CITY OF HOUSTON

Sylvester Turner
Mayor

P.O. Box 1562
Houston, Texas 77251-1562

Telephone – Dial 311
www.houstontx.gov

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The Honorable Dade Phelan
Chair, House Committee on State Affairs
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768

To Whom It May Concern,

Chapter 51 of the Local Government Code outlines the general powers municipalities possess to enact ordinances. The general authority under Chapter 51 allows a municipality to adopt, amend, or repeal an ordinance for the peace and order of the municipality, **or for the trade and commerce of the municipality.** Chapter 51 also allows a municipality to enact ordinances which are necessary and proper for carrying out a power granted by law to a municipality.

HB 3899 proposes that Chapter 51 of the Local Government Code include the general rule that a municipality cannot **adopt or enforce** an ordinance which imposes a restriction, conditions, or regulation on commercial activity (subsection b). Commercial activity is broadly defined to include the purchase or sale of goods or services of any kind or quality, conducted by a person in more than one municipality of this state.

- One possible problem with this proposed bill is that the language seems inconsistent with the placement of this subsection. Chapter 51 of the Local Government Code discusses the powers to enact, amend, and repeal ordinances. HB 3899 includes the enforcement of ordinances. However, the Local Government Codes discussion of a municipality's enforcement authority is located in Chapter 54

HB 3899 as written, has the possibility of greatly impacting a municipality's ability to regulate Illicit Massage Businesses (IMB) and Sexually Oriented Businesses (SOB). One exception to the general rule against the regulation of commercial activity is that the municipality may adopt and enforce an ordinance which is "essential to the necessary regulation of local land use." HB 3899 defines regulation of local land use as "taking action consistent with Chapters 211-214 of the Local Government Code and includes a laundry list of activities exempt from regulation.

- A plain reading of HB 3899 provides no direction on what is in fact considered "essential" to regulate local land use. The definition provided of a local land use regulation provides a list of what is not included within the scope of regulation. However, no guidance is provided to determine what is in fact necessary.

- There is no guidance on what is considered "necessary." Because HB 5899 includes the municipality's authority to enforce its limitation, a municipality's ability to use civil or criminal mechanisms to enforce appropriately-enacted ordinances may be limited.
- Because HB 3899 provides no guidance on what regulations are considered "necessary," it may require court review to determine what "necessary" in fact means. The efficacy of the enforcement of ordinances, along with the public safety or municipalities should not be hinged on appellate court review.

Another exception to the general rule proposed in HB 3899, is that a municipality is empowered to adopt and enforce an ordinance essential to "directly regulating a uniquely local concern that the governing body determines cannot be of similar concern in another municipality because of the uniqueness of local concern." A uniquely local concern means a particularized concern unique to the physical conditions in the municipalities.

- It is hard to imagine what in fact would constitute a "uniquely local concern" to justify local regulation under HB 3899's language.
- If municipalities sought to regulate IMB activity through land use regulations to target trafficked women living within the businesses, this would hardly be considered a matter of "uniquely local concern" because one of the hallmarks of an IMB is that the trafficked women often are forced to live on-site. Thus, any regulation targeting this conduct would exceed the scope of authority proposed under HB 3899.

Moreover, any municipality seeking to regulate activity and conduct of "uniquely local concern," the municipality is burdened with quite a stringent requirement of "contemporaneously adopting a detailed written statement describing the uniquely local concern and its basis for its determination that the concern cannot be similar concern in another municipality."

- When municipalities are regulating the location of SOBs, the municipality must only show "secondary effects" to have a valid time, place, and manner restrictions on where SOBs can be located. The municipalities' findings of "secondary effects" do not have to be detailed and made contemporaneously—the findings of secondary effects do not even have to be from within the regulating municipality itself. Thus, HB 3899 is suggesting much more stringent standards than what is required under the First Amendment for time, place, and manner restrictions.

Based on its text, it is unclear how HB 3899 will affect a municipality's ability to exercise its basic zoning authority. A municipality's basic zoning authority includes the ability to create and implement a comprehensive plan. A comprehensive plan is utilized by a municipality to, "promote the sound development of municipalities and promote the public health, safety, and welfare." A comprehensive plan can also facilitate long term development of provisions relating to land use, among others.

- HB 3899 may also limit a municipality's ability to exercise its discretion on whether it would like to "district" licensed SOBs together or displace SOBs within its plans for urban development. This is a municipality's right which has been affirmed under various First Amendment challenges.

Irrespective of the contradictory language contained within HB 3899, it is hard to comprehend how this proposed rule will, in fact, encourage and facilitate the free flow of intrastate commerce, as identified by the bill. In fact, it will hinder a city's ability to regulate illicit businesses.

Sincerely,

Minal Patel Davis
Special Advisor to the Mayor on Human Trafficking