NO. 2011 DCV-1103-c.

J.D. MALDONADO, GABRIEL VEGA, TIMOTHY WELLS, BRIAN WHITE and DENISE WHITE	)(	**IN THE DISTRICT COURT**
	)(	**NUECES COUNTY, TEXAS**
V.	)(	
CITY OF CORPUS CHRISTI	)(	**94th JUDICIAL DISTRICT**

MEMORANDUM IN SUPPORT OF PLAINTIFFS' PETITION FOR TEMPORARY INJUNCTION

COMES NOW Plaintiffs J.D. MALDONADO, GABRIEL VEGA, TIMOTHY WELLS, BRIAN WHITE and DENISE WHITE, by and through their attorneys, and, in support of Plaintiff's Motion for Temporary Injunction, states as follows:

INTRODUCTION

The Plaintiffs are an association of tobacco accessory and novelty shop owners located within the City of Corpus Christi whose businesses have suffered injury from a recently passed ordinance. The Defendant is a home rule city duly formed and existing under the laws of the State of Texas. Plaintiffs seek to enjoin Defendant, its agents, servants, and employees from enforcing, directly or indirectly, any of the provisions of the ordinance until further orders of the Court.

Defendant's ordinance was passed under a flagrant violation of the Texas Open Meetings Act, denying the Corpus Christi public—and the Plaintiffs as interested persons who bring this action—the opportunity to be informed concerning the transactions of public business. The Open Meetings Act, codified at chapter 551 of the Government Code, requires that the public be given notice of the time, place, and subject matter of meetings of governmental bodies—something that the Defendant failed to do not only once, but twice. Moreover, Defendant wantonly negated any mental culpability requirement and effectively banned anything that "can be used" as illegal paraphernalia. This is a clear violation of the Plaintiffs' constitutional rights to due process and is also preempted by well-settled Texas law.

Defendant has acted arbitrarily and destructively under the guise of this ordinance: Defendant's agent has repeatedly stated his intention is to close these shops and arrest the Plaintiffs—in clear violation of a code enforcement officer's abilities under the City Charter[1]. Defendant has refused all of the Plaintiffs' repeated requests for clarification of the ordinance's breadth. They have suffered injury to their property rights through lost sales, lost customers, and the uncertain regulatory environment resulting from the Defendant's ordinance. Plaintiffs are being targeted for ruin, as Defendant's agent recently issued a patently false press release to local news sources declaring one merchant was caught selling a banned substance, "K-2", on Friday, March 15, 2011, although no such substance was available for sale at his store and he was not cited for selling such substance. That this particular merchant had even cleared his sales with Assistant City Attorney Allison Logan only further demonstrates Defendant's arbitrary and erratic actions under this ordinance.

[1] City of Corpus Christi, Texas, Municipal Code, Part III, The Code of Ordinances, Chapter 1- General Provisions, Section 1-13, Code enforcement official. ((d) A code enforcement official is not authorized to arrest an individual for violation of any city ordinance.).

FACTS

Plaintiffs are the owners of tobacco accessory and novelty shops located within the City of Corpus Christi. Plaintiffs have owned and operated their various businesses without incident or disturbance by law enforcement, some for over a decade. On either February 8, 2011 or February 15, 2011, Defendant purportedly passed Ordinance 028648[2] prohibiting the use and possession of "illegal smoking products" and "illegal smoking paraphernalia." See EXHIBIT A. On February 15, 2011, the ordinance was amended by reducing the fine to the maximum allowed under state law and exempting "hookahs", which are water pipes of Middle Eastern origin popular at certain bars and restaurants and sold by Plaintiffs.

Plaintiffs were informed that, as a result of the ordinance, they and their employees would be subject to arrest and that their property could be seized. On February 28, 2011, police officers from the City of Corpus Christi Police Department visited the store of Plaintiff Timothy Wells, ticketed him for being in violation of the newly passed ordinance, and seized various pipes allegedly made illegal under the ordinance. See EXHIBIT B. On March 18, 2011, Defendant issued another citation under the ordinance and seized private property, then promptly released a false story to local press sources indicating a merchant had been selling "K-2", when in fact he was not. See EXHIBIT C. Plaintiffs believe that further prosecution under the ordinance is imminent. Plaintiffs have suffered injury to their property rights through lost sales, lost customers, and the uncertain regulatory environment resulting from the Defendant's ordinance.

JURISDICTION AND PROCEDURE

This case arises under the laws and constitution of the State of Texas and the United States. This court has jurisdiction pursuant to Art. V, § 8 of the Texas Constitution. Venue is appropriate in Nueces County pursuant to Section 15.002(a)(1) and (3) of the Texas Civil Practices and Remedies Code because the principal office of the City of Corpus Christi are located in Nueces County all of the events giving rise to the claim occurred in Nueces County.

Plaintiffs have filed a petition for injunction and motion for temporary injunction pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code. A person whose rights are affected by a statute or municipal ordinance may ask a court to determine any question of construction or validity arising under the instrument and obtain a declaration of rights thereunder. Tex. Civ. Prac. & Rem. § 37.004(a). The Texas Supreme Court has established that a civil court has jurisdiction to declare a criminal statute constitutionally invalid and enjoin its enforcement when enforcement of the unconstitutional statute threatens irreparable injury to property rights. *Texas v. Morales*, 869 S.W.2d 941, 942 (Tex. 1994).

ARGUMENT

I. THE STANDARD FOR PRELIMINARY INJUNCTION

A temporary injunction's purpose is to preserve the status quo. *Butnaru v. Ford Motor Co*., 84 S.W.3d

[2] It is unclear what the actual ordinance number is. On February 3, 2011, the City Secretary Armando Chapa posted the agenda for the upcoming February 8, 2011 City Council Meeting, which included Item 21, under subheading "K. Regular Agenda." On February 8, 2011, the Council then purported to adopt an emergency ordinance No. 028648, according to the official record of the proceedings of the City Council, the City Council Minutes. On February 15, 2011, the Council then purported to "reconsider" Item 21 of the February 8, 2011 agenda during discussion on Item 16 of the February 15, 2011 agenda. The Item was referred to as "the ordinance" in the official record of the proceedings of the City Council Minutes. On February 15, 2011, the Council then purported to adopt an emergency ordinance No. 028967, according to the official record of the proceedings of the City Council, the City Council Minutes.

198, 204 (Tex. 2002).

To obtain a temporary injunction, the applicant must plead and prove three specific elements:

(1) a cause of action against the defendant;
(2) a probable right to the relief sought; and
(3) a probable, imminent, and irreparable injury in the interim.

Id. Whether to grant or deny a temporary injunction is within the trial court's sound discretion. Id.

A declaratory judgment pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code is the proper cause of action. Tex. Civ. Prac. & Rem. § 37.004(a). An injunction is available as a remedy in an action for declaratory judgment. Tex. Civ. Prac. & Rem. § 65.011. Plaintiffs have submitted sworn affidavits regarding the injury to their businesses from the Defendant's ordinance. Many employees have already been laid off and the stores are barely surviving. Without relief from this Court, these businesses will have to close and the damage from Defendant's ordinance will be irreparable. If the Court believes that the Plaintiffs have demonstrated a probable right to relief, then an injunction should be granted.

II. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIM:

A. THAT DEFENDANTS VIOLATED THE TEXAS OPEN MEETINGS ACT BY FAILING TO PROVIDE ADEQUATE NOTICE.

Defendant's ordinance was passed with faulty and insufficient notice to the public, as required by the Texas Open Meetings Act. This violation denied the Corpus Christi public, and the Plaintiffs as interested persons who bring this action, the opportunity to be informed of their government's actions.

Plaintiffs are interested persons in that they are taxpayers and citizens of the City of Corpus Christi who are affected by the actions herein described and who meet the statute of limitations requirement under the Texas Open Meetings Act to bring an action for violations of the Act. Tex. Loc. Gov't Code §§ 551.142 (an "interested person" may bring an action to enjoin violations of the Act); *Matagorda County Hosp. Dist. v. City of Palacios,* 47 S.W.3d 96, 102 (Tex.App.2001) (adopting a broad definition of an "interested person" under the Texas Open Meetings Act.). The Corpus Christi City Council (the "Council") is a governing body subject to the Texas Open Meetings Act. Tex. Loc. Gov't Code. §551.003(3)(c) (defining a "governmental body").

An "interested person" may bring an action by mandamus or injunction to stop, prevent or reverse a violation or a threatened violation of the Act. Tex. Loc. Gov't Code §551.142(a). Section 551.141 provides that "[a]n action taken by a governmental body in violation of this chapter is voidable." Texas law provides that "[a] governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body" in order to apprise the public of government action. Tex. Loc. Gov't Code §551.041; *Acker v. Texas Water Com'n*, 790 S.W.2d 299, 300 (Tex. 1990) ("Our citizens are entitled to more than a result. They are entitled not only to know what government decides, but to observe how and why every decision is reached.).

Notice must be sufficient enough to apprise the public of the subjects to be considered during the meeting. *Id*; *Friends of Canyon Lake v. Guadalupe-Blanco River Authority*, 96 S.W.3d 519 (Tex. App. – Austin, 2002, pet. denied); *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762 (Tex. 1991). Further, notice should use simple terms and avoid language that would only be understood by someone "intimately involved" with the subject matter. Tex. Att'y Gen. Op. No. JC-0169 (2000). If the notices posted for a governmental body's meetings consistently distinguish subjects, an abrupt departure from

this practice may raise a question as to the adequacy of the notice. Tex. Att'y Gen. Op. No. JC-0057 (1999). Catch-all listings are insufficient to apprise the public of a subject matter's consideration. *Cox Enter., Inc. v. Bd. of Trustees*, 706 S.W.2d 956, 959 (Tex. 1986).

Further, "[t]he provisions of [the Act] are mandatory and are to be liberally construed in favor of open government." *City of Farmers Branch v. Ramos*, 235 S.W.3d 462, 469 (Tex. App.—Dallas 2007, no pet.) A particular subject requires more specific treatment where it is of special interest to the community. *See Cox Enter., Inc. v. Bd. of Trustees*, 706 S.W.2d 956, 959 (Tex. 1986); Op. Tex. Att'y Gen. No. H-1045 (1977)

On February 3, 2011, the City Secretary Armando Chapa posted the agenda (herein referred to as "Council Agenda 2/8") for the upcoming February 8, 2011 Council Meeting, which included Item 21, under subheading "K. Regular Agenda", which is set out herein in hec verba:

K. REGULAR AGENDA

CONSIDERATION OF MOTIONS, RESOLUTIONS, AND ORDINANCES:

21. Ordinance amending Chapter 33, Code of Ordinances, City of Corpus Christi, by adding a new Article (IX) to regulate illegal smoking products and related paraphernalia and by specifically negating a requirement of a culpable mental state; providing for penalties; providing for severance; and providing for publication. (Attachment # 21)

The above item does not indicate any "emergency" to be considered. Moreover, the above agenda contained no statement that an interested public could discern qualified as an "emergency" condition meeting the requirements of the City's Charter[3], so as to authorize immediate, day-of passage. In fact, a citizen would have no way of knowing the City would bypass the Charter's two-reading requirement before an ordinance could be passed. This insufficient notice undermines the very underpinnings of the Texas Open Meetings Act—democracy. The Act gives citizens—the electors—an inalienable right to watch and know what is happening with laws that affect us. By not indicating an emergency, the City merely presented to the public that the Ordinance would pass like any other, that is, that it would undergo two readings and deliberations. The item is also clearly legal jargon that an interested public would have difficulty surmising meant an emergency was occurring that would effectively wipe out settled constitutional and state law.

While the Council Agenda 2/8 did include the following statement under subheading "G. Explanation of Council Action":

[3] City of Corpus Christi, Texas, Municipal Code, Part I-Charter, Article II.-City Council, §14(f)- Meetings of the Council ((f) No ordinance shall be passed finally on the date it is introduced but the same shall be considered and voted upon at two regular meetings, except in the case of emergency and then only when requested in writing by the mayor or a majority of the members of the council, and the finding of an emergency by the council shall be conclusive. No ordinance granting any franchise shall ever be passed as an emergency measure. For the purposes of this subsection, an "emergency" shall be defined as a condition involving an immediate need to preserve and protect public property, the need for the immediate and efficient utilization of physical resources in the city, the need for the immediate and equitable institution of zoning changes in order to protect the health, safety and welfare, or an immediate action necessary for the efficient and effective administration of the city's affairs.).

G. EXPLANATION OF COUNCIL ACTION:

For administrative convenience, certain of the agenda items are listed as motions, resolutions, or ordinances. If deemed appropriate, the City Council will use a different method of adoption from the one listed; may finally pass an ordinance by adopting it as an emergency measure rather than a two reading ordinance; or may modify the action specified. A motion to reconsider may be made at this meeting of a vote at the last regular, or a subsequent special meeting; such agendas are incorporated herein for reconsideration and action on any reconsidered item.

The statement "G. Explanation of Council Action" indicates no specific ordinance as being subject to emergency passage, and is a "catch-all" generality intended to "convenience" that only applies to "certain of the agenda items". This "catch-all" language is a clear violation of the purpose of the Texas Open Meetings Act and is insufficient notice to the public of any purported "emergency".

No agenda item is indicated or specifically subject to this catch-all statement; nor was any specific subject matter indicated as being under special "emergency" consideration. The "catch-all" includes no reference to: (1) "illegal smoking products"; (2) "related paraphernalia"; (3) any Ordinance amending Chapter 33 of the City's Code of Ordinances; or (4) any language meant to alert the public to an agenda item constituting an "emergency" condition under the City's Charter.

Most importantly, the City of Corpus Christi has been informed that vague generalities are simply not sufficient notice under the Texas Open Meetings Act. Op. Tex. Att'y Gen. No. GA-0668 (2008). In 2008, the Texas Attorney General clearly opined that every topic addressed in a meeting of the Corpus Christi City Council must be specifically listed in an agenda, and found that the City's use of a generality is inadequate as a matter of law. Id., citing *City of Port Isabel v. Pinnell*, 201 S.W. 3d 394, 406 (Tex. App. –Corpus Christi 2006, no pet.) The Attorney General stated that the City's "general and generic" notice within a vague term or catch-all simply fails to sufficiently notify a reader, as a member of the interested public. Id.

Nonetheless, on February 8, 2011, the Council purported to adopt "emergency" Ordinance No. 028948, according to the City Council Minutes—the official record of the proceedings of the Council. See EXHIBIT D.

Simply put, there is nothing in Defendant's agenda that would give a resident of Corpus Christi even an inkling of the *substance* of what was to occur on February 8, 2011. The citizens of Corpus Christi were simply given a vague, complicated description of a possible ordinance—and *no* notice of an emergency. Because the City Council failed to provide sufficient public notice at every step of the process, it is clear that Plaintiffs will likely succeed on the merits of their claim that the Defendant violated the Texas Open Meetings Act. Plaintiffs seek a declaration that the purported emergency ordinance and all aspects thereof, including pending enforcement, be declared void.

B. THAT DEFENDANTS VIOLATED THE TEXAS OPEN MEETINGS ACT BY FAILING TO GIVE ANY NOTICE OF THE SECOND ORDINANCE PASSED.

Plaintiffs incorporate the above paragraphs in Section (A) herein.

On February 15, 2011, the Defendant failed to provide even insufficient notice that it would take action, in a clear and flagrant violation of the Texas Open Meetings Act. The February 15, 2011 agenda did not

contain any mention of a new ordinance or amendment[4], and yet Defendant purported to adopt a new ordinance under the guise of a "revisit" suggested by the City Secretary. See EXHIBIT E.

C. THAT DEFENDANT'S ORDINANCE IS UNCONSTITIONALLY VAGUE.

Defendant's ordinance is unconstitutionally vague and violates their right to due process under the 14th Amendment to the United States Constitution.

The Defendant's ordinance defines illegal smoking paraphernalia as "any device, equipment or utensil that is used, intended to be used, or by its design can be used in ingesting or inhaling illegal smoking materials." Defendant's ordinance then makes it an offense for any person to "use, possess, purchase, barter, give, publicly display, deliver, sell, offer for sale, or transfer any illegal smoking product or illegal smoking paraphernalia." Defendant's ordinance also provides that the "culpable mental state required by Chapter [sic] 6.02 of the Texas Penal Code is specifically negated and dispensed with and a violation is a strict liability offense."

Under a plain reading of the language in the ordinance, the possession of any item that can be used to smoke illegal smoking products is now against the law in the City of Corpus Christi, regardless of whether the person had the intent to use the item with tobacco or an illegal smoking product. This makes the possession of any pipe or rolling paper illegal in the City of Corpus Christi.

The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The more important aspect of the vagueness doctrine is not actual notice, but rather the requirement that a legislature establish minimal guidelines to govern law enforcement. *Id*. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id*.

Because virtually every item that can be considered drug paraphernalia has a legitimate legal use, the United States Supreme Court has repeatedly and consistently found that an intent requirement is critical to the constitutionality of such statutes. *Hoffman Estates v. Flipside*, 455 U.S. 489, 497 (1982) (recognizing that a scienter requirement mitigates a law's vagueness); *Posters 'n' Things v. U.S.*, 511 U.S. 513, 522 (1993) (reading intent into U.S. drug paraphernalia law even though Congress did not include a mental state requirement). In fact, the Model Drug Paraphernalia Act drafted by the United States Department of Justice explicitly includes an intent requirement explaining that:

> Drug paraphernalia laws are most often attacked because they are too vaguely worded…they are usually silent on the criminal state of mind that must accompany the prohibited conduct. This

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[4] In fact, the City could have *only* acted by enacting a new ordinance according to its own Charter. See City of Corpus Christi, Texas, Municipal Code, Part I-Charter, Article II.-City Council, §14(d)- Meetings of the Council
((d) The council shall act only by ordinance, resolution, or motion. . . . The following actions, in addition to others specified by law or this Charter, shall be by ordinance only:

(1) Amendment or repeal of any existing ordinance;
(2) Adoption, amendment or repeal of a code of ordinances or code of technical regulations;
(3) Conveyance or authorization of the conveyance of any real property;
(4) To prescribe a fine or penalty or establish any rule or regulation for the violation of which a fine or other penalty is imposed;
(5) To regulate the rates charged by a public utility; and
(6) To adopt any legislation.).

deprives an individual of fair warning as to what the law forbids. It also vests too much discretion in authorities to determine what property and what activities are controlled.

Tobacco Accessories and Novelty Craftsmen Merchants Association of Louisiana v. Treen, 681 F2d 378, 380 (1982). In the above Fifth Circuit case, the "intended for use" requirement was found to mitigate the Louisiana laws vagueness. *Id* at 383. The court cited numerous examples of other cases where "intended for use" language" in drug paraphernalia statutes was upheld. *Id*. Texas' drug paraphernalia law, which contains an intent requirement and was also based on the Model Drug Paraphernalia Act, has also been upheld. *Gas Pipe v. Texas*, 696 S.W.2d 126, 136 (1985) ("No item is drug paraphernalia absent the requisite intent to use it in connection with controlled substances."); *Atkins v. Clements*, 529 F.Supp 735 (1981).

In our research, we were unable to find a single example of a drug paraphernalia ordinance that did not require intent. Texas drug paraphernalia law requires intent. See EXHIBIT F. A City of Dallas ordinance upon which the Defendant purportedly based its ordinance also requires intent. See EXHIBIT G. Defendant's language criminalizing the possession of any item that "can be used" to smoke illegal products and Defendant's removal of any intent or knowledge requirement for culpability under its ordinance is a clear violation of the due process requirements of the United States Constitution.

D. THAT DEFENDANT'S ORDINANCE IS PREEMPTED BY TEXAS STATE LAW.

Corpus Christi is a home-rule municipality operating under a municipal charter. Tex. Loc. Gov't Code §5.004 ("A municipality is a home-rule municipality if it operates under a municipal charter that has been adopted or amended as authorized by Article XI, Section 5, of the Texas Constitution."),City of Corpus Christi, Texas, Municipal Code Part I-Charter (1987) (Article 1- Charter).

Home-rule municipalities have governmental authority to govern without the legislature authorizing each governmental action, but remain subject to limitations enacted by the legislature. See Tex. Loc. Gov't Code §51.072 (Home-Rule Act); Tex. Const. art. XI, § 5 ("[N]o charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws . . . of this State.").

Though broad, a home-rule city's discretionary power is nevertheless limited to the extent that it is "inconsistent with the Constitution . . . or . . . general laws" of the State. Tex. Const. art. XI, § 5.

The general laws of the state need not expressly declare the legislature's intent to preempt a city's rule-making authority, but may imply preemption is necessary. *Lower Colorado Riv. Auth. v. City of San Marcos*, 523 S.W. 2d 641, 645 (Tex. 1975) ("A limitation on the power of home rule cities by general [state] law . . . may be either an express limitation or one arising by implication.").

Thus, if no reasonable construction leaving both a city ordinance and a state law in effect can be reached, they must be held repugnant to each other. *Dallas Merch's & Concessionaire's Ass'n. v. City of Dallas*, 852 S.W. 2d 489, 492 (Tex. 1993).

This limitation means that "[a]n ordinance of a home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute." *Dallas Merch's & Concessionaire's Ass'n. v. City of Dallas*, 852 S.W. 2d 489, 491 (Tex. 1993) (citing *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex.1982)); see also *Ex parte Farley*, 144 S.W. 530 (Tex. Crim. App. 1912) ("If the state denounces an offense and fixes the punishment for it, and the city or town undertakes to pass an ordinance punishing the same offense, then the ordinance must be the same as

the state law both as to definition and as to punishment."), *Abrams v. State*, 563 S.W. 2d 610 (Tex. Crim. App. 1978) (Penalty provisions in city ordinances may not differ from penalties provided by state statute.).

Corpus Christi Ordinances 028948 and 028967 state: "It shall be unlawful for any person to use, possess, purchase, barter, give, publicly display, deliver, sell, offer for sale, or transfer any . . . illegal smoking paraphernalia"

Corpus Christi Ordinance 028948 defines "illegal smoking paraphernalia" as: "any device, equipment, or utensil that is used, intended to be used, or by its design can be used in ingesting or inhaling illegal smoking materials and may include but is not limited to:

1. A metal, wooden, acrylic, glass, stone, plastic, or ceramic pipe with or without a screen, permanent screen, hashish head, or punctured metal bowl;
2. A water pipe;
3. A carburetion tube or device;
4. A smoking or carburetion mask;
5. A chamber pipe;
6. A carburetor pipe;
7. An electric pipe;
8. An air-driven pipe;
9. A chillum;
10. A bong; or
11. An ice pipe or chiller.

On February 15, 2011, Ordinance 028967 was purportedly passed, amending the above definition to exclude "hookahs".

Both purported ordinances specifically negate intent, stating: "The culpable mental state required by Chapter [sic] 6.02 of the Texas Penal Code is specifically negated and dispensed with and a violation is a strict liability offense."

While the banned substances listed in the purported city ordinances are not yet illegal under state law[5], Texas law sets forth the following requirement regarding substances deemed "controlled substances" under federal law: "[I]f a substance is designated. . . a controlled substance under federal law . . . the [Texas State Public Health] commissioner similarly shall control the substance under this chapter." Tex. Health & Safety Code § 481.034.

On Tuesday, March 1, 2011, the United States Department of Justice, Drug Enforcement Administration ("DEA") temporarily delegated JWH-018, JWH-073, JWH-200, CP-47,497, and cannabicyclohexanol as Schedule 1 chemicals under the federal Controlled Substances Act. Federal Register Volume 76, Number 40 (Tuesday, March 1, 2011)] [Rules and Regulations] [Pages 11075-11078] [FR Doc No: 2011-4428].[6]

[5] On January 1, 2011, Senate Bill 331 was filed in the Texas State Legislature. While the bill has not yet reached Senate committee, if passed it would add certain chemicals to Penalty Group 2 of the Texas Controlled Substances Act. All of the chemicals purportedly banned by the City of Corpus Christi are listed in the bill. See: http://www.legis.state.tx.us/tlodocs/82R/billtext/pdf/SB00331I.pdf - navpanes=0

[6] Notably, the temporary DEA order does not delegate some chemicals listed in the purported Corpus Christi Ordinance. Three chemicals not specifically listed in the federal order but included in the Ordinance are: (1) Salvia divinorum or salvinorin, (2) HU-211, and (3) JWH-081.

Thus, the "drug paraphernalia" provisions of the Texas Health and Safety Code also encompass the above substances as "controlled substances".

Under Texas law, "drug paraphernalia" is defined as: "equipment, a product, or material that is used or intended for use in . . . injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter." Tex. Health & Safety Code §481.002(17).

Further, under Texas law the term "drug paraphernalia" includes: "an object used or intended for use in ingesting, inhaling, or otherwise introducing [controlled substances] into the human body, including:

(i) a metal, wooden, acrylic, glass, stone, plastic, or ceramic pipe with or without a screen, permanent screen, hashish head, or punctured metal bowl;
(ii) a water pipe;
(iii) a carburetion tube or device;
(iv) a smoking or carburetion mask;
(v) a chamber pipe;
(vi) a carburetor pipe;
(vii) an electric pipe;
(viii) an air-driven pipe;
(ix) a chillum;
(x) a bong; or
(xi) an ice pipe or chiller.

Tex. Health & Safety Code. § 481.002(17). Texas law prescribes the requirements for the offense of possession or delivery of illegal paraphernalia, and specifically requires intent. Under Texas state law, the offense of possession of "drug paraphernalia" requires that a person: "*knowingly or intentionally* uses or possesses *with intent* to use drug paraphernalia . . . to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter." Tex. Health & Safety Code §481.125(17) (emphasis added).

Plaintiffs are likely to prevail on the merits of their claim that Defendant's ordinance is preempted by the Texas Health and Safety Code. Corpus Christi's home-rule city authority is limited where its rule-making is inconsistent with the general laws of the state. Tex. Const. art. XI, § 5. The general laws of the state of Texas clearly preempt the city's ordinance purporting to ban "illegal paraphernalia".

The Texas Penal Code expressly prohibits a city from enacting an ordinance proscribing the same conduct as is proscribed in the Penal Code, and the Code incorporates the culpable mental state requirements from offenses defined in other state laws, such as the state paraphernalia laws contained in the Texas Health and Safety Code. Tex. Pen. Code §1.08, §1.03(b). Moreover, the Texas Health and Safety Code expressly encompasses federal "controlled substances". Tex. Health & Safety Code §481.034. The Texas Health and Safety Code provisions on paraphernalia are the "general law" of this state governing the subject matter of "illegal paraphernalia". There is no reasonable construction of the city ordinance and the state law governing paraphernalia, because the City Ordinances purport to prohibit any item that "can be used" to ingest illegal substances. To leave the Ordinances in effect would be to preempt state laws, which require a culpable mental state—that is, that an offender intend to use an item illegally. Moreover, the city ordinances and state law are repugnant in that they define the same offense differently—that is, a person commits an offense of possessing "illegal paraphernalia" in Corpus Christi simply because he holds any item that "can be used" with an illegal substance. Conversely, a person commits an offense of possessing "illegal paraphernalia" in Texas when he intends to use an item with an illegal substance. If the City Ordinances were to remain in effect, a person could be guilty in Corpus Christi of an action that is

perfectly legal under Texas law, i.e., in Corpus Christi an offender could merely be possessing a tobacco pipe and be found to have broken the ordinances.

"Clearly an ordinance which conflicts or is inconsistent with state legislation is impermissible." *City of Brookside Village v. Comeau*, 633 S.W. 2d 790, 796 (Tex. 1982). The citizens of Corpus Christi cannot be subject to conflicting laws—the state law must take precedence. Because the Defendant's ordinance is in conflict with state law, it is clear that the Plaintiffs will likely succeed on the merits of their claim that Defendant's ordinance is preempted and unenforceable. Plaintiffs seek a declaration that the purported emergency ordinance and all aspects thereof, including pending enforcement, be enjoined.

III. PLAINTIFFS SATISFY THE REMAINING REQUIREMENTS FOR INJUNCTIVE RELIEF.

Plaintiffs have clearly shown a cause of action against Defendant and have demonstrated a probable right to relief sought. Also, Plaintiff has shown that:

A. Plaintiffs will suffer irreparable injury that greatly outweighs any purported harm to the Defendant should the status quo be maintained.

B. The status quo is the condition of non-violation of law, and the Court's duty is to restrain violations of law.

The status quo sought to be preserved by this application for temporary injunction is the condition of non-violation of the Texas Open Meetings Act.

Where the acts sought to be enjoined are acts that constitute a violation of law, the status quo to be preserved should be non-violative of that law. Continued violation of the law cannot be permitted. *Houston Compressed Steel Corp. v. State*, 456 S.W.2d 768, 773 (Tex. Civ. App.--Houston [1st Dist.] 1970, no writ); See also *Texas Pet Food, Inc. v. State*, 529 S.W.2d 820, 829 (Tex. Civ. App.--Waco 1975, writ ref'd n.r.e.). Accordingly, the continuing violation of the Texas Open Meetings Act, which ensures our open government, should not be considered the status quo, pending a trial on the merits.

Upon proving that a state law has been violated, it is the duty of the court to restrain it. "In an injunction case wherein the very acts sought to be enjoined are acts which, prima facie, constitute the violation of expressed law, the status quo to be preserved should never be a condition of affairs where the respondent would be permitted to continue the acts constituting that violation. In such instances, the status quo to be preserved by temporary injunction is the last actual, peaceable, uncontested status which preceded the pending controversy, and when it is determined that the law is being violated it is the province and the duty of the court to restrain it." *Houston Compressed Steel Corp. v. State*, 456 S.W.2d 768, 773 (Tex. Civ. App.--Houston [1st Dist.] 1970, no writ); *Rattikin Title Co. v. Grievance Committee*, 272 S.W.2d 948 (Tex. Civ. App.-- Forth Worth 1954, no writ).

Defendant has clearly violated the Texas Open Meetings Act not one, but twice. The status quo to be preserved should be non-violative of the Texas Open Meetings Act pending a trial on the merits. The Court's duty in this case should be not be a condition of affairs where the Defendant may continue violations of the Texas Open Meetings Act.

D. A preliminary injunction will not be adverse to the public, as the status quo prior to the actions taken by Defendant has never been illegal, and the Defendant can rely on state and federal law to enforce any substance ban.

CONCLUSION

For all the foregoing reasons, the Court should issue immediate injunctive relief enjoining Defendant, its agents, servants, and employees from enforcing, directly or indirectly, any of the provisions of the ordinance until further orders of the Court.

DATED this

_____ day of March 2011.

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