

MWEO

From: Michelin, Carlos [CMichelon@sdcwa.org]
Sent: Tuesday, December 30, 2008 2:30 PM
To: MWEO
Cc: Frame, Kent; Nora Jaeschke; Glen Schmidt; Rose, Bill; Weinberg, Ken; Roy, Toby; Brewer, Celia; Portillo, Mayda; Mooney, Kelly
Subject: San Diego Regional Comments to Model Landscape Ordinance
Attachments: SDCAC_Cmnt_Ltr-12-08.PDF

Dear Simon,

On behalf of the San Diego Region's Conservation Action Committee, attached are comments to the latest version of the draft ordinance.

Please call me at 858-522-6756 if you have any questions in relation to this submittal. Thanks for the opportunity to comment.

Best regards,

Carlos Michelin
SDCWA

CAC Membership:

Building Industry of America
Bureau of Reclamation
California Association of
Community Managers
California Center for
Sustainable Energy
California Council of
American Society of
Landscape Architects
California Landscape
Contractors Association
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U.S. Navy Region Southwest
Water Conservation Garden
at Cuyamaca College
Manufacturers, Suppliers,
Reserve Specialists, and
Landscape Service Providers



Conservation Action Committee

December 30, 2008

Department of Water Resources
Office of Water Use Efficiency and Transfers
Attention: Simon Eching
P.O. Box 942836
Sacramento, CA 94236-0001

RE: SAN DIEGO REGION'S COMMENTS TO STATE'S UPDATED DRAFT MODEL
WATER-EFFICIENT LANDSCAPE ORDINANCE

Dear Mr. Eching:

The regional Conservation Action Committee of San Diego County is pleased to provide the enclosed comments to the State's recently updated draft model water-efficient landscape ordinance.

We commend DWR staff for its efforts to improve the draft ordinance by incorporating many of the comments and suggestions submitted in March 2008 by stakeholders statewide. We'd also like to express our appreciation for the Department's participation in an informative roundtable session on the ordinance, held at the San Diego County Water Authority's headquarters on December 19, 2008. Over the past two years our region has been actively engaged in developing a local model landscape ordinance for use in San Diego County. The roundtable session was an invaluable activity to advance our region's understanding of the emerging update to the State ordinance.

The following comments are offered in a constructive spirit, with the aim of ultimately supporting a streamlined and effective regulation that can be successfully implemented at the local level. Recognizing that many improvements have been made since the last round of public comments, it is also important to identify persistent gaps and inconsistencies that must be rectified to achieve the ordinance's intended purpose. While this letter sets forth major concerns about the model ordinance, please accept the comprehensive comments incorporated and attached hereto as Exhibit A.

A primary and critical issue for local agencies is the perception that the model ordinance will require staff time and expertise that is not currently available. Given the constraints of the economy, it is more important than ever that the model ordinance be clear and easy to understand so that each local agency may adopt and implement the model ordinance in a meaningful way.

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waterconservationsummit.com

This version of the ordinance is a significant improvement over the first draft, in that it provides increased flexibility to local agencies to craft an ordinance that works. However, from the local agency perspective, in its current form, the model ordinance does not provide an adoptable or feasible framework for local agency implementation for the following reasons:

1. Several local agencies have affirmed that many of the provisions of the revised ordinance still constitute an unfunded mandate.
2. Compliance with the prescribed technical standards is highly dependent on access to water use data, which may not be universally available to local agencies.
3. The ability for local agencies to determine when waivers or variances are admissible should be reinstated in recognition that community attributes and characteristics vary widely throughout the state, and
4. While clarification was previously requested, it is not clear what type of ordinance would meet an “at least as effective in conserving water” standard.

Attached for your convenience is a copy of a chapter entitled “Adopting Legislation” an excerpt from the publication “[An Ounce of Prevention: Best Practices for Making Informed Land Use Decisions](#)” by the Institute for Local Government that is available through the League of California Cities. The chapter provides guidance on how to draft local ordinances that would help improve this from the perspective of local agencies and that would also help accomplish the goals of the California legislature.

It is impossible to discern the scope of the revised model ordinance. At the outset, it is not clear when and to what the model ordinance applies. The model ordinance contains numerous references to a “landscape permit” as a trigger for applying its provisions, yet most jurisdictions do not have an independent requirement for a landscape permit. Instead, a landscape plan is often a required component of a development plan.

From the viewpoint of industry, local agencies and prospective applicants, the regulation is hypertechnical and has little meaning for the non-landscape professional. The highly technical content and standards more appropriately belong in a separate design manual, as is anticipated by the San Diego regional draft model ordinance. The ordinance appears over-reaching in its prescriptive approach to establishing both a performance standard (MAWA water budget) and specifications for authorized technologies (e.g., mandate of drip irrigation on slopes). Professionals should be empowered to select the appropriate technology, provided they can demonstrate compliance with MAWA.

From the water utility perspective, the new language on potential responsibilities of water purveyors has already been the subject of some controversy, since AB 1881 (Gov. Code section 65592) applies only to local agencies – meaning cities and counties (not water utilities). By statute the model ordinance applies solely to local agencies. While involvement of water purveyors may be desirable for many reasons, it is not mandated in the governing statute. In addition, the total absence of consequences for non-compliance (either for the local agency or for the individual applicant) is in stark contrast to the highly prescriptive and complex nature of the ordinance. While the random and five year audit requirements have been deleted with good

reason, it appears that overall enforcement requirements have been diluted. Other highlights of key comment areas include:

- Applicability: Close potential loopholes to ensure broad applicability (e.g., eliminate exemption for cemeteries) and clarify triggers such as permitting requirements and square footage.
- Definition of landscape area: Include mulched, pervious surfaces to promote water-saving landscape designs.
- Implementation and compliance issues: Preferably, require local agencies to enforce the model ordinance the same as any other adopted ordinance, or otherwise defer to the local agency to ensure that roles and procedures prescribed by the State are consistent with existing authorities.
- Technical Standards: Streamline the structure and content of the ordinance by moving the highly technical content to a separate Design Guidebook.
- Duplication: Eliminate duplicative references to existing regulations already in effect (grading, storm water, etc.).
- Technical Standards: Expand options for compliant hardware on slopes to facilitate meeting vegetation coverage targets for erosion control purposes.

Again, please refer to the attached table, which provides more detailed comments to the draft ordinance, organized by section.

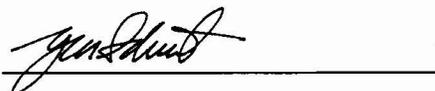
In closing, due to the unusual December 30 deadline, please note that Conservation Action Committee members may not universally agree with all the submitted comments. For the purpose of these comments, our Committee's efforts have focused on accurately relaying to the State the most salient points in the ongoing dialogue among regional stakeholders. While we have done our best to emphasize central themes with broad consensus, individual Conservation Action Committee members may have diverging views on select issues.

We appreciate this opportunity to share our comments and look forward to a new public release in the very near future.

Very truly yours,



Nora Jaeschke
Chair, Conservation Action Committee



Glenn Schmidt
American Society of Landscape Architects
Co-Chair, CAC Model Ordinance Working Group

EXHIBIT A

SAN DIEGO REGIONAL COMMENTS TO DWR'S UPDATED MODEL LANDSCAPE ORDINANCE DRAFT

Section	Title	Comments
490 (b) 6	Purpose Comment 043.2	490 (b) 6 – <i>“encourage water purveyors to use economic incentives.”</i> Gov. Code 65592 makes this Model Ordinance applicable to local agencies only--defined as any city, county or city and county including a charter city or charter county. Water purveyors that are not cities or counties are not subject to the Model Ordinance. Local agencies have no ability to set rates for water purveyors that are not cities or counties.
490 (b) 7	Comment 043.3	490 (b) 7 – encourage local agencies to <i>“designate the necessary authority that implements and enforces the provisions”</i> of the model ordinance. The meaning is unclear as drafted, consider <i>“dedicate sufficient resources to implement and enforce.”</i> Or, given section 492 does this mean designation of police powers to another agency? It is not clear.
490.1 (a) 1	Applicability Comment 043.4	Model Ordinance states it applies to new construction, rehabilitated landscapes for public agency projects and private development with a total project landscaped area equal to or greater than 2500 sq. ft. requiring a <i>“building or landscape permit, plan check or design review.”</i> Later, the requirement is for rehabilitated landscapes, not just rehabilitated landscapes for public agency projects. What is the distinction between Section 490.1(a) (1) and (2). Wouldn't subsection (2) always fall within the definition of subsection (1) because <i>“developer-installed”</i> is included within <i>“private development projects”</i> ?
	Comment 043.5	Few jurisdictions have an independent <i>“landscape permit.”</i> More often, a landscape plan or compliance with landscape guidelines is a component of a development plan subject to a discretionary permitting process. This ordinance does not create a requirement for a landscape permit and most cities do not have such a requirement. The meaning needs to be clarified.
	Comment 043.6	Similarly, the need for a ministerial <i>“building permit”</i> is governed primarily by the UBC (as modified by local agencies) which typically governs the construction and alteration of every building or structure (not landscaping). Similarly <i>“plan check”</i> is required for virtually every construction project. A building permit is required to install a hot water heater or a new window in a building. Is such a permit application really intended to trigger the provisions of the Model Ordinance?
490.1	Comment 043.7	490.1 is triggered by minimum square footage and other factors differentiating between developer installed and homeowner installed landscaping. The ordinance should base application on a more neutral trigger, such as the submission of permit application. It would be easy to avoid the application of the ordinance by simply splitting up the projects especially as they apply to rehabilitation projects. Further, it seems important, at a minimum, to require the installation of the appropriate water efficient hardware and water conserving devices for all new development regardless of square footage.
	Comment 043.8	Section 490.1 Applicability (a5) Cemeteries: Cemeteries should not be given special exemptions except as special landscape areas. Like public parks they should be required to stay within the 1.0 ETAF.
491	Definitions Comment 043.9	(l) – <i>“hardscapes”</i> includes any durable surface material, both pervious and non-pervious. To promote the use of pervious materials in order to permit rainwater or other water on hardscapes to reach the underlying soil and provide for potential groundwater recharge, we believe that the definitions should differentiate between pervious and nonpervious harscapes, thereby encouraging the use of pervious hardscapes where appropriate.
	Comment 043.10	(aa) – <i>“irrigation water use analysis means an analysis of water use data based on meter readings and billing data.”</i> This information is not typically available to local agencies that are not also water purveyors. The Model Ordinance must be capable of being implemented and enforced by the local agencies it applies to.
	Landscape Area Comment 043.11	(cc) - Definition of landscape area unnecessarily excludes pervious elements (e.g., mulched areas). Definition should be further refined to include permanently mulched areas. Artificial Turf should be included as permanently mulched areas. To provide more clear definition we propose to include mulch within the definition as follows. <i>“means all of the planting areas, turf areas, mulch areas, and water features in a landscape design plan subject to the Maximum Applied Water Allowance (MAWA) calculation.</i>
	Comment 043.12	(ee) – This limits the definition of a landscape contractor to a person with a valid C-27 license. However, if the work is performed as part of an overall project, a Class B licensee may perform the landscape work. This should be changed to define landscape contractor as a person properly licensed in accordance with the Business and Professions Code. Numerous sections require the landscape professional to certify that they agree to comply with the criteria in the ordinance and agree to apply them for the efficient use of water in grading, irrigation, etc. design. However, no parallel certification is required by the homeowner for an owner-builder project.

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Section	Title	Comments
	Comment 043.13	(hh) – <i>“Local agency is also responsible for the enforcement of this ordinance, including but not limited to approval of a permit and plan check or design review.”</i> This implies the only enforcement required is the permit, plan check or design review approval. Administration and implementation of a regulatory program is not typically considered enforcement of that program.
	Low Volume Irrigation Systems Comment 043.14	(jj) definition of Low Volume Irrigation should be restored to include systems that have a flow rate of .75 or less. If a specific flow rate is not desirable the following definition is recommended: “Low volume irrigation means the application of irrigation water through a system of tubing or lateral lines and low-volume emission devices. Low volume irrigation systems are specifically designed to apply small volumes of water at a rate similar to the ability of soil to uptake the water.”
	Comment 043.15	(tt) - <i>“permit” means “any permit issued by local agencies for new building or rehabilitated landscapes.”</i> Permits are not typically required for rehabilitated landscapes. Rehabilitated landscapes are typically unregulated (see section (ccc)).
	Recreational Area Comment 043.16	(zz) definition of recreational area. The revised definition uses the word ‘active’ which in park design means sports fields that are actively scheduled for games, and excludes ‘passive’ grassy areas that are used for picnicking and informal play. A better definition would be “areas dedicated to play such as parks, sports fields, golf courses or school yards where turf provides a playing surface.”
	Rehabilitated Landscapes Comment 043.17	(ccc) – <i>“rehabilitated landscape” is defined as a “re-landscaping project that requires a permit, plan check or design review.”</i> Typically, re-landscaping alone does not require any independent permitting, rendering the application to rehabilitated landscapes moot. This section further states that the re-landscaping project must meet area requirements and the <i>“modification occurs within one year”</i> of what? There should be a threshold such as ‘if the modified area is greater than 2,500 S.F. and the site requires a permit’. It is also unclear if the entire site falls under the ordinance, or just the rehabilitated area.
	Comment 043.18	(nnn) – <i>“water conserving plant”</i> is defined as a plant species having a <i>“low plant factor”</i> an undefined term.
	Water Feature Comment 043.19	(ooo) – <i>“water feature”</i> provides that it is a design element where open water performs an aesthetic or recreational function. We did not note any definition of open water utilized as habitat. The definition of a water feature excludes constructed wetlands, however, constructed wetlands is not a defined term. Constructed wetlands and stormwater best management practices should be included in the landscape areas if they require permanent irrigation systems. Also, stormwater basins can be large and might be designed to include very high water use plant material. These should not be exempted from the requirements.
492 & 493	Provisions for New Construction or Rehabilitated Landscape Comment 043.20	“Provisions for New Construction or Rehabilitated Landscapes” and 493 “Provisions for Existing Landscapes” state that a local agency may designate another agency, such as a water purveyor, to implement some or all of the requirements of the Model Ordinance. However, water purveyors have no legal obligation to assume responsibilities under the Model Ordinance. Cal. Gov. Code section 65594 and the Model Ordinance requirements apply only to <i>“local agencies”</i> as defined. The designation of police powers cannot be unilaterally accomplished by a local agency and water purveyors are not subject to the Model Ordinance. Further, delegation of police power authority is problematic, but may be accomplished to a limited extent by mutual aid agreements.
492.1	Compliance with Landscape Documentation Package Comment 043.21	States that following submission of the Landscape Documentation Package, the applicant should submit a copy of the Water Efficient Landscape Worksheet to the local water purveyor. However, there is no apparent purpose for the submittal and there is no jurisdiction over the water purveyors. This provision and similar ones should be deleted. Duplicative: 492.1 (c) (2) states the applicant must provide a copy of the Landscape Documentation Package to him or herself (see definition of applicant in (ww)).
492.2	Penalties Comment 043.22	492.2 as amended permits local agencies to administer penalties for non-compliance but does not require them to do so. There is no enforcement mechanism required by or outlined in the Model Ordinance. This provision should be deleted and cities or counties should be required to implement and enforce the Model Landscape Ordinance as set forth therein. Further, there is no penalty in Gov. Code section 65592 that applies to local agencies for failure to adopt or enforce the Model Ordinance. Given the current economic climate and the severe shortages of money and staff being experienced by local agencies, there is scant incentive to spend much staff time or resources on the Model Ordinance.

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SAN DIEGO REGIONAL COMMENTS TO DWR'S UPDATED MODEL LANDSCAPE ORDINANCE DRAFT

Section	Title	Comments
492.3	Elements of the Landscape Documentation Package Comment 043.23	Section 492.9(c)(3) requires the project applicant to submit copies of the approved Certificate of Completion to the local water purveyor. Instead, transmittal by the local agency to the appropriate water purveyor would be preferable to ensure that the Certificate is accurate and has, in fact, been approved.
	Variances & Waivers Comment 043.24	492.3 Waivers and Variances. All references to waivers and variances have been removed. A local agency should have the ability to allow variances that meet the spirit of the ordinance, when strict adherence poses an undue burden on the applicant or discourages the applicant from a superior design solution.
492.5	Soil Management Plan Comment 043.25	Overreaching. 492.5 (c) Soil samples are required to be sent to a laboratory for analysis. This seems unduly burdensome unless the relationship between soil type and water efficiency is demonstrated. If the irrigation operates within its MAWA, then why is soil analysis also required?
492.6	Landscape Design Plan Comment 043.26	Duplicative. 492.6 (B) states "each hydrozone shall have plant materials with similar water uses. A hydrozone by definition [see 491 (y)] is a portion of the landscaped area having plants with similar water needs.
492.7	Irrigation Design Plan Comment 043.27	Duplicative. 492.7 (a) (1) (A) Water Code section 535 already requires separate water meters to measure water used exclusively for landscape purposes when the connection serves landscaping of more than 5,000 sq. ft. of irrigated landscaping.
	Comment 043.28	Section 492.7(a)(1)(T) requires non-turf areas on slopes greater than 25% to be irrigated with drip irrigation or other low volume irrigation technology. The Statewide General Construction Permit requires disturbed areas, including slopes, to contain at least 70% of established vegetative cover before a construction permit can be issued. Low volume irrigation techniques will not accomplish the necessary 70% coverage within a reasonable time. Local agencies should be given the authority to approve other types of irrigation on a temporary basis until the vegetation is sufficiently established to allow issuing a construction permit.
	Comment 043.29	492.7 (L) "Irrigation system capacity shall not exceed the capacity required for peak water demand based on water budget calculations." This restriction does not allow for the many events and situations that public, and publicly used landscapes facilitate. During the summer, special activities may extend well into the evening, or prevent irrigation for several days. On occasion, irrigation repairs require turning a system off for multiple days. Once the system is available for operation, it is often necessary to operate multiple valves at once to replace the deficit. We recommend striking this condition.
	Comment 043.30	492.7 (R) "Areas less than 8' in width in any direction shall be irrigated with subsurface drip" Recommend that Recreational Areas be exempt from this restriction. Often grass is used as a 'driving surface' for maintenance. In certain situations, small shrub areas invite children to 'leap over them' at the expense of the shrubs. Small shrub beds tend to collect litter, requiring higher maintenance. If the Recreational Area is held to its MAWA and does not allow runoff into storm water, this flexibility should be given to them. While subsurface irrigation is a possibility for narrow areas, this technology requires special attention that is not available with the manpower allocated public projects.
	Comment 043.31	492.7 (S) "Overhead irrigation shall not be permitted within 24" of any non-permeable surface." For reasons similar to 492.7 (R), we recommend that Recreational Areas be exempt from this restriction.
492.8	Grading Design Plan Comment 043.32	Duplicative. 492.8 Grading Design Plan – Local agencies typically have grading ordinances in place governing grading. They also have storm water ordinances governing run-off. Avoid the potential for conflict and the need for local agencies to amend existing regulatory ordinances.
	Comment 043.33	Section 492.3(a)(6) requires that a grading design plan be submitted as part of the Landscape Documentation Package. Section 492.8 gives the requirements of the plan. Developments are often required to prepare comprehensive grading plans as part of a discretionary permit. The County recommends that local agencies be given the authority to allow these comprehensive grading plans to fulfill the landscape ordinance requirement for a grading design plan.
492.9	Certificate of Completion Comment 043.34	492.9 also requires submittal of a Certificate of Completion to the water purveyor for no apparent purpose and the water purveyor has no obligation to take action on such a certificate of compliance.

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SAN DIEGO REGIONAL COMMENTS TO DWR'S UPDATED MODEL LANDSCAPE ORDINANCE DRAFT

Section	Title	Comments
	Comment 043.35	492.9 Certificate of Completion. After local agency approval of the landscape design, this section requires a preliminary inspection to confirm the system was installed as designed (a)(6). Then a final inspection and certification that the project was installed pursuant to the approved "plan" [should read "permit"?] is required. Immediately after installation, an irrigation audit is required by a certified irrigation auditor (a)(7). If applicant acts in reliance on approved plan and installation, what is the audit for? Finally, this requires all landscaping to be complete prior to issuance of COO. Typically, the COO indicates only that the building is compliant with building codes for the intended use and is safe for occupancy. Also, issuance of occupancy permits varies throughout the region. Lastly, Certificate of Completion must be provided to the water purveyor, although the water purveyor is not charged with implementation of this ordinance and the reason for the submittal is not evident.
492.10	Irrigation Scheduling	Expand watering window to 6pm to 10 am to accommodate irrigation at large sites Comment 043.36
492.12	Irrigation Audit, Irrigation Survey and Irrigation Water Use Analysis Comment 043.37	492.12 regarding irrigation audits, surveys and analysis requires information that local agencies that are not water purveyors may not have access to. The Model Ordinance must be capable of being implemented and enforced solely by the local agencies with no reliance on water purveyors because water purveyors have no legal obligation to assist with implementation and enforcement of the Model Ordinance.
493.1	Irrigation Audit, Irrigation Survey and Irrigation Water Use Analysis Comment 043.38	493.1 Existing landscapes are limited to Section 493.1 and the rest of the ordinance does not apply. It applies to existing landscapes with dedicated or mixed use water meter of one acre or more and the local agency "may" require irrigation water analysis, irrigation surveys and irrigation audits to meet existing MAWA. (1) Can a local agency that is not a water purveyor get the information needed to determine MAWA compliance? (2) Who is going to seek permission to measure existing landscaped areas to determine if MAWA compliance is necessary—and who is going to get the inspection warrant if permission is denied? Existing landscapes should be exempt and the Model Ordinance should apply prospectively instead. (3) Finally, what happens if the property does not meet MAWA? These are not cases where the property owner has sought any type of permit or review from a local agency and no penalties are required under the Model Ordinance.
	Comment 043.39	Finally, the Model Landscape Ordinance does not contemplate how the Ordinance is to be enforced against subsequent owners of property. It may be enforced as a condition of approval that runs with the land on discretionary permits. Further, because there is no independent requirement for a landscape permit in most jurisdictions, there is nothing to prohibit a homeowner from redoing the landscaping in violation of the Model Ordinance.
493.2	Water Waste Prohibition Comment 043.40	Duplicative. 493.2 Waste Water Prevention states that local agencies shall prohibit water waste and shall establish penalties. Most local agencies have water waste prohibitions in their municipal codes in drought response and other ordinances.
Other	Implementation Deadline Extension for Local Jurisdictions Comment 043.41	Since DWR will be finalizing its update later than anticipated, it is requested that local jurisdictions also receive a proportional extension for their adoption.

CHAPTER 3

IN THIS CHAPTER

- Determination of Authority
- Scope of Legislative Action
- Considerations In Regulatory Design
- Clear Wording
- Responsibility for Drafting

Adopting Legislation



Most elements of the general plan are implemented through zoning ordinances. Ordinances are legislative acts because they establish policies that apply to a broad range of parcels or applicants. Well-drafted legislation does what the local agency intends it to do—nothing more, nothing less. Poorly drafted legislation, on the other hand, can be interpreted in unintended ways and increase the risk of litigation.

Determination of Authority

The first step in drafting an ordinance is making sure that the agency has the authority to legislate. The authority to regulate land arises from the “police power” to protect the public’s health, safety and welfare.¹ In California, this power is passed to cities and counties, which can make and enforce such laws to the extent that they do not conflict with the laws of the state.² Courts have traditionally construed the police power to authorize local land use regulation.³

¹ The police power is inherent in a sovereign government. This power is reserved for states in the Tenth Amendment to the United States Constitution. *See also Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926) (holding that local governments may protect the general welfare through enactment of residential zoning ordinances).

² Cal. Const. art. XI, § 7. *Miller v. Board of Public Works*, 195 Cal. 477 (1925).

³ *Candid Enterprises, Inc. v. Grossmont Union High School Dist.*, 39 Cal. 3d 878, 886 (1985).

The police power is also “elastic,” meaning that it is flexible enough to meet the changing conditions of society.⁴ Thus, actions that might not have been thought of as promoting the general welfare a century ago (like actions to assure aesthetic character, perhaps) are within the purview of the general welfare today. Courts have found that a wide variety of local concerns legitimately fall within the general welfare, including growth management.⁵

But there are limits to the police power. One of the primary limits to this power is the caveat that local laws may not conflict with state law. An example is the state “anti-NIMBY” law, which prohibits local agencies from denying affordable housing projects unless specific findings can be made. A more complex example is the second unit or “granny flat” law, which requires local agencies to adopt processes to approve second unit applications ministerially, without discretionary review or a public hearing.⁶ Agencies that do not

Statutory Limitations

The state has imposed many specific limitations on the exercise of local zoning power. The following are some examples.⁷

- **Residential Zoning.** Sufficient land must be zoned for residential use based on how much land has been zoned for non-residential use and on future housing needs. A small exception applies to built-out communities.
- **Second Units (“Granny Flats”).** Qualifying second unit applications are not subject to discretionary review.
- **Density Bonuses/Affordable Housing.** Projects that include certain percentages of affordable units must be allowed to build at densities 10 to 35 percent greater than the maximum allowed under a zoning ordinance.
- **Group Homes and Child Care Facilities.** Day care facilities for six or fewer children licensed under the Community Care Facilities Act must be treated as single-family residences. In addition, residential facilities serving six or fewer persons must also be considered equivalent to conventional single-family uses. The law also requires cities and counties to treat large family day care centers as single-family homes.
- **Coastal Zone.** Land in the coastal zone cannot be developed without a coastal development permit.
- **Solar Energy Systems.** Local agencies, including charter cities, may not unreasonably restrict the use of solar energy systems in a way that significantly increases cost or decreases efficiency.
- **Discrimination.** Ordinances that deny rights to use or own land or housing based on ethnic or religious grounds are illegal.
- **Manufactured Homes.** Manufactured homes cannot be prohibited on lots zoned for single-family dwellings.
- **Timber and Agricultural Land.** Farm and timber lands that are enrolled in special zones or preserves—which provide tax breaks in return for the promise to keep the land in agricultural or timber production—may not be developed without payment of a penalty. For agricultural lands, additional controls may include a prohibition on annexation while the land is enrolled in such programs.
- **Psychiatric Care.** Zoning ordinances may not discriminate against general hospitals, nursing homes, and psychiatric care and treatment facilities.
- **Billboards and Signs.** Outdoor advertising displays cannot be removed without payment of just compensation. Reasonably sized and located real estate “for sale” signs must also be permitted.
- **Surplus School Sites.** If all public agencies waive their rights to purchase a surplus school site, the city or county with jurisdiction over the site must zone the property in a way that is consistent with the general plan and compatible with surrounding land uses.

⁴ *Euclid v. Ambler Realty Company*, 272 U.S. 365, 387 (1926), *Agins v. City of Tiburon*, 447 U.S. 255, 260-63 (1980), and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

⁵ *DeVita v. County of Napa*, 9 Cal. 4th 763 (1995).

⁶ Cal. Gov’t Code § 65852.2.

⁷ See Cal. Gov’t Code § 65913.1 (residential zoning); Cal. Gov’t Code § 65852.1 (second units); Cal. Gov’t Code § 65915 (density bonus); Cal. Health & Safety Code §§ 1566.3, 1597.45 & 1597.46 (group homes and child care facilities); Cal. Gov’t Code § 65850.5 (solar energy); Cal. Gov’t Code § 65852.3 (manufactured homes); Cal. Gov’t Code §§ 51100 and following (timberland); Cal. Gov’t Code §§ 51200 and following (agricultural land); Cal. Welf. & Inst. Code § 5120 (psychiatric care); Cal. Bus. & Prof. Code § 5412 (billboards); Cal. Civ. Code § 713 (signs advertising real property); Cal. Gov’t Code § 65852.9 (surplus school sites).

Best Practices: Minimizing the Risk of Preemption Arguments

- Consult with the agency's attorney about the degree to which state or federal law addresses a problem facing the community.
- Through legislative findings or staff reports:
 - Explain why the agency's regulation achieves significant public purposes historically within the police power.
 - Emphasize purposes for local regulations that are separate and independent from purposes emphasized in state or federal regulations, or both.
 - Highlight, when relevant, the ways in which the local regulation addresses a local problem that varies from jurisdiction to jurisdiction.
 - Identify any language in the federal or state statutes, regulations or legislative or regulatory history that leaves room for related or supplemental local regulation and then explain how the local regulation fits into that category.
 - Describe how the local regulation addresses issues traditionally considered to be subject to local control.
 - Demonstrate why the agency's regulation is compatible with or furthers any existing state or federal laws in the area.

adopt such procedures must approve all second unit applications ministerially according to a set of state standards. Conflicts with federal laws can also prevent local action.

Not surprisingly, determining whether and to what extent an agency may be precluded from acting on certain issues can involve a complex analysis. Sometimes state or federal law is not clear on the extent to which it precludes local regulations. Agency attorneys will apply slightly different tests when determining whether state or federal law preempts local legislation:

- (1) Congress demonstrates its intent to occupy the field of regulation and supplant state or local authority (federal standard).
- (2) The state or local law may conflict with federal law by making it impossible to comply with federal law or by creating an obstacle to the goal of the law (federal standard).⁸
- (3) A local law conflicts with state law when it duplicates, contradicts, or enters a field which has been fully occupied by state law, whether expressly or by legislative implication (state standard).⁹

Sometimes state and federal laws leave room for more stringent local regulation, either expressly or by implication. State and federal law can often be viewed as a baseline requirement allowing the adoption of additional local standards. This is particularly the case for most planning and zoning laws, where the state has found that such laws impose a minimum limitation and that local agencies may exercise the “maximum degree of control over local zoning matters.”¹⁰

Nevertheless, there are a number of areas, such as telecommunications, affordable housing, habitat conservation, and other environmental regulations, where the scope of controlling federal or state law is quite extensive. Thus, it is advisable to consult early on with agency counsel to ensure that a proposed regulation is within the agency's authority to enact and does not conflict with state or federal law.

Finally, charter cities have additional authority to enact laws that conflict with state law if those laws fall into the specific category of “municipal affairs,” or matters of local, as opposed to statewide, concern.¹¹ Of course, charter city enactments cannot conflict with the charter itself—charters generally contain limits on local legislative authority.¹²

⁸ *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

⁹ *People ex rel. Deukemejian v. County of Mendocino*, 36 Cal. 3d 476, 484 (1984); *Candid Enterprises, Inc. v. Grossmont Union High School District*, 39 Cal. 3d 878, 885 (1985); *California Federal Savings and Loan Association v. City of Los Angeles*, 54 Cal. 3d 1 (1991).

¹⁰ Cal. Gov't Code § 65800.

¹¹ See Cal. Const. art XI, § 5(a); *California Federal Savings and Loan v. City of Los Angeles*, 54 Cal. 3d 1, 13 (1991) (rejecting static and compartmentalized description of municipal affairs).

¹² *City of Glendale v. Tronsden*, 48 Cal. 2d 93, 98 (1957).



Scope of Legislative Action

The next step in the process is to develop a core set of drafting guidelines that describe the intended scope and objectives of the ordinance. Oftentimes, this type of information is developed through a civic engagement process. Typically, such guidelines include some or all of the following elements:

- **Goal.** What problem is the agency trying to solve? In the land use context, answering this question will typically involve an analysis of impacts of certain kinds of land uses and why they are either beneficial or detrimental to the community.¹³
- **Scope.** The extent to which the ordinance will apply should be clearly understood from the beginning. Often, there are particular types of projects or areas in which the ordinance should not apply.
- **Uniformity versus Flexibility.** There are instances where the local agency will want to treat every project the same. For example, courts are more likely to uphold local agency

fees when they are applied equally to all landowners as opposed to when they are applied on a more individualized basis.¹⁴ More flexibility, however, may be appropriate if each application is likely to have its own unique circumstances that will need to be addressed individually.

- **Specificity versus Discretion.** A related concept is whether to include every aspect of a regulatory program in an ordinance. This enables the program to be fully vetted politically. However, it can be challenging to anticipate every detail. The alternative is to draft ordinances to cover major purposes and key elements, and then delegate to staff the responsibility of preparing regulatory guidelines that flesh out the day-to-day details. Often, such implementation procedures or guidelines must still be approved by resolution. Publicizing such guidelines is important so that those who are subject to the regulations are aware of the full extent of their obligations.
- **Consistency with Existing Regulations.** Anytime an agency adds an ordinance to its code, the agency needs to consider how the new provisions affect existing regulations. A key goal is not to lose the benefit of desirable procedures and substantive provisions.¹⁵ It can also be useful to include a provision specifying how any remaining, inadvertent conflicts should be resolved.

Considerations In Regulatory Design

The third step is to determine the overall design of the ordinance. Design elements affect how the regulation will be implemented and enforced. Thus, having a sense of how the provisions will work together will help at the drafting stage.

¹³ Michael A. Zizka, Timothy S. Hollister, Marcella Larsen & Patricia E. Curtin, *State & Local Land Use Liability* § 3:2 (1997).

¹⁴ *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643 (2002).

¹⁵ Zizka et al., *supra* note 13, § 3:26.

Major elements include:

- **Locating Definitions.** A typical ordinance includes a definitions section at the very beginning. This often makes the most sense, particularly if it's the type of ordinance that will be circulated separately, like a sign ordinance. But many also work in tandem with other ordinances. Under these circumstances, including all land use definitions in one section of the zoning code promotes consistency through out the code.¹⁶
- **Locating Substantive Provisions.** Substantive provisions—or provisions that impose a duty, burden or obligation—should be located in the main provisions of the ordinance. They should not be hidden in definitions. The ordinance should be organized so that all the main obligations can be easily identified and located.
- **Integration with State and Federal Programs.** Be alert to the confusion that can be caused when a term used in a local ordinance has a different meaning under state or federal law. For example, assume an agency adopts a special housing assistance program that includes a definition for a “qualifying low-income household” as any family that makes less than \$35,000 per year. This definition is confusingly similar to the federally defined “low-income household.” It’s usually better to follow existing state or federal definitions to minimize confusion. However, where the policy choice has been made to provide a benefit different from state and federal law, use a different term. In this example, a term like “City Housing Program Recipient” eliminates most confusion with state and federal government terms.¹⁷
- **Elements for Proof.** Consider the elements that must be proved to enforce the ordinance. For example, a prohibition that reads, “homeowners may not landscape yards with nonnative trees” requires proof of five elements. First, the homeowner (as opposed to a tenant) must have planted it. Second, the language implies that it must be part of a landscape plan (as opposed to planted randomly). Third, it must be within a “yard” (which may or may not include the entire lot). Fourth, the plant must not be native to the area (defined by whom or what list?). And fifth, what actually constitutes a tree may not be clear. A simpler approach would be: “only trees from the city’s Native Tree List may be planted on Residential Lots.” Here, a list of native trees incorporated by reference would reduce the inquiry to two elements: (1) existence of a non-listed tree (2) on a residential lot (presumably a designation in the zoning code). (This latter provision also eliminates a double negative.)
- **Variance Procedures.** Most zoning ordinances include a variance procedure. Variances provide a safety valve to assure that ordinances are applied in a way that is fair to all property owners. But variances also protect agencies from “facial” challenges to an ordinance.¹⁸ A “facial” challenge usually seeks to invalidate an ordinance as written. In order to make such a challenge, the owner must show that it is impossible for the ordinance to be applied in a way that complies with the law. But this claim cannot be made when a variance is available, because it affords the agency the opportunity to change the ordinance’s application to avoid an unconstitutional or illegal result.
- **Economic Variance Procedures.** In addition, a special economic variance can be used to protect against claims that a regulation amounts to a taking of property. This type of variance does more than just provide a second chance to review an ordinance. It also requires the challenger to submit additional information to demonstrate the alleged economic loss, which is necessary to determine whether a taking has occurred.

See sample economic variance at www.ca-ilg.org/takings.)

¹⁶ *Id.* at § 3:13.

¹⁷ *Id.* at § 3:25.

¹⁸ See for example *Home Builders Ass’n v. City of Napa*, 90 Cal. App. 4th 188 (2001) (finding that the presence of a variance procedure defeated a facial takings claim).

Thus, the variance allows for a fully informed decision. If the agency determines that the regulation will indeed result in a taking if applied, it can grant the variance or alter the regulation. On the other hand, if the regulation does not constitute a taking, the variance helps ensure that the administrative record will contain facts that support the agency's decision.

- **Create Mechanisms to Ease Enforcement.** To the extent practicable, place all requirements into a single document or application to make it easier for staff to determine that all conditions have been met. For example, many inclusionary housing ordinances require that all the conditions of the ordinance be expressed in a single document that is recorded against the property. This does two things: first, it creates one point in the process to assure that all the conditions are met; and second, in recording the conditions, the agency assures that further financing and sale of the property will be conditioned on the local agency actions.

It's often helpful to map the regulatory design by creating a flow chart that starts with the regulatory goals and moves through the process of implementation. In most instances, the chart should integrate the relevant steps in the development approval process to ensure that the new ordinance complements existing regulations. The flow chart will help identify critical points where enforcement can most easily be managed. It can also be helpful in assigning responsibilities for the various tasks that will need to be undertaken to achieve the regulatory goal. Once completed, the flow chart can guide drafting.¹⁹

Clear Wording

A great deal of thought should be put into the terms and language used in the ordinance. An ordinance may not be enforceable if it cannot be reasonably understood.²⁰ Vague terms also increase the risk of inconsistency and misinterpretation, which can expose an agency to claims that the agency applied its laws in an arbitrary or

Drafting Tips

Use Plain Language. Be clear. Use short words, avoid jargon and legalistic language, and express thoughts in short sentences (17 to 25 words).

Avoid Double Negatives. Double negatives are confusing. For example, use "timely" instead of "not untimely." Often the double negatives that get through the first drafts are not immediately apparent because they are contained in separate clauses within a sentence.

Use Simple Definitions. Use dictionary definitions whenever possible and do not use definitions to change the commonly understood meaning of terms.²¹

Avoid "Shall" and "Shall Not." Many ordinances rely on the word "shall" to designate a responsibility or duty to take or refrain from taking action. But "shall" has several meanings, some of which are directory, not mandatory. Thus, "shall" can be interpreted to mean something closer to "should."²² To avoid potential

misinterpretations, use words like "must" and "will."

Identify the "Who" and the "What." Identify who will receive the benefit or burden created by the ordinance and what the benefit or burden is.

Draft for the Long Term. Outdated terms create confusion. For example, be cautious about singling out technologies (like GIS). Instead, focus on the end result.²³ Likewise, consider the potential for change when assigning responsibilities. Assign tasks to senior positions (or their designee), like a community services director, that are likely to survive a restructuring.

Don't Rush It. The process of adopting legislation involves an investment of agency and decision-maker time. Make optimal use of that time by doing the necessary groundwork to produce a clear document that achieves the agency's objectives.

¹⁹ Zizka et al., *supra* note 13, § 3:30, apps. 3A-E.

²⁰ *Miller v. California*, 413 U.S. 15, 27 n.10 (1973) (finding that an ordinance must convey sufficiently definite warning as to the proscribed conduct when measured by common understanding).

²¹ Robert J. Martineau, *Drafting Legislation and Rules in Plain English* 25 (West Publishing Co., 1991).

²² *Id.* at 79-80.

²³ Zizka et al., *supra* note 13, § 3:29.

discriminatory way.²⁴ The risk can be especially great when a regulation involves constitutionally protected rights—like free speech.²⁵

There is no clear-cut formula, however, that will assure precision in every ordinance. Drafting is a craft. Repeated review and editing is a must. Fundamentally, legislative language should be so clear and exact that it can only be applied in a way that is consistent with the agency's intent.²⁶

Thus, commonly used words or terms that may be subject to varying interpretations should be clearly defined. Ambiguities in language, however, can arise in surprising and unanticipated ways. For example, many local agencies have agricultural zoning regulations. But many do not define the term "agriculture" with a great degree of certainty. Consider the following examples:

- A landowner who runs a contract harvesting business builds a maintenance facility for his (and other) harvest equipment. Neighbors claim that the use is commercial, not agricultural.
- A biotech company maintains a herd of goats that it injects with proteins to research a cure for cancer. Neighbors claim that the use is medical, not agricultural.
- A tomato farmer decides to grow hothouse tomatoes and builds greenhouses on 100 acres of otherwise protected coastal farmland. Neighbors claim that this practice is contrary to the traditional definition of agriculture.

In each case, the questioned use arguably fits a broader definition of "agriculture," even though it was probably not what the drafter had in mind. On the other hand, the local agency may not want to regulate the every term so closely, and may elect to rely on the traditional (and evolving) use of a specific term like "agriculture." Of course, the drafter cannot anticipate all contingencies, but must nevertheless strive to anticipate when the

A Caution About Cut and Paste Drafting

It can be tempting to take an ordinance from another jurisdiction, make a few minor changes, and then forward it for approval. Looking for models from other jurisdictions is often a good starting point. But each jurisdiction has a different general plan, zoning code, housing requirements, and geography. Language conventions and definitions will also vary. To avoid drafting problems and litigation, any language pulled from another jurisdiction must be thoroughly reviewed and tailored to fit into the agency's own regulatory program.

agency will want the ordinance to apply and how those subject to the regulation may try to avoid the ordinance's application.

Drafting clear definitions for key terms enables an agency to exactly describe the scope of the action. Some drafters wait until an ordinance is close to final form before drafting the definitions to avoid inadvertently leaving key terms undefined. It may also be helpful to have a layperson review the draft ordinance to determine whether all terms have been adequately explained.²⁷

As with much of writing, one of the hardest parts of drafting is developing a first draft. In many instances, staff will look to see how other agencies have implemented similar policies (see sidebar "A Caution About Cut and Paste Drafting"). A process for fully vetting the drafts, however, assures that the first draft does not have to be perfect. Indeed, department heads and others will often provide better, more detailed comments in response to an "average" first draft. In other words, treat the first draft as just a starting point and rely on the review, comment, and editing process to take it the rest of the way.

²⁴ *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Zizka et al., *supra* note 13, § 3:23.

²⁵ *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

²⁶ Martineau, *supra* note 21, at 25.

²⁷ Zizka et al., *supra* note 13, § 3:13.

Elements of the Typical Ordinance

Title. The title should sufficiently advise the reader of the subject matter. The words “amending,” “authorizing,” or “repealing” denote the type of action to be taken.²⁸

Scope. Limit each ordinance to one subject. If there is a question, it’s better (albeit possibly more difficult politically) to offer two ordinances instead of combining them into one.²⁹

Findings or Statements of Purpose. Findings are not usually required for legislative acts, but they can communicate the purpose behind the action if there is a question about how the ordinance should apply. However, courts exercise limited review of legislative acts;³⁰ hence, findings can also be limiting and unhelpful in defending an ordinance. When included, findings may either be listed in the accompanying recitals or included as part of the codified ordinance.

Ordaining or Enacting Clause. The form of the enacting clause is specified by statute. The enacting clause for cities is: “The city council of the City of _____ does ordain as follows:”³¹; for counties: “The Board of Supervisors of the County of _____ ordains as follows.”³²

Substantive Provisions. This section contains the regulatory program to be adopted.³³

Special Clauses. Some ordinances also include special clauses that are not typically published with the rest of the ordinance but nevertheless affect how the ordinance is applied. A typical example is a clause that specifies when the ordinance becomes effective (if different than the typical 30 day waiting period).

Severability Clause. A severability clause states that if any part of the ordinance is found to be invalid or unconstitutional, the remaining sections will still be applied to the maximum extent practicable. A severability clause is not necessary if the ordinance will be codified and the code itself contains a generic severability clause.

Signature and Attestation. All city ordinances must be signed by the mayor and attested by the city clerk.³⁴ County ordinances must be signed by the chair of the board of supervisors and attested by the county clerk.³⁵

Responsibility for Drafting

Generally, the agency’s attorney has ultimate responsibility for ordinance drafting,³⁶ although the attorney can also play more of a reviewing role. The drafter should consult with all the departments—such as planning, finance, code enforcement, building inspection, and the fire

department—that are likely to be involved in enforcing an ordinance.³⁷

In addition, the actual drafting may be easier after the agency engages in a searching process of program design. For many land use ordinances, this would involve getting input from the planning commission and often the public generally through some kind of civic engagement process.

²⁸ International Institute of Municipal Clerks, *Manual for Drafting Ordinances & Resolutions* 3 (1998).

²⁹ Zizka et al., *supra* note 13, § 3:6; Martineau, *supra* note 21, at 39.

³⁰ *California Hotel & Motel Association v. Industrial Welfare Commission*, 25 Cal. 3d 200 (1979).

³¹ Cal. Gov’t Code § 36931.

³² Cal. Gov’t Code § 25120.

³³ Martineau, *supra* note 21, at 119.

³⁴ Cal. Gov’t Code § 36932.

³⁵ Cal. Gov’t Code § 25121.

³⁶ See, e.g., Cal. Gov’t Code § 41802 (requiring city attorney to frame all ordinances and resolutions required by the legislative body). There is no parallel statute that applies to county counsels.

³⁷ International Institute of Municipal Clerks, *supra* note 28 at 1.