

# Texas Coastal Citizen Planner Program

## Legal Foundations of Community Planning *Part I*

Matthew J. Festa, J.D., M.A., M.P.A.  
Professor of Law  
South Texas College of Law Houston  
Rice University Kinder Institute



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INSTITUTE FOR URBAN RESEARCH

# Land Use Constitutional Foundations

Property Rights  
Eminent Domain  
Regulatory Takings

# Takings: some terminology and constitutional structure

- Eminent Domain
  - Power to take private property
  - Inherent function of sovereignty
- Police Powers
  - General power of government to regulate
    - Public health
    - Safety
    - Morals
    - General welfare
  - Only the States have police power

# U.S. Constitution—Amendment V

*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

# Terminology—the Constitution

- Fifth Amendment
  - Due Process Clause
    - “No person shall be deprived of life, liberty, or property, without due process of law;”
  - Takings Clause
    - “Nor shall private property be taken for *public use* without *just compensation*”
- Fourteenth Amendment
  - Incorporation
    - “No state shall deprive any person of life, liberty, or property without due process of law”

# Due Process Clause

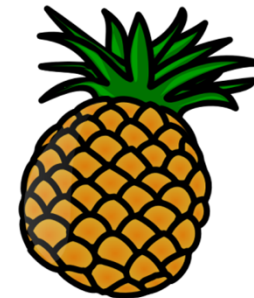
- Due Process Clause
  - Must have due process before liberty or property is interfered with
  - What does this mean?
    - Procedure—the process that is due?
    - Substantive component?

# Takings Clause

- “Nor shall private property be taken for *public use* without *just compensation*”
- “Just Compensation Clause”
  - How?
  - When?
- “Public Use” Clause
  - Does the public have to be able to “use” it?
  - When a taking not for “public use”?

# What does “public use” mean?

- The public has to own & use it? (e.g., public park)
- The public has to have access to it? (e.g., common carrier)
- It has to be public property? (e.g., City Hall)
- SCT: OK if it’s a “public purpose” (*Berman, Midkiff*)
- *Kelo*: what if it’s for the “public benefit” to the economy?





# *Kelo v. City of New London*



- Susette Kelo (Council voted to evict June 5)
- Cristofaro (Council voted to evict June 5)
- Parties who settled in the week leading up to Council's eviction vote on June 5
- The high-powered, politically-connected Italian Dramatic Club (allowed to remain)

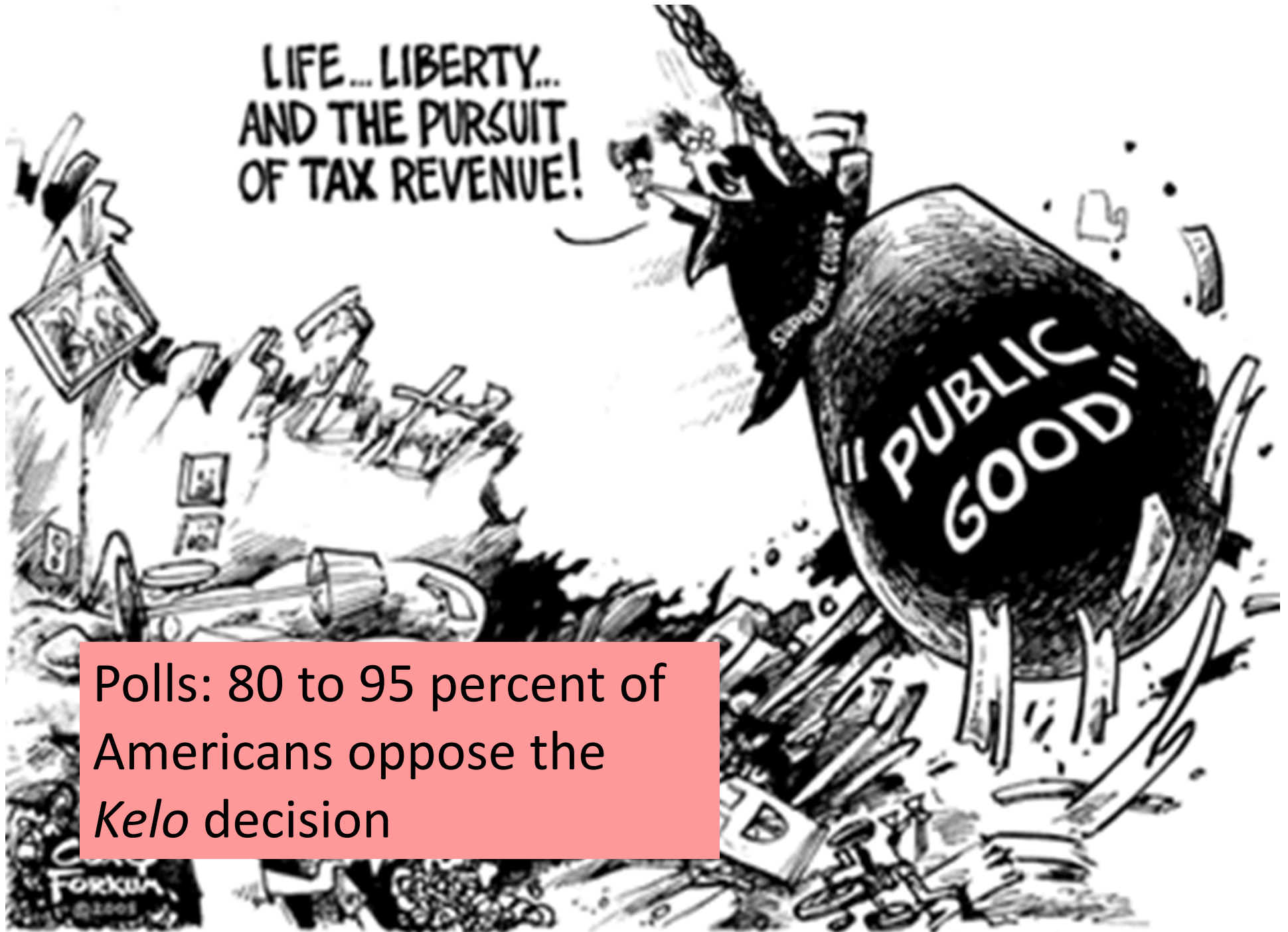
# *Kelo*

- Petitioners: not a valid taking
- City: Taking is for a public use
  - Part of a larger redevelopment plan
  - Will bring economic benefits to the community
    - New businesses
    - Jobs
    - Tax revenue
  - It's our (City/legislative) business to decide what's reasonably necessary to achieve goals



# *Kelo*—U.S. Supreme Court

- Q—does taking property for the purpose of economic development satisfy the “public use” requirement of the Fifth Amendment?
- Court—yes (in this case)
- When *won't* an “economic” taking be OK?
  - Purely private transfer from A to B
  - Evidence that public purpose is “mere pretext”
  - Taking is not reasonably necessary (i.e. fails rational basis test)



Polls: 80 to 95 percent of Americans oppose the *Kelo* decision

# *Kelo*: The Backlash

- Stevens, J.: “nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power”
- Post-*Kelo*: almost all 50 states have enacted “anti-*Kelo*” property rights laws . . .
- But most are ineffective!!
  - Texas, e.g.: no “economic development,” but “community development” takings OK
  - “Blight” exceptions swallow the rule.



*Kelo: Pfizer site, 2009*

Photo: New York Times:  
[http://roomfordebate.blogs.nytimes.com/2009/11/12/a-  
turning-point-for- eminent-domain/](http://roomfordebate.blogs.nytimes.com/2009/11/12/a-turning-point-for- eminent-domain/)

# Texas Constitution

## Article I (Bill of Rights), Section 17

*Sec. 17. TAKING, DAMAGING, OR DESTROYING PROPERTY FOR PUBLIC USE; SPECIAL PRIVILEGES AND IMMUNITIES; CONTROL OF PRIVILEGES AND FRANCHISES. (a) No person's property shall be taken, damaged, or destroyed for or applied to **public use** without adequate **compensation** being made, unless by the consent of such person, and only if the taking, damage, or destruction is for:*

- *(1) the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by:*
  - *(A) the State, a political subdivision of the State, or the public at large; or*
  - *(B) an entity granted the power of eminent domain under law; or*
- *(2) the elimination of urban blight on a particular parcel of property.*

*(b) In this section, "public use" does not include the taking of property under Subsection (a) of this section for transfer to a private entity for the primary purpose of **economic development** or enhancement of tax revenues.*



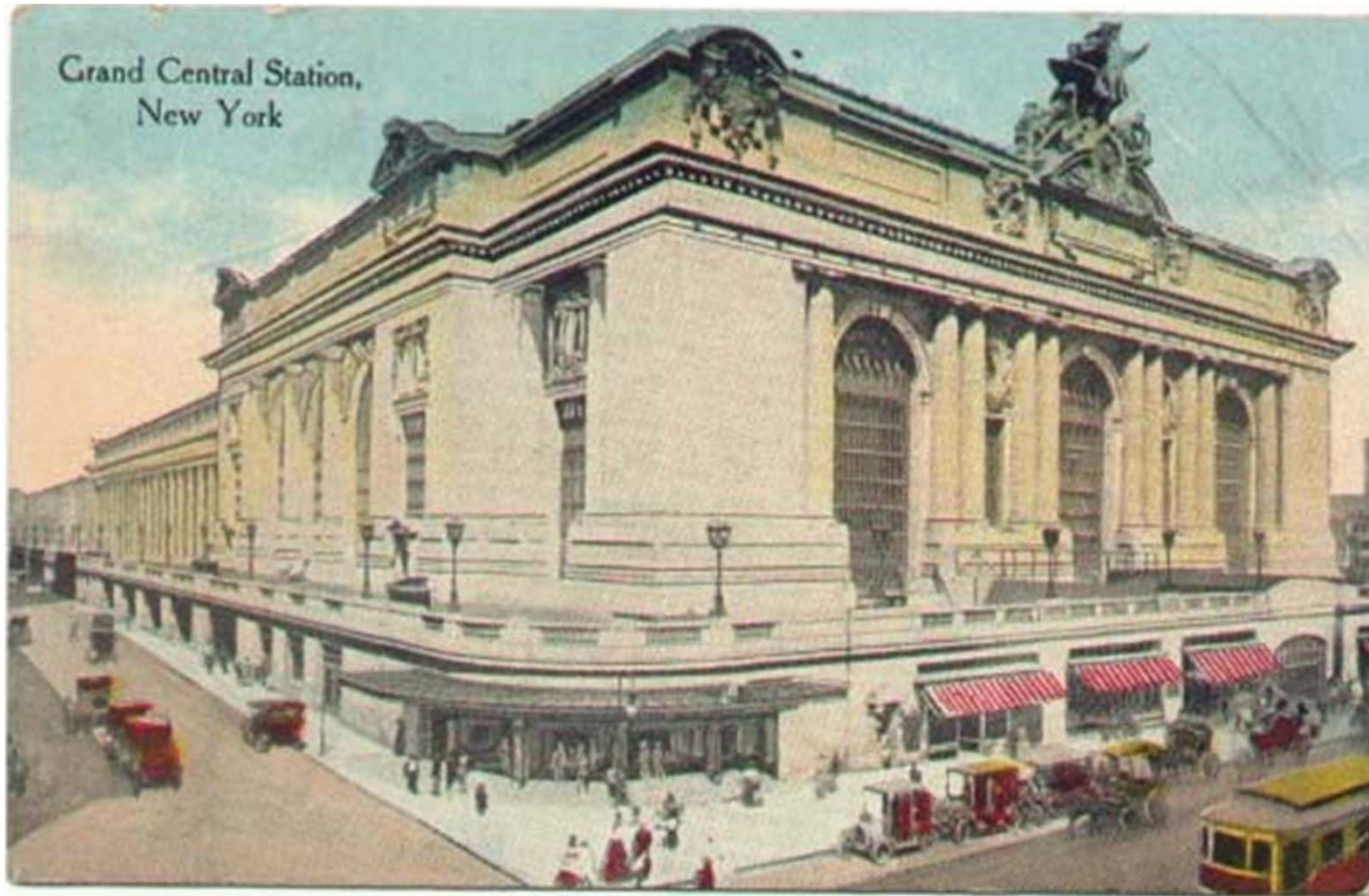
# Just Compensation Clause—How?

- “Just Compensation” Clause
- How do you measure what is just?
  - Who decides?
    - Court
    - Other government agencies
    - What if property owner disagrees?
  - How much compensation is “just”?
    - Market value?
    - What about consequential effects?
    - Transaction costs/externalities?
    - What about subjective value?

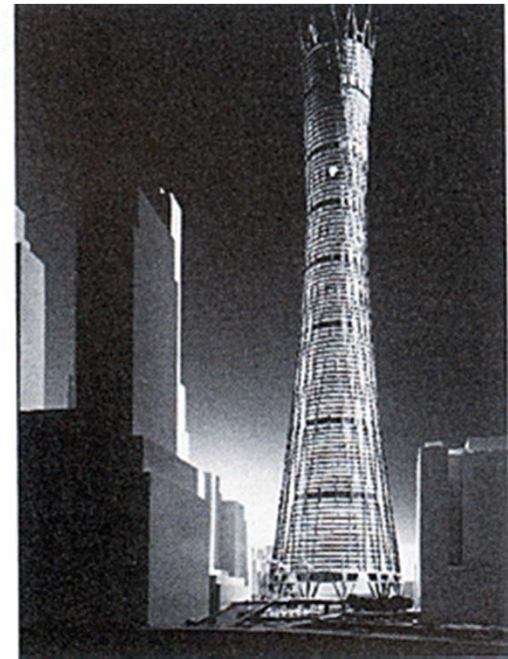
# Just Compensation Clause—When?

- When does the Compensation Clause apply?
- Physical takings of property—title seized
- What about regulations?
  - No—that’s police power;
  - Unless—
    - the regulation is found not to be proper exercise of police power . . . Then it’s a violation of substantive due process; or
    - It’s a “regulatory taking”

*Penn Central Transportation Co. v.  
City of New York (1978)*



# *Penn Central*



# *Penn Central*

Balancing test for regulatory takings:

- Economic impact of the regulation on the claimant
- Interference with investment-backed expectations
- Character of the government action
- Reaffirmed in *Tahoe-Sierra* (2002)

# So what constitutes a “taking”

- Actual taking of title (eminent domain).
- Regulation that “goes too far”? Maybe.
- Physical occupation of property—usually.
  - Brennan, *Penn Central*: character of government interference prong— “physical invasion”
  - *Loretto*: tiny but permanent physical occupation = “per se taking”
- *Nollan v. Ca. Coastal Comm’n*
  - “exaction” of an easement = physical taking

# Legal Nuisance

- *A substantial nontrespasory invasion of use or enjoyment of land that is caused either by negligent, reckless, or ultrahazardous activities, or by activities that are intentional and unreasonable.*

# Nuisance, Property, and the State

- Private property rights enforceable by gov't
  - Adjoining property owners have reciprocal rights to reasonable use & enjoyment
- Theoretical basis for public control of land use
  - Rationale for use of “police power” to prohibit land uses producing negative externalities
  - Basis for zoning = existence of remedy for use that damages adjacent property



# Comprehensive vs. Incremental

- Nuisance: judge-made land use planning
  - Case or controversy
  - Judges not in best position
- LUP is inherently based on societal value decisions
  - Implicit pyramid of uses
- Policy vs. common law
  - Planning more properly a “legislative” function?

# Origins of Modern Zoning

- 1916 NYC first zoning ordinance
  - Regulate use of land; height; % of lot built on
  - Use classifications:
    - Residential
    - Business
    - Unrestricted
- 1926: *Euclid*

# Zoning Regulations

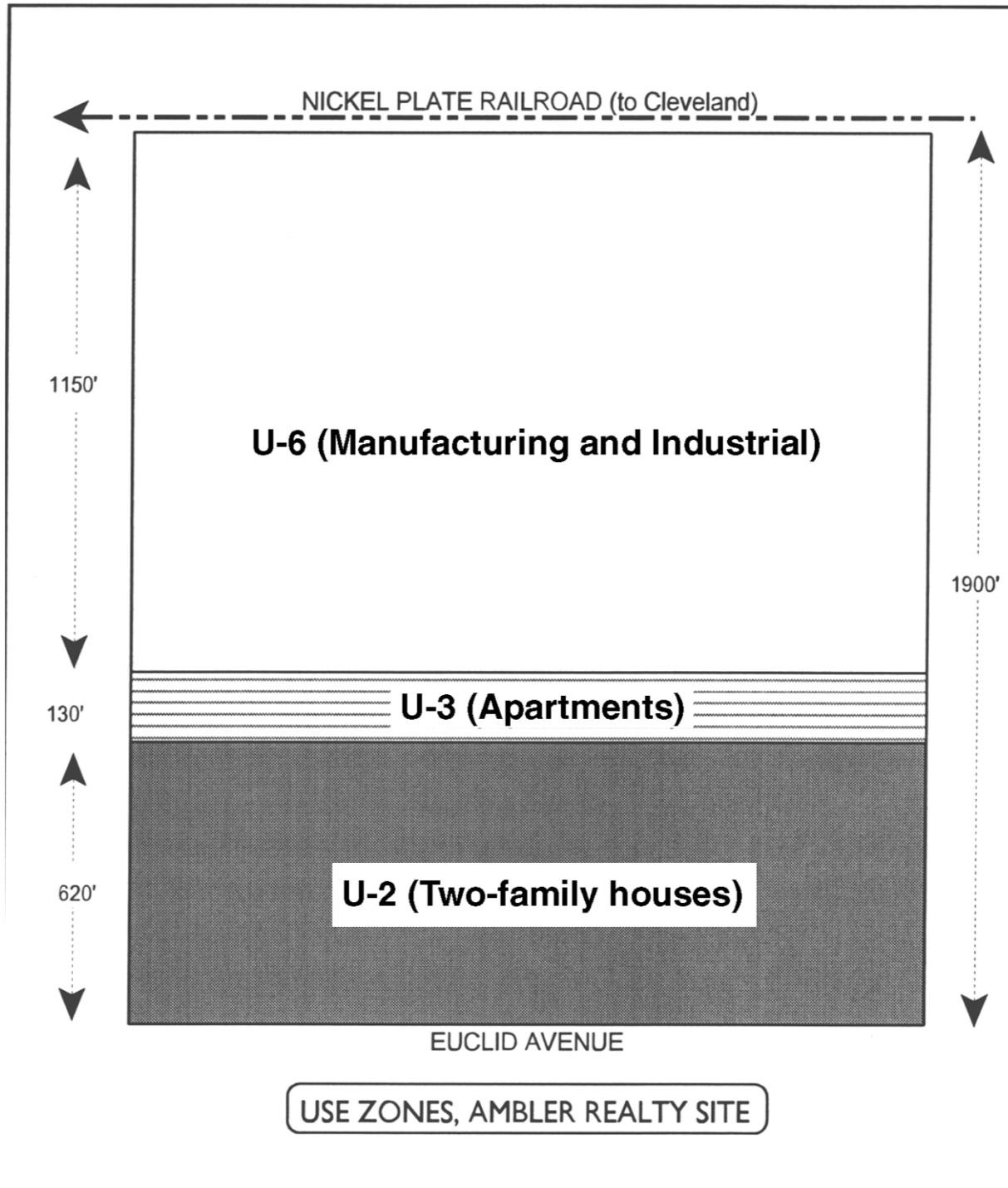
- Regulates the use of land
- Has been upheld as a valid exercise of the police power
- Texas Zoning Enabling Statute:  
Chapter 211 Texas Local Government Code

# Standard State Zoning Enabling Act (SZEА)

- Municipality may “regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of a lot that may be occupied, the size of yards, . . . the density of population, and the location and use of buildings, structures, and land . . . .”  
– *U.S. Dept. of Commerce (1926)*

# *Village of Euclid v. Ambler Realty Co.*

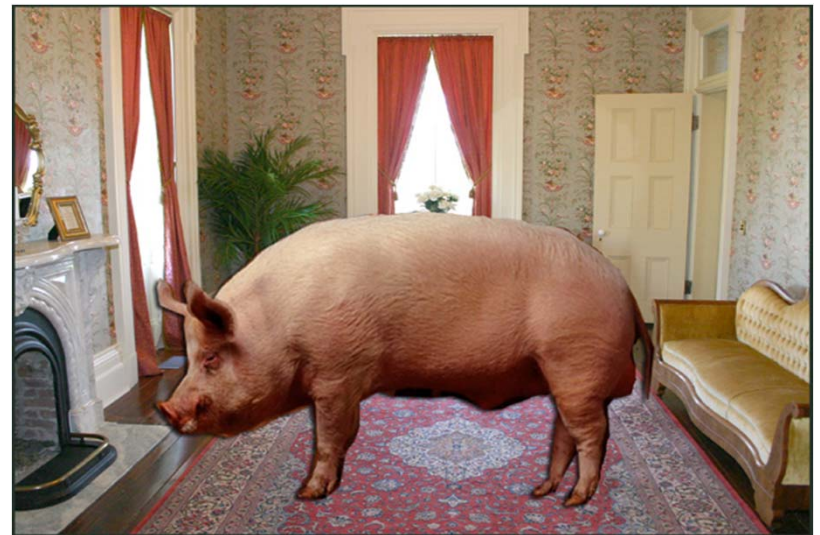




# Euclid's Zoning

# *Village of Euclid*—S.Ct. on Zoning

- SCT: zoning is cool with us.
  - Life is more complex in these modern times
  - Regulations are necessary to cope
  - Analogy to nuisance law
    - Uses that are OK in some places are inappropriate in others
    - Like “a pig in the parlor”
  - Zoning by districts
    - Experts involved
    - Apartments = parasites



# Texas Zoning Enabling Act

## Sec. 211.003. ZONING REGULATIONS GENERALLY.

(a) The governing body of a municipality *may regulate*:

(1) the **height**, number of stories, and **size** of buildings and other structures;

(2) the **percentage** of a lot that may be occupied;

(3) the **size** of yards, courts, and other open spaces;

(4) population **density**;

(5) the **location and use** of buildings, other structures, and land for business, industrial, residential, or other purposes;

(b) [for **historic preservation**,] the construction, reconstruction, alteration, or razing of buildings



# Typical Zoning Ordinance

- 1. Purpose
- 2. Definitions
- 3. Districts
  - Single-family residential
  - Multi-family residential
  - Neighborhood retail
  - Commercial
  - Industrial

# Typical ZO—2

- 4. District regulations
  - Application of regs
  - Rules for each district
  - Parking
  - Conditional use permits
  - Nonconforming uses
- 5. Administration & enforcement
  - Zoning Officer
  - Board of Zoning Appeals (BZA)

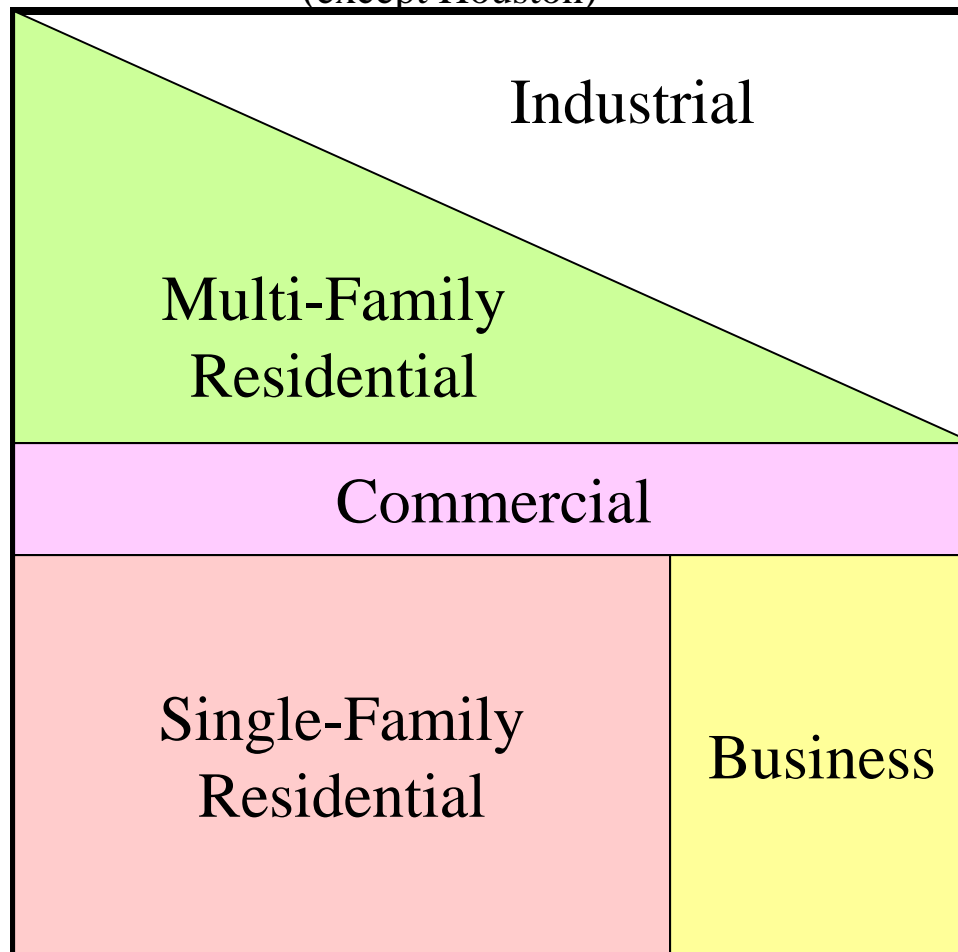
# Is zoning in the comprehensive plan?

- No!
- Plans are not “law.”
- Zoning is a “legislative” issue
  - Must be a separate zoning ordinance
  - Authorized by state law, implemented at local level
  - The zoning ordinance always follows the plan, right?

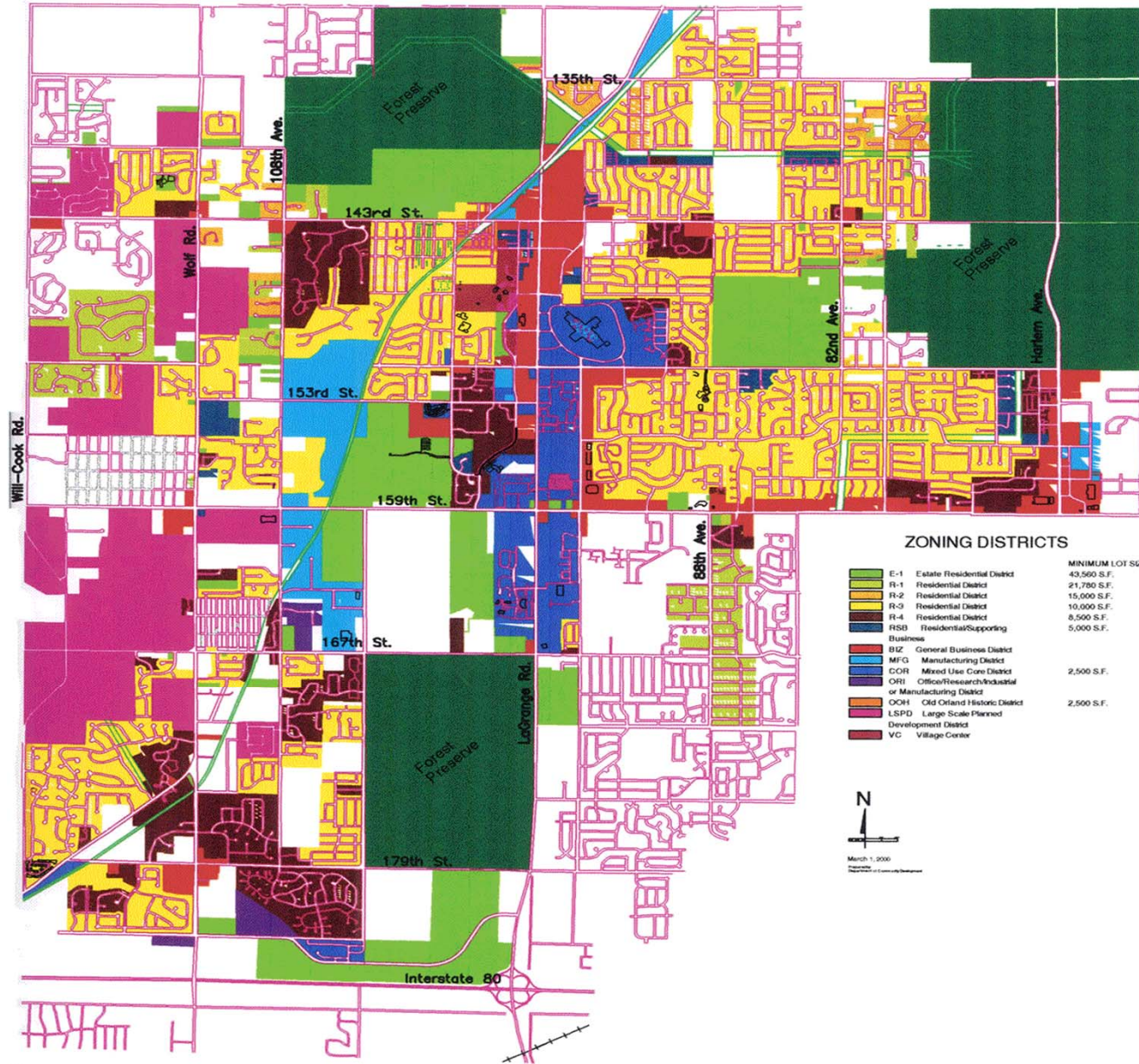
<http://www.statutes.legis.state.tx.us/>

# Zoning by District—Separation of Uses

Anytown, USA  
(except Houston)



# VILLAGE OF ORLAND PARK ZONING MAP



# Subdivision Regulations

- Chapter 212 Texas Local Government Code
- City Regulations
- Provides system of land registration, identification of property for mail, emergency services
- Controls standards for infrastructure

# Subdivision Regulations

- Governing body has approval authority for plats.
- Plats must be approved if they meet all elements of subdivision ordinance and related regulations.
- 30 day time limit for action—approval or denial—from date of application for action, or plat is deemed approved.

# Subdivision Regulations

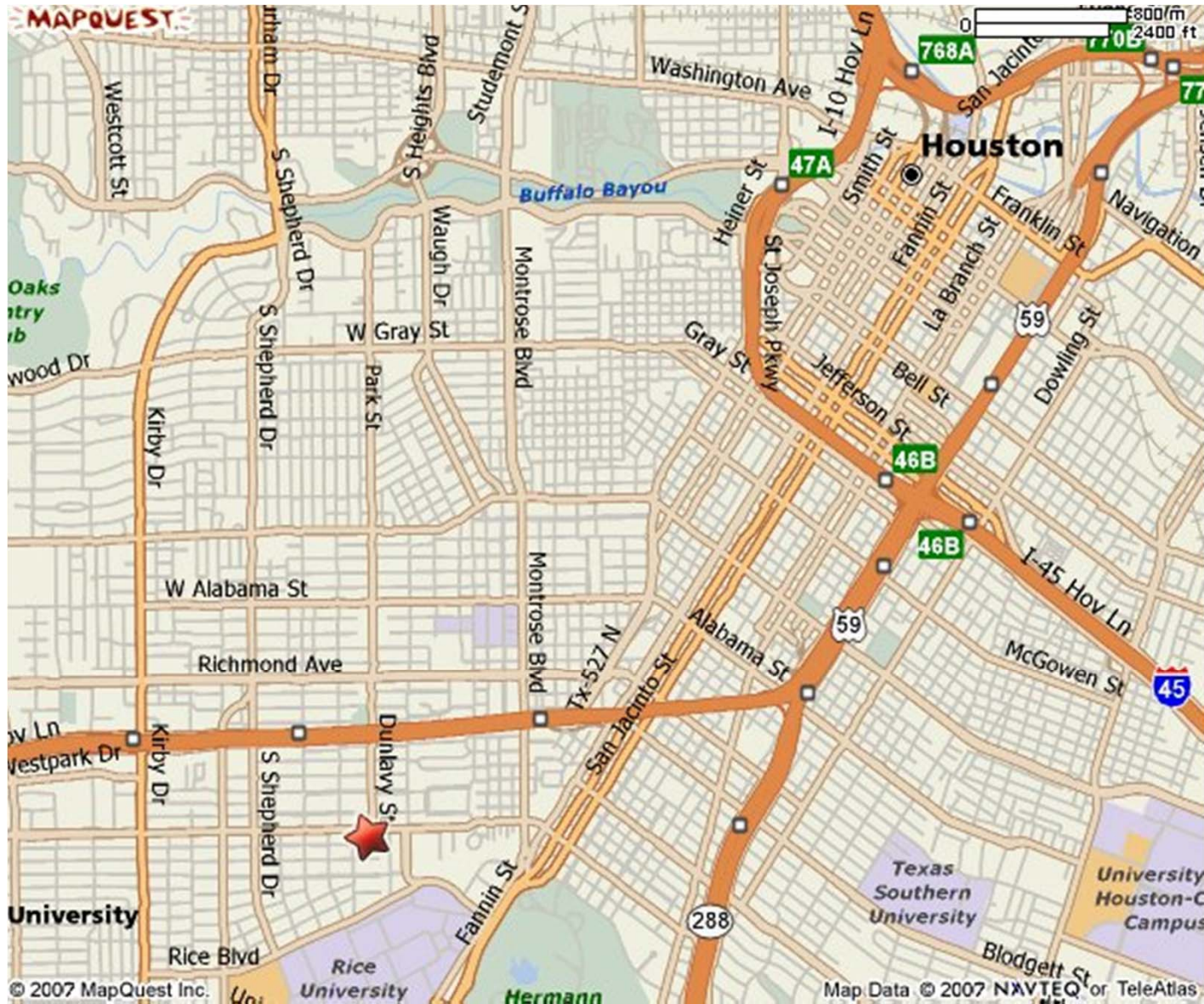
- Major issue is whether exactions are proportional or excessive
- There must be a “rough proportionality” between the exactions—e.g., ROW—and the burden on the city infrastructure.
- This requirement is now statutory—an engineer hired by the city must evaluate and certify that exactions are proportional.



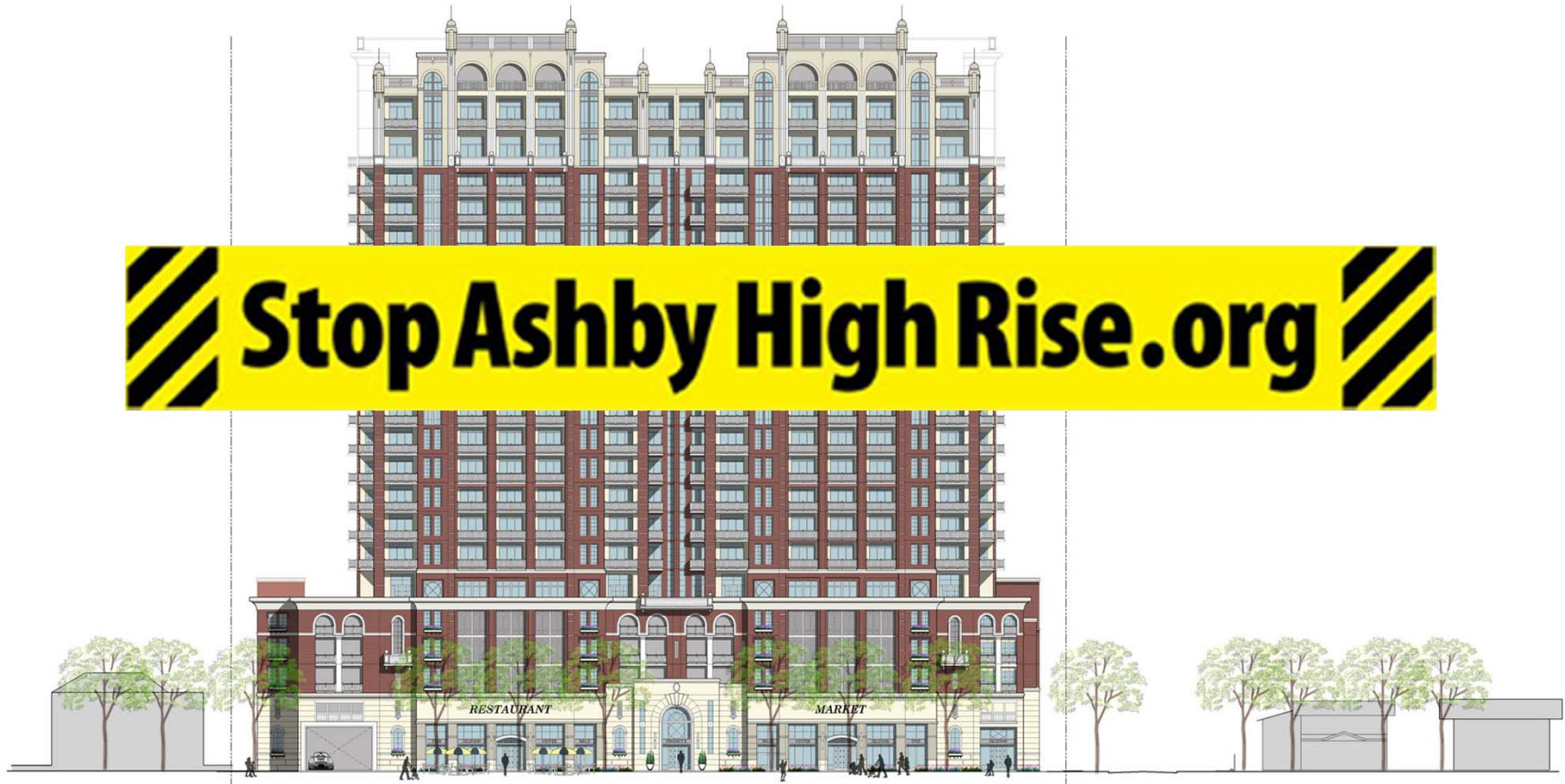
# Estoppel & Vested Rights

- Do landowners have protection vs. ZO amendments?
- What happens if the gov't/community is presented with an "as of right" proposal it doesn't like?
- Vested Rights
  - Based on constitutional protection of property rights
- Estoppel
  - Fairness—comes out of equity

# A Land Use Case Study



# *A Land Use Case Study . . .*



# Vested Rights—Texas

- *“Rights to which a permit applicant is entitled under this chapter accrue on the filing of an original application or plan for development or plat application that gives the regulatory agency fair notice of the project and the nature of the permit sought.”*
  - Texas Local Gov’t Code, Ch. 245

<http://www.statutes.legis.state.tx.us/>

<http://www.statutes.legis.state.tx.us/Docs/LG/htm/LG.245.htm>

# Avoiding the Courthouse

- Ask questions of staff or the city attorney.
- Follow your comprehensive plan and ordinances.
- Ensure an accurate record is made, if required.
- Be objective in your comments and let the process work.
- Treat everyone the same and consistently follow good rules of procedure.

# Zoning Regulations—Who's who

- City Council
  - Legislative body
  - Final authority on all zoning matters
  - Cannot act without recommendation from Planning and Zoning Commission
  - Due to legislative nature of actions in the zoning context, decisions given great deference

# Who's who

- Planning and Zoning Commission
  - Appointed by City Council
  - Quasi-legislative body
  - Makes recommendations to City Council on zoning matters
  - Duty to implement plans adopted by City Council

# Who's who

- Zoning Board of Adjustment
  - The quasi-judicial board
  - May not act in way that re-writes or changes the legislation
  - Empowered to hear certain applications
    - Variances
    - Appeals
    - Special Exceptions
    - Other matters under the zoning ordinance



# Statutes Affecting Gov't Ops

- Texas Local Government Code (other than planning statutes)
  - Chapter 171—Conflict of Interests
  - Chapter 176—Disclosure of Relationships
- Texas Government Code
  - Chapter 551—Open Meetings Act
  - Chapter 552—Public Information Act
  - Chapter 2007—Private Property Act/Takings Law

# Zoning Board Hearings

- Formality?
- Procedure
- Substantive—is variance best process?
  - Conditional uses
  - Zoning amendment
  - Site plans

# Parties

- Developer cases vs. neighbor cases
- Relief denied?
  - Landowners will appeal
- Relief granted?
  - Neighbors will appeal
- Municipality nominally allied w/ other party

# Judicial Review of Land Use Disputes

1. The Presumption of Validity
2. The Arbitrary and Capricious Standard

# Presumption of Validity

- E.g., *Krause v. City of Royal Oak*
- Local gov't regulates from police powers
  - General health, safety, welfare, morals
- A lawfully-enacted ordinance is presumed valid
  - Burden on P to overcome presumption
- Result?
  - *Krause*—difficult to rebut

# The Arbitrary & Capricious Standard

- Burden on P to rebut presumption by clear & convincing evidence that law is A&C
  - i.e., that ZO does *not* bear substantial relation to police power objectives (health, safety, welfare)
- A&C holdings are rare in land use

# Big Box

- Typical “big box” controversies—Issues?
  - Economic development
  - Environmental impact
  - Energy/utilities
  - Congestion, traffic
  - Neighborhood
  - Infrastructure
  - Housing
  - “Blight?”



# Avoiding zoning & regulation

- Nonconforming use
  - *Preexisting*
- Zoning Amendment
  - *Planning commission/city council*
- Special Exception/Special Use Permit
  - *In the Zoning Ordinance*
- Variance
  - *ZBA*



# Nonconforming Uses

- Policy concerns:
  - Fairness
  - Safety valve to avoid takings
- *Conforti*: fact-based balancing
  - “Character, nature, & kind” of use before/after ZO change
  - “Substantially different effect”
  - “Nature & purpose of the nonconforming use”

# Nonconforming Uses

- Modern approach: most states prohibit termination of nonconforming use
  - May run with the land
  - But restrict expansion, extension, reconstruction, etc.
  - What happens when you change the use?
- How to get rid of it— “amortization”?
  - *Gage*: balancing
    - Investment
    - Nature of use
    - Building’s character, age, others factors

# NIMBYs and LULUs—some things you can't totally control

- Sexually oriented businesses
- Manufactured homes
- Cell towers
- Signs
- Group homes
- Landfills
- No referendums except for initial zoning regulation

# SOBs

- In the Unzoned City?



# Religious Land Use

- Laws
  - First Amendment free exercise/establishment
  - RLUIPA
    - Substantial burden
    - Least restrictive means
    - Equal treatment
  - Burden must be more than “incidental” (*CLUB*)
  - State constitutions; state RFRA
- Q—is presumption of validity reversed for religious land use?

# Special Exceptions

- “Special exception,” “special use permit,” “conditional use”
  - Authorized in the ZEA
- Concept
  - We might want to have certain nonconforming things in a particular zone . . .
    - *E.g., schools, churches, hospitals, [SOBs?]*
  - Under certain criteria;
  - Q: if you meet the criteria, does board have discretion?

# Site Plan Review

- Local Gov't gets opportunity to review the design specifics of a project
  - Use specifics
  - Layout
  - Building elements
  - Location & dimensions
  - Traffic, access, parking
  - Landscape, architecture, aesthetics
- Subdivision regs; PUDs (Ch. 6)
- Constitutional?
  - Generally, OK (*Charisma*)

# “Downzoning”

- Zoning land for a less dense/intense use than market demand
- Intentional—“Wait-and-see” zoning
- Issues?
  - All development requires permission (vs. as-of-right)
  - Discretion



# Variance

- Case-by-case excusal from LU regs
- “Administratively authorized departure from the terms” of the ordinance for “unique & individual hardship”
- Safety valve?
  - Avoid constitutional problems from strict application

# Variance criteria

- “Unnecessary hardship” —e.g., *Leo*
  - No reasonable return as zoned
  - Unique circumstances
    - Not general situation in the neighborhood
  - Variance won’t alter character of community
- Also—hardship not self-inflicted
- *Bottom line: variance should not be in complete discretion of ZBA*

# Zoning Amendments

- 3d way of obtaining a land use not permitted by ZO
- No standards in ZEAs. Why not?
  - It's a legislative action (in theory)
- 2 ways to amend:
  - Map
  - Text (new use or new procedure)

# Estoppel & Vested Rights

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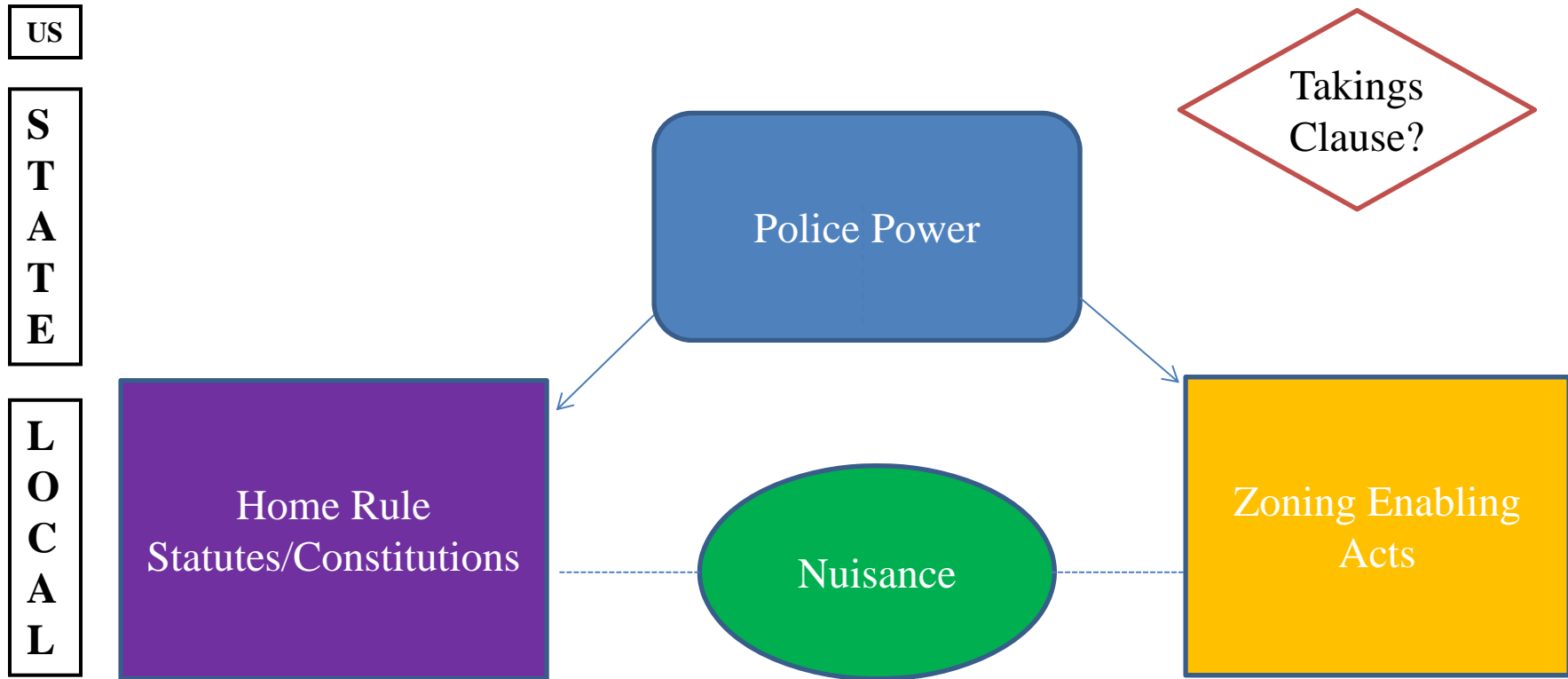
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# Spot Zoning

- Zoning change that intensifies use of a tract by amending the zoning map
- Standards? None (legislative)
- Concern: special treatment?
  - ZO is supposed to be generally applicable
- Challenges: Equal Protection Clause (14A)
- Must zoning be done in accordance with the comprehensive plan? (*Kuehne*)

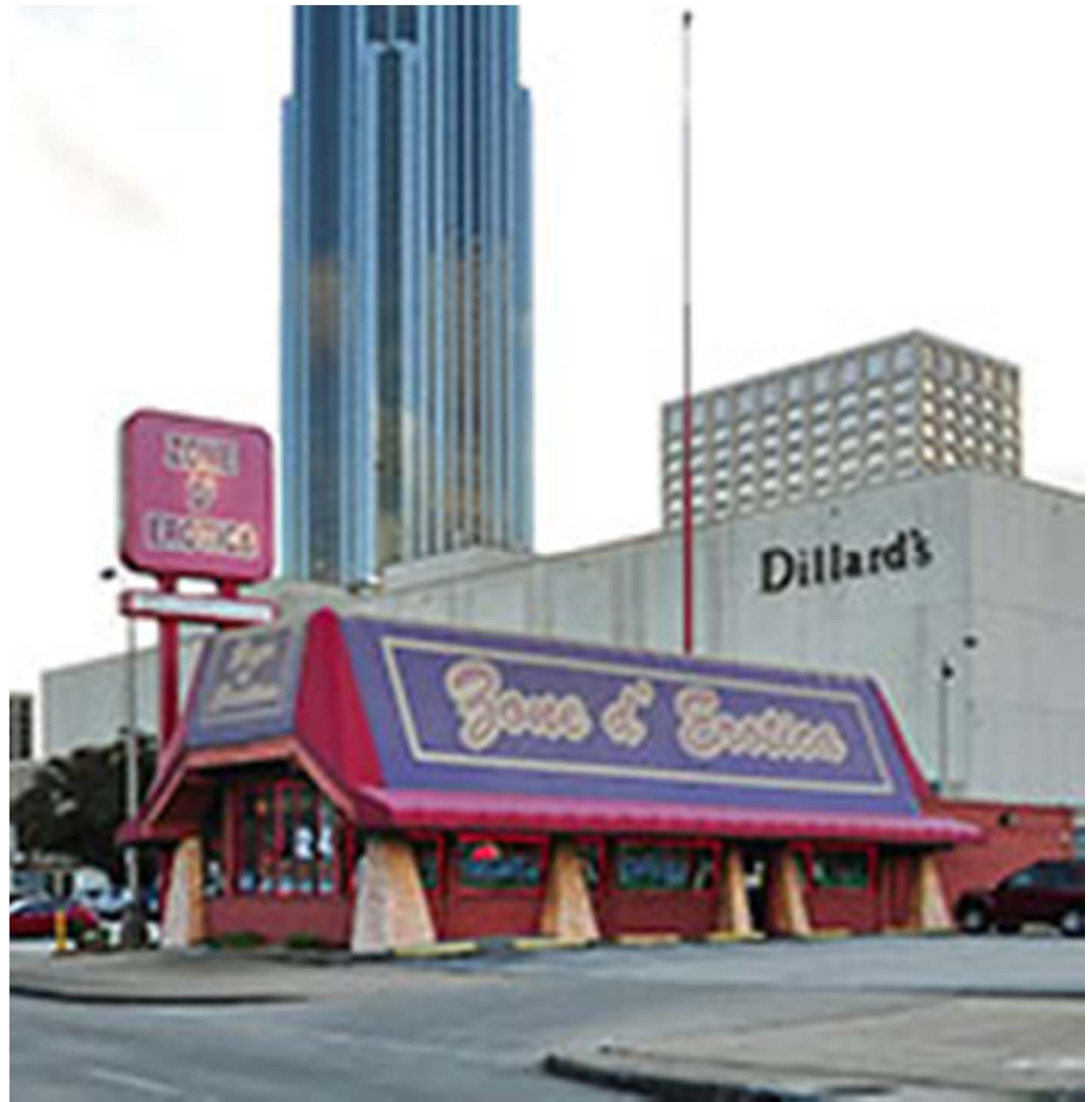
# Home Rule vs. Zoning Authority



- Substance
- Procedure

- Substance
- Procedure

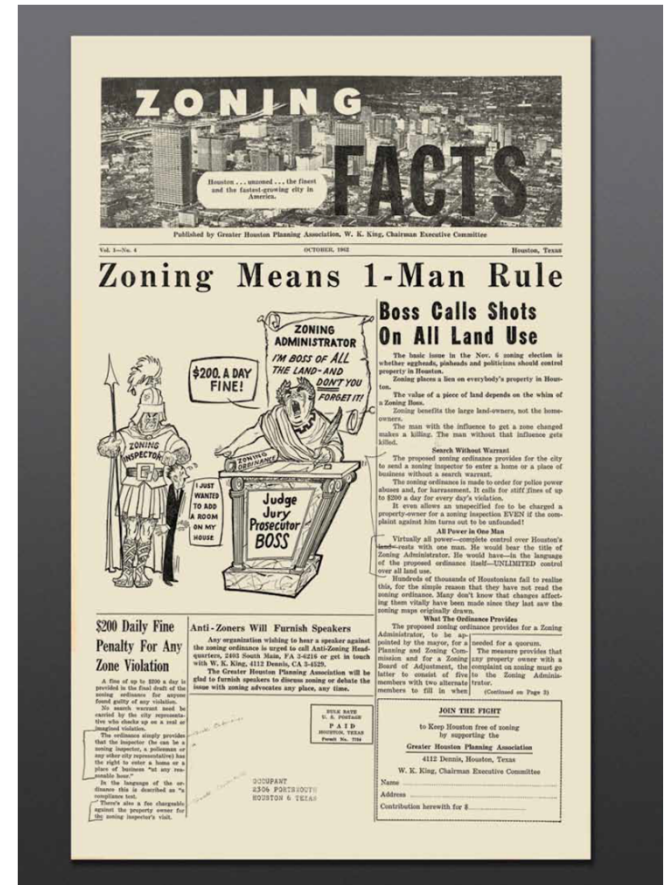
# The Unzoned City?





# Why is Houston “Unzoned”?

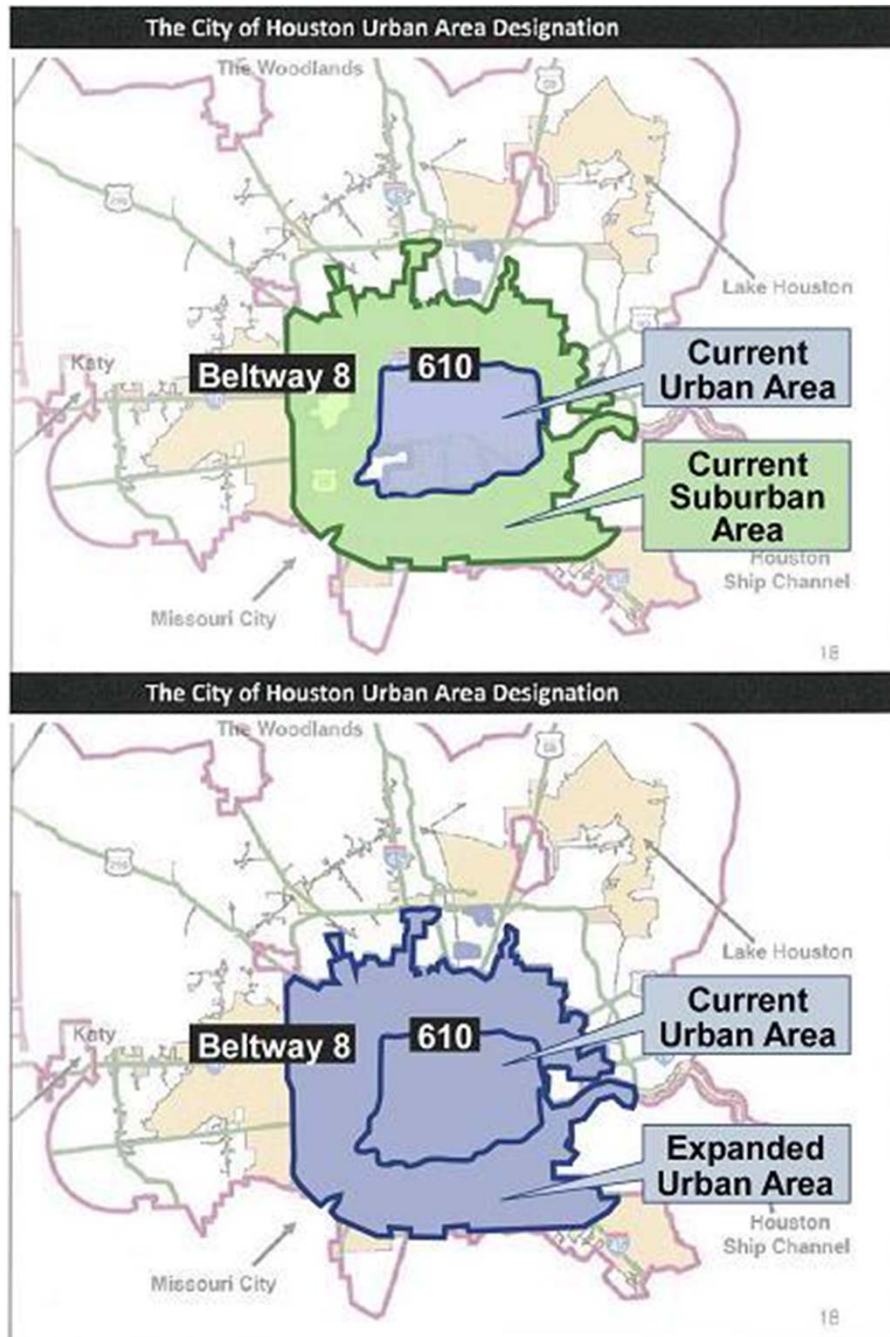
- City Charter Art. VII-b:  
*The City of Houston shall have the power to adopt a zoning ordinance only by . . .(b) holding a binding referendum at a regularly scheduled election.*
- Referenda:
  - 1948, 1962, 1993: rejected



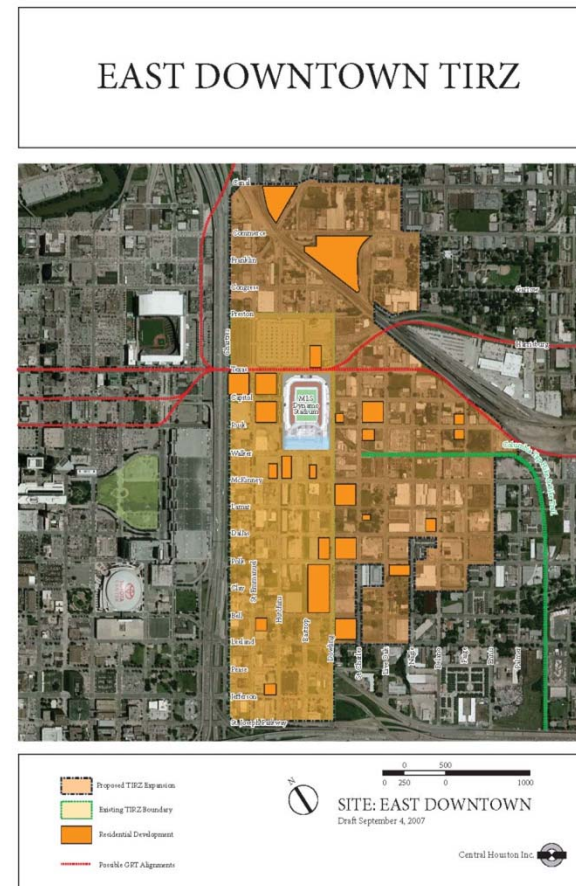
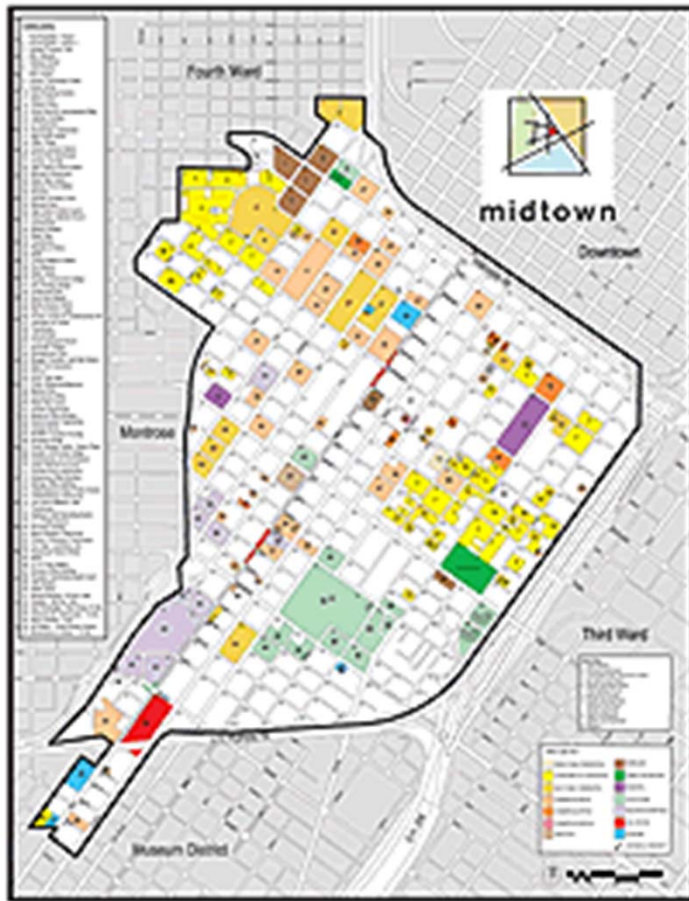
# De Facto Zoning in Houston

- Government rules
  - Lot sizes & setbacks
  - Parking requirements
  - Street widths
  - Sign code
  - Noise ordinance
  - Building Code
  - Flood zones
  - MUDs
  - TABC rules
  - SOBs
  - Gang districts!
- Private land use controls
  - Covenants / Deed Restrictions
    - City enforcement
  - HOAs
  - Exactions
  - Nuisance suits

# Houston's Urban- Suburban Boundary



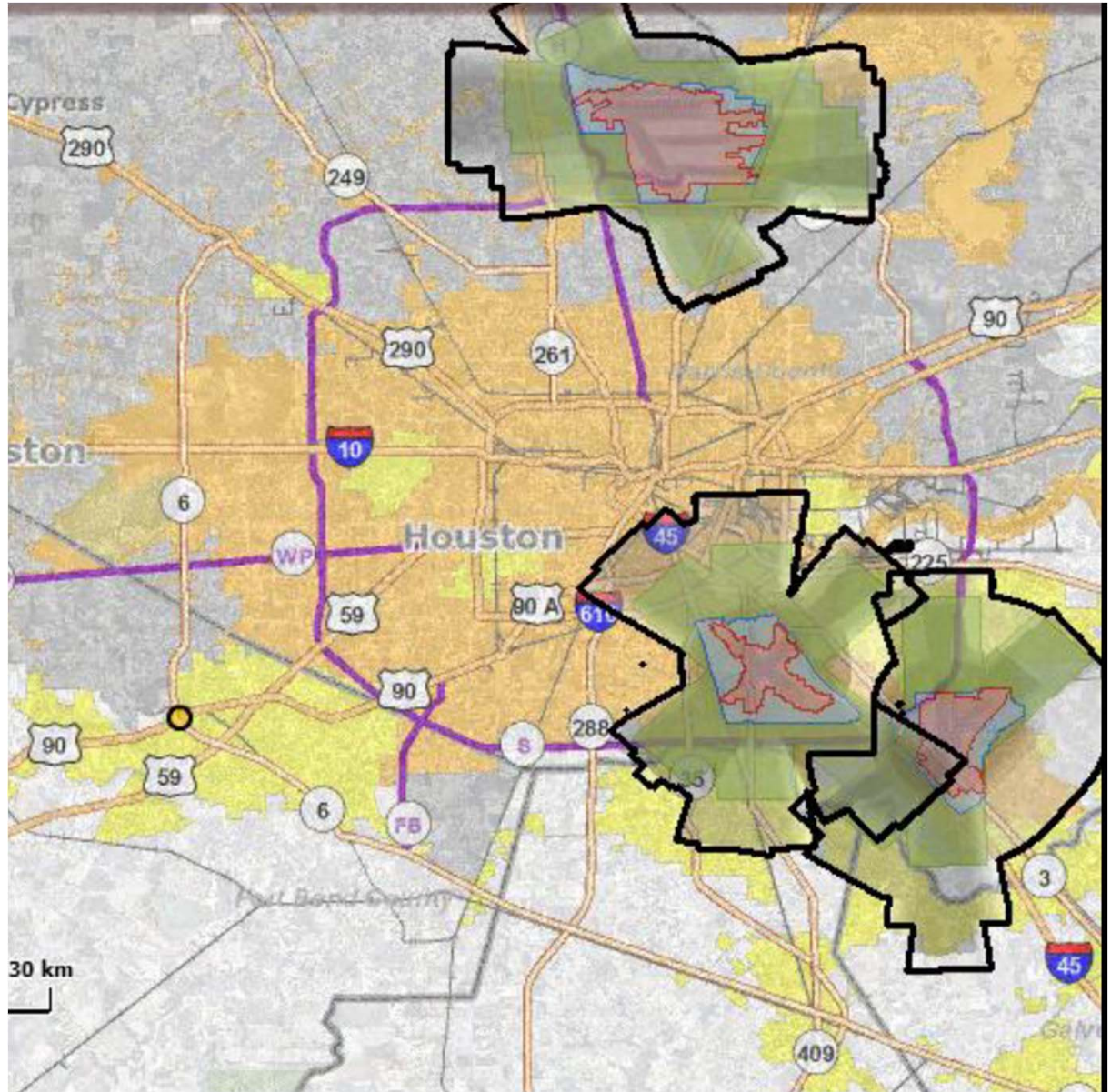
# Tax Increment Reinvestment Zones\* (TIRZ)



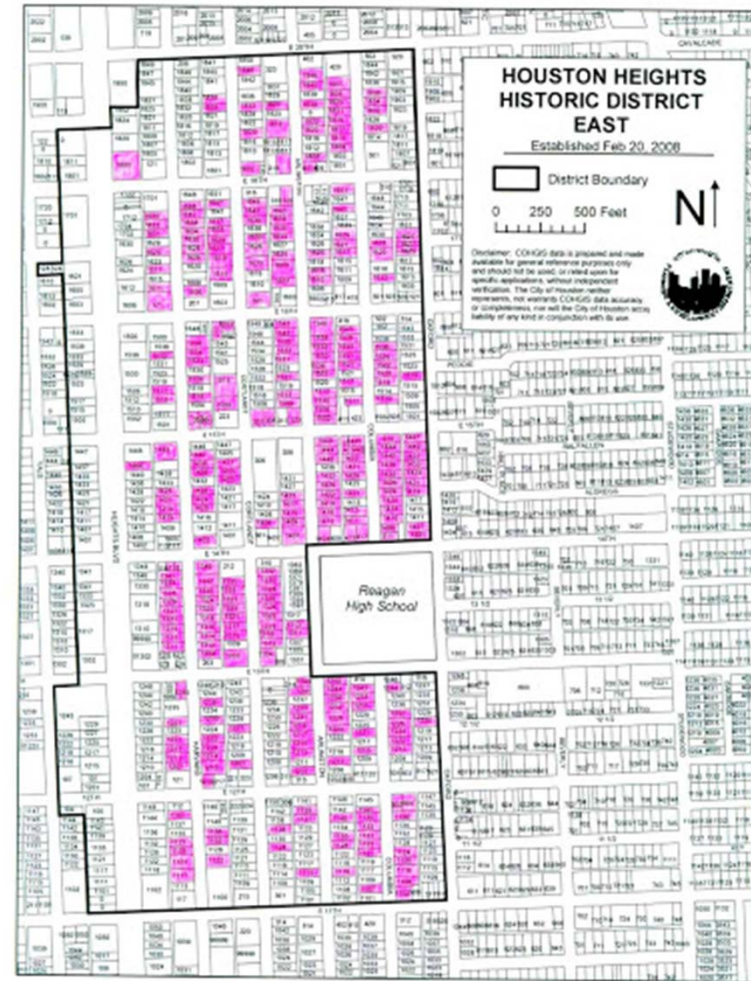
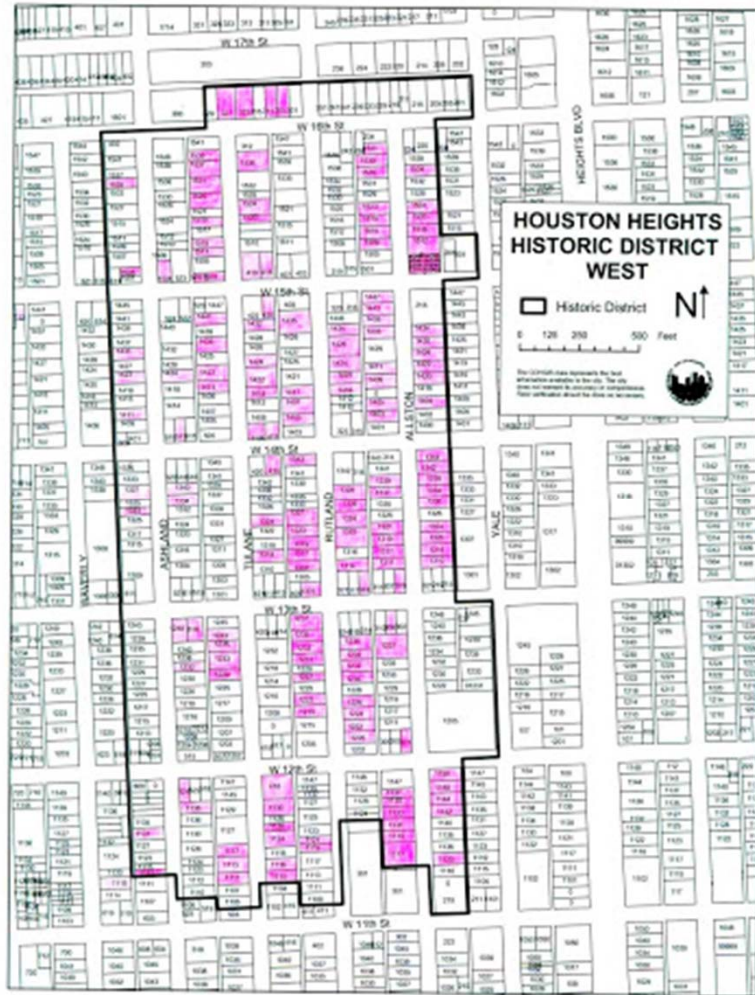
\* (emphasis added)

# Houston Airport Zoning

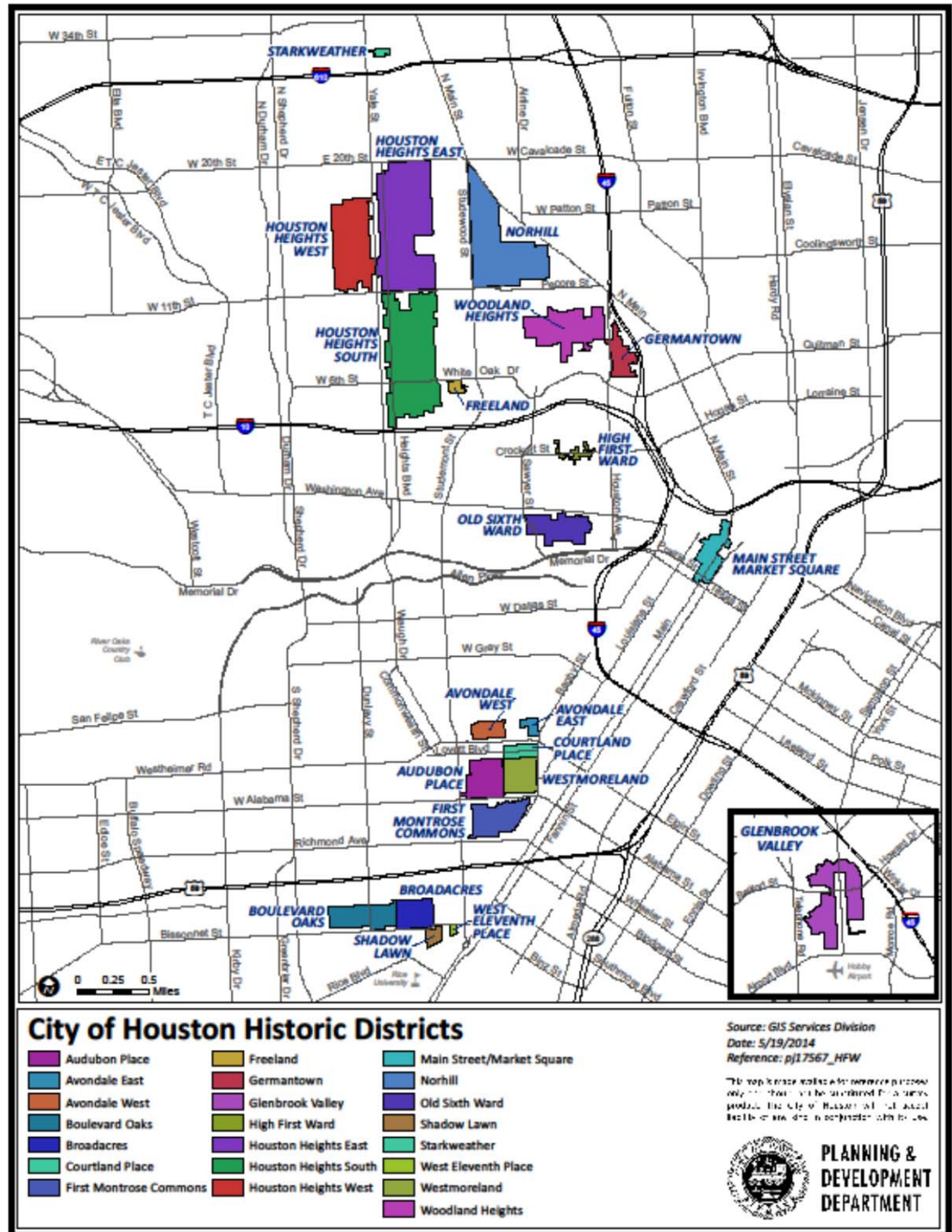
- Houston City Code, Ch. 9, Art. VI (2008)
- “Tiers” 1, 2, 3
- Explicitly regulates land use by district



# Historic Preservation Districts

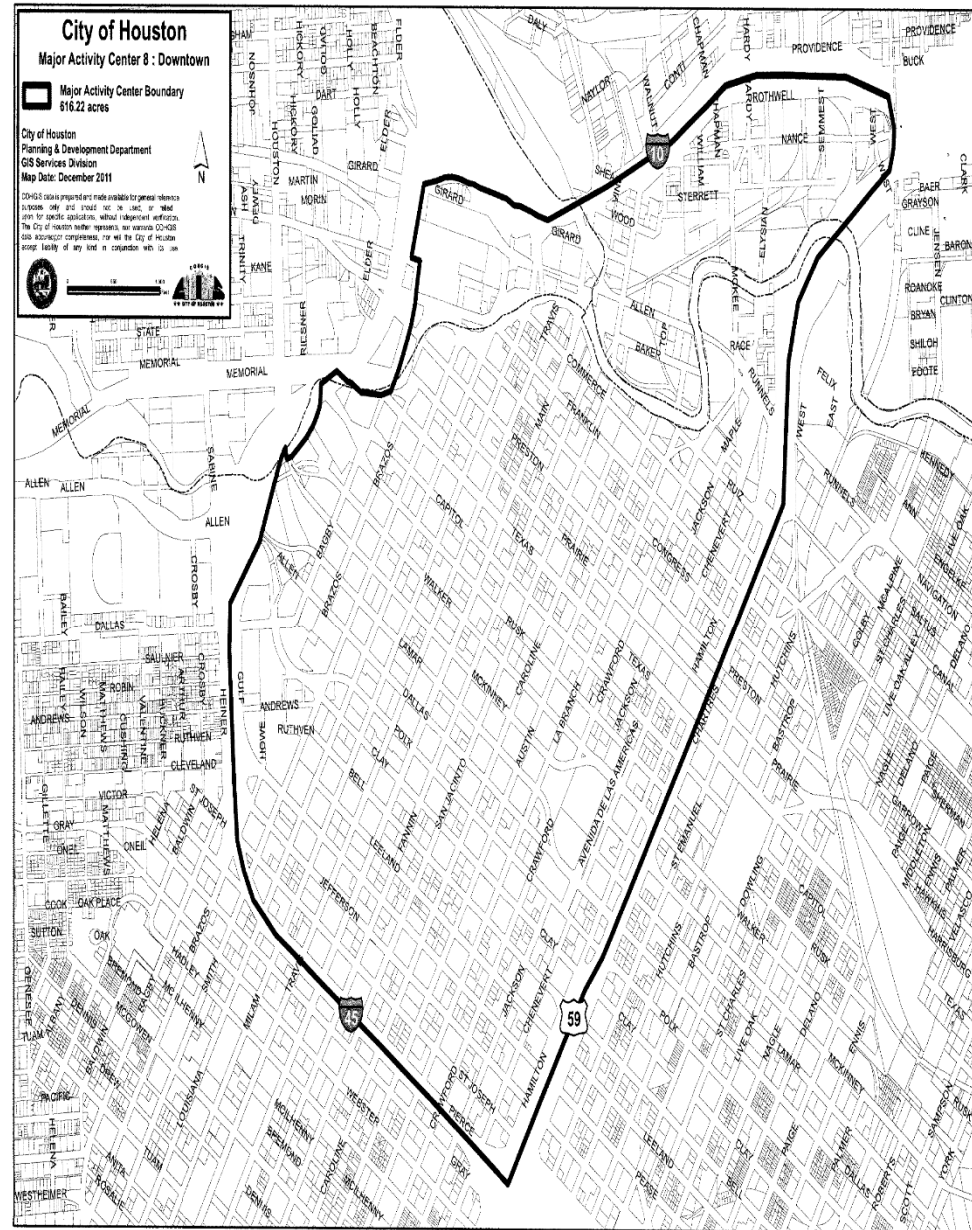


# Historic Preservation Districts



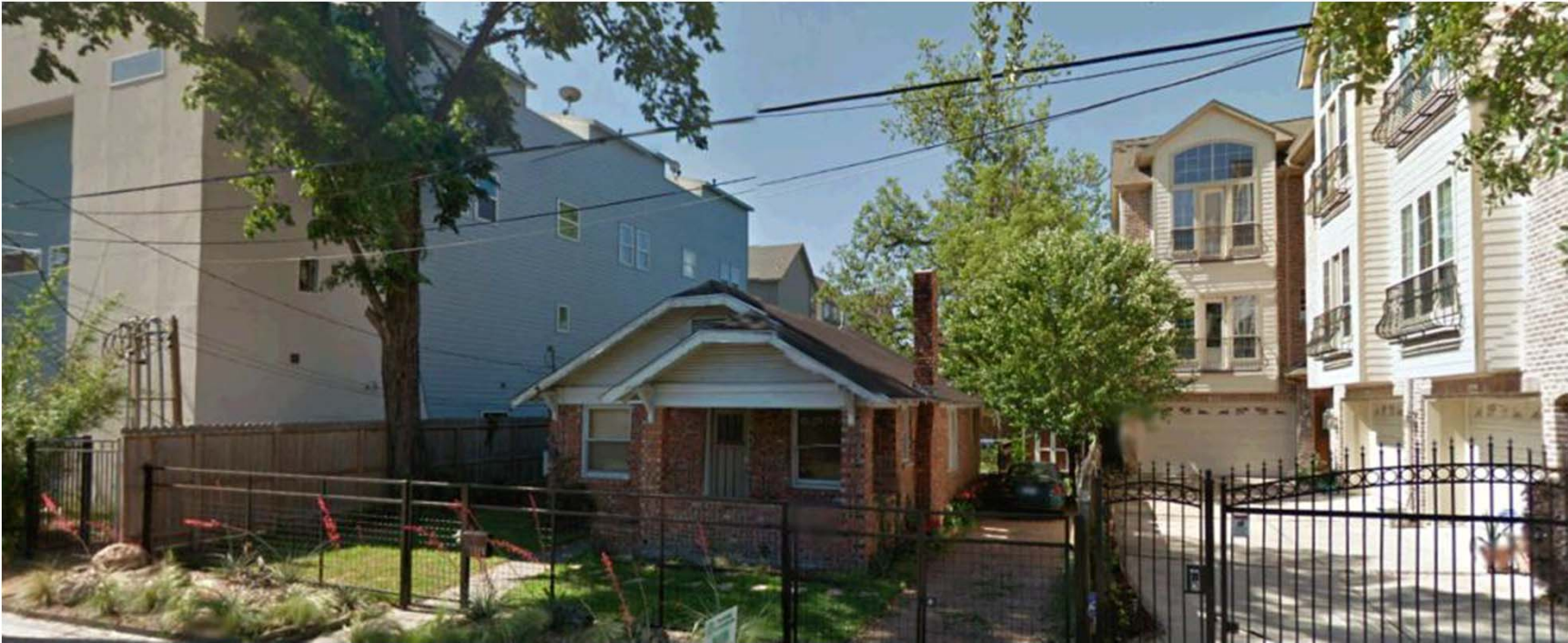
# “Major Activity Center”

- “Residential Buffer Ordinance,” Ch. 42 (2011)
- Inside MAC : density, height, etc. allowed
- Outside MAC: height restrictions, “buffers”:
  - *Defined by proximity to single-family residential*





# Special Minimum Lot Sizes / Building Lines



**Learn How You Can Preserve the Character  
of Your Neighborhood**

*Source: Houston Planning & Development Department,*

[http://www.houstontx.gov/planning/Neighborhood/docs\\_pdfs/MLS\\_Brochure\\_2013.pdf](http://www.houstontx.gov/planning/Neighborhood/docs_pdfs/MLS_Brochure_2013.pdf)

# All of these laws are designed:

- Protect the city,
- Protect elected and appointed officials, staff as individuals,
- Protect the applicant's property and civil rights,
- Protect neighbor's and public property interests, and
- Protect and inform the public.

# Goals for Land Use Decisions

- To make reasoned decisions that will provide the best growth and development plans for the community.
- To make those decisions in accordance with all applicable laws and due process.
- To avoid the courthouse.

# Questions?

Matthew J. Festa

South Texas College of Law Houston

Rice University Kinder Institute for Urban Research

[mfesta@stcl.edu](mailto:mfesta@stcl.edu)

713.206.0398



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