

Texas Citizen Planner Program

Legal Foundations of Community Planning

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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?



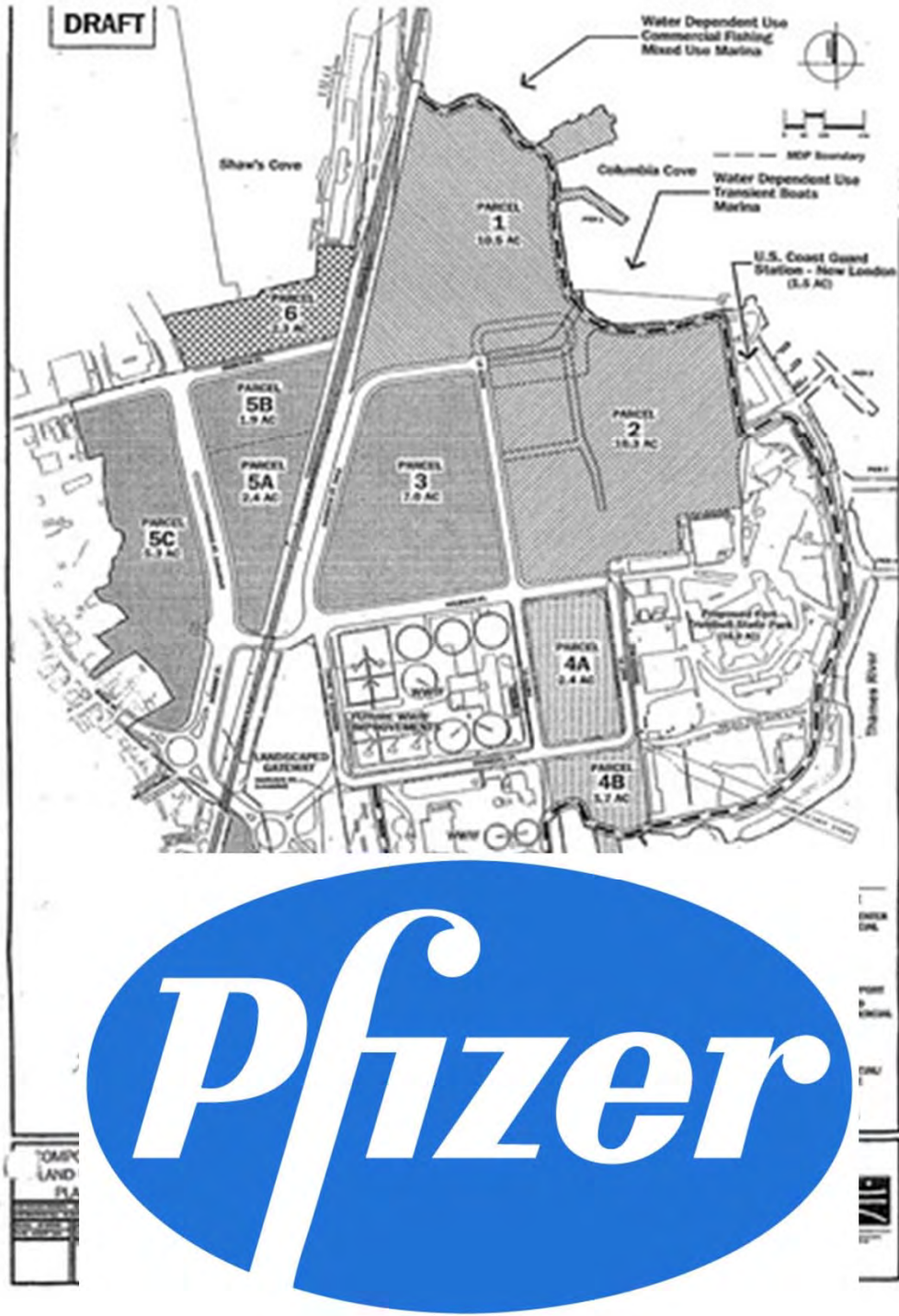
Kelo v. City of New London



- 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

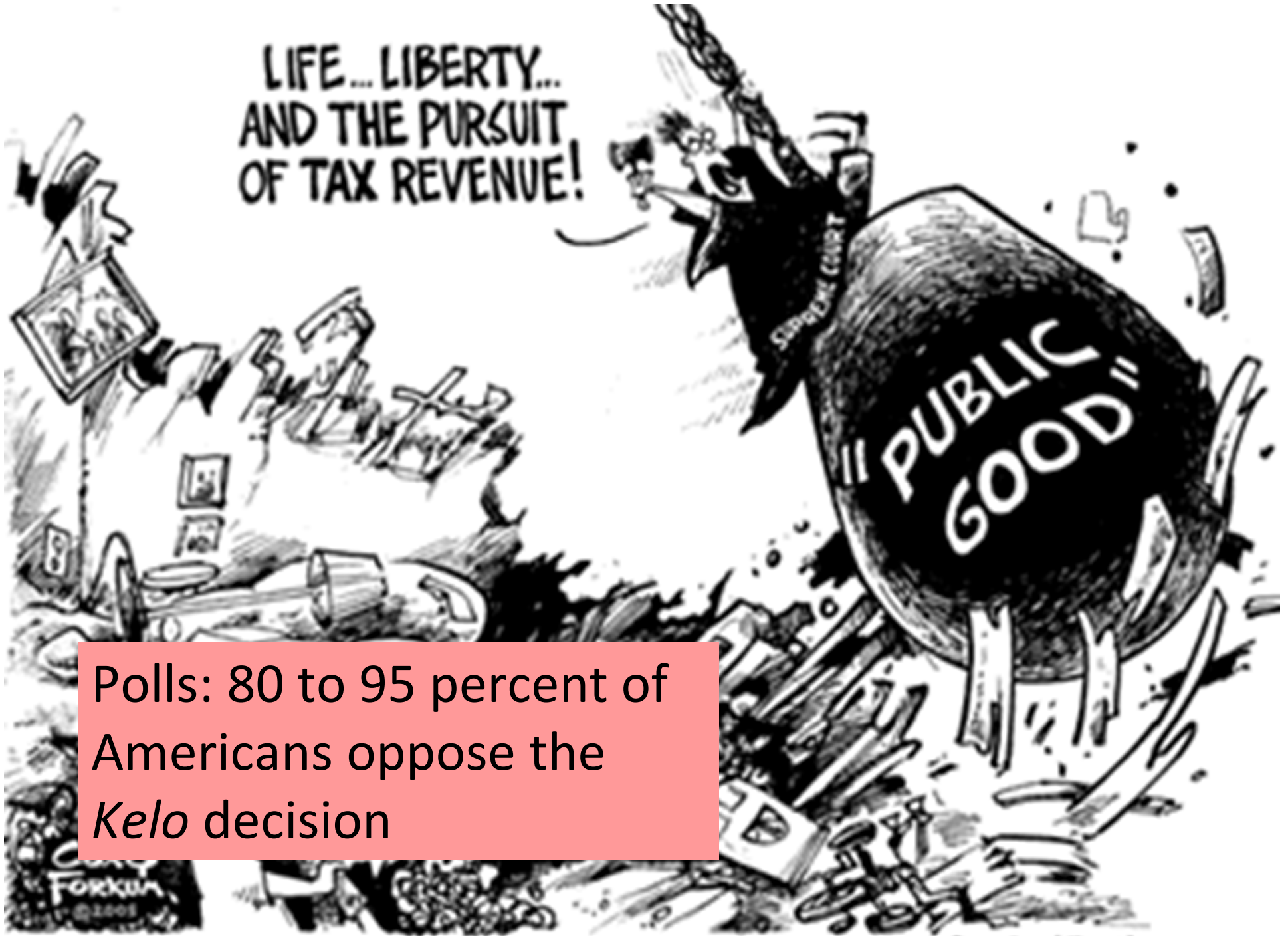
- Petitioners: not a valid taking
- City: Taking is for a public use
 - Part of a larger redevelopment plan
 - Will bring economic benefits to the community
 - New businesses
 - Jobs
 - Tax revenue
 - It's our (City/legislative) business to decide what's reasonably necessary to achieve goals



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)

LIFE... LIBERTY...
AND THE PURSUIT
OF TAX REVENUE!



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/)

Season's Greetings & Happy Takings



Here is my house
that you did take
From me to you,
this spell I make
Your houses, your homes
Your family, your friends
May they live in misery
That never ends
I curse you all
May you rot in hell

- *Susette Kelo*
December, 2006



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.*

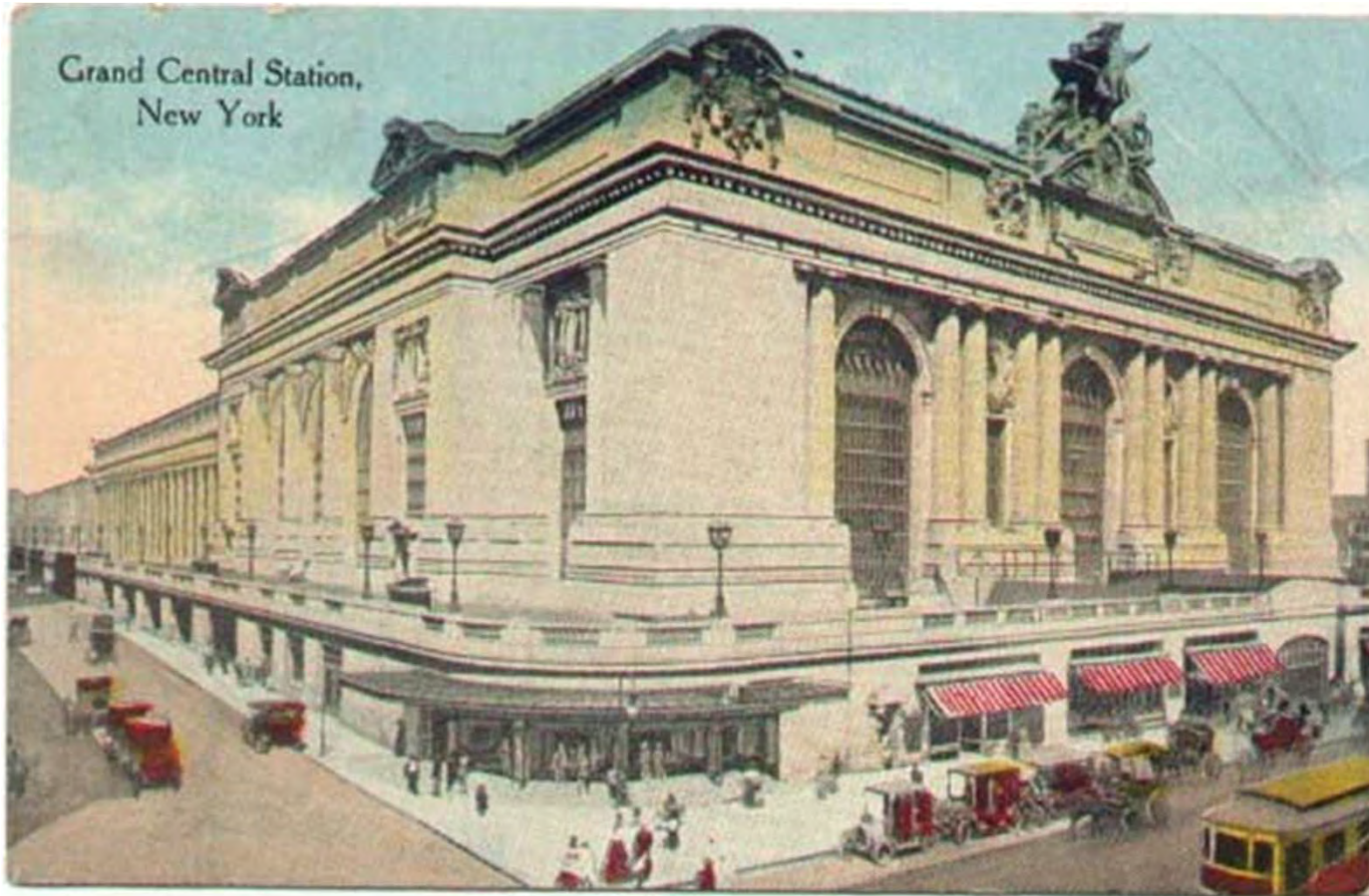
Just Compensation Clause—How?

- “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?

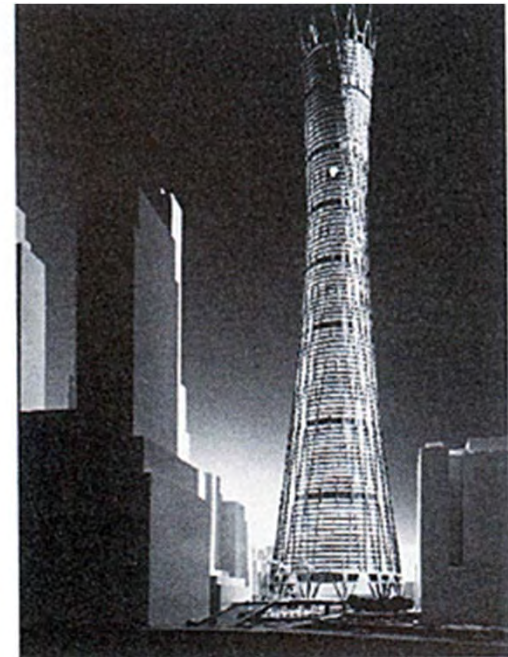
Just Compensation Clause—When?

- 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.
 - *Loretto*: tiny but permanent physical occupation = “per se taking”
- “Exactions”
 - “exaction” of an easement = physical taking
 - “Nexus” / “Proportionality”

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.*

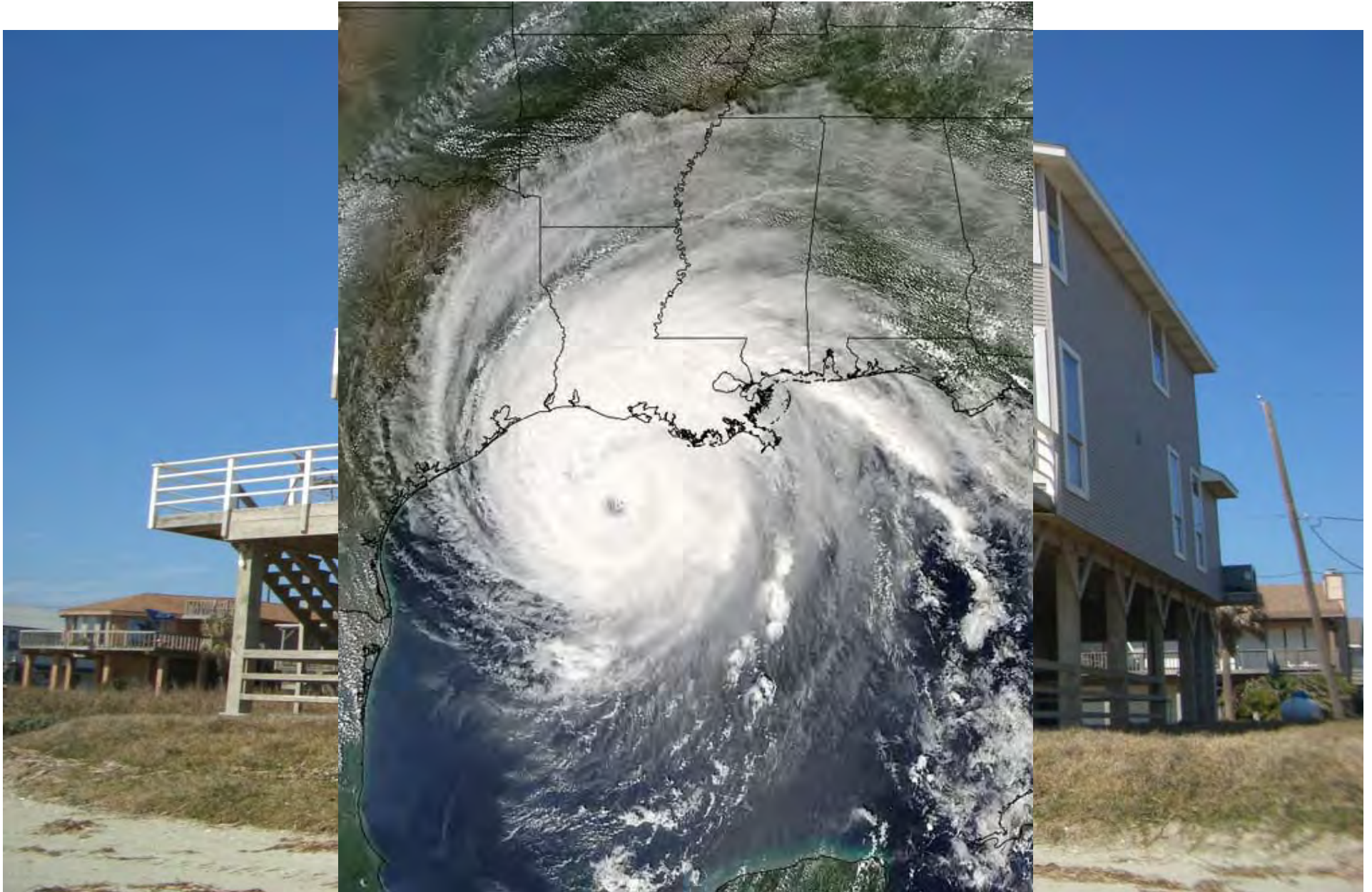
Nuisance, Property, and the State

- 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

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

Galveston, TX



Hurricane Rita



*Hurricane Rita Evacuation
September 17, 2005*



Aftermath

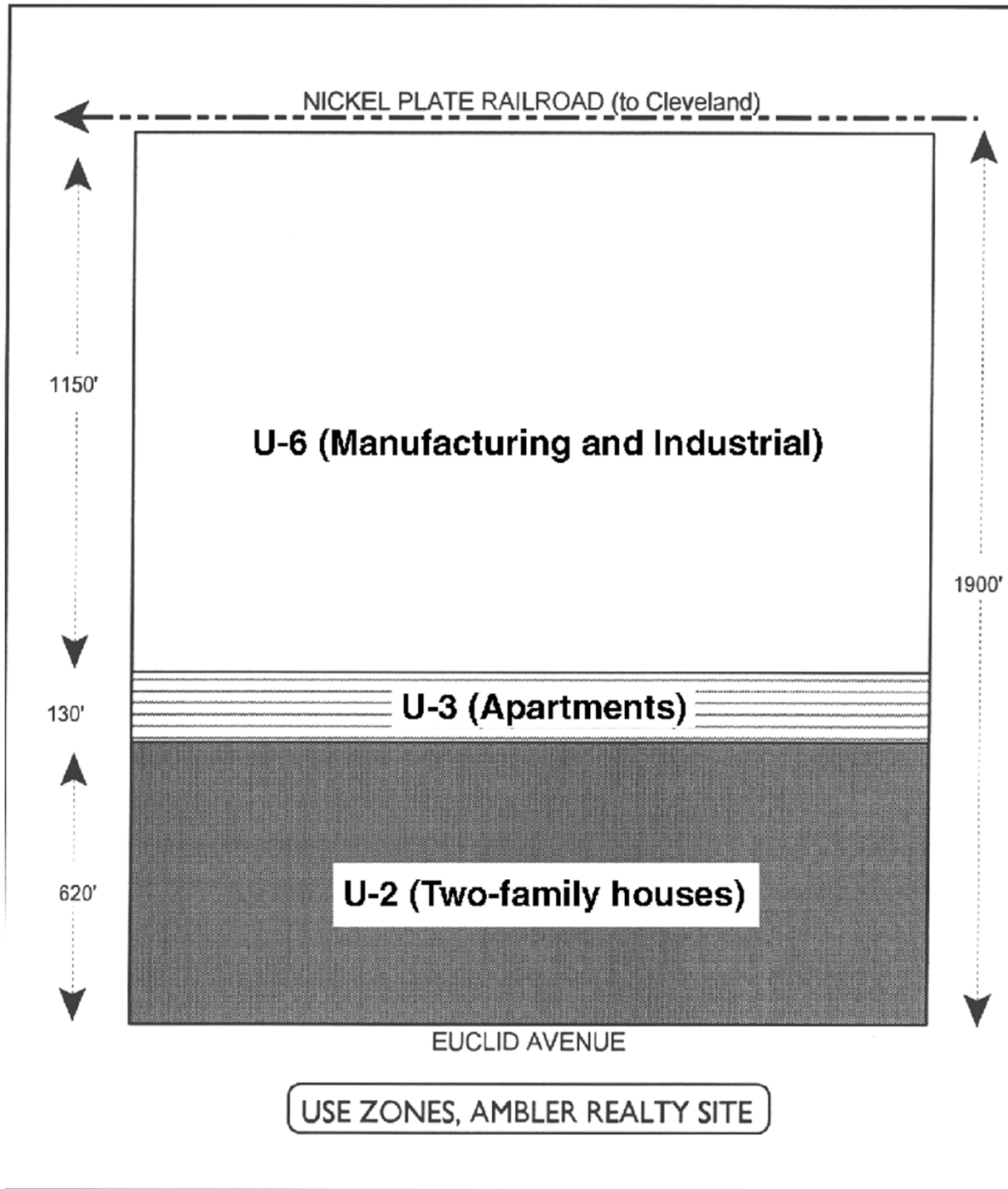


Severance—TX SCT

- State statute does not establish a rolling easement without proof that an easement exists through dedication, prescription, or custom;
- Statute does not provide that an easement rolls with drastic “avulsion”—only “gradual, imperceptible changes”
- Now what?

Village of Euclid v. Ambler Realty Co.

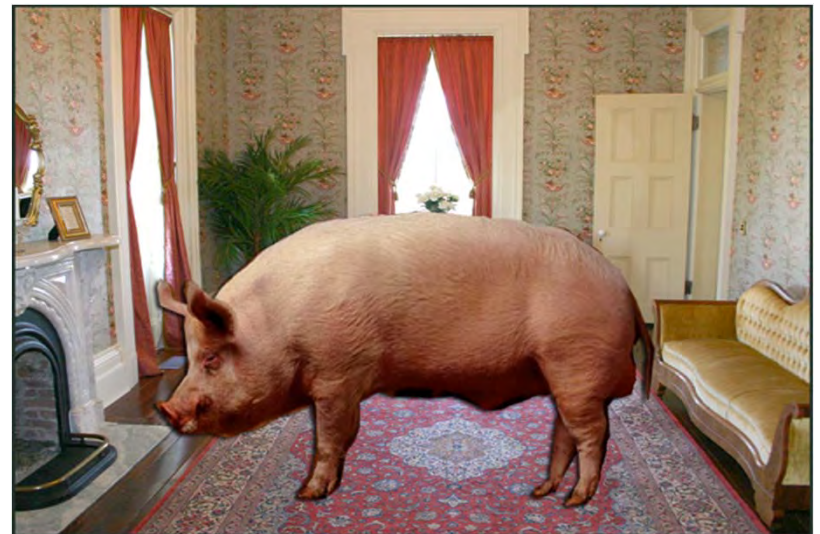




Euclid's Zoning

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)

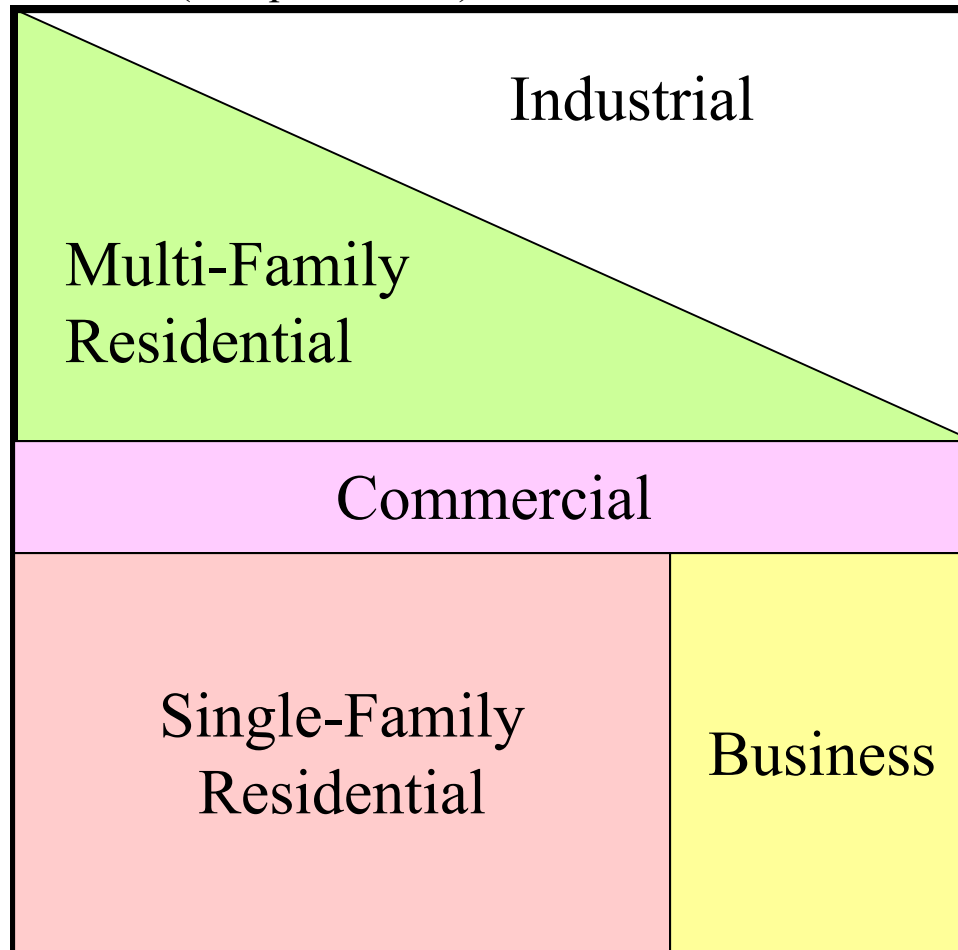
Is zoning in the comprehensive plan?

- 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)



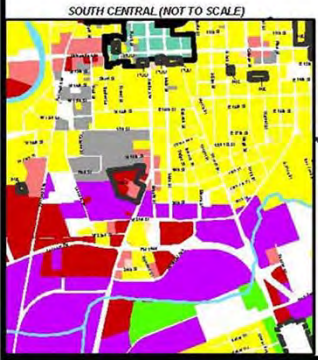
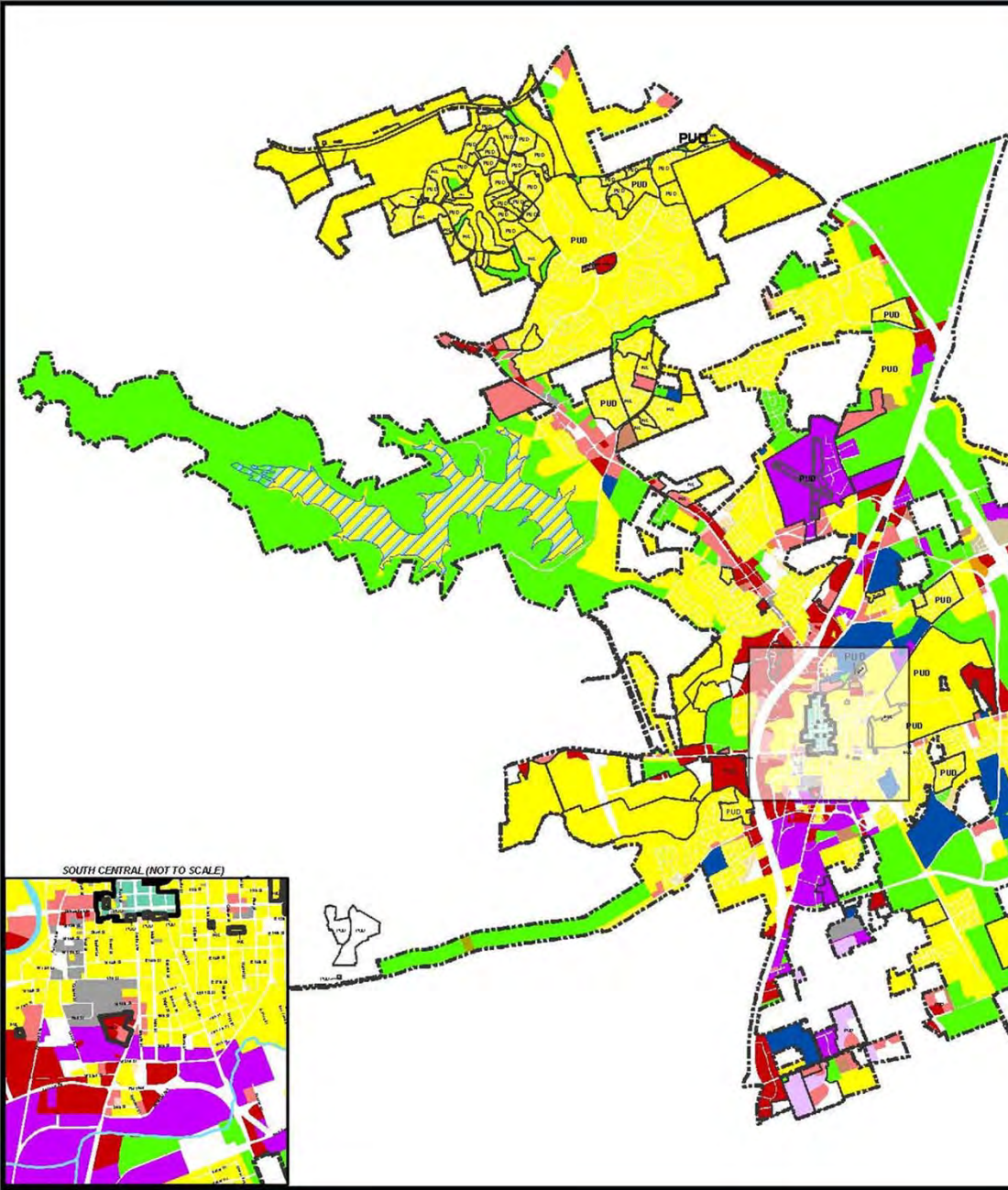


OFFICIAL ZONING MAP

October, 2018



NORTH CENTRAL (NOT TO SCALE)

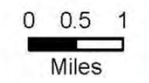


SOUTH CENTRAL (NOT TO SCALE)

Legend

- City Limits
- Zoning Districts**
- A (Agriculture)
- R-E (Executive Office)
- R-L (Executive Low Density)
- R-D (Executive Single-Family)
- M (Manufactured Housing)
- T-1 (Two Family)
- T-2 (Townhouse)
- M-1 (Low Density Medium Density)
- M-2 (High Density Medium Density)
- O-1 (Office)
- M-3 (Office Site - Sensitive)
- C-1 (Neighborhood Commercial)
- C-2 (Local Commercial)
- C-3 (General Commercial)
- U (Urban)
- P (Business Park)
- Special Districts**
- PUD (Planned Unit Development)
- Downstream County
- Municipal Ordinance
- City Limits

The official zoning map of the city shall be the map as shown on this page. Any changes to the map shall be made by the City Council. The City Council may amend the map by ordinance. The City Council may also amend the map by resolution. The City Council may also amend the map by ordinance. The City Council may also amend the map by resolution. The City Council may also amend the map by ordinance. The City Council may also amend the map by resolution.



1:500 = 3,010,000:1
Georgetown, Texas
City of Georgetown, Texas
Planning and Development Department
100 West Street
Georgetown, TX 77626
Phone: 512-863-5000

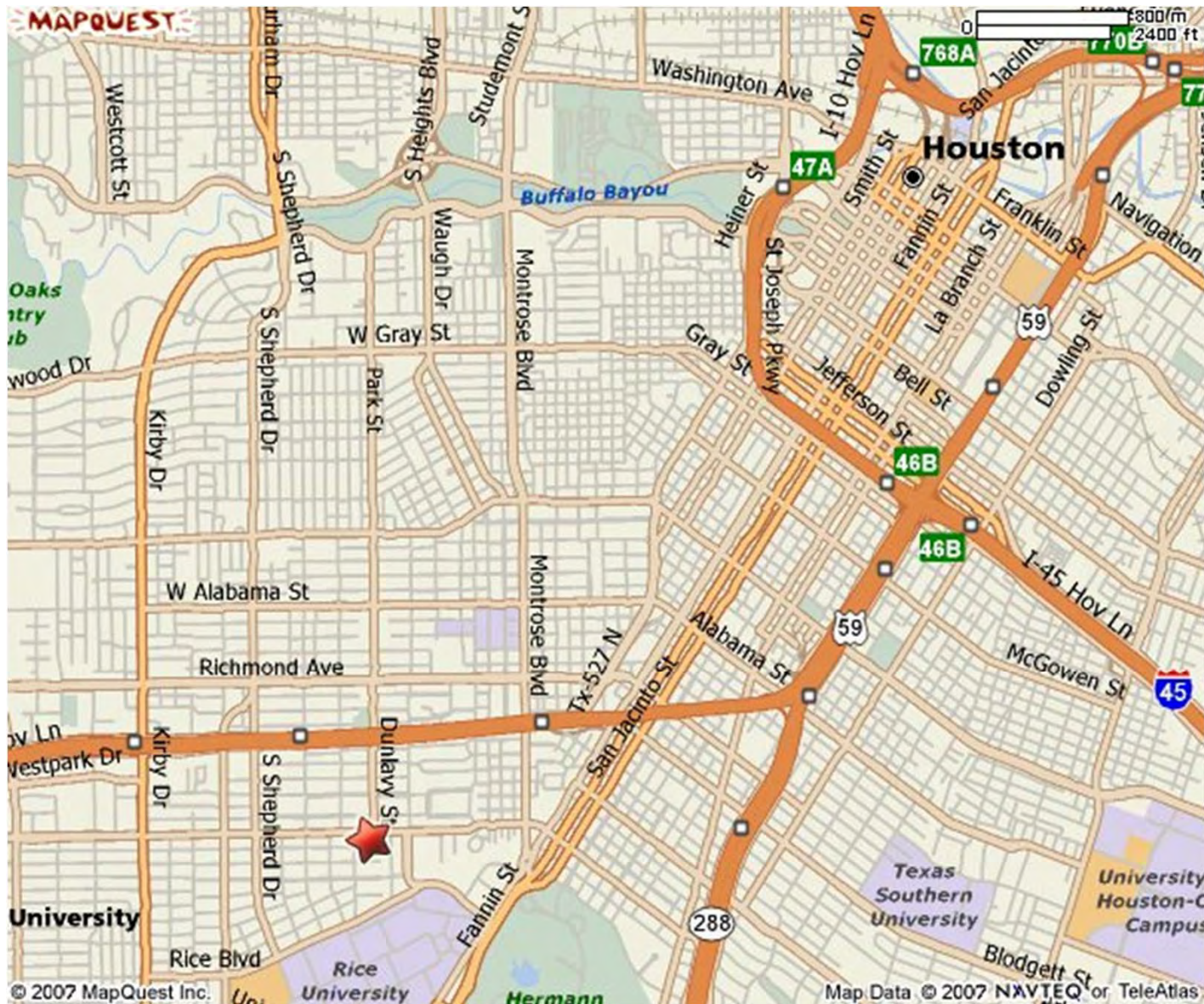
Subdivision Regulations

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

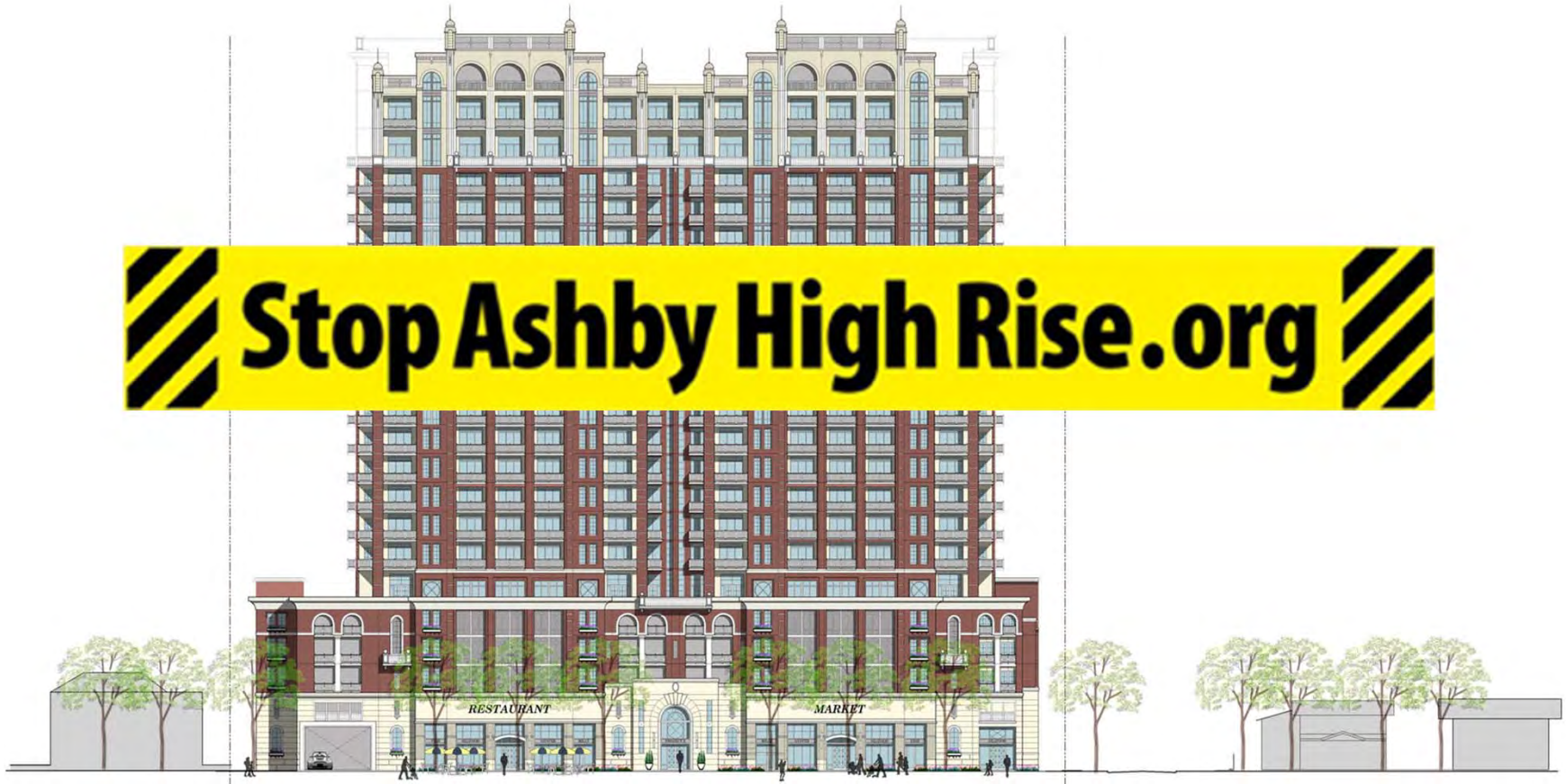
Estoppel & Vested Rights

- 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

Nonconforming Uses

- i.e, “grandfathering in”
- Policy concerns:
 - Fairness
 - Safety valve to avoid takings
- 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”?
 - 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

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

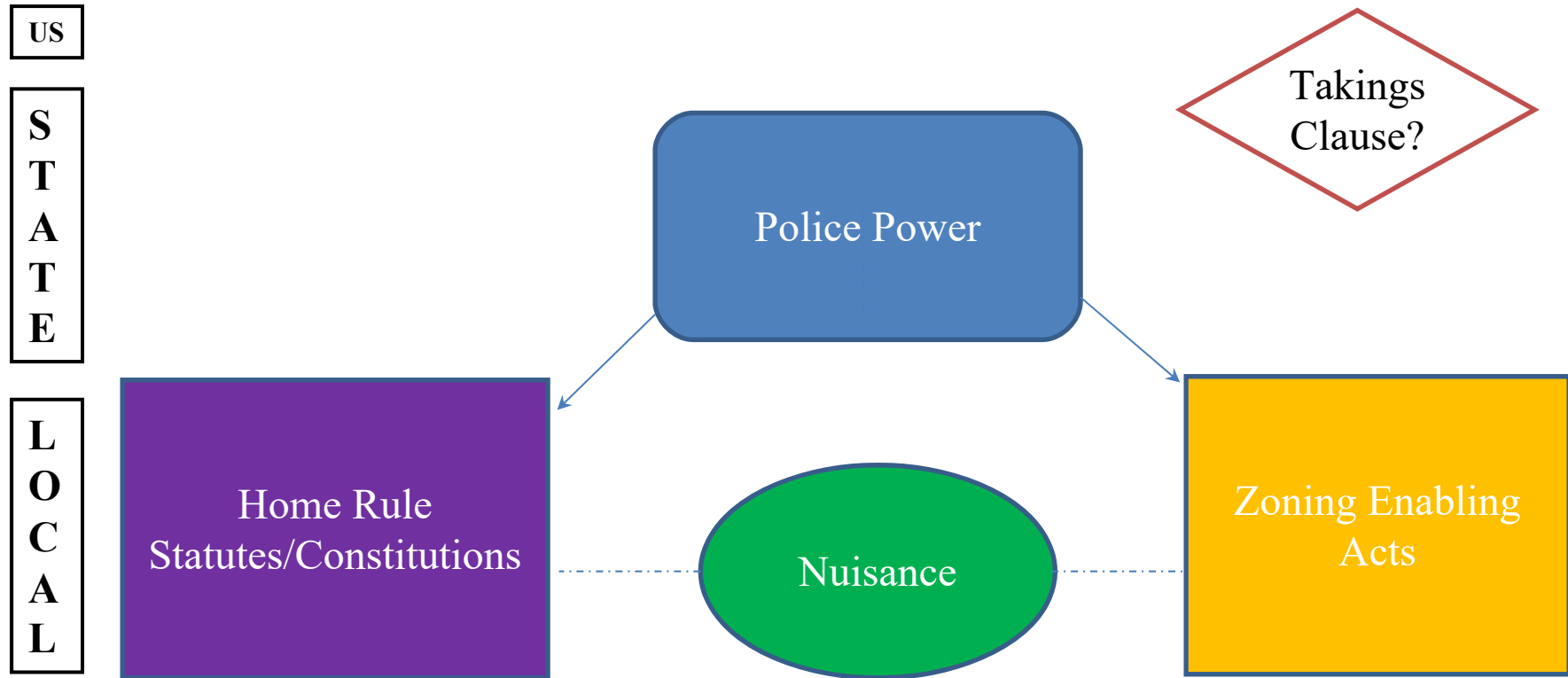
Zoning Amendments

- 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)

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?

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
- Private land use controls
 - Covenants / Deed Restrictions
 - City enforcement
 - HOAs
 - Exactions
 - Nuisance suits

Land Use regulations should:

- 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?

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