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Spring 2015

Is An Apartment A Nuisance?

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Zoning and Land Use Planning

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Is an Apartment a Nuisance?

I. Introduction

In the recent case of *Loughead v. Buckhead Investment Partners*, a group of Houston, Texas homeowners filed suit to exclude an apartment building from their neighborhood.¹ Because Houston has no zoning, the plaintiffs claimed that the building was a common law nuisance.² In December 2013, the plaintiffs received damages from a jury; the defendants will appeal the verdict.³

The question of whether multifamily housing near single-family housing may constitute a nuisance one of first impression, but if the *Loughead* verdict is upheld on appeal, neighborhood activists may seek to raise such nuisance claims even in cities with zoning.⁴

The purpose of this article is to argue that such claims should generally not be allowed to go to a jury. After describing the background of nuisance law and of the *Loughead* litigation, I assert that the public interest in favor of affordable

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¹See Plaintiffs' Original Petition, *Loughhead v. Buckhead Investment Partners*, at http://stopashbyhighrise.org/site/wp-content/uploads/2013/06/1-Plaintiffs_Original_Petition.pdf ("Complaint").

²*Id.*, sec. VI; Erin Mulvaney, *Jury weighs fate of Ashby high-rise*, at <http://www.houstonchronicle.com/business/real-estate/article/Jury-weighs-fate-of-Ashby-high-rise-5070278.php?t=34cdeebc7e7b6b599e>.

³See Erin Mulvaney, *Jury awards \$1.7 million to residents in Ashby case*, at <https://www.youtube.com/watch?v=VdGHm51EjzE>.

⁴I note in passing that something permitted by zoning can still be an actionable nuisance. See 7 Stuart M. Speiser, Charles F. Krause, and Alfred W. Gans, *The American Law of Torts*, sec. 20.25 at 230 (2011) ("A defendant's compliance with a zoning ordinance may be a factor in determining whether the conduct is a nuisance, but it is not determinative."). Thus, nuisance actions may succeed even in cities with zoning, and even if the defendant's conduct complies with zoning.

housing and walkable, transit-friendly infill development supports rejection of such claims. In addition, I argue that even if neighborhood concerns should be weighed against these broader public interests, those concerns should be raised through the zoning process rather than through jury trials.

II. Factual and Legal Background

Nuisance is a “nontrespassory invasion of another’s interest in the private use and enjoyment of land.”⁵ Traditionally, a nuisance existed whenever a person used their land in a manner that caused substantial harm to another possessor of land.⁶ For example, if a farm creates odors that offend its neighbors, the neighbors can sue for an injunction to stop the odors.⁷

As industrialization increased the number of polluting land uses, courts tried to accommodate industry by requiring that only “unreasonable” land uses be treated as nuisances.⁸ Thus, petty annoyances may not constitute a nuisance.⁹ More recently, some courts have held that in determining whether a defendant’s land use is unreasonable, courts should weigh the gravity of the harm caused by an alleged nuisance against the social utility of the defendant’s conduct.¹⁰ Nuisance suits generally involve allegations that defendant has caused unreasonable odor, pollution or noise.¹¹

A. Factual Background of Loughhead

In 2007, a group of developers announced that they planned to build a high-rise building near the Boulevard Oaks Historic District in Houston, Texas,¹² a wealthy historic

⁵Restatement (Second) of Torts, sec. 821D.

⁶See John G. Sprankling, Understanding Property Law, sec. 29.03 at 487 (2007).

⁷*Id.*

⁸*Id.* at 487–88.

⁹*Id.*, sec. 29.04[D] at 492.

¹⁰*Id.* at 488.

¹¹See Speiser et. al., *supra* note 4, sec. 20.10-11 (devoting one section of nuisance discussion to noise pollution alone, and another to gases, smoke, dust, odors, vibration and light pollution).

¹²See Plaintiffs’ Original Petition, Loughhead v. Buckhead Investment Partners, paras. 8–10 (naming developers and noting that their intentions “became public in 2007”), at <http://stopashbyhighrise.org/site/w>

district dominated by single-family houses.¹³ Neighborhood residents vigorously opposed the project, primarily because of concerns about traffic.¹⁴

In response to neighborhood opposition, the city delayed the project for two years.¹⁵ However, the city could not reject the project merely because of its alleged incompatibility with the surrounding neighborhood, because Houston has no zoning code to separate houses from multifamily dwellings.¹⁶

Instead, the city's Public Works Department denied the developers a permit to build a driveway, on the ground that the project would create too much traffic.¹⁷ The developer then agreed to scale back the project by eliminating all the project's commercial uses, and by reducing the number of apartments in the building.¹⁸ The Public Works Department then granted the permit, but was reversed by an appellate panel made up of city employees.¹⁹ The developers then filed suit, and the city settled the case by agreeing to grant the permit if the developers reduced the number of stories from 23 to 21, and made certain other concessions in order to reduce traffic.²⁰

[p-content/uploads/2013/06/1-Plaintiffs—Original—Petition.pdf](#)
("Complaint").

¹³See City of Houston Planning & Development Department, *Historic Preservation Manual, Boulevard Oaks*, at http://www.houstontx.gov/planning/HistoricPres/HistoricPreservationManual/historic_districts/boulevard_oaks_arch.html (describing houses and their architectural styles); See John Mixon, *Four Land Use Vignettes From Unzoned(?) Houston*, 24 Notre Dame J. L. Ethics & Public Policy 159, 166 (2010) (describing project as 23 stories) (describing Boulevard Oaks and nearby Southhampton as "wealthy" residential areas).

¹⁴*Id.* at 169 ("Yellow signs opposing the 'Tower of Traffic' sprouted on virtually every yard within a mile of the Ashby site."). In addition, some homeowners raised concerns over privacy and shadows from the high rise. *Id.*

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.* at 171.

¹⁸*Id.* (describing developer's decision to make property solely residential and to reduce number of units).

¹⁹*Id.*

²⁰See Caroline Evans, "This is Not Over," Stop Ashby Organizers vow lawsuit, picket lines at packed strategy meeting, Examiner, April 26, 2012, at http://www.yourhoustonnews.com/bellaire/news/this-is-not-over-stop-ashby-organizers-vow-lawsuit-picket/article_56b626dc-58fe-512b-903a-41854dcc2824.html (describing settlement).

The homeowners responded by filing a suit for common-law nuisance in May 2013. The plaintiffs alleged that the high-rise would unreasonably interfere with their property because it would be “abnormal and out of place in its surroundings”.²¹ In addition, the building would allegedly reduce the plaintiffs’ privacy by “providing direct views into Plaintiffs’ backyards and causing gross invasions of privacy, depriving their properties of rain and sunlight thereby damaging their plants and other vegetation, diverting traffic onto their small residential streets, and causing substantial additional congestion at the intersections they use for ingress and egress.”²²

At a hearing held in June 2013, a trial court decided that plaintiffs’ case could go to a jury, based on Texas nuisance case law.²³ At trial, as noted above, the jury awarded damages to the plaintiff, and the developers appealed.²⁴

C. Case Law On Point?

Plaintiffs’ claim that an apartment building near a house can be a nuisance was not entirely without legal support. In 1926, the Supreme Court, in a decision upholding the constitutionality of zoning, wrote that an apartment houses in a neighborhood of houses “come very near to being nuisances.”²⁵ However, the Court did not state that apartment buildings *were* nuisances, and in any event this statement was dicta because the decision addressed the constitutionality of zoning rather than a common law nuisance claim.

The most relevant case relied upon by plaintiffs was *Spiller v. Lyons*.²⁶ In *Spiller*, a group of homeowners alleged that a motel created a nuisance.²⁷ A Texas appellate court upheld a jury verdict for the plaintiffs, partially because the motel

²¹Complaint, para. 34.

²²*Id.*, para. 35. The plaintiffs also claimed that the foundation of the high-rise would somehow damage the plaintiffs’ foundations. *Id.*

²³*See* Hearing on Defendant’s Motion for Special Exceptions, District Court for Harris County, Texas 27, at <http://stopashbyhighrise.org/site/wp-content/uploads/2013/06/Transcript-06-06-13-Hearing-on-Defs-Motion-for-Special-Exceptions.pdf> (“I’m going to allow the plaintiff’s pleadings to stand . . . As I read the cases, I agree it appears there is no question but that I have [discretion to grant either an injunction or damages].”)

²⁴*See supra* note 3.

²⁵*Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 383, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926).

²⁶*Spiller v. Lyons*, 737 S.W.2d 29 (Tex. App. Houston 14th Dist. 1987).

²⁷*Id.* at 30.

violated restrictive covenants affecting the land,²⁸ but also because “the increased traffic would be a danger to children walking to and from nearby schools . . . and the influx of strangers and transients would be an offense to normal sensibilities.”²⁹ The court also stated without any explanation that “the present water and sewage services were already strained and that operation of a motel would further impair those services.”³⁰

Although the motel residents in *Spiller* would presumably have been somewhat more transient than apartment residents, some of the arguments raised by the *Spiller* court could apply in any case involving additional housing. Nearly any new residential development will bring additional people to a neighborhood, some of whom will be driving automobiles. Thus, the “increased traffic” argument raised by the *Spiller* court might make any residential development a nuisance. Since new residents of a neighborhood are by definition “strangers” at first, the court’s suggestion that “strangers and transients” create a nuisance might also justify finding that new housing is equally problematic. And new residents may also increase the demand for infrastructure, as in the *Spiller* case.

On the other hand, at least one other court has rejected a similar claim. In *California Tahoe Regional Planning Agency v. Jenkins*,³¹ a regional planning agency and the state of California claimed that high-rise hotel-casinos near Lake Tahoe were a nuisance³² because they would attract “more people and cars”³³ to the area, thus harming the regional environment.³⁴ The U.S. Court of Appeals for the Ninth Circuit rejected the claim, stating: “not every threatened

²⁸*Id.*

²⁹*Id.*

³⁰*Id.* Plaintiffs also cited numerous other nuisance cases that did not involve housing. See *Pool v. River Bend Ranch, LLC*, 346 S.W.3d 853 (Tex. App. Tyler 2011) (all terrain vehicle park a nuisance); *GTE Mobilnet of South Texas Ltd. Partnership v. Pascouet*, 61 S.W.3d 599 (Tex. App. Houston 14th Dist. 2001) (cellular telephone tower a nuisance); *Champion Forest Baptist Church v. Rowe*, 1987 WL 5188 (Tex. App. Houston 1st Dist. 1987) (upholding trial court decision that church parking garage a nuisance).

³¹*California Tahoe Regional Planning Agency v. Jennings*, 594 F.2d 181, 9 Env'tl. L. Rep. 20131 (9th Cir. 1979).

³²*Id.* at 184.

³³*Id.* at 193.

³⁴*Id.* at 194.

injury can be enjoined as a potential nuisance. The line is not a bright one, but we cannot consider high rise hotels and their occupants as indistinguishable from untreated sewage, noxious gases, and poisonous pesticides.”³⁵ Thus, California Tahoe suggests that residential development is so different from traditional nuisances that it should generally not be treated as a nuisance.

In sum, existing case law is divided as to the reach of nuisance law. No case directly addresses whether apartments or condominiums near single-family housing is a nuisance, and case law is divided as to whether hotels and motels in such areas should be treated as nuisances.

III. Policy

Given that case law is ambiguous, courts have ample discretion to decide whether residential development that differs from its neighbors can be a nuisance. At least three public policies support a per se rule that buildings that are taller or more densely developed than their neighbors should not be treated as nuisances: the public policy in favor of additional rental housing, the public policy in favor of more pedestrian-friendly infill development, and the public policy in favor of orderly zoning and planning.

A. More housing

Throughout the United States, there is a rental housing shortage. Between 2000 and 2014, median household income has increased by 25.4%, while rent has increased by 52.8%.³⁶ Nationally, the percentage of renters paying more than 30% of their income from housing jumped from 38% in 2000 to 50% in 2010.³⁷ 27% of renters (including 71% of renters earning under \$15,000) now pay more than half their incomes in rent.³⁸ The explosion in rental costs has not been limited to traditionally high-cost cities such as New York. For example,

³⁵*Id.*

³⁶See Krishna Rao, *The Rent is Too Damn High*, at <http://www.zillow.com/research/rent-affordability-2013q4-6681>.

³⁷See Annie Lowrey, *With Rental Demand Soaring, Poor are Feeling Squeezed*, New York Times, Dec. 9, 2013, at http://www.nytimes.com/2013/12/10/business/economy/the-poor-are-squeezed-as-rental-housing-demand-soars.html?pagewanted=all&_r=0.

³⁸Joint Center for Housing Studies, *State of the Nation's Housing 38* (2014) at <http://www.jchs.harvard.edu/research/publications/state-nations-housing-2014> (“State”).

in Hattiesburg, Mississippi, rents increased from 20% of household income in 1979 to 35.2% in 2013.³⁹

This shortage is in part a result of increased demand for rental property; the post-2008 economic downturn has meant that fewer renters can afford to purchase houses, while tighter credit standards have forced would-be homebuyers to rent.⁴⁰ Moreover, the supply of rental housing has not kept up with demand. Although the number of multifamily housing starts in 2013 is higher than it was at the start of the economic downturn, it is still less than half the number of multifamily starts in 1985.⁴¹ As a result, between 2006 and 2012, the supply of multifamily units increased by 1.6 million, while the number of renters increased by over 5 million.⁴² In addition, 1.9 million rental units were demolished between 2001 and 2011; these units were disproportionately low-cost units.⁴³ As a result of these trends, the national rental vacancy rate (8.3%) is at its lowest point since 2000.⁴⁴

If (as in the Houston case discussed above) homeowners are allowed to use nuisance law to keep multifamily housing out of their neighborhoods, the shortage of rental housing is likely to get worse. If would-be landlords can only build in places far from single-family homes, the possible supply of land available for multifamily housing will decrease, the number of new units will decrease, and rents will continue to rise.

In fact, the logic of Fisher may limit rental housing even in areas far away from single-family housing. If any increase in population means increased traffic, and increased traffic means nuisance, then there is no reason why only homeowners could use nuisance law to stop development. A commercial landowner could raise the same complaint, asserting that housing nearby could clog traffic and thus unreasonably interfere with the commutes of its employees and customers. Even a landlord seeking to limit competition could sue to stop nearby apartments on similar grounds.

³⁹See Rao, *supra* note 36.

⁴⁰See Lowrey, *supra* note 37.

⁴¹See State, *supra* note 38, at 34 (307,000 starts in 2013, up from 109,000 in 2009, but far below 670,000 in 1985).

⁴²*Id.* at 24. However, about 3 million single-family homes were rented out. *Id.*

⁴³*Id.* at 25.

⁴⁴*Id.* at 22–23.

B. Infill Development

Because most urban land is zoned for single-family housing, virtually all of urban America (except in the most densely populated cities) is near a group of single-family houses. In Houston, single-family housing takes up 67% of all land and 95% of all land used for housing.⁴⁵ One survey of 10 cities shows that Houston is only the sixth most house-dominated city out of 10 surveyed; even in Baltimore (the least house-dominated city surveyed) 49% of all land and 70% of residential land is used for houses.⁴⁶ Even a brief look at Baltimore streets will reveal that multifamily and commercial land is often concentrated on a few major streets, and that those streets are surrounded by streets full of single-family homes.⁴⁷

It logically follows that if apartments near single-family homes were a nuisance, almost every new apartment building in the United States would be a nuisance. If apartments could be built at all, they could only be built in “greenfield” locations— that is, in exurban places far from existing development.⁴⁸

But public policy favors building multifamily housing in existing urban neighborhoods and inner suburbs, especially if those neighborhoods are near downtown and/or densely developed. Existing neighborhoods near downtown tend to be less dependent on automobiles than greenfields, for two reasons. First, bus and rail networks are generally centered near downtown business districts,⁴⁹ so neighborhoods near downtowns tend to have the most convenient public transit

⁴⁵See Gordon Bonan, *Ecological Climatology*, CH. 14 at 24, at <http://www.cgd.ucar.edu/tss/aboutus/staff/bonan/ecoclim/1sted/Chapter14.pdf> (67% of city land used by single-family homes, 3% by multifamily housing, and 30% by commercial and industrial space).

⁴⁶*Id.*

⁴⁷See generally Google Maps, at maps.google.com (look at Baltimore, Md. and click on yellow icon to see individual streets).

⁴⁸See Anne Marie Pippin, *Community Involvement in Brownfield Redevelopment Makes Cents: A Study of Brownfield Redevelopment Initiatives in the United States and Central and Eastern Europe*, 37 Ga. J. Int'l & Comp. L. 589, 596 (2009) (greenfields are “pristine, undeveloped land typically located in low density suburban areas”); Andrea Wortzel, *Greening the Inner Cities: Can Federal Tax Incentives Solve the Brownfields Problem?*, 29 Urb. Law 309, 315 (1997) (greenfields are “undeveloped sites in suburban or rural locations”).

⁴⁹See Jon C. Teaford, *The Metropolitan Revolution: The Rise of Post-Urban America* 10 (2006) (historically, transit lines converged downtown, and as number of automobiles increased, “the prospects for downtown-

service and the highest transit ridership.⁵⁰ Second, compact neighborhoods tend to have higher transit ridership than thinly populated places; if only a few houses can be built on a block near public transit, only a few houses can access such transit.⁵¹ Neighborhoods near downtown tend to be more compact, and thus can support more transit service.⁵²

It follows that if new housing is built in existing neighborhoods near downtown, the residents of those neighborhoods will drive less than residents of greenfield sites, and will be more likely to walk, bike or use public transit. Where there is the case, both these new residents and the public as a whole benefit. Residents of transit-oriented neighborhoods benefit by being able to own fewer cars and by being able to use their existing cars less frequently, thus reducing household transportation budgets. For example, residents of Washington, D.C. spend \$9461 per household on transportation, while the average household in Washington's outer suburbs spends \$15,601 per household, and some suburbs have even higher transportation costs.⁵³ In addition, residents of transit-friendly places are able to get more exercise

centered public transit worsened"); Anthony Downs, *Still Stuck in Traffic: Coping with Peak Hour Traffic* 252 (2004) (for example, in Los Angeles public transit "modal share" higher in downtown than in other employment centers).

⁵⁰See Brian D. Taylor and Camille N.Y. Fink, *The Factors Influencing Transit Ridership: A Review and Analysis of the Ridership Literature*, at <http://www.uctc.net/papers/681.pdf> (citing studies showing that downtown "employment explains a very high percentage . . . of the number of transit commuters" and that downtown size one factor affecting ridership).

⁵¹See Joanna D. Malaczynski and Timothy P. Duane, *Reducing Greenhouse Gas Emissions from Vehicle Miles Traveled: Integrating the California Environmental Quality Act with the California Global Warming Solutions Act*, 36 *ECOLOGICAL L.Q.* 71, 80 n. 44 (2009) (raising average density to nine units per acre could reduce vehicle miles traveled by 30% nationwide); See Robert H. Freilich, *The Land Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 *Urb. Law.* 547, 552 & n. 18 (2009) (neighborhood must have at least seven units per acre to support regular transit service); Downs, *supra* note 49, at 210 (seven units per acre supports bus service once every half-hour); Jed Kolko, *Making the Most of Transit: Density, Employment Growth, and Ridership Around New Stations* 16, at <http://www.ppic.org/main/publication.asp?i=947> ("transit ridership falls considerably at distances beyond just one quarter-mile from a transit station").

⁵²*Id.* at 8 ("the density of both population and employment typically declines with increasing distance from downtown").

⁵³See Urban Land Institute, *Beltway Burden* 4–5, at <http://www.cnt.org/repository/BeltwayBurden.pdf> (listing costs for various jurisdictions,

as part of their daily lives by walking to and from bus and train stops, and are thus, other things being equal, likely to be in better health.⁵⁴ The public as a whole benefits from reduced traffic congestion (because higher transit ridership means fewer cars on the roads) and also from reduced pollution (because fewer cars on the roads means less pollution and fewer greenhouse gas emissions). According to one study, more compact development could reduce vehicle miles traveled by 20–40%, which in turn would reduce total transportation-related carbon dioxide emissions by 7–10% by 2050.⁵⁵

C. Inconsistency with the Purposes of Zoning and Planning

One purpose of zoning is to allow cities to create an orderly plan of development for the benefit of the entire city, as opposed to just one landowner or group of landowners.⁵⁶ So if a particular land use is necessary but unpopular, the city should zone for that use— for example, by spreading it throughout the city so that all neighborhoods feel the pain arising from such land uses, or by concentrating it in an area where it will harm no one.

But if anyone harmed by an unpopular use can file suit for nuisance, the location of unpopular uses will be determined not by citywide give-and-take, but by whoever has the best

and adding that the most expensive suburb is Fauquier County, Virginia, where an average transportation cost of \$17,996 makes the combined cost of housing and transportation more than 25% more than the region's central jurisdictions). Cf. Urban Land Institute, *Bay Area Burden* 6–7 at http://www.cnt.org/repository/Bay-Area-Burden_FINAL_lowres.pdf (showing similar results for metropolitan San Francisco cities and suburbs, despite that region's higher housing costs).

⁵⁴See Vanessa Russell-Evans and Carl S. Hacker, *Expanding Waistlines and Expanding Cities: Urban Sprawl and its Impact on Obesity, How the Adoption of Smart Growth Statutes Can Help Build Healthier and More Active Communities*, 29 Va. Env'tl. L.J. 63, 75–88 (2011) (summarizing evidence); Reid Ewing et. al., *Relationship between urban sprawl and physical activity, obesity and morbidity-Update and refinement*, at <http://www.sciencedirect.com/science/article/pii/S135382921300172X>.

⁵⁵Reid Ewing et. al., *Growing Cooler: The Evidence on Urban Development and Climate Change* 9 at <http://www.smartgrowthamerica.org/documents/growingcoolerCH1.pdf>.

⁵⁶See *Duckworth v. City of Bonney Lake*, 91 Wash. 2d 19, 27, 586 P.2d 860, 866 (1978) (“the purpose of zoning is not to increase or decrease the value of any Particular lot or tract. Rather it is to benefit the Community generally by the intelligent planning of land uses . . . [and to] promote orderly growth and development”).

lawyers. And if every neighborhood has adequate representation, the undesirable-but-necessary land use will have no place to go.⁵⁷

III. Conclusion

The Loughhead case may encourage homeowners to file nuisance suits in order to stop new residential development near their neighborhoods. Courts should reject such claims because the broader public interests in affordable housing and infill development favor more development in existing areas, not less development. Furthermore, disputes over when multifamily housing is compatible with other land uses should be raised in zoning proceedings, not in nuisance actions, because zoning authorities can weigh homeowners' interest in avoiding congestion and similar externalities against the citywide public interests discussed above.

⁵⁷Of course, this argument does not apply to Houston, which (as noted above) has no formal zoning. *See supra* note 2 and accompanying text. But it does apply elsewhere.