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Yes to Infill, No to Nuisance

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INTRODUCTION

In the recent case of *Loughhead v. 1717 Bissonnet, L.L.C.*, a group of Houston, Texas homeowners filed a common-law nuisance suit to exclude an apartment building from their neighborhood.[1] Plaintiffs argued that the apartment building would reduce their property

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1. *See* Loughhead v. 1717 Bissonnet, L.L.C., No. 2013-26155, slip op. (Tex. D. Ct. May 1, 2014), *available at* https://www.justex.net/JustexDocuments/12/Ashby%20opinion.pdf.

values by (among other things) increasing traffic and changing their neighborhood's character.[2] In December 2013, a jury awarded the plaintiffs damages, and the defendants plan to appeal the verdict.[3] The question of whether multi-family housing near single-family housing may constitute a nuisance is apparently one of first impression.

If the *Loughhead* verdict is upheld on appeal, anti-development activists may seek to raise similar nuisance claims even in cities which have zoning codes,[4] unlike Houston.[5] If courts endorse such claims, apartment buildings throughout the United States could be found to constitute nuisances whenever litigious neighbors might object.

Part I of this Article describes the background of nuisance law and the *Loughhead* litigation. Part II then criticizes the arguments in favor of the plaintiffs' claim. Part III suggests that public policies in favor of walkable infill development and affordable housing support the rejection of similar claims, and adds that even if neighborhood concerns should be weighed against these policies, such balancing should occur during the zoning process, rather than through jury trials (at least in cities with zoning). Part IV then proposes a rule that draws a line between appropriate and inappropriate nuisance actions.

I. FACTUAL AND LEGAL BACKGROUND OF NUISANCE

As noted above, the *Loughhead* plaintiffs alleged that the apartments at issue constituted a common-law nuisance because they would increase nearby traffic and otherwise harm neighborhood character. This Part explains nuisance law, describes the relevant facts of *Loughhead* in more detail, and then discusses the most relevant case law.

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2. *See infra* notes 25–26 and accompanying text.

3. *See Loughhead*, No. 2013-2655, at 1; Erin Mulvaney, *Jury Awards $1.7 Million to Residents in Ashby Case*, HOUS. CHRON. (Dec. 17, 2013), http://blog.chron.com/primeproperty/2013/12/jury-sides-with-residents-in-ashby-case/#18972101=0.

4. I note in passing that something permitted by zoning can still be an actionable nuisance. *See* 7 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 20.25 (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.

5. *See* Amanda Huron, *Planning and Politics*, *in* CITIES OF NORTH AMERICA: CONTEMPORARY CHALLENGES IN U.S. AND CANADIAN CITIES 208 (Lisa Benton-Short ed., 2013) (noting that Houston is the "only major city in the United States without zoning," but adding that Houston has numerous other land-use regulations).

Nuisance is a "nontrespassory invasion of another's interest in the private use and enjoyment of land."[6] Nuisance suits generally involve allegations that a defendant's use of its land has caused unreasonable odor, pollution, or noise.[7]

At common law, a nuisance exists whenever a person uses his land in a manner that causes substantial harm to another owner or possessor of land.[8] As industrialization increased the number of polluting land uses, courts tried to accommodate industry by limiting nuisance claims to "unreasonable" land uses.[9] Thus, petty annoyances (such as telephone calls[10] or an ugly swimming pool[11]) may not constitute nuisances.[12]

More recently, some courts have adopted a "balance of utilities test," where a use is found to be "unreasonable unless the utility of the actor's conduct outweighs the gravity of the harm."[13] For example, one Idaho decision adopted this balancing test on the ground that the state's "economy depends largely upon the benefits of agriculture, lumber, mining and industrial development."[14] This statement suggests that in Idaho, nuisance claims against these industries will be met with skepticism, as the court will weigh any harm to nuisance plaintiffs against the economic benefits of such development.

A. Factual Background of *Loughhead*

In 2007, Buckhead Investment Partners began plans to build a mixed-use, twenty-three-story building on a tract of land that had previously been used for a two-story, sixty-seven-unit apartment

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6. RESTATEMENT (SECOND) OF TORTS § 821D (1979).

7. *See* SPEISER ET AL., *supra* note 4, §§ 20.10–.11 (devoting one section of nuisance discussion to noise pollution alone, and another to gases, smoke, dust, odors, vibration, and light pollution).

8. *See* JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 29.03 (2d ed. 2007). The discussion below relates to private nuisance claims, which involve land use that injures a private landowner. *Id.* § 29.01. By contrast, public nuisance claims (attacking activity that interferes with the rights of the public generally) are beyond the scope of this discussion. *Id.*

9. *Id.* § 29.03.

10. *See* Sofka v. Thal, 662 S.W.2d 502, 508–09 (Mo. 1983) (holding that daytime telephone calls were not a nuisance, despite the fact that they awakened plaintiff).

11. *See* Fenton v. Longwill, No. 5836, 1987 WL 19559, at *5 (Del. Ch. Nov. 5, 1987) (describing a pool as a "minor but distinct annoyance").

12. SPRANKLING, *supra* note 8, § 29.04[D].

13. *Id.* § 29.03.

14. Carpenter v. Double R Cattle Co., 701 P.2d 222, 228 (Idaho 1985).

complex.[15] The land in question was near the Boulevard Oaks Historic District in Houston, Texas,[16] a wealthy historic district with many single-family houses.[17] Neighborhood residents vigorously opposed the project, primarily because of concerns about traffic.[18] Despite such neighborhood opposition, the city could not reject the project merely due to its alleged incompatibility with the surrounding neighborhood, because Houston has no zoning code to separate houses from multifamily dwellings.[19]

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.[20] The developer then agreed to scale back the project by eliminating all of the project's commercial uses and reducing the number of apartments in the building, among other things.[21] The Public Works Department then granted the permit, but an appellate panel made up of city employees reversed that decision.[22] The developers filed suit, and the city settled the case by agreeing to grant the permit if the developers reduced the number of stories from twenty-three to twenty-one and made additional concessions to reduce traffic.[23]

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15. Loughhead v. 1717 Bissonnet, L.L.C., No. 2013-26155, slip op. 1, 11 (Tex. D. Ct. May 1, 2014) (describing developer's plans; noting that a prior development had sixty-seven units; and pointing out that "[a] two story residential development was on the Property for decades").

16. *See* Plaintiff's Original Petition at ¶¶ 8–10, Loughhead v. Buckhead Inv. Partners, Inc., (Tex. D. Ct. May 1, 2013), http://stopashbyhighrise.org/site/wp-content/uploads/2013/06/1-Plaintiffs_Original_Petition.pdf [hereinafter Complaint].

17. *See Historic Preservation Manual*, CITY HOUS. PLANNING & DEV. DEP'T, http://www.houstontx.gov/planning/HistoricPres/HistoricPreservationManual/historic_districts/boulevard_oaks_arch.html (last visited Apr. 19, 2015) (describing houses and their architectural styles); John Mixon, *Four Land Use Vignettes From Unzoned(?) Houston*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 159, 166 (2010) (describing Boulevard Oaks and nearby Southampton as "wealthy" residential areas).

18. *See* Mixon, *supra* note 17, 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.*

19. *Id.* at 169.

20. *Id.* at 171.

21. *Id.* (describing developer's decision to make property solely residential and to reduce the number of units); *see* Loughhead v. 1717 Bissonnet, L.L.C., No. 13-26155, slip op. 2–3 (Tex. D. Ct. May 1, 2014) (describing other measures to mitigate).

22. *See* Mixon, *supra* note 17, at 171.

23. *See* Caroline Evans, "*This is Not Over": Stop Ashby Organizers Vow Lawsuit, Picket Lines at Packed Strategy Meeting,* EXAMINER, Apr. 26, 2012, http://www.yourhoustonnews.com/bellaire/news/this-is-not-over-stop-ashby-organizers-

A group of Boulevard Oaks homeowners responded by filing a nuisance suit against the developers in May 2013.[24] The plaintiffs alleged, among other things, that the building would unreasonably interfere with their property because it would cause "[diversion of] traffic onto their small residential streets, and caus[e] substantial additional congestion at the intersections they use for ingress and egress."[25] In addition, they claimed that the building "would be abnormal and out of place in its surroundings thereby altering the character of the neighborhood [and] would substantially decrease the value of Plaintiffs' houses."[26]

At a hearing held in June 2013, a trial court decided that the plaintiffs' case could go to a jury based on Texas nuisance case law.[27] The trial commenced in November 2013, and ended with a jury verdict in December.[28] The jury found a nuisance and awarded damages to the owners of twenty of the thirty nearby homes.[29] The trial court rejected the defendants' motion for a judgment notwithstanding the verdict,[30] and the developers have appealed.[31]

B. Legal Background: No Case Law on Point

In 1926, the Supreme Court, in a decision upholding the constitutionality of zoning, wrote that apartments intermingled with a neighborhood of houses "come very near to being nuisances."[32]

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vow-lawsuit-picket/article_56b626dc-58fe-512b-903a-41854dcc2824.html (describing settlement).

24. *See generally* Complaint, supra note 16.

25. *Id.* ¶ 35. The plaintiffs also claimed that the foundation of the high-rise would somehow damage the plaintiffs' foundations, and that the height of the building would cause invasions of their privacy and reduced sunlight. *Id.*

26. *Id.* ¶ 34.

27. *See* Hearing on Defendant's Motion for Special Exceptions at 27, Loughhead v. Buckhead Inv. Partners, Inc., No. 13-26155 (Tex. D. Ct. June 6, 2013), 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 [sic] 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].")

28. *See* Loughhead v. 1717 Bissonnet, L.L.C., No. 2013-26155, slip op. at 3 (Tex. D. Ct. May 1, 2014).

29. *Id.*

30. *Id.* at 7. The court did not explain in detail why it upheld the jury's finding, stating only that the jury relied on unspecified evidence that the plaintiffs' houses had lost market value. *Id.* at 17–18. The court stated, "there is sufficient evidence to support that finding." *Id.* at 7. The court also rejected the plaintiffs' request for an injunction rather than damages. *Id.* at 7–11.

31. *See* Mulvaney, *supra* note 3.

32. Euclid v. Ambler Realty, 272 U.S. 365, 383 (1926).

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.[33]

Since then, no case has directly addressed the question of whether a large apartment building near single-family homes is a nuisance. However, two nuisance cases involve a somewhat analogous situation: hotels and motels near single-family homes. The *Loughhead* plaintiffs relied on *Spiller v. Lyons*.[34] In *Spiller*, a group of homeowners alleged that a nearby motel would create a nuisance.[35] A Texas appellate court upheld a jury verdict for the plaintiffs, partially because the motel violated restrictive covenants that burdened the defendant's land,[36] 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."[37] 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."[38]

Spiller is not directly on point for the issue at hand because the motel violated restrictive covenants.[39] Moreover, the motel residents in *Spiller* would presumably have been more transient than the apartment residents in *Loughhead*.[40] But some of the arguments raised by the *Spiller* court could apply to any apartments near an

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33. *Id.* at 394–95 (upholding zoning that excluded apartments from zones dominated by detached residences).

34. 737 S.W.2d 29 (Tex. App. 1987); *see* Hearing on Defendant's Motion for Special Exceptions, *supra* note 27, at 9–10.

35. *See Spiller*, 737 S.W.2d at 30.

36. *Id.*

37. *Id.*

38. *Id.* Plaintiffs also cited numerous other nuisance cases that did not involve housing or lodging. *See* Pool v. River Bend Ranch, 346 S.W.3d 853 (Tex. App. 2011) (holding an all-terrain vehicle park a nuisance); GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet, 61 S.W.3d 599 (Tex. App. 2001) (holding a cellular telephone tower a nuisance); Champion Forest Baptist Church v. Rowe, No. 01-86-654-CV, 1987 WL 5188 (Tex. App. Jan. 8, 1987) (upholding the trial court decision that church parking garage was a nuisance).

39. *See Spiller*, 737 S.W.2d at 30.

40. *Compare* Von der Heide v. Zoning Bd. of Appeal, 123 N.Y.S.2d 726, 730 (N.Y. Sup. Ct. 1953) ("[A motel] merely furnishes the *transient* guest with sleeping quarters and bath and toilet facilities, with linen service and a place to park his car.") (emphasis added), *with* Alsberg v. Lucerne Hotel Co., 92 N.Y.S. 851, 852 (N.Y. App. Term 1905) ("These apartments are rented upon annual leases and transient tenants are not solicited.").

already-settled neighborhood, or indeed to any additional housing in such areas. Nearly any new residential development will bring additional residents to a neighborhood, some of whom will be driving automobiles.[41] Thus, the "increased traffic" argument raised by the *Spiller* court might make any new apartments (or even houses) a nuisance if they are near an existing neighborhood. 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 a similar finding as to new housing. And new residents may also increase the demand for infrastructure, as in the *Spiller* case.[42]

On the other hand, at least one court has rejected a similar claim. In *California Tahoe Regional Planning Agency v. Jenkins*,[43] the plaintiffs asserted that high-rise hotel-casinos near Lake Tahoe were a nuisance[44] because they would attract "more people and cars"[45] to the area, thus harming the regional environment.[46] The U.S. Court of Appeals for the Ninth Circuit rejected the claim, stating, "not every threatened 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."[47] Thus, *California Tahoe* suggests that even hotels (and by implication houses and apartments) are so different from traditional nuisances that they should generally not be treated as such.

A nuisance plaintiff might argue that the *Spiller* court's decision that a motel near single-family houses was a nuisance supports a similar finding as to apartments, because hotels and motels, like apartments, involve temporary residents. But nuisance case law involving hotels and motels is divided, and thus does not consistently support a nuisance claim directed against multifamily housing. Moreover, no case directly addresses whether new apartments near single-family housing are a nuisance.

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41. *Cf. Quick Facts: Resident Demographics*, NAT'L MULTIFAMILY HOUSING COUNCIL, http://www.nmhc.org/Content.aspx?id=4708 (last visited Apr. 19, 2015) (noting that seventy-four percent of apartment renters' households have at least one vehicle).

42. *See Spiller*, 737 S.W.2d at 30.

43. 594 F.2d 181 (9th Cir. 1979).

44. *Id.* at 184.

45. *Id.* at 193.

46. *Id.* at 194.

47. *Id.*

II. POLICY: ARGUMENTS FOR NUISANCE LIABILITY

In the context of nuisance law, negative externalities are "land uses that have harmful spillover effects on neighboring property."[48] For example, when a business dirties the air or water without paying the costs of cleaning up such pollution, it has imposed an externality upon everyone negatively affected by such pollution.[49] One purpose of nuisance law is to limit land uses that generate such externalities.[50]

The *Loughhead* plaintiffs argued that placing large apartment buildings near single-family houses would create two major externalities: (1) increased traffic;[51] and (2) intangibly altered neighborhood character and thus reduced property values.[52] For the reasons stated below, courts should not use these arguments to justify limiting housing construction near existing development.

A. Increased Traffic

A common argument against new housing (raised not just in nuisance actions but in many zoning disputes)[53] is that such housing

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48. Benjamin Harney, *The Economics of Exclusionary Zoning and Affordable Housing*, 38 STETSON L. REV. 459, 466 (2009). More broadly, negative externalities are "costs imposed on a party by the actions of another party that are not borne by the acting party." Richard D. Gary & Michael L. Teague, *The Inclusion of Externalities in Electric Generation Resource Planning: Coal in the Crossfire,* 95 W. VA. L. REV. 839, 843 (1993).

49. Gary & Teague, *supra* note 48, at 844.

50. *See* Harney, *supra* note 48, at 466–67 ("Nuisance disputes generally involve land uses that generate negative externalities . . . .").

51. Complaint, *supra* note 16, ¶ 21.

52. *Id.* ¶ 34. The plaintiffs also claimed that the building's height would reduce their privacy and sunlight, that the project's foundation would disrupt the soil of neighboring properties, and that by destroying nearby trees, the defendants would reduce neighborhood property values. *Id.* ¶¶ 27–28, 35. Because these arguments are highly project-specific and would not necessarily apply to other multifamily development, I have chosen not to address them below. It does seem to me, however, that as a general matter building height should not justify nuisance claims for two reasons. First, it is simply not the case that high-rise buildings generally reduce sunlight, unless the building is on an extremely narrow street. *See* Michael Lewyn, *The Sunlight Myth,* PLANETIZEN (Apr. 29, 2014, 5:50 PM), http://www.planetizen.com/node/68573 (showing numerous examples of tall buildings on sunny streets). Second, a high-rise building will actually result in less visual intrusion into neighbors' yards than a house or small apartment building, because just as the residents of a house 100 feet from a neighbor's yard can see less than those of a house ten feet away, the residents of an apartment 100 feet above the yard can see less than those on lower floors.

53. *See, e.g.*, Watson v. Mayflower Prop., 223 So. 2d 368, 374 (Fla. Dist. Ct. App. 1969) (upholding zoning limiting density, based on the city's concerns about traffic congestion); Storch v. Zoning Bd. of Howard Cnty., 298 A.2d 8, 15 (Md. 1968) (same); Jeffrey L. Sparks, *Land Use Regulation in Arizona After the Private*

would increase traffic. This argument can be used against any new housing, since any development would add people to a neighborhood and thus possibly add cars. For example, residents of an existing subdivision might argue that if a new subdivision is created anywhere near them, the new residents would use the same roads as the current residents, creating additional traffic congestion.

This argument should not justify a nuisance action for three reasons. First, arguments based on traffic have no logical stopping point. If any increase in population means increased traffic, and increased traffic means nuisance, then there is no reason why only homeowners could raise nuisance claims. A commercial landowner or residential landlord could raise the same complaint, asserting that nearby housing could clog traffic and thus unreasonably interfere with the commutes of its employees, tenants, and customers.

Second, if new people mean new traffic, this means that new housing will add traffic *wherever* it is located. If new housing does not add traffic in the plaintiffs' neighborhood, such housing will be built elsewhere and add traffic in someone else's neighborhood.[54] Thus, the claim that traffic equals nuisance is a "beggar thy neighbor" argument—rather than eliminating the externality of traffic, it merely shifts the externality to another neighborhood and thus does not reduce society's total of negative externalities. Moreover, lawsuits designed to exclude new housing may not even limit traffic in the plaintiffs' neighborhood: if restrictions on development keep people out of neighborhood A and force them to live in neighborhood B instead, neighborhood B's cars may drive through neighborhood A, thus increasing congestion in both neighborhoods.[55]

Third, to the extent that nuisance suits limit the density of existing neighborhoods and force new housing into "greenfield" sites—that is, undeveloped areas, as opposed to places near existing development[56]—they may actually increase region-wide automobile

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Property Rights Protection Act, 51 ARIZ. L. REV. 211, 232 (2009) ("Zoning that limits density may relate to transportation and traffic control.").

54. *Cf.* Adam Millard-Ball, *Phantom Trips*, ACCESS MAG., Fall 2014, at 3, http://www.accessmagazine.org/wp-content/uploads/sites/7/2015/01/access45-Phantom-Trips-revise-links.pdf. Highway engineers' estimates of how many trips will be generated by new development are often erroneous because "most trips substitute for existing ones—they are diverted from existing locations as people change where they live, work, and shop in the light of new travel options." *Id.* at 6.

55. Of course, this is most likely to be the case in certain circumstances: where neighborhood A has some destination worth visiting, or where drivers can cut through neighborhood A in order to reach some destination worth visiting.

56. *See* Anne Marie Pippin, Note, *Community Involvement in Brownfield Redevelopment Makes Cents: A Study of Brownfield Redevelopment Initiatives in*

traffic. Greenfield sites tend to be more automobile-dependent than existing neighborhoods, because they are further from urban cores that are often the hub of public transit networks.[57] Thus, shifting housing to greenfields would cause the overall amount of automobile traffic to *increase*, because some people who might not drive to every destination if they lived in an existing neighborhood would become full-time drivers in an automobile-dependent greenfield neighborhood. And even if the number of drivers remained constant, vehicle miles traveled would increase if greenfield sites were further from shops and other destinations, thus forcing people into longer commutes.[58]

In sum, the argument that added traffic is sufficient to make development a nuisance lacks merit. If added neighborhood traffic makes development a nuisance, all new housing is a nuisance. But if all new housing is a nuisance, a successful nuisance claim may merely displace the nuisance of traffic from a plaintiff's neighborhood to another neighborhood.

B. Neighborhood Character

A nuisance plaintiff might argue that new housing, especially housing dissimilar to a neighborhood's existing housing stock, is a nuisance because it is (in the words of the *Loughhead* complaint) "abnormal and out of place in its surroundings,"[59] which might, in some intangible way, make the neighborhood less popular and thus reduce property values.[60] This argument, like arguments based on

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the United States and Central and Eastern Europe, 37 GA. J. INT'L & COMP. L. 589, 596 (2009) (defining greenfields as "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) (defining greenfields as "undeveloped sites in suburban or rural locations").

57. *See* discussion *infra* Parts III.A.1–2.

58. I note that this seems to be the case; neighborhoods far from downtown, in fact, tend to be further from shops and similar destinations, while downtowns and nearby areas tend to be within walking distance of more destinations. *See, e.g.*, Jack Romig, *Walk This Way: Close-to-Home Amenities Prove Draw as More People Leave Their Cars Parked*, MORNING CALL (Jan. 3, 2014), http://articles.mcall.com/2014-01-03/features/mc-walkability-sunday-real-estate--0105-20140103_1_walkability-easton-main-street-initiative-valley-community (citing examples); *Boise, Idaho*, WALKSCORE, http://www.walkscore.com/ID/Boise_City (last visited Apr. 19, 2015) (illustrating that neighborhoods near downtown are more walkable); *Hamilton, Ontario*, WALKSCORE, http://www.walkscore.com/CA-ON/Hamilton (last visited Apr. 19, 2015) (same); *Richmond, Virginia*, WALKSCORE, http://www.walkscore.com/VA/Richmond (last visited Apr. 19, 2015) (same).

59. Complaint, *supra* note 16, ¶ 34.

60. *Id.*

traffic congestion, has no logical stopping point: any new housing changes neighborhood character to some extent, and any new housing might also affect property values by increasing citywide housing supply.

Like congestion-related arguments against new housing, the "neighborhood character" argument is essentially another "beggar thy neighbor" argument: if additional density affects neighborhood character, it will change the character of a greenfield site just as much as it changes the character of an existing neighborhood. Indeed, the effect of new housing upon greenfield sites will be more radical: a large apartment building will change a cornfield far more drastically than it will change a neighborhood full of houses or small apartment buildings. Thus, restrictions upon new housing may merely shift out-of-character development from one site to another.

Even if the threat of nuisance suits causes new housing to shift to an area with a similar housing stock rather than to a greenfield site, the new housing affects the "receiving" area's character by increasing neighborhood population. For example, a neighborhood with ten apartment buildings will presumably feel busier than a neighborhood with just five apartment buildings, even if no other housing exists.

Moreover, the public policy in favor of reducing pollution actually *supports* changing the character of some areas. In recent decades, many suburbs and neighborhoods have been built in a way that forces their residents to drive automobiles in order to reach any conceivable destination.[61] These automobile-dependent neighborhoods generate both greenhouse gas emissions and other forms of automobile-induced pollution.[62] Because pollution has traditionally been a major concern in nuisance law,[63] preserving these places in their current automobile-dependent form is likely to *create* nuisance-like harms, rather than prevent them. By contrast, if infill development changes neighborhood character by adding housing that is close enough to public transit stations and bus stops to increase transit ridership, or is close enough to shops and offices to enable people to walk to these places, such development actually mitigates the nuisance-like harms caused by low-density development.[64]

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61. *See infra* notes 83–96 and accompanying text (contrasting older, more pedestrian-friendly neighborhoods with newer areas).

62. *See infra* notes 107–10 and accompanying text (explaining that less automobile-dependent places create less pollution).

63. *See supra* note 7 and accompanying text.

64. I note, however, that this argument is not applicable to all infill development: some infill development does little to increase walkability or access to public transit,

A nuisance plaintiff's emphasis on property values should also not be indulged, because many American communities have been *too* successful in bolstering land prices. For example, in San Francisco, zoning is quite restrictive,[65] and residential development is so difficult that the city has added only 1500 housing units per year for the past twenty years—fewer than the city's population gain (32,000 people) from 2010 to 2013 alone.[66] The law of supply and demand suggests that where a city has artificially constricted supply, housing prices will be high.[67] This is in fact the case in San Francisco. Housing prices in San Francisco are quite high; the average housing unit costs over $800,000, more than ten times median household income.[68]

Out-of-control housing costs caused by constricted housing supply are not limited to large cities such as San Francisco. For example, Sausalito, California, a suburb of San Francisco,[69] granted between 1.4 and 13.6 permits per 10,000 people yearly since 2000.[70] By contrast, the state average has ranged between 6.4 and 45.3 building permits per 10,000 people.[71] As a result, Sausalito's median housing unit costs over $900,000, more than three times the state average ($283,000 in 2012).[72]

Some commentators argue that homeowners have relied on the neighborhood status quo, and thus should have veto power over new development. For example, Bradley Karkkainen argues that when someone buys a house, he or she intends to purchase not only the property, but part of the "neighborhood commons"[73]—not only

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either because it is not located near shopping or public transit, or because it is designed in a way that discourages walking (for example, a subdivision without sidewalks or with overly wide streets).

65. *See* Kim-Mai Cutler, *How Burrowing Owls Lead to Vomiting Anarchists (or SF's Housing Crisis Explained)*, TECHCRUNCH (Apr. 14, 2014), http://techcrunch.com/2014/04/14/sf-housing/ (describing zoning and planning process in San Francisco, and how it limits housing supply).

66. *Id.*

67. *Id.*

68. *See San Francisco, California,* CITY-DATA.COM, http://www.city-data.com/city/San-Francisco-California.html (last visited Apr. 19, 2015).

69. *See Sausalito, California,* CITY-DATA.COM, http://www.city-data.com/city/Sausalito-California.html (last visited Apr. 19, 2015). Sausalito is a town 7.4 miles from San Francisco.

70. *Id.*

71. *Id.*

72. *Id.* In 2012, the estimated median house or condo value was $928,705. *Id.* The mean price of a detached house was $1,100,950. *Id.*

73. Bradley Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45, 69 (1994). Although Karkkainen makes this argument in the context of

community-owned property "such as public schools, public recreational facilities, and public transportation facilities,"[74] but also "intangible qualities such as neighborhood ambiance, aesthetics, and the physical environment."[75]

According to Karkkainen, changes in a neighborhood's density or land use,[76] by changing the physical environment, reduce the value of neighbors' interest in the "commons" because "the neighborhood is taking the first step toward becoming something other than the neighborhood where [the residents] chose to live."[77] In other words, neighborhood residents purchase homes in reliance on neighborhood pattern X, and therefore should have veto power over changes that turn neighborhood X into someplace different.

But this argument may be a self-fulfilling prophecy; when judges and politicians give people the right to veto nearby development, they are more likely to expect the status quo to remain, and thus more likely to rely on it. Homeowners already have this veto power through zoning codes, since zoning boards and politicians often take the advice of neighborhood activists.[78] Extending this veto power to nuisance actions would, if anything, increase such reliance. Accordingly, courts should reject this argument.

In sum, courts should reject nuisance plaintiffs' arguments that any new housing that might affect neighborhood character or property values should justify liability, because this argument is a "beggar thy neighbor" argument: if development is kept out of a neighborhood, it shifts to another area and changes the character of that place. Moreover, the public interest favors more housing rather than less, especially in expensive regions where limited housing supply has made housing overwhelmingly expensive.

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zoning, it seems to me that this argument could also be used to justify nuisance actions.

74. *Id.*

75. *Id.*

76. *Id.* at 73 (stating that "changes in density, as well as shifts from residential to commercial or industrial uses" are "disruptive of a neighborhood's character because they are inconsistent with current uses of the neighborhood commons").

77. *Id.* at 72–73.

78. *See* Greg Greenway, *Getting the Green Light for Senate Bill 375: Public Engagement for Climate-Friendly Land Use in California*, 10 PEPP. DISP. RESOL. L.J. 433, 442 (2010) (arguing that infill development is not as common as professional planners would like because when one landowner proposes such development, other neighborhood "residents frequently organize to oppose such development"); Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget"*, 62 CASE W. RES. L. REV. 81, 84–85 (2012).

III. POLICY: ARGUMENTS AGAINST NUISANCE LIABILITY

To the extent that concerns over property values, neighborhood character, and increased traffic justify nuisance claims related to new housing, these concerns are outweighed by three major policies: (1) the public policy in favor of pedestrian-friendly "infill" development, (2) the public policy in favor of affordable rental housing, and (3) the public policy in favor of orderly zoning and planning.

A. Infill Development, Walkability, and Transit

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 such as those owned by the *Loughhead* plaintiffs. In Houston, single-family housing takes up sixty-seven percent of all land and ninety-five percent of all land used for housing.[79] One survey of ten cities shows that Houston is only the sixth most house-dominated city out of those ten surveyed; even in Baltimore (the least house-dominated city surveyed), forty-nine percent of all land and seventy percent of residential land is used for houses.[80] Even a brief look at Baltimore streets will reveal that multi-family and commercial land is often concentrated on a few major streets, and that those streets are surrounded by streets full of single-family homes.[81] 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.

But public policy favors building housing in existing urban neighborhoods and inner suburbs, rather than in greenfields, for two reasons. First, because existing neighborhoods tend to be more pedestrian-friendly than greenfield sites, development in existing neighborhoods (commonly referred to as "infill")[82] increases the

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79. See GORDON BONAN, ECOLOGICAL CLIMATOLOGY, ch. 14, at 24 (2002), *available at* http://www.cgd.ucar.edu/tss/aboutus/staff/bonan/ecoclim/1sted/Chapter 14.pdf (reporting that sixty-seven percent of city land was used by single-family homes, three percent by multifamily housing, and thirty percent by commercial and industrial space).

80. *Id.*

81. *See generally* GOOGLE MAPS, http://maps.google.com. To see individual streets look at Baltimore, Md. and click on the "Street View" icon.

82. *Cf.* Morgan E. Rog, *Highway to the Danger Zone: Urban Sprawl, Land Use, and the Environment*, 22 GEO. INT'L ENVTL. L. REV. 707, 717 (2010) (contrasting infill development with "outward expansion" of cities).

number of people who can walk to jobs, shops, and other destinations. Second, because existing neighborhoods are more likely to be well served by public transit than greenfield sites, infill increases the number of people who can use public transit rather than driving. In turn, increased walking and transit use creates a variety of public benefits: people living in walkable, transit-oriented infill neighborhoods benefit because they can get more exercise and spend less money on automobile-related costs, and the public as a whole benefits from reduced automobile-related pollution.

1. Walkability and Infill

For a variety of reasons explained below,[83] older, more urban areas tend to be more walkable (that is, more comfortable for pedestrians) than greenfield sites. Such walkable places create a variety of benefits both for their residents and for the public as a whole, including reduced obesity, reduced transportation costs, reduced pollution, and reduced harm from car crashes.

a. Why Infill Is Usually More Walkable

Older neighborhoods (especially those built before automobile ownership became nearly universal) are more likely than greenfield sites to be designed around the needs of the pedestrian,[84] rather than being designed solely for the benefit of motorists. For example, older neighborhoods are more likely to have sidewalks, thus allowing pedestrians to walk without having to dodge speeding traffic throughout their walk.[85] Furthermore, older neighborhoods also tend to have narrower streets.[86] Narrow streets are more convenient for

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83. *See* infra Part III.A.1.a.

84. I do not discuss bicyclists separately because many of the points below apply to bicyclists as well. For example, if a speeding motorist on a wide street is less likely to notice a pedestrian in time to avoid an accident, such a motorist is less likely to notice a bicyclist as well. *See infra* notes 88–91 and accompanying text.

85. *See* Robert Puentes, *First Suburbs in the Northeast and Midwest: Assets, Challenges, and Opportunities*, 29 FORDHAM URB. L.J. 1469, 1471 (2002) (noting that older suburbs were "built when sidewalks were the rule, not the exception"); Gabor Zovanyi, *The Role of Initial Smart-Growth Legislation in Advancing the Tenets of Smart Growth*, 39 URB. LAW. 371, 383 (2007) ("[W]ritings that list common features of older neighborhoods refer to . . . streets lined with trees and sidewalks.").

86. *See* John M. Barry, *Form-Based Codes: Measured Success Through Both Mandatory and Optional Implementation*, 41 CONN. L. REV. 305, 307 (2008) (pointing out that "narrow streets" are one of several "central features of older cities that have largely disappeared"); Zovanyi, *supra* note 85, at 383 (noting that "narrow streets" are a common feature of older areas).

pedestrians because they take less time to cross than wider streets.[87] In addition, narrower streets are safer for pedestrians than are wide streets, because the more time a pedestrian spends on a street, the more time he or she is exposed to vehicle traffic.[88] Wide streets also tend to encourage motorists to drive more rapidly,[89] thus increasing the likelihood of pedestrian/automobile collisions. A speeding motorist has a narrower field of vision than one driving slowly, and is thus less likely to notice a pedestrian.[90] Moreover, a speeding motorist who does notice a pedestrian is less likely to be able to stop in time to avoid a collision than a motorist who is driving more slowly.[91] And when collisions do occur, they are more likely to be fatal at rapid speeds: a non-motorist has a 3.5% chance of death from a car traveling fifteen miles per hour, and an 83% chance of death from a vehicle traveling forty-four miles per hour.[92]

Older neighborhoods also tend to have shorter blocks than newer areas.[93] Where blocks are shorter and intersections more common, pedestrians have more opportunities to cross streets without crossing midblock or going out of their way to reach an intersection, and thus can reach destinations more quickly.[94]

The oldest, pedestrian-friendly neighborhoods are also more likely to have streets that are arranged in an interconnected grid, rather than the cul-de-sac, dead-end streets that dominate most late twentieth-century suburbs.[95] A grid system is more comfortable for

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87. *See* Donavan v. Jones, 658 So. 2d 755, 765 (La. Ct. App. 1995).

88. *See* Wallace Immen, *City Seeks Solution to Commute Crunch*, GLOBE & MAIL, Apr. 26, 2002, at A22 (pointing out that in downtown Toronto, pedestrians "have to run to beat the changing light" on wide streets).

89. *See* Stephen H. Burrington, *Restoring the Rule of Law and Respect for Communities in Transportation,* 5 N.Y.U. ENVTL. L.J. 691, 700 (1996) (arguing that "solicitude toward fast traffic" motivates government to build wide streets).

90. *Id.* at 704 n.50 (noting that a motorist driving thirty miles per hour has a 150-degree field of vision, while one driving twice that speed has only a fifty-degree field of vision).

91. *See* Joey Ledford, *Speeding Cars Terrify Neighborhoods*, ATLANTA J. & CONST., Aug. 27, 1997, at B ("At 20 mph, it takes you 20 feet to react and another 20 feet to stop. At 40 mph, it's 40 feet to think and another 80 feet to stop.").

92. *See* Burrington, *supra* note 89, at 704.

93. *See* Barry, *supra* note 86, at 307 (describing "short blocks" as another "central feature of older cities").

94. *See* Jeff Gray, *Police Blaming Accident Victims, Pedestrian Says*, GLOBE & MAIL, Mar. 15, 2004, at A8 (stating that suburban Toronto is "trouble for pedestrians" because of "long blocks that provide so few safe opportunities [for pedestrians to cross streets]").

95. *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, 556 (1998).

pedestrians because where residential cul-de-sacs do not connect with other cul-de-sacs, pedestrians must go out of their way to travel from one residential street to another.[96]

In theory, a greenfield building or subdivision could be remade to resemble older city neighborhoods, with sidewalks and a grid of short, narrow streets. But, such a neighborhood might be very automobile-dependent if its residents had no worthwhile destinations within walking distance. Because this is often the case for greenfield sites far from regional downtowns, places near built-out urban cores are, as a practical matter, the most walkable.[97]

Admittedly, a few developers of greenfield sites have solved this problem by building not just residences on pedestrian-oriented streets, but shops and offices near the residences.[98] But, such large-scale greenfield development requires a considerable amount of capital, because the developer must either build hundreds of residences to create demand for the nearby shops,[99] or be lucky enough to find a site that is accessible to residents of other neighborhoods.[100] However, any site that is close enough to nearby neighborhoods to attract customers may be close enough to attract a nuisance action. So, if courts hold that new housing creates a nuisance merely by its proximity to an existing neighborhood, the most walkable neighborhoods are likely to be nuisances even if they are on greenfield sites.

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96. *See* Michael Southworth & Eran Ben-Joseph, *Reconsidering the Cul-de-Sac*, ACCESS MAG., Spring 2004, at 28, 29–30 (explaining that a pedestrian "must always leave the cul-de-sac via a collector street to go anywhere" and showing a diagram of a cul-de-sac in which pedestrians cannot reach parallel streets).

97. *See supra* note 58.

98. *See, e.g.,* LANCE JAY BROWN ET AL., URBAN DESIGN FOR AN URBAN CENTURY: SHAPING MORE LIVABLE, EQUITABLE, AND RESILIENT CITIES 155 (2d ed. 2014) (describing Kentlands in suburban Washington as a "greenfield suburban development" that was designed "along the lines of a traditional urban neighborhood [because among other things, it] substituted a street grid for conventional cul-de-sacs"); AARON PASSELL, BUILDING THE NEW URBANISM: PLACES, PROFESSIONS, AND PROFITS IN THE AMERICAN METROPOLITAN LANDSCAPE 7–8 (2012) (describing a mix of uses in Kentlands).

99. *See* Hazel Borys, *Retail On My Mind,* PLACEMAKERS (Feb. 20, 2012, 12:01 AM) http://www.placemakers.com/2012/02/20/retail-on-my-mind/ (referring to the common rule of thumb that one thousand housing units is usually necessary to support a neighborhood corner store, unless it can attract visitors from outside neighborhoods).

100. *Id.* (stating the "1000 rooftop" rule is less likely to be relevant if a store "is located along a busy road, or if there is an employment center or civic use nearby that attracts shoppers beyond the neighborhood").

b. Why the Public Interest Favors Walkability

When infill development increases the number of people who can walk to various destinations, the public benefits in several respects.

First, people who live in walkable communities are likely to be healthier, because someone who has more opportunity to walk is, all else being equal, more likely to engage in physical activity and thus less likely to be overweight or obese.[101] The U.S. Surgeon General advises that thirty minutes of walking for five days a week will reduce the risks of obesity and weight related problems[102]—a goal more likely to be met in areas that are comfortable for pedestrians. For example, one Australian study found that after controlling for socio-economic factors such as income and education, "individuals living in high compared to less walkable areas were not as likely to be obese."[103] Similarly, a survey of New York City residents asked a sample of New Yorkers how frequently they walked or cycled ten blocks or more, and found that as walkability increased, so did the likelihood of such exercise.[104]

Second, people drive less where they have the opportunity to walk—and where people drive less, they are, all else being equal, more prosperous because they spend less on transportation. For example, residents of Portland, Oregon, drive twenty percent less than residents of the average metropolitan area, and thus collectively save $1.1 billion per year.[105] Similarly, residents of the city of Washington, D.C., spend $9461 per household on transportation annually, while the average household in Washington's outer suburbs

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101. *See* Vanessa Russell-Evans & 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. ENVTL. 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*, 26 HEALTH & PLACE 118 (2014).

102. *See* MEGAN LEHMAN ET AL., INST. FOR PUB. ADMIN., HEALTHY & WALKABLE COMMUNITIES 3 (2007), http://www.ipa.udel.edu/publications/HealthyWalkable.pdf.

103. *See* Falk Müller-Riemenschneider et al., *Neighborhood Walkability and Cardiometabolic Risk Factors in Australian Adults: An Observational Study,* 13 BMC PUB. HEALTH 755 (2013), *available at* http://www.biomedcentral.com/1471-2458/13/755.

104. *See* Lance Freeman et al., *Neighborhood Walkability and Active Travel (Walking and Cycling) in New York City,* 90(4) J. URB. HEALTH 575, 580 (2013), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3732693/pdf/11524_2012_Article_9758.pdf (finding "inverse association between [neighborhood] walkability and reporting no episodes of active travel").

105. *See* JEFF SPECK, WALKABLE CITY: HOW DOWNTOWN CAN SAVE AMERICA ONE STEP AT A TIME 29 (2012).

spends $15,601 per household, and some suburbs have even higher transportation costs.[106]

Third, if more Americans are allowed to live in neighborhoods where they can reach a wide variety of destinations without driving, they will create less automobile-related pollution than would otherwise be the case. According to one study, sponsored by the Urban Land Institute, more compact, walkable development could reduce vehicle miles traveled by twenty to forty percent, which in turn would reduce total transportation-related carbon dioxide emissions by seven to ten percent by 2050.[107]

Environmental benefits from walkable development are not limited to greenhouse gases. One study by several scholars, sought to quantify the benefits of reduced driving by replacing half of all short car trips in the eleven largest Midwestern regions with bicycle trips, thus reducing regional vehicle miles by ten percent.[108] The study found that reducing short car trips would reduce particulate matter[109] pollution enough to lead to 525 fewer pollution-related deaths and thousands of fewer hospital admissions, thus creating a societal savings of just over $4.2 billion per year.[110]

Fourth, walkable communities tend to be safer, because where people can drive less frequently, they are less likely to injure themselves and others with their vehicles. The automobile-oriented

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106. *See* URBAN LAND INST., BELTWAY BURDEN: THE COMBINED COST OF HOUSING AND TRANSPORTATION IN THE GREATER WASHINGTON, DC, METROPOLITAN AREA 4–5 (2009), *available at* http://commerce.uli.org/misc/Beltway Burden.pdf (listing costs for various jurisdictions, 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 twenty-five percent more than the region's central jurisdictions); *cf.* URBAN LAND INST., BAY AREA BURDEN 6–7 (2009), *available at* http://uli.org/wp-content/uploads/2012/06/ Bay-Area-Burden-1026-LowRes2.pdf (showing similar results for metropolitan San Francisco cities and suburbs, despite the region's higher housing costs).

107. REID EWING ET AL., URBAN LAND INST., GROWING COOLER: THE EVIDENCE ON URBAN DEVELOPMENT AND CLIMATE CHANGE 9 (2007), *available at* http://www.smartgrowthamerica.org/documents/growingcoolerCH1.pdf.

108. *See* Maggie L. Grabow et al., *Air Quality and Exercise-Related Health Benefits from Reduced Car Travel in the Midwestern United States*, 120 ENVTL. HEALTH PERSP. 68, (Jan. 2012) *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/ PMC3261937/.

109. *See* Am. Trucking Ass'ns, Inc. v. EPA, 283 F.3d 355, 359 (D.C. Cir. 2002) (explaining that particulate matter "refers to all solid particles and liquid droplets found in air" and is "associated with a range of adverse health effects such as coughing, shortness of breath, aggravation of existing respiratory conditions like asthma and chronic bronchitis, increased susceptibility to respiratory infections and heightened risk of premature death").

110. *See* Grabow et al., *supra* note 108, at 72–73.

United States has traffic fatality rates far higher than those of European nations with less automobile dependence, and within the United States the most automobile-oriented places have the highest automobile fatality rates.[111] The seven metropolitan areas with the highest share of commuters walking to work were New York, Boston, San Francisco, Pittsburgh, Philadelphia, Seattle, and Washington; in these regions, between 3.5% and 5.9% of commuters walked to work.[112] Six of the seven (all but Pittsburgh) had motor vehicle crash death rates below the average for metropolitan areas, and even Pittsburgh's death rate was below the average for the United States as a whole.[113] By contrast, the metropolitan areas with the lowest percentage of pedestrian commuters were Birmingham, Dallas, Nashville, Orlando, Raleigh, and Richmond, with Atlanta and Louisville tied for seventh; in these regions, between 1% and 1.3% of commuters walked to work.[114] All seven had traffic death rates higher than that of Pittsburgh (and thus of the average metropolitan area).[115]

Residents of walkable communities create a wide variety of benefits for themselves and for the public, including exercise-related health benefits, reduced spending on transportation, reduced pollution, and fewer deaths and injuries from car crashes. It follows that if nuisance suits are allowed to reduce the amount of infill development, and if such development would otherwise often occur in walkable areas, Americans will exercise less, spend more on transportation, pollute more, and be more likely to die in car crashes.

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111. *See* SPECK, *supra* note 105, at 45.

112. *See* Wendell Cox, *Major Metropolitan Commuting Trends: 2000–2010,* NEW GEOGRAPHY (Oct. 25, 2011), http://www.newgeography.com/content/002500-major-metropolitan-commuting-trends-2000-2010. I am not counting Rochester, New York, (which actually ranked ahead of two of these cities) because I have not found its traffic death statistics.

113. *See* Scott R. Kegler et al., *Motor Vehicle Crash Deaths in Metropolitan Areas—United States, 2009*, MORBIDITY & MORTALITY WKLY. REP., July 20, 2012, at 523, *available at* http://www.cdc.gov/mmwr/pdf/wk/mm6128.pdf. The metropolitan area average was 8.2 deaths per 100,000 people, and the national average was 11.1 deaths per 100,000 people. *Id.* at 524. Death rates per 100,000 people for each metropolitan area were as follows: Boston 5.0, New York 5.1, Philadelphia 7.3, Pittsburgh 9.2, San Francisco 5.6, Seattle 5.9, and Washington 7.5. *Id.* at 524–26

114. *See* Cox, *supra* note 112.

115. *See* Kegler et al., *supra* note 113, at 524–26 (reporting the following fatality rates per 100,000 people: Atlanta 10.7, Birmingham 15.3, Dallas 9.8, Louisville 11.8, Nashville 13.0, Orlando 11.3, Raleigh 9.6, and Richmond 11.5).

2. Infill and Transit

Just as infill development increases walking, such development also increases public transit use, creating the same kinds of public benefits that are created by walkable neighborhoods.

a. More Infill Means More Transit

There are two reasons why residents of older areas can typically use public transit more easily than residents of greenfield sites. First, transit networks have historically been centered near downtown business districts,[116] so neighborhoods near downtowns (which tend to be older)[117] tend to have the most convenient transit service and the highest transit ridership.[118] Second, compact areas 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.[119] Neighborhoods near downtown tend to be more compact, and thus can support more transit service.[120]

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116. *See* JON C. TEAFORD, THE METROPOLITAN REVOLUTION: THE RISE OF POST-URBAN AMERICA 10 (2006) (explaining that, historically, transit lines converged downtown, and as the number of automobiles increased, "the prospects for downtown-centered public transit worsened").

117. *See, e.g.,* Bill Lewis, *Infill Construction Boosts Older Neighborhoods*, TENNESSEAN, Sept. 25, 2014, http://www.tennessean.com/story/money/real-estate/2014/09/25/infill-construction-boosts-older-neighborhoods/16215821/ (identifying Nashville's "older neighborhoods" with the "heart of the city").

118. *See* Brian D. Taylor & Camille N.Y. Fink, *The Factors Influencing Transit Ridership: A Review and Analysis of the Ridership Literature* 7–8, 10 (UCLA Dep't of Urban Planning, Working Paper 2003), *available at* http://www.uctc.net/papers/681.pdf (citing studies showing that downtown district "employment explains a very high percentage . . . of the number of transit commuters," and that the size of downtown districts is one factor affecting ridership).

119. *See* ANTHONY DOWNS, STILL STUCK IN TRAFFIC: COPING WITH PEAK HOUR TRAFFIC 210 (2004) (noting that seven housing 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 (2011), *available at* http://www.ppic.org/content/pubs/report/R_211JKR.pdf ("[T]ransit ridership falls considerably at distances beyond just one quarter-mile from a transit station."); Joanna D. Malaczynski & 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 ECOLOGY L.Q. 71, 80 n.44 (2009) (explaining that raising average density to nine units per acre could reduce vehicle miles traveled by thirty percent nationwide); John Keitz, *Public Transit: All About Density,* NUMBERS BOX (Nov. 9 2014, 3:00 PM), http://numbersbox.blogspot.com/2014/11/public-transit-all-about-density.html. (showing that metro areas with the highest population density tend to have the highest transit ridership).

120. *See* KOLKO, *supra* note 119, at 8 ("[T]he density of both population and employment typically declines with increasing distance from downtown.").

It follows that if new housing is built in existing neighborhoods (especially compact neighborhoods near regional downtowns), the residents of such housing will be able to walk, bike, and use public transit more frequently than would be the case if new housing were confined to greenfield sites.

b. Housing Near Transit Benefits the Public

The public benefits from increased housing supply near public transit for the same reasons that the public benefits from increased housing supply in walkable neighborhoods generally.

For example, just as residents of walkable neighborhoods are more likely to be able to exercise in the course of their daily routine and thus to experience better health, residents of neighborhoods near public transit can do the same. According to a federal household travel survey, users of transit spent a median of nineteen minutes walking to and from transit stops.[121] Thus, many transit users may be able to meet (or almost meet) the Surgeon General's recommendations even without other exercise.

Similarly, just as the residents of walkable areas benefit financially by being able to spend less money on automobiles, people who live near public transit will also be able to drive less and thus spend less on automobiles. As noted above, residents of central cities, which tend to have higher transit use than suburbs,[122] tend to spend less on transportation than residents of automobile-dependent suburbs.[123]

And just as residents of pedestrian-oriented neighborhoods pollute less, residents of transit-oriented places drive less and thus pollute less. Harvard economist Edward Glaeser and University of California, Los Angeles economist Matthew Kahn conducted a study finding that the most transit-oriented places emitted fewer greenhouse gases than most automobile-dependent places. In particular, New York City, the region with the highest use of public transit, had the lowest level of automobile-related carbon dioxide emissions from driving among sixty-six regions surveyed.[124] The four

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121. *See* Freeman et al., *supra* note 104, at 582.

122. *See* Edward L. Glaeser & Matthew E. Kahn, *The Greenness of Cities: Carbon Dioxide Emissions and Urban Development* 27–28 (Nat'l Bureau of Econ. Research, Working Paper No. 14238, 2008), *available at* http://www.nber.org/papers/w14238.pdf.

123. *See supra* note 106 and accompanying text.

124. *See* Glaeser & Kahn, *supra* note 122, at 42. Even when public transit-related carbon dioxide emissions are added to this figure, New York's per-household emissions level of 24,467 was below the national median for driving-related emissions alone (26,744). *Id.*

other regions where over ten percent of commuters used public transit (Washington, Chicago, Boston, and San Francisco-Oakland)[125] had emissions levels higher than those of New York, but lower than the national median.[126] By contrast, among the six regions surveyed where one percent or fewer of commuters used public transit, all had automobile-related carbon dioxide emissions higher than the national median.[127] Moreover, cities (where transit usage tends to be higher)[128] consistently created less carbon dioxide than suburbs: in each of the sixty-six cities surveyed, transportation-related carbon dioxide emissions (including both emissions from automobiles *and* emissions from transit) were higher in suburbs than in cities. For example, in New York, the city's per-household transportation emissions were 3783 pounds fewer than those of the suburbs.[129]

Finally, residents of transit-friendly places, like residents of pedestrian-friendly places, also experience fewer deaths from car crashes than residents of automobile-dependent areas. In the six regions where transit use is highest, car crash deaths were below the metropolitan area average.[130] By contrast, in the seven regions where transit use is lowest, crash death rates were either higher than or (in the case of Indianapolis) equal to the metropolitan area average.[131]

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125. *See* Cox, *supra* note 112.

126. *See* Glaeser & Kahn, *supra* note 122, at 41. The most-polluting region of the five, Washington, emitted 25,918 pounds of automobile-related carbon dioxide per household; twenty-eight of the sixty-six metropolitan areas created less pollution. *Id.*

127. *See id.* The lowest-emission city of this group, Memphis, produced more automobile-related emissions (28,440 pounds of carbon dioxide per household) than all but sixteen of the sixty-six cities surveyed. *Id.* The other five regions were Raleigh (29,922), Indianapolis (29,222), Birmingham (30,041), Nashville (30,495), and Oklahoma City (28,953). *Id.* Glaeser and Kahn did not include statistics for Jacksonville, a seventh major metropolitan area where only 1 percent of commuters used transit to get to work. *See* Cox, *supra* note 112.

128. In every single region surveyed by Glaeser and Khan, public transit produced more carbon dioxide emissions in cities than in suburbs. *See* Glaeser & Kahn, *supra* note 122, at 41–44. But in not one of those regions did the increased transit emissions from cities equal the increased vehicle emissions from suburbs. *See id.*

129. *Id.*

130. These regions are New York, Chicago, Philadelphia, Boston, San Francisco-Oakland, and Washington. *See* Cox, *supra* note 112. For vehicle fatality statistics, see Kegler et al., *supra* note 113, at 524–26 (providing statistics for each city except Boston). Chicago's regional death rate of 5.9 per 100,000 is below the metropolitan area average of 8.2. *See id.*

131. These regions are Birmingham, Indianapolis, Jacksonville, Memphis, Nashville, Raleigh, and Oklahoma City. *See* Cox, *supra* note 112. For vehicle fatality statistics, see Kegler et al., *supra* note 113, at 524–26 (providing death rates for Indianapolis (8.2, which was identical to metropolitan area average), Raleigh (9.6), Birmingham (15.3), Jacksonville (13.3), Memphis (17.8), Nashville (13.0), Raleigh (9.6), and Oklahoma City (11.6)).

Thus, a resident of a place with above-average public transit is likely to spend less on transportation, create less pollution, get more exercise, and be victimized by fewer car crashes than a resident of an automobile-dependent area. It follows that housing in such places should be encouraged rather than discouraged.

Moreover, if more housing should be built in compact urban areas, it is precisely the sort of housing targeted in *Loughhead*—compact, large-scale multifamily housing. As noted above, places with high population density tend to have higher transit ridership than places with low population density.[132] All else being equal, multi-family housing is likely to have more people per building than single-family housing, which means that neighborhoods with multi-family dwellings tend to have higher transit ridership and to drive less than neighborhoods dominated by single-family homes.[133] Thus, a city that wishes to reduce automobile-related pollution should seek to encourage (or at least allow) multi-family housing in areas near public transit.[134] It follows that a state wishing to encourage transit ridership should restrict lawsuits designed to exclude multi-family housing from existing in compact neighborhoods.

B. The Public Interest Favors More Rental Housing

Throughout the United States, there is a rental housing shortage. This shortage has been caused by 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.[135] Moreover, the supply of rental housing has not kept up with demand. Although the number of multi-family housing starts in 2013 was higher than it was at the start of the economic downturn, it was still less than half the number

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132. *See supra* note 119 and accompanying text.

133. This need not always be the case. For example, if the multifamily building has a huge parking lot that takes up more land than the building itself, it may actually have fewer households than a block filled with single-family buildings with small driveways.

134. *Cf.* Amanda Siek, *Smart Cities: A Detailed Look at Land Use Planning Techniques That are Aimed at Promoting Both Energy and Environmental Conservation*, 7 ALB. L. ENVTL. OUTLOOK J. 45, 54 (2002) (citing an example of a county trying to increase transit ridership by stimulating multifamily housing near transit stations during a discussion of transit-oriented zoning).

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

of multi-family starts in 1985.[136] As a result, between 2006 and 2012, the supply of multi-family units increased by 1.6 million, while the number of renters increased by over 5 million.[137] In addition, 1.9 million rental units were demolished between 2001 and 2011.[138] As a result of these trends, the national rental vacancy rate (8.3%) is at its lowest point since 2000.[139]

As a result of this shortage, rents have increased throughout the United States. Between 2000 and 2014, median household income has increased by 25.4%, while rent has increased by 52.8%.[140] Nationally, the percentage of renters paying more than 30% of their income for housing jumped from 38% in 2000 to 50% in 2010.[141] Twenty-eight percent of renters (including 69% of renters earning under $15,000) now pay more than half their incomes in rent.[142] The explosion in rental costs has not been limited to traditionally high-cost cities. For example, in Hattiesburg, Mississippi, rents increased from 20% of household income in 1979 to 35.2% in 2013.[143]

If homeowners are allowed to use nuisance law to limit multi-family housing, 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 supply of land available for multi-family housing will decrease, the number of new units will decrease, and rents will continue to rise even more than would otherwise be the case. This is the case because of the law of supply and demand: if the supply of a commodity is limited, and demand is unchanged, people will bid up the price for that commodity.[144]

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136. *See* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., STATE OF THE NATION'S HOUSING 34 (2014), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/sonhr14-color-full.pdf.

137. *Id.* at 25. However, about three million single-family homes were rented out. *Id.*

138. *Id.* at 25.

139. *Id.* at 22–23.

140. *See* Krishna Rao, *The Rent is Too Damn High*, ZILLOW REAL EST. RES. (Apr. 15, 2014), http://www.zillow.com/research/rent-affordability-2013q4-6681.

141. *See* Lowrey, *supra* note 135.

142. *See* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 136, at 5.

143. *See* Rao, *supra* note 140.

144. *Cf.* Homeowner's Corp. of River Trails v. Saba, 626 So. 2d 274, 276 (Fla. Dist. Ct. App. 1993) (stating that where there is "a housing shortage . . . the economic law of supply and demand result[s] in unusually high housing prices"); Autumn Corp. v. Lederman, 95 N.Y.S.2d 57, 61 (N.Y. Sup. Ct. 1949) (asserting that the "lack of necessary business rental space due to the last war" led to "the exaction of exorbitant, unfair and unreasonable rents").

In fact, the logic of *Loughhead* 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 in theory persons other than homeowners might be able to assert nuisance claims against builders of new housing. For example, the owner of an office park could argue that nearby housing might clog traffic and thus unreasonably interfere with the commutes of its employees and customers.

In sum, the national shortage of rental housing means that now, more than ever, a neighborhood's phobias should not be used to limit the supply of such housing.

C. Zoning Is a Less Harmful Remedy Than Nuisance

One purpose of zoning is to allow a municipality to create an orderly plan of development for the benefit of the entire city, as opposed to just one landowner or group of landowners.[145] So where a city or neighborhood is divided over a proposed land use, the city can hold hearings and listen to a variety of perspectives, rather than just those of one neighbor.

By contrast, in a lawsuit the court will primarily hear the perspectives of the plaintiff and the defendant, rather than those of the community as a whole. Thus, the court might give undue weight to the perspectives of one or two people. So if nuisance suits become more common in disputes relating to multi-family housing, a city's land use map might be determined not by citywide (or even neighborhood-wide) give-and-take, but by the most successful litigant—thus substituting rule by the angriest litigant for rule by the majority of voters. Even if nuisance suits do not make development impossible, they would make new construction burdensome by forcing would-be builders to face two hurdles (zoning and a lawsuit) where today one hurdle (zoning) is currently the norm. Thus, courts should not allow one or two angry homeowners to use nuisance suits to preempt zoning codes and other municipal plans.

IV. A PROPOSED RULE

For the reasons stated above, courts should not treat new infill housing as a nuisance. But what rule should they adopt? One

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145. *See* Duckworth v. City of Bonney Lake, 586 P.2d 860, 866 (Wash. 1978) ("[T]he 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.")

possible rule might be: "housing should never be a nuisance." But this rule is overly simplistic, because even though new housing is not generally a nuisance, certain features of a building could create a nuisance. For example, a building could have an unusually noisy air conditioning system,[146] or some other rare feature that harms nearby landowners.

A more precise rule would be that infill housing is not a nuisance where the plaintiffs' arguments are limited to concerns about traffic congestion, neighborhood character, or other concerns that have no logical stopping point. Thus, courts should reject nuisance claims where the plaintiffs' major concern is that the housing is denser than nearby tracts of land or would allegedly increase congestion by bringing additional people into the neighborhood. This rule would apply the public policies in favor of new housing and compact development, yet still leave open the possibility that a building or subdivision may have unique features that create negative externalities.[147]

A nuisance plaintiff might argue that, just as many courts balance interests in other nuisance cases,[148] courts should decide infill-related nuisance suits by balancing the disruption caused by new housing against the social benefits of new housing.[149] However, courts should reject this theory for two reasons. First, in cities with zoning, such balancing may already be performed by zoning boards and city councils, as well as by judges overhearing appeals from zoning decisions.[150] Thus, there is no need for judges to duplicate this balancing by adjudicating separate nuisance suits. Second, an additional layer of balancing would make the fate of any new residential development even more unpredictable, and would thus

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146. *See, e.g.*, Nair v. Thaw, 242 A.2d 757 (Conn. 1968) (holding that a house's air conditioning system was a nuisance).

147. By analogy, I suspect that this rule could reasonably be applied to all nuisance arguments that, like concerns over traffic congestion, might be applicable to all new housing. But rather than set out a general rule that might be overbroad, courts or legislatures might wish to decide on a case-by-case basis which arguments are similarly meritless.

148. *See supra* notes 13–14 and accompanying text.

149. Alternatively, a plaintiff might argue that, like the *Loughhead* court, courts should allow nuisance claims in such situations, but grant damages (rather than an injunction) against allegedly objectionable residential development. *See supra* note 30 and accompanying text. But even the threat of damages liability might chill infill development, and thus reduce infill housing supply—albeit to a lesser extent than injunctions which absolutely shut down such projects.

150. *See supra* Part III.C (explaining why nuisance suits should not replicate the zoning process).

reduce the overall supply of infill housing—which (as explained above) would mean that fewer people could live in older neighborhoods, which in turn means more people driving more cars, more danger to citizens from car crashes, pollution, and greenhouse gas emissions, and more expensive housing. These results are a high price to pay for the flexibility of a balancing test.

CONCLUSION

The *Loughhead* plaintiffs argued that a large multi-family building in an area dominated by single-family homes was a nuisance, in part because the building generates traffic and differs from the other buildings in the neighborhood. This argument, if consistently accepted by courts, would mean that any building or subdivision that adds a significant amount of housing to a neighborhood is a nuisance, because any new residents are likely to generate traffic, and any increase in neighborhood population is likely to alter neighborhood character in some way.

If courts frequently use nuisance law to limit infill development, a variety of negative results would become more common. Because infill development would be less frequent, developers would have to build new housing in greenfield sites, often far from downtowns and from public transportation. As a result, more people would be unable to walk or use public transit to jobs and other destinations, causing increased vehicle use and spending on vehicles, as well as additional obesity, pollution, and deaths and injuries from automobile collisions. Moreover, the resulting decrease in new housing construction could raise rents and new home prices. Accordingly, courts should refuse to allow nuisance suits against new housing, at least where such suits are based on concerns generally applicable to new housing.