



Tips on Drafting Bylaws

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The points raised in this brief memorandum are not intended to exhaust the subject matter suggested by its title. They are the random thoughts of a municipal lawyer that just might jump-start your own reflection on how best to write good local laws. I believe that the structural elements of a good law are as applicable to general and special acts of our state Legislature as they are to local ordinances and by-laws, rules and regulations of government entities, and a variety of other things we do with the written word. The points raised here are for the most part equally applicable to city ordinances as town by-laws, but I will adopt the convention of speaking in terms of town by-laws, Town Meeting, and Town Counsel with the understanding that the concepts addressed are transferable to local legislation in cities.

I have included at the end of this memorandum a list of resources on the general subject of legislative drafting, and would like to credit those resources for many of the tips included here.

Before settling down to write your by-law:

Purpose - Make absolutely certain that you fully understand what the proposed by-law is intended to accomplish. Discuss the purposes with those who have proposed it, and explore concretely with them the probable manner in which the by-law will ultimately be applied.

Models - Check to see if ordinances or by-laws of the same sort have been adopted in other cities and towns, and determine if any might serve as a useful model for your proposed amendment. Locate other sources for models or samples of local laws intended to achieve the purposes of the proponents. Much like buying a suit off the rack, no such model or sample is likely to fit perfectly without alterations that take into account the unique circumstances of your own community. Tailoring should always be done in consultation with the town counsel.

Experts - Contact known experts in the field for guidance on how best to achieve the legislative objectives.

Legal Considerations - Reduce to writing -- even if only for your own benefit -- the constitutional and statutory constraints within which you must proceed in drafting the text of the by-law.

First Draft - Gather the facts, research the law, do an outline, and begin to write the first draft. Some recommend starting at the end of the list by fashioning the rough text of the act as a means of capturing the insights perched precariously on the tip of your mind. The outline will help you get to the gist of the by-law.

From: <https://masscptc.org/docs/core-docs/bylaw-writing.html>

Retrieved on September 30, 2021

When you have written your first draft:

Scope - Ask yourself: Is the by-law broad enough? Is it too narrow? Consider whether the focus and scope of your proposed by-law is sufficiently inclusive of other classes and situations for which a by-law of broader scope would be more appropriate. In other words, avoid letting your by-law suffer from too narrow an application when the mischief it sets out to deal with is broader than the single situation that led to the proposed amendment.

Clarity - When you are finished with your draft, have it read by a non-lawyer, preferably someone who will be affected by the act, and by someone with talent in good writing, grammar, and spelling.

Counsel - Discuss the proposed by-law with town counsel for consistency with state and federal law, and to determine whether review and approval of the proposed amendment by state or federal agencies is required before it can become effective.

In preparation for Town Meeting:

Preamble - Be careful with the preamble (or statement of intent or purpose), which is often much longer than necessary, and often serves merely to add high-toned verbiage and ambiguity to otherwise straightforward text. Avoid wherever possible statements of intent, which are rarely if ever needed, and should never be used to compensate for imprecise or careless drafting. Avoid the use of "Whereas."

Concise Summary - Prepare a concise summary of the proposed amendment with an explanatory statement of what it is intended to accomplish and how it will be applied after adoption. This will be useful when the proposed amendment is being deliberated on by the town meeting.

Anticipate Objections - Anticipate what anyone opposed to the by-law might think of the amendment, and to the extent possible try to address those issues in the draft.

Organizational considerations:

Congruence with Existing Code - Organize the elements of the by-law logically and in harmony with the organization of the municipality's other by-laws. Adopt a consistent structure to the by-law amendment so that it fits in harmoniously with other parts of the municipal code, including numbering, formatting, positioning, and captioning. The structure might be the following:

- 1) Definitions . Make sure that all terms used in the proposed amendment are either as defined elsewhere in the municipal code and used consistently with such definition, or else are added in the definition section of the proposed amendment. The better approach might be to add any new technical term of the existing definitions section of the code. Caution: never state a substantive provision of the by-law in the form of a definition. Use the same words to mean the same thing throughout the code.
- 2) Applicability . Be clear and precise about the class of persons or entities for whom the proposed amendment creates rights and privileges, or imposes duties and responsibilities.
- 3) Exclusions and Exemptions . Specify any exclusions or exemption to the applicability.
- 4) Administration . Specify which local government officer or agency is to administer and enforce the provisions of the by-law. Include (or refer to) the powers and duties of the enforcement officer or agency, as well as any restrictions thereon.

5) Sanctions and Remedies . Specify the penalties for violation of the by-law and whether non-criminal disposition will be available. Specify who shall have standing to apply for enforcement of the by-law, and what remedies are available to one seeking enforcement. Include where appropriate a mechanism for administrative review.

6) Severability Clause . Consider whether it is desirable to include a severability provision, that is, whether, if the Attorney General or a court should later determine that one or more provisions of the by-law is illegal or unconstitutional, the remaining provisions would continue in full force and effect. Careful thought should be given here, since the loss of some provisions could defeat the whole intent of the by-law.

7) Effective date . State the effective date of the by-law if it is to be later than provided by general law. Town by-laws ordinarily take effect only after (a) the town meeting votes favorably on the by-law, (b) the Attorney General approves the by-law as provided in General Laws Chapter 40, Section 32, and (c) thereafter the Town Clerk publishes it as required by that same section. However, there is a difference between the "effective date" of a general by-law and the effective date of a zoning by-law. The general by-law takes effect when the foregoing three requirements have been met, while the zoning by-law takes effect as of date it was adopted by Town Meeting.

Drafting tips:

Plain English - To the extent possible, use plain English, the principle precept being to minimize the use of technical (or undefined) terms and to use common, ordinary words understandable to the general public.

Unnecessary and Vague Words - Avoid them.

Present Tense Verbs - Use the present tense, third person singular. Don't say "The building commission shall be the enforcement officer," but rather say "The building commission is the enforcement officer."

Singular Number - Avoid the plural. If either the singular or plural can be used, prefer the singular. Don't say "Applicants must notify all abutters," but rather "The applicant must notify all abutters."

Short Sentences - Avoid sentences of more than twenty-five (25) words in length, or with multiple subordinate clauses. Use short and direct sentences to express ideas positively.

Nominalization - Avoid making nouns out of verbs (nominalization) wherever possible. For example, prefer the *administrator shall consider the application* to the *administrator shall give consideration to the application*. Nouns are usually longer and require supporting words for meaning. Don't say "shall give consideration to," but rather "shall consider."

Avoid Pronouns - If you must use a pronoun, make sure the antecedent is clear and unambiguous. For example, "The Moderator recognized Mr. Jones, but he was unaware of town counsel's ruling on the motion" [who, the Moderator or Mr. Jones?]. Don't use the third person plural (they) as a singular gender-neutral pronoun, preferring rather to repeat the noun. Avoid masculine pronouns. You rarely have to worry about gender-neutrality if you don't use pronouns.

Adjectives and Modifiers - Avoid misplaced or unnecessary modifiers. Place modifiers so there is no doubt about what they modify.

Active Voice Verbs - Use the active voice. The passive voice lacks a clear actor. When a by-law imposes a duty or prohibition, the reader needs to know exactly to whom the duty or prohibition applies. For example, don't say "Rules shall be adopted," rather say "The Planning Board shall adopt rules."

Redundancy - Avoid the lawyer's tendency to employ redundancies such as unless and until, cease and desist, good and sufficient, and the like. Perhaps the worst of these is authorize and direct, an expression that combines a word that grants discretion (authorize) with one that is mandatory (direct).

Consistency - Be consistent. Once having introduced a term into the text avoid the use of synonyms for that terms as a device to make the act more readable. Despite plain English, laws can and should be a bit boring, not great literature.

Shall or May? - On the use of the words shall and may, remember that the word shall is used exclusively to impose a duty to act (the Town Manager shall submit a proposed budget to the Finance Committee on November 1 of each year.) You should not use shall to indicate the future tense, to impose a duty not to act, to impose a limitation, or to declare a legal result rather than to give a command. Correspondingly, the word may should be used exclusively to grant discretion or authority to a particular actor. Where you wish to prohibit an action, the words shall not are misleading and the appropriate term is may not. Technically, the words Shall not mean that a person does not have a duty to engage in the described action, while the words May not serve to deny the actor power or authority to engage in the action. Lastly, don't say "No person shall," rather say "A person may not."

Punctuation - It matters. The use of comma where not needed, or the absence of a comma where needed, will totally alter the meaning of the text. Avoid large blocks of text, which the eye tends to scan without comprehension and which often leads the reader to lose track of where the proposed amendment fits into the overall architecture of the code. Always use a comma after every word or phrase in a series, including the one before the "and" or "or." For example, don't say "apples, oranges, lemons and limes," but rather "apples, oranges, lemons, and limes." And consider the use of the outline format and "white space" to help the reader.

Sectioning - Split discrete thoughts out into sections, subsections, etc. Each time an act is required or prohibited, it should have its own section or subsection.

Acronyms - Avoid initials and acronyms wherever possible.

A by-law that is written with great precision and legal accuracy, but that cannot be easily read and understood by those it is intended to apply to, will result in confusion, unintentional violations, and unfairness. Good by-law drafting is governed by the same principles that govern any form of effective written communication. Be clear, concise, and readable. Do not abandon the use of words and expressions that have served you well in your ordinary written communications with others.

Resources

Reed Dickerson, *The Foundations of Legal Drafting* (Little, Brown & Co., 2nd Edition, 1986)

Robert Martineau, *Drafting Legislation and Rules in Plain English* (West Publishing Company, 1991)

Lawrence D. Shubow, *Statutory Construction* (Chapter 19, Mass Practice Series, Vol. 14B, Summary of Basic Law)

David A. Marcello, Executive Director, The Public Law Center, Tulane Law School, New Orleans A *Legislative Drafting Primer* . (1995 IMLA Annual Conference, Chicago , IL .)

Robert Dick, *Legal Drafting* (Carswell Co., Toronto, 2nd ed. 1985)

Elmer A. Driedger, *A Manual of Instruction of Legislative and Legal Writing*(Department of Justice, Ottawa, 6 vols. 1982)

Bryan A. Garner, *The Elements of Legal Style* (Oxford University Press, New York, 1991)

William P. Statsky, *Legislative Analysis and Drafting* (West Publishing Company., St. Paul, MN, 2nd ed., 1975)

W. Strunk, Jr. and E. White, *The Elements of Style* (3rd ed. 1979)

G. C. Thornton, *Legislative Drafting* (Butterworths Legal Publishers, St. Paul, MN, 3rd ed., 1987)

Richard C. Wydick, *Plain English for Lawyers* (Carolina Academic Press, Durham, NC, 2nd. ed., 1985)

Michael Faden and Marc P. Hansen, Office of the County Attorney, Montgomery County, Maryland, *Plain Language Legislative Drafting* (IMLA Annual Conference, Phoenix, AZ, November 1997) -- a copy attached to this Memorandum.