

No. 19-0689

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**In the Supreme Court of Texas**

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KATHLEEN POWELL and PAUL LUCCIA,

*Petitioners,*

v.

CITY OF HOUSTON, TEXAS,

*Respondent.*

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**JOINT BRIEF OF LAND DEVELOPERS AND  
SCENIC ORGANIZATIONS AS *AMICI CURIAE*  
IN SUPPORT OF THE CITY OF HOUSTON**

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## **IDENTITY AND INTEREST OF *AMICI CURIAE***

We are developers or organizations who support property rights and sensible land regulation. We write to express concern about the potential impact of this case on land development in Houston.

Carleton Riser is President of Transwestern Development Company, a developer of office, industrial, multifamily, mixed-use and healthcare projects with 34 offices nationwide, based in Houston.

Harry Masterson is a founding principal of Concourse Development, a leading residential land developer based in Houston. Harry has served as President on the Board of Directors of the Greater Houston Builders Association (GHBA).

Clay Likover is President of Ojala Holdings, a developer that has delivered a wide range of projects in greater Houston and across Texas and Louisiana including storage and affordable housing and high-end multifamily apartments in secondary and tertiary markets.

John Breeding is the President and CEO of the Uptown Houston District, the first improvement district in the state of Texas.

Scenic Texas is a Texas nonprofit corporation dedicated to the enhancement of the state's visual environment. Scenic Texas and its chapters work in Austin to provide information, education and advocacy concerning statewide scenic issues.

Scenic Houston is a Texas nonprofit corporation. It is the only organization dedicated to preserving and enhancing Houston's visual environment, often through development partnerships.

No fee has been or will be paid for the preparation of this brief.

## INTRODUCTION

Over the last century, Houston has developed a unique land regulatory system based on incremental—and geographically limited—restrictions. This system has enabled the creation of special districts (including scenic districts), initiated from the bottom up, and supported and relied upon by property owners and developers. Meanwhile, in the seventy years after the Zoning Enabling Act, Houstonians have rejected top-down zoning schemes on five occasions. Houston is alone among large cities in having rejected zoning. The Court should hesitate before forcing the city to adopt an outdated zoning regime. Doing so would have a severe negative impact on land development and property rights in Texas. Houston’s system has been highly successful in promoting growth of affordable housing and beneficial development because of its stability, pragmatism, and flexibility.

The Court should limit burdensome development regulations based on constitutional principles. It should not, however, create a cause of action for illegal “de facto zoning” based on a definition of zoning that neither the legislature nor the people of Houston anticipated. The Court should tread carefully in this area of intense legislative activity. Regardless of the merits of historic districts, an opinion from this Court could inadvertently jeopardize essential and incrementally more “zoning-like” regulations, creating uncertainty as to the validity of Houston’s complex regulatory regime that has served the community extraordinarily well over many decades.

## ARGUMENT

### I. District-Based Regulation is Authorized by Statute.

Houston's district-based regulatory system is built on a foundation of direct legislative authorization, separate and independent from the Zoning Enabling Act.

#### *A. A Tale of Two Cities: Dallas Versus Houston*

Dallas was the pioneer of zoning in Texas, passing its first zoning ordinance in 1919 shortly after the Home Rule Amendment. Court challenges culminating in *Spann v. Dallas*, 235 S.W. 513 (Tex. 1921), however, created broad uncertainty regarding the scope of home rule. In response, Dallas promoted a zoning enabling act in 1921 and again in 1927. Finally, this court ruled for the city in *Lombardo v. Dallas*, 73 S.W.2d 475 (Tex. 1934). Dallas now has an elaborate zoning scheme with 41 different zoning categories.

Houston took a different path. Facing a traffic crisis and seeking to avoid Dallas's legal quagmire, the city focused its planning efforts on a street plan.<sup>1</sup> Then in 1927, the Houston delegation sponsored a bill authorizing the city to impose setbacks, independent of zoning, Acts 1927, 40th Leg., p. 415, ch 276. Houston's Freeway Plan remains its primary planning tool. The legislature also passed a "platting" statute, establishing the second pillar of Houston's regulatory regime, during the same session. Acts 1927, 40th Leg., p. 342, ch. 231. This statute has

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<sup>1</sup> See Archie Henderson, "City Planning in Houston, 1920-1930," *Houston Review* 9, no. 3 (1987) 115-123.

been described as “a direct grant of undefined police power to the governing body to enact subdivision regulations,” and it reaffirms broad municipal authority for district-based land use regulation.<sup>2</sup>

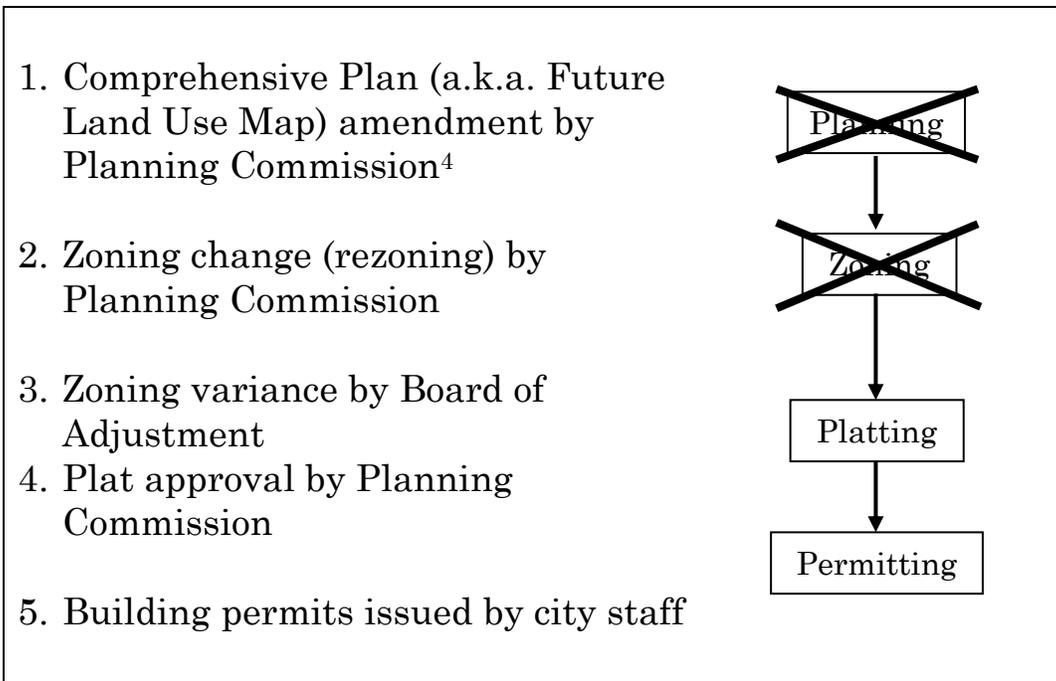
### *B. “Platting” in Houston*

In Houston, platting means something different than what it means in any other city. A “plat,” traditionally, is a survey showing how *land is subdivided*, as contrasted with zoning, which is “regulating *construction* and use within districts.” Tex. Loc. Gov’t Code § 211.005 (emphasis added). In Houston, a plat is all of the above. It can be a traditional plat or a site plan for a construction project that does not include a subdivision (such as renovating a house), which is referred to as a “development plat.” In reviewing these different types of plats, the Planning Commission grants variances based on wide-ranging inquiries outside of the face of the plats such as site visits, adjoining development, “development trends,” and “sound public policy.”<sup>3</sup> By empowering the Planning Commission to determine variances and enforce a variety of district-based regulations during the “platting” stage, Houston has managed to eliminate multiple layers of bureaucracy, as shown on the following chart:

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<sup>2</sup> John Mixon, “The Role of Variances in Determining Ripeness in Takings Claims Under Zoning Ordinances and Subdivision Regulations of Texas Municipalities, 29 St. Mary’s L. J. 765, 780 (1998).

<sup>3</sup> See Houston Planning & Development Department, [http://www.houstontx.gov/planning/Commissions/docs\\_pdfs/PC-Training-Platting-and-Permitting.pdf](http://www.houstontx.gov/planning/Commissions/docs_pdfs/PC-Training-Platting-and-Permitting.pdf) (2017).



The absence of a zoning board is the most striking difference between development in Houston and Dallas (and every other large city in the country). Instead of having to go before a zoning board to obtain a variance, developers can go straight to the Planning Commission.

The platting statute provides an independent statutory basis for Houston’s geographically limited regulatory system. While the statute largely duplicates the delegation of police powers under the Home Rule Amendment, it has provided city leaders assurance in the wake of *Spann* that they could implement Houston-style comprehensive planning based, e.g. the Freeway Plan, without the need for a zoning ordinance. In 1987, the legislature passed a statute, limited to Houston, ratifying its sui generis platting system. *Town of Lakewood Vill. v.*

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<sup>4</sup> Development process in large Texas cities. Dallas, Ft. Worth, San Antonio, El Paso, and Corpus Christi (not including Austin).

*Bizios*, 493 S.W.3d 527, 532 (Tex. 2016) (citing Tex. Local Gov’t Code § 212.041 et seq. (Subchapter B: Regulation of Property Development)).

## II. A Century of District-Based Regulation in Houston

Houston’s district-based regulatory system has developed over many decades in response to specific problems. The chart below summarizes Houston’s geographically limited development regulations with citations to the city’s Code of Ordinances:

### District-Based Development Regulations in Houston

Land Use Restrictions		Building Restrictions	
<i>Districts with Use Classes</i>		<i>Neighborhood Districts</i>	
Tax Increment Reinvestment Zone	§§ 42-100, 44-127; 1999-755, 2012-739	Setbacks	§§ 42-164, -170
		Lot Sizes	§ 42-179
		Height	§ 42-272
Airports (Land Use Tiers)	§ 9-360	Parking	§ 26-503
<i>Minimum-Distance Buffers</i>		Façade	§ 42-651
Hotel	§ 28-202	Signs (Scenic Districts)	Sign Code
Bars	§ 3-2	Trees - Various Districts	§ 33-104,128,161
Mobile homes, RVs	§§ 29-15,-87	<i>Flood Plain Zones</i>	
Car lots	§ 28-34	Elevations	§ 19-11
Signs	§ 28-37	<i>Street Hierarchy Classification System</i>	
Noise	§ 30-2	Setback	§ 42-150
Cell towers	§ 28-524	Sidewalk width	§ 42-621
Sexually oriented business	§ 28-125	Parking	§26-503,10;42-101
Meat processing facilities	§ 10-272	Right-of-way	§ 42-122
Hazardous enterprises	§ 28-233	Open space	§ 42-230
Oil and gas wells	§ 31-5	<i>Other</i>	
Heliport	§ 9-323	Parks	§ 42-256
Recyclers	§ 28-34	Lake Houston	§ 23-5
Parolee housing	§ 28-156		
<i>Deed Restricted Neighborhoods, HOAs, Master Planned Communities</i>			
All of the above		§§ 10-3, 10-551	

*A. Restricted Areas*

From its earliest days, Houston has restricted the use of property for certain uses within a minimum distance (typically 1000 feet) of other protected uses, resulting in thousands of circular multiblock districts with heightened land use restrictions.

<b>Restricted Uses</b>	<b>Protected Uses</b>
Hotels	Residential neighborhoods
Bars	Churches
Car lots	Schools
Signs	Hospitals
Noise	Parks
Cell towers	
Sexually oriented businesses	
Meat processing facilities	
Hazardous enterprises	
Oil and gas wells	
Heliports	
Salvage yards	
Parolee housing	
Salvage yards	
Parolee housing	

In addition, the Residential Buffering Ordinance is a more expansive regulation protecting residential neighborhoods. Code § 42-272. The ordinance prohibits tall buildings in proximity to residential areas except in eight geographically defined Major Activity Centers such as the Central Business District.

*B. The Freeway Plan*

Beginning in the 1920s, city leaders developed the closest thing that Houston has to a comprehensive planning map, the Major

Thoroughfare and Freeway Plan (MTFP). Updated annually since 1942, the MTFP “serves as notice to the public for developing land adjacent to the identified roads.” Specifically, setbacks, which prohibit building anything within a minimum distance from the street, are determined by the classification of each street according to the MTFP’s Street Hierarchy Classification System (Principal Thoroughfare, Thoroughfare, Major Collector, Minor Collector).

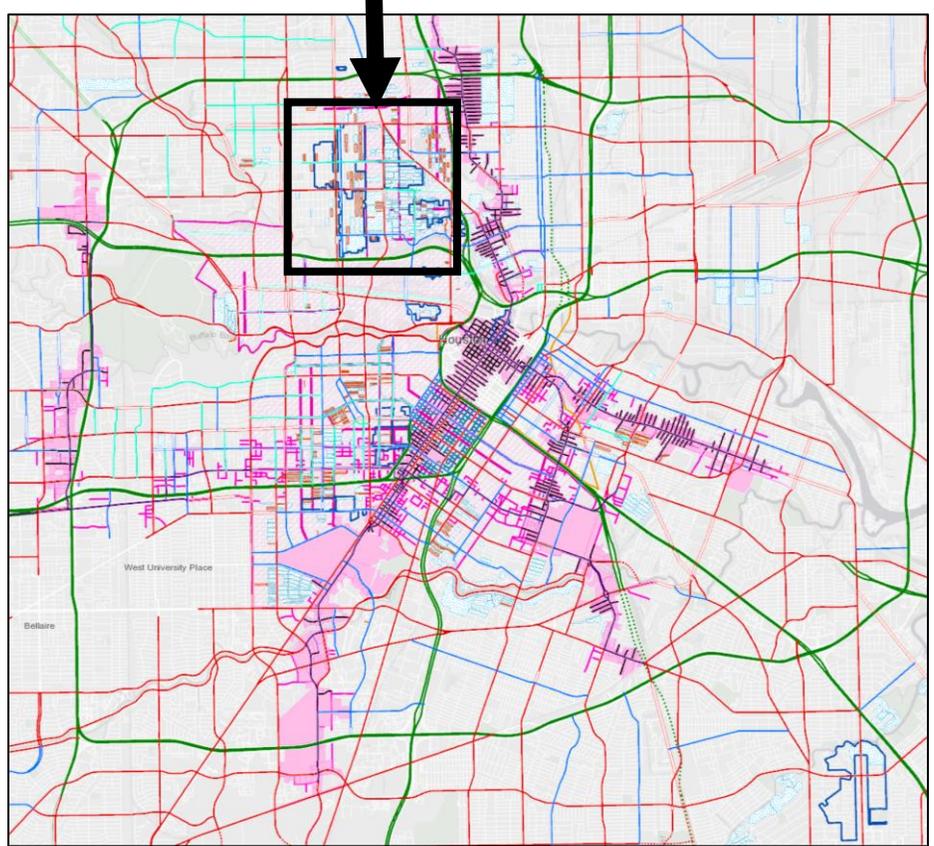
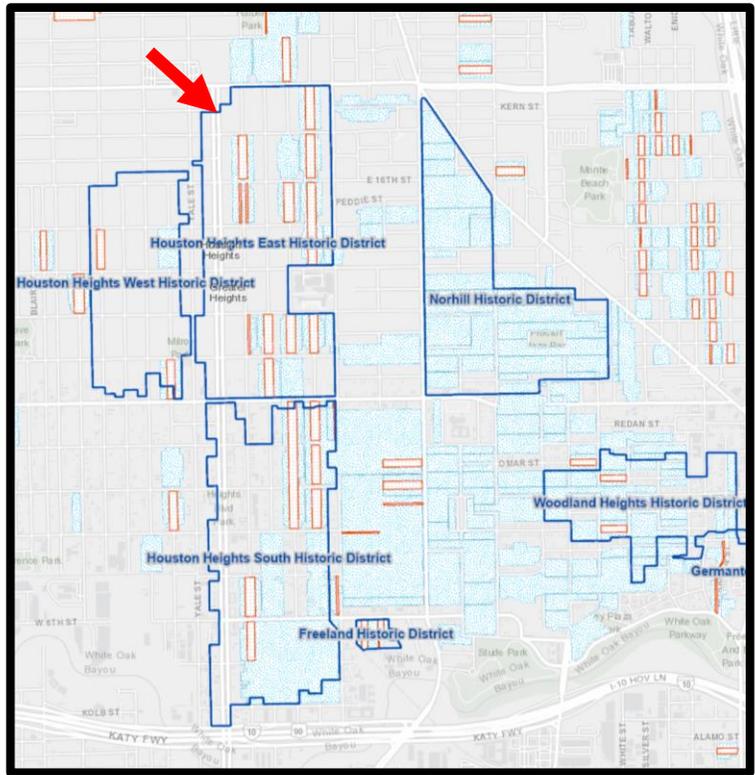
Beginning in the 1990s, the city added a series of overlay districts on top of the MTFP, initially dividing it into an Suburban Area and an Urban Area with different minimum lot sizes.<sup>5</sup> Next, the city allowed neighborhoods to apply for special lot sizes, street widths, and setbacks. As shown on the map on the next page, the property at issue in this case, according to the original petition, happens to be located in a Special Minimum Set Back/Lot Size Area and Street Width Exception Area overlaid on the MTFP. These districts overlap with the East Heights Historic District (red arrow on map on next page).

Lastly, the city has established “walkable places” and “transit oriented development” districts which include a panoply of special regulations for larger districts. (These appear as dense gridlines on the map on the next page.) These districts are the culmination of a 25-year effort to develop neighborhood-level rules.

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<sup>5</sup> See Houston Planning & Development Department, [http://www.houstontx.gov/planning/DevelopRegs/docs\\_pdfs/presentation-ch42.pdf](http://www.houstontx.gov/planning/DevelopRegs/docs_pdfs/presentation-ch42.pdf) (2012).

- Major Thoroughfare Plans (MTFP)**
- Freeway/Tollway
  - TBW Freeway/Tollway
  - ... Proposed Freeway/Tollway
  - Major Thoroughfare
  - TBW Major Thoroughfare
  - ... Proposed Major Thoroughfare
  - Major Collector
  - TBW Major Collector
  - ... Proposed Major Collector
  - Transit Corridor Street
  - TBW Transit Corridor Street
  - ... Proposed Transit Corridor Street
  - Minor Collector
  - TBW Minor Collector
  - ... Proposed Minor Collector
- Bikeways**
- Existing Low Comfort
- Dedicated On-Street - LC
  - Shared On-Street - LC
- Existing High Comfort
- Dedicated On-Street - HC
  - Shared On-Street - HC
  - Off-Street
- Proposed High Comfort
- ... Dedicated On-Street - Proposed
  - ... Shared On-Street - Proposed
  - ... Off-Street - Proposed
- Key Connections**
- Key Connection
- Planning and Development**
- Historic Districts (City of Houston)
- 
- Special Minimum Building Lines
- 
- Special Minimum Lot Size
- 
- Street Width Exception - 60 ft
- 
- Street Width Exception Area
- 
- Market Based Parking
- 
- Walkable Places Streets
- Primary Streets
  - Secondary Streets
- TOD Streets
- Primary Streets
  - Secondary Streets



Houston Map Viewer, showing MTFP and overlay districts in the Heights (black box) and East Heights Historic District (red arrow).

### *C. Flood Zones*

In 1968, Houston prohibited all building in the flood plain. The flood plain ordinance has been amended many times and now imposes elevation requirements on buildings within FEMA-designated flood zones.

### *D. Special Districts*

Beginning in the 1970s, Houston designated thousands of special districts such as Tax Increment Reinvestment Zones (TIRZs), entered various annexation agreements with Municipal Utility Districts (MUDs), and otherwise provided different rules for different areas through special districts that are home to millions of people in greater Houston. At least 35 types of special districts have been authorized by the legislature. Special districts have a variety of regulatory powers over landowners including taxing, bonding, and eminent domain.

### *E. Deed Restricted Neighborhoods*

The city is authorized by a series of Houston-specific statutes to regulate property through deed restrictions. Tex. Local Gov't Code ch. 201, 204, 212. Much like the historic preservation ordinance, these laws were passed to protect homeowners in older Houston neighborhoods with expiring deed restrictions. HOAs for large master planned communities increasingly take on the role of municipal governments, providing different land uses for limited areas within the city or county. Under Tex. Prop. Code § 202.002(a), the HOA has a presumption of validity in enforcing deed restrictions similar to that of a municipality. The statutes also allow HOAs to override the terms of covenants and involuntarily modify land use restrictions. The city, in

turn, is authorized to condition building permits on compliance with deed restrictions. The city is also authorized to enforce deed restrictions directly. Unlike any other city, Houston has a dedicated in-house legal team which handles roughly 1,000 deed restriction cases per year, defined by statute as a “government function.” Tex. Loc. Gov’t Code § 212.157.

In sum, over the last century following the passage of the Zoning Enabling Act, the city has established thousands of isolated or overlapping geographically limited districts in response to specific issues faced by the city.

### **III. Conclusion**

Houston’s regulatory system enjoys the strong support of the development community and the public, which has repeatedly and soundly rejected zoning. It is undoubtedly a system unique to Houston, and it has helped provide affordable housing to millions of Houstonians. Should the Court’s decision give credence to Petitioner’s claim for “illegal de facto zoning,” thereby raising doubts about the other development regulations, e.g. district-based parking or floodplain requirements, real estate investors and developers may well take their capital elsewhere while Houston tries to sort out how a successful regulatory regime can be reestablished. We strongly urge the Court not to rule in any manner that creates doubt as to the validity of any element of Houston’s century-old district-based regulatory system.

Respectfully submitted,  
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### **CERTIFICATE OF COMPLIANCE**

I hereby certify that this document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), because it contains 1,727 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Cooke Kelsey  
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### **CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of this instrument was served by electronic service pursuant to the Texas Rules of Appellate Procedure upon the following counsel of record on January 3, 2020:

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