated purpose.³⁹

One of the primary constitutional attacks an ordinance can face is whether it is tailored to address the stated legitimate governmental purpose. The properly tailored prong is the weakest link for many ordinances since courts must give deference to the legislatively

³⁷ *SDJ*, 837 F.2d at 1274

³⁸ *J & B Entertainment, Inc* 152 F.3d at 373; *See Renton*, 475 U.S. at 51-52, 106 S.Ct. at 931

³⁹ Dependant upon the type of constitutional challenge, the tailoring standard will range from simply a rational relationship, to being narrowly tailored, to encompassing the least restrictive means possible.

determined facts and the need for a specific policy.

Different tailoring is required for different ordinances as well as for different subject matters. Generally speaking, in tailoring your ordinance you simply need to ensure the procedure set out in the ordinance is reasonably meant to address the primary purpose. Cities are not required to tailor all ordinances to a precise mathematical certainty and are permitted to experiment with proper methods of accomplishing a specific purpose.⁴⁰ However, the ordinance must be adequately related to the stated purpose in order to be justified.

A Quick Note about Void for Vagueness Challenges

Another common constitutional attack is to try and hold an ordinance void for vagueness. The vagueness doctrine protects individuals from laws lacking sufficient clarity of purpose or precision in drafting.⁴¹

Words within ordinances are given their common and ordinary meaning unless specifically defined within the law.⁴² As a result, be cautious

with too many definitions within an ordinance. To avoid a successful vagueness challenge, an ordinance must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.⁴³ When words are given their ordinary meaning, they are more likely to inform a person of ordinary intelligence what is and what is not permissible.

Additionally, an ordinance can be too vague if it authorizes or even encourages arbitrary and discriminatory enforcement.⁴⁴ One of the purposes behind the vagueness doctrine is that vague statutes allowed judges, prosecutors, and police officers to determine what behavior is and is not criminal.⁴⁵ If too much discretion exists for a city official to decide what conduct is permissible and what is not, the ordinance can be challenged on vagueness grounds as well as under the doctrine of “unbridled discretion.” For example, if an ordinance establishes an application process for a permit, but fails to list the criteria a city official should follow in granting or denying the application, the ordinance could be held unconstitutional.⁴⁶

S.W.2d 232, 235 (Tex.Civ.App.-Austin 1963, writ ref'd n.r.e.).

⁴³ "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

⁴⁴ *Hill v. Colorado*, 530 U.S. 703, 732 (2000)

⁴⁵ *Grayned*, 408 U.S. at 108-09 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries ...").

⁴⁶ *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1992) (invalidating regulation that "plac[es]

⁴⁰ It does not offend the Constitution simply because a classification 'is not made with mathematical nicety' " *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970), quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911); *N.W. Enterprises Inc. v. City of Houston* 352 F.3d 162 (5th Cir. 2003); *See*, *SDJ, Inc.*, 837 F.2d at 1276.

⁴¹ *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18, 95 S.Ct. 2268, 2276-77, 45 L.Ed.2d 125 (1975).

⁴² TEX. GOV'T CODE ANN. §311.011; *Calvert v. Austin Laundry and Dry Cleaning Co., Inc.*, 365

To avoid having an ordinance declared void for vagueness, careful, yet common sense drafting is encouraged. Think through the process/procedure/or prohibition while drafting the ordinance. Use common words of ordinary understanding when possible. Put yourself in the position of a citizen or application to determine if the language properly provides notice of its terms. Finally, provide guidelines for conduct for either citizens or city officials to rely upon when deciding how to act under the ordinance.

Almost Done

With a wide variety of different constitutional challenges to choose from, a city attorney has a lot to consider when drafting a constitutional ordinance. While the above analysis may not help you with every ordinance you draft, it does tend to apply to the most common constitutional challenges. The important things to remember are to:

- 1) put in legislative findings establishing a proper policy;
- 2) back up the findings with some evidence;
- 3) tailor the ordinance to address the specific purpose your set forth; and
- 4) not stress out about it because someone will probably challenge it anyway.

Helpful Hints

Dependant upon the type of ordinance you are drafting, the following helpful hints may also apply:

unbridled discretion in the hands of a government official or agency")

- Make sure to provide reasonable alternatives for any prohibited conduct (other means of expression, other alternatives for commercial locations, other application alternatives)
- Try to identify early the types of constitutional challenges you may face (First Amendment, Due Process, Equal Protection, etc.) and adjust the facts/policy/tailoring accordingly.
- Avoid making general categorizations or treating the categories differently unless supported with a darn good reason, plus legislative findings and back up to show why the differential treatment is justified and rationally connected to a legitimate governmental interest.
- Allow for an appeal process, even up to the judicial level if necessary⁴⁷
- Avoid using the terms “immoral,” “religious health,” “negative image” and “positive image.”
- Use common sense and initiate the “smell” test to reduce facial challenges to your ordinances

⁴⁷ This not only deals with a Due Process challenge but can come into play with other challenges as well. If dealing with an application process, such as for a sign, you may run into a “prior restraint” problem under the First Amendment. If the ordinance is ever held to be content-based, it can still stand if it allows for prompt judicial review. *E.g., Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).