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Opinion Committee

Debra Danburg
Chair
Committee on Elections
State Affairs

March 25, 1993

MBJ

The Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-19657-93

I.D.# 19557

RE: Condoms in bars

RQ-522

Dear General Morales:

The City Council of the City of Houston is considering an ordinance that would mandate the sale or availability of condoms in certain premises where alcoholic beverages are sold. There has been considerable concern about whether this type of ordinance is preempted by state law. Copies of the proposed ordinance, a letter dated March 4, 1993, regarding the matter by Gayle Gordon, General Counsel, Texas Alcoholic Beverage Commission, and an opinion dated March 8, 1993, by Benjamin L. Hall, III, City Attorney, City of Houston, are enclosed.

Your opinion is urgently requested on the issue of whether a home-rule city may lawfully adopt and enforce an ordinance requiring that condoms be sold in certain premises that sell alcoholic beverages.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read "Debra Danburg".

Debra Danburg
State Representative

DD/dj
Enclosures

cc: The Honorable Robert C. Lanier
Mayor, City of Houston

Mr. Benjamin L. Hall, III
City Attorney, City of Houston

City of Houston, Texas, Ordinance No. _____

AN ORDINANCE AMENDING THE CODE OF ORDINANCES OF THE CITY OF HOUSTON, TEXAS, BY ADDING A NEW SECTION 21-18 REQUIRING THE AVAILABILITY OF CONDOMS AND INFORMATION RELATING TO CONDOMS ON CERTAIN BUSINESS PREMISES; CONTAINING VARIOUS PROVISIONS AND FINDINGS RELATING TO THE FOREGOING SUBJECT; DECLARING CERTAIN CONDUCT TO BE UNLAWFUL; PROVIDING FOR SEVERABILITY; AND DECLARING AN EMERGENCY.

* * * *

WHEREAS, the transmission of HIV and other sexually transmitted diseases constitutes a public health emergency within the City of Houston; and

WHEREAS, the risk of transmission of sexually transmitted diseases can be greatly reduced through the use of high quality latex condoms; and

WHEREAS, it has been shown that wider availability of condoms can help decrease the incidence of sexually transmitted diseases; and

WHEREAS, among the major contributing factors of transmission of sexually transmitted diseases are casual interpersonal relationships and poor judgments related to the influence of alcohol; and

WHEREAS, further availability of condoms on certain business premises that sell alcoholic beverages for on-premise consumption will send a message of responsibility to the public,
NOW, THEREFORE,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON, TEXAS;

SECTION 1. That the code of Ordinances, Houston, Texas, is hereby amended by adding a new Section 21-18, which reads as follows:

"Sec. 21-18. Condom availability on certain premises.

(a) The owner and principal manager of a business premises upon which alcoholic beverages are sold for on-premises consumption shall make high quality latex condoms available upon the premises in one of the following manners:

- (1) Condoms may be made available by offering them for sale through coin-operated dispensing machines, which shall be continually stocked and maintained in each rest room to which any member of the public has access; or
- (2) Condoms may be made available by making them continually available for sale at a sales desk or counter upon the premises, provided that signs no smaller than 4" x 5 1/2" advising of the availability of the condoms, the retail price, and the location of the sales desk or counter at which they may be purchased are conspicuously posted in each rest room to which any member of the public has access.
- (3) Condoms may be made available by making them continually available at a sales desk or counter upon the premises at no charge to the customer provided that signs no smaller than 4" x 5 1/2" advising of the availability of the condoms and the location of the sales desk or counter are conspicuously posted in each rest room to which any member of the public has access.

(b) The owner and principal manager of a business premises upon which alcoholic beverages are sold for on-premises consumption shall continuously display signs in each rest room to which any

member of the public has access setting forth information concerning HIV and other sexually transmitted diseases and the benefits of the use of condoms with language provided by the City of Houston Health and Human Services Department.

(c) Violation of subsection (a) or (b) of this section shall constitute a misdemeanor that is punishable as provided by section 1-6 of this Code. A violation of this section shall not affect a license or permit granted under the provisions of the Texas Alcoholic Beverage Code.

(d) It is an affirmative defense to prosecution under this section that the premises derives seventy-five percent or less of total gross receipts from the sale of alcoholic beverages for on-premises consumption."

(e) It is an affirmative defense to prosecution under this section that the premises has a maximum building occupancy permit of fifty persons or less.

Section 2. If any provision, section, subsection, sentence, clause, or phrase of this Ordinance, or the application of same to any person or set of circumstances is for any reason held to be unconstitutional, void or invalid, the validity of the remaining portions of this Ordinance or their application to other persons or sets of circumstances shall not be affected thereby, it being the intent of the City Council in adopting this Ordinance that no portion hereof or provision or regulation contained herein shall become inoperative or fail by reason of any unconstitutionality, voidness or invalidity of any other portion hereof, and all provisions of this Ordinance are declared to be severable for that

purpose.

SECTION 4. There exists a public emergency requiring that this Ordinance be passed finally on the date of its introduction as requested in writing by the Mayor; therefore, this Ordinance shall be passed finally on such date and shall take effect immediately upon its passage and approval by the Mayor; however, in the event that the Mayor fails to sign this Ordinance within 5 days after its passage and adoption, it shall take effect in accordance with Article VI, Section 6, Houston City Charter.

PASSED AND ADOPTED this _____ day of _____, 1993.

APPROVED this _____ day of _____, 1993.

Mayor of the City of Houston

Pursuant to Article VI, Section 6, Houston City Charter, the effective date of the foregoing Ordinance is _____.

City Secretary