

November 2010  
Written by  
WESLEY HOTTOT



# HOUSTON, WE HAVE A PROBLEM

Space City Regulations  
Prevent Entrepreneurs From Taking Off

INSTITUTE FOR JUSTICE  
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**Cover Photos**

**Top**—Houston now bans all inflatable advertising.

**Bottom**—Taco trucks across Houston have been put out of commission by the city's burdensome mobile food regulations.



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## Space City Regulations Prevent Entrepreneurs From Taking Off

**by Wesley Hottot**  
**Institute for Justice Texas Chapter**  
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*This report would not have been possible without the gracious participation of the seven amazing entrepreneurs it profiles.*





## INTRODUCTION

Houston is one of America's great cities. With a population of more than 2.1 million,<sup>1</sup> it is the fourth-largest city in the nation.<sup>2</sup> Houston is also a gateway for immigrants from around the world, with 28 percent of the city's population born outside of the United States.<sup>3</sup>

Houston has a proud tradition of fostering entrepreneurship. Indeed, when you compare the city's record to the abysmal standard being set by other cities around the nation, Houston does a respectable job of protecting entrepreneurship and economic liberty. The city has enacted few of the most ruinous ordinances that undermine entrepreneurs in other municipalities. For example, Houston does not have a zoning ordinance and has no general business license. The city

does not regulate landscapers, handymen, beauty services or moving companies. It does not regulate home-based businesses any differently than other businesses. The city's private transportation regulations are not perfect (taxicab licenses are artificially limited), but they are much less burdensome than regulations in other cities (new licenses are meted out, by lottery, every three to four years).<sup>4</sup> Another thing Houston does right is it provides would-be entrepreneurs with a lot of easily accessible information, including business start-up classes.<sup>5</sup> As a result, Houston's economy is booming. In 1960, the city had just one Fortune 500 company; in 2008, the Houston area boasted 23 (only New York City is home to more Fortune 500 headquarters).<sup>6</sup> In 2006, only 22 countries had a gross domestic product greater than Houston's gross regional product.<sup>7</sup> That same year, Houston ranked second in employment growth among the 10 most populous metropolitan areas in the United States and *Forbes* named the city the third "Best Place for Business and Careers" in the United States. The city is a national leader in the energy, technology and aeronautics industries.<sup>8</sup> Houston is undoubtedly an opportunity city,<sup>9</sup> but for whom?



**If entrepreneurship in Houston is to continue its phenomenal success story, the government will have to once again step out of the way of the city's entrepreneurs.**

This report focuses on the things Houston needs to improve in order to remain an opportunity city for all:

- City officials have unfairly targeted taco trucks for extinction by enacting unreasonable regulations that do not apply to their brick-and-mortar competitors. These regulations disproportionately affect immigrant entrepreneurs.
- Confusing and burdensome requirements have made vending on the city's streets and sidewalks impossible. Houston allows street vending on paper only; the city has not granted a street-vending permit for public property since at least 2004.
- In a misguided attempt to make Houston look like a cookie-cutter suburb, the city council has also passed ridiculous sign restrictions and outright bans on certain forms of advertising.

- The city's tow truck regulations until recently included an unapologetic monopoly on servicing freeways within the city's limits. (Today, Houston continues to artificially limit the freeway towing market to just 11 companies and it imposes strict price controls throughout the rest of the city.)
- The city has long fought a war against jitneys—or private vans—despite its desperate need for more public transit options.

In the name of so-called “beautification,” Houston is beginning to turn its back on the cultural and economic vibrancy that made the city so unique.<sup>10</sup> Attempts to transform Houston into a suburbanite's paradise

are changing the city's historically hands-off, bottom-up approach to municipal regulation, even though that approach has been essential to Houston's many past and present economic successes.<sup>11</sup> City officials have also at times indulged the worst forms of protectionism—giving exiting industries an unfair and costly edge over their competitors. If entrepreneurship in Houston is to continue its phenomenal success story, the government will have to once again step out of the way of the city's entrepreneurs.

Houston has long been “a venue where people who work hard can get ahead,”<sup>12</sup> but today the city is in danger of becoming something it is not and should not be—just like every other American city.

## TACO TRUCKS

Houston's mobile taquerias—commonly called “taco trucks”—are a classic example of entrepreneurs finding and filling a gap in the food-service market. Taco trucks provide low-cost, nutritional food to the city's many Hispanic residents, as well as taco connoisseurs of all cultures. Unlike brick-and-mortar restaurants, taco trucks can go to their customers—setting up near a construction site or public event. Because they pay low rent (usually a small fee to park on another business's property), the trucks can pass considerable savings on to their customers without compromising on the quality of their food.

But Houston and the state of

Texas have taken aim at taco trucks and other mobile food businesses in the city.<sup>13</sup> Houston has imposed unnecessary requirements that are stunting the growth of the mobile food industry.<sup>14</sup> The Texas Legislature even became involved, micromanaging the city's regulation of mobile food businesses and making criminals out of the entrepreneurs who own them.

The Legislature became involved at the behest of one city councilmember, Toni Lawrence, who was frustrated with the council's reluctance to enforce stricter mobile food regulations. Councilwoman Lawrence enlisted state representatives Robert Talton and Dwayne Bohac to make an end-run around the city council, which expressed concerns about Hispanic businesses being unfairly targeted for stricter regulation.<sup>15</sup>

The Texas Legislature passed three laws that apply only to Houston.<sup>16</sup> The first, authored by Representative Bohac, required the city to enforce its mobile food rules “in the same manner that [it] enforces other health and safety regulations relating to food service.”<sup>17</sup> The second required Houston to demand written, notarized permission from the owner of the property on which mobile food units operate.<sup>18</sup> Another law passed the same year requires the city to make mobile food units visit commissaries every day.<sup>19</sup> Finally, during the 2009 legislative session, Representative Bohac authored and the Legislature passed a law requiring Houston to include certain items on its mobile food license applications—including the area to be serviced and the address of the commissary from which the business obtained its food.<sup>20</sup>

These new laws, and the city ordinances that resulted from them, have a negative impact on Houstonians who rely on the industry for their livelihoods and on the many more who rely on the industry for quality, convenient food.

The requirements imposed by the new rules are daunting.<sup>21</sup> Before even getting started, a mobile food entrepreneur must obtain a “medallion” (or license) from the City of Houston Department of Health and Human Services.<sup>22</sup> This requires submitting, in-person, two sets of plans that satisfy a 28-point checklist.<sup>23</sup> An inspection of the truck is also required to verify that it matches the submitted plans.<sup>24</sup> The entrepreneur must provide extensive documentation at the



*Estela Jimenez operated a taco truck in Houston for eight years before the city's new mobile food regulations forced her to close down. She simply could not afford to move her truck every 24 hours.*

time of this inspection (including an itinerary and route list) and is required to pay \$560 in fees (including \$200 for the installation of an electronic tracking system).<sup>25</sup> The fact that inspections are only conducted for three hours on Tuesdays and Thursdays adds to the inconvenience.<sup>26</sup>

The operator of a mobile food business is also required to obtain proof of property ownership from any landowner on whose property he will operate for more than one hour a day.<sup>27</sup> Although it might seem reasonable to gain a property owner's permission, the process requires the use of an official Department of Health and Human Services form that must be signed and notarized.<sup>28</sup> The government has transformed the previously simple task of asking permission to use someone's property into a cumbersome legal burden that discourages property owners from agreeing to host a mobile food unit.

Once in operation, mobile food businesses are faced with still greater hurdles. The operator has to travel to one of 15 designated commissaries every 24 hours in order to be cleaned.<sup>29</sup> The number of commissaries is too small and the time it takes to travel to one and wait for inspection limits the profitability of mobile food businesses.<sup>30</sup> Operators must also disclose their menu, including every ingredient used, its origin and how each dish is prepared. Obnoxiously, a new form must be filled out for each ingredient.<sup>31</sup> Further, operators are required to demonstrate the mobility of their trucks when they are asked to do so by any police officer or health officer.<sup>32</sup>

Houston's health and safety concerns could be more fairly met by requiring taco trucks to meet the same stan-

dards as brick-and-mortar restaurants. There is no ordinance requiring restaurants to disclose their menus and the source of every one of their ingredients. Indeed, restaurants would balk at such a requirement not only because it is burdensome and unnecessary, but also because it would force them to give away valuable business secrets. Restaurants do not have to transport their own grease and wastewater; instead, they employ "vacuum trucks," which suck up grease and wastewater and properly dispose of it. Nor do restaurants have to submit separate forms for salt, flour and butter. Taco trucks should only be required to meet basic equipment and sanitation standards and remain subject to inspection. This is all that is required of brick-and-mortar restaurants and it is all that should be required of taco trucks, too.

The truth is the city's health and safety concerns seem to be a cloak for an arbitrary sense of Houston's "beautification." State Representative Robert Talton, one of the legislators responsible for the special mobile food legislation passed between 2005 and



2009, was quoted as saying, “I just don’t want us to become, you know, a Third-World area.”<sup>33</sup> The reality is that the new rules have a greater impact on the city’s Hispanic population because, as late as 2007, Hispanics operated 85 percent of the mobile food service units in Houston.<sup>34</sup>

A small group of taco truck owners sued Houston, arguing that the city’s ordinances and the state laws on which they were based are unconstitutional because they discriminate against minorities.<sup>35</sup> The court dismissed the case because cities are given a shockingly wide berth to enact laws that are “rationally related” to any legitimate government interest. The court thought it was rational for the city to apply different rules to taco trucks and restaurants because taco trucks are mobile.<sup>36</sup> But the court ignored the fact that many taco truck entrepreneurs would prefer not to move their trucks (it is the city that is making them move). The Court did not require the city to show that the taco trucks that do change locations are in any way more dangerous than brick-and-mortar restaurants.

Due to the excessively burdensome and arbitrary requirements imposed by the government, significant

barriers have been placed in the way of local entrepreneurs who want to serve a distinct market in the Houston food-service industry. Some of those entrepreneurs are standing up for themselves and their right to do business in the city.

## *Estela Jimenez*

Estela Jimenez operated a taco truck in Houston for eight years before the city’s new mobile food regulations forced her to close down. She simply could not afford to move her truck every 24 hours. “It’s very hard to constantly move it around, back and forth,” she said through a translator. The cost and the physical burden of packing up the truck, driving it on Houston’s busy freeways and personally draining the truck’s water and grease is just too much. “It’s a waste of time and money for us,” she said.

But Estela has not given in to the government. She has become an advocate for the many other taco vendors around Houston who are threatened by the new regulations, starting the Association of Mobile Taquerias, which now has more than 100 members. “Whenever a particular business has problems, I will go and assist them so that they will be able to continue operating their business,” she said. “The city is constantly making up new requirements that are not about public health,” she said. “The city wants to put these businesses out of business.”

At one point, the city’s health inspectors teamed up with the Houston Police Department to harass taco trucks in the Spring Branch neighborhood. “The first thing they would ask for,” Estela said, “is a valid ID; and then they would run their criminal history.” Estela said this was about the time that Representative Bohac began proposing laws in the Texas Legislature imposing special rules on Houston’s mobile food industry. “It is my understanding that he was receiving campaign contributions from the local restaurant association,” she said. In fact, Bohac has consistently reported large contributions from the Texas Restaurant Association, of which the Houston Restaurant Association is a member.<sup>37</sup>

Estela helped one taco truck owner who was not allowed to get the medallion for which he was otherwise

**“The city is constantly making up new requirements that are not about public health. The city wants to put these businesses out of business.”**

-Estela Jimenez





qualified because he did not have a valid driver’s license. “To me, a driver’s license has nothing to do with being able to sell food and nothing to do with the public’s health. His worker was the one who would drive the truck around and he had a valid driver’s license.” After Estela organized a protest outside of the city health department, officials allowed the man to obtain a medallion.

Estela points out that the taco trucks have been useful at times when hurricanes have come through the city and cut electricity to brick-and-mortar restaurants. “We were able to help out the people who had no power,” she said. “The city should notice that these taquerias are necessary, especially for the labor workers because they are sweaty and dirty and all they want to do is stand in front of the window and ask for their food and go on to work.”

Estela is also concerned about the quality of food that her community has available to it. “They want to force us to eat hamburgers, hotdogs, pizzas, when obviously it is a little healthier to eat what is served at taquerias.”

Asked why she is fighting so hard for other people’s businesses, Estela said, “Because we’ve come to the United States where they say there’s justice for everyone, and so therefore we have to fight for fairness and justice.”

“Just because we don’t understand a particular language,” Estela said, “doesn’t mean that we don’t understand our own rights.”

## STREET VENDING

Houston has effectively outlawed the sale of goods on its public streets and sidewalks.<sup>38</sup> There are two exceptions, both of which are, unfortunately, completely useless to anyone who wants to make a living selling things on Houston’s streets or sidewalks.

First, Houstonians may obtain a permit from the city for so-called “street vending” on *private* property.<sup>39</sup> Second, Houstonians may attempt to obtain a permit from the city to vend on public property, but the permit is only valid in a small district in the downtown core (about 24 square blocks).<sup>40</sup> The trouble is that both of these permits are next to impossible to obtain.<sup>41</sup> (See pages 7 and 8.)

The city recently made an effort to simplify its street-vending permitting regime, but in doing so, made it even harder to obtain and maintain legal permission to vend.<sup>42</sup> For example, under the old regime you needed a \$2,000 surety bond and could use your permit for 40 days; now you need a \$10,000 surety bond, your permit is only good for seven days, and you can obtain no more than two permits in any 30-day period and no more than ten permits in any one year.<sup>43</sup> You have always needed the written, notarized permission of the owner of the property on which you intend to vend or the property adjacent to the public property on which you intend to vend and \$50 in cash for each (short-lived) permit application you make.<sup>44</sup> Amazingly, each application for public-property sales has to be reviewed by three separate city departments, while a fourth department is responsible for accepting the applications.<sup>45</sup>

Houston has made it so difficult to get a street-vending permit, it does not have any legal street vendors on its public streets or sidewalks. Open records requests to the city show that from July 2004 to June 2009, it did not issue any street-vending permits for the sale of goods on public property, but cited 1,541 individuals for selling goods on city streets without a license.<sup>46</sup> Nevertheless, the city continues to make criminals out of those who cannot obtain street-vending permits, imposing fines between \$250 and \$500 and a criminal misdemeanor on anyone who fails to obtain a permit.<sup>47</sup> The result is that Houston supposedly has street-vending permits, but it has no legal street vendors.



# MY EXPERIMENT IN NOT OBTAINING A STREET VENDING PERMIT

By Wesley Hottot

It is all but impossible to obtain a street-vending permit. I know because I tried. I am a licensed Texas attorney and I could neither understand Houston's requirements to obtain a street-vending permit nor convince the city to grant me a permit. In fact, I could not even convince city officials to accept my application. A potential entrepreneur who was forced to go through the same process that I went through would undoubtedly come away frustrated.

1. First things first, I had a lot of trouble finding the street vending application. It took almost an hour to find the appropriate forms on the city's website. Then, the relevant webpage only had out-of-date forms with 2006 dates on them. These being the only available forms, I pressed on.<sup>48</sup>
2. Next, I had to identify a bonding agency that would be able to provide the required surety bond. (A surety bond is a contract under which one person agrees to guarantee that another person will perform his obligations to a third person.) I visited the Texas Insurance Commissioner's website and searched for some guidance, eventually finding a list of agencies in the business of bonding in Texas. I found six located in my hometown of Austin and a separate link for the National Association of Surety Bond Producers that yielded two more. With a list of eight firms, I began making calls.
3. Four of the eight bonding agencies said they had not heard of a surety bond for street vending and would not be able to provide one. One agency said they did not do bonds for \$2,000 because the amount was too low. Only two firms initially said they could do this type of bond, but one, after checking with their underwriter, changed their mind. (The underwriter said I needed insurance, not a bond.) After two hours of phone calls, one of the eight bond agencies I found in Austin was willing to provide a street vending bond.
4. I met with an agent at the one company that would consider selling me the required surety bond. The bonding agent had no idea what a street vending bond was and I had to explain it to her.
5. The agent tried to locate Houston's bond form online and this took about 20 minutes. When she found the city's form, it automatically generated the effective date as well as an expiration date of exactly two years and 40 days later. I said I would need to change the effective date of the bond because it would take me a few days to travel to Houston and get my application submitted. She said that the city's form would not permit her to change the dates, despite the fact that I would need at least another day to get my application and bond to the city.
6. The bonding agent said the fee for the bond was also automatically generated and that it would be \$250. I protested because the city's application form said the bond fee could not be more than 10 percent of the bonded amount (or \$200 on a \$2,000 bond, or \$1,000 on the city's new \$10,000 bonding requirement).
7. The bonding agent called her supervisor and, after another 20 minutes, said the premium could be reduced to \$175 if I would agree to limit the term of the bond to two years. I pointed out that the city requires the bond to run at least two years and forty days (or two years longer than the vending permit). The bonding agent said the fee was automatically generated and that I would have to pay \$250 and then ask for a refund. Also, I had to pay a four percent fee for using a credit card.
8. I waited one hour while the agent prepared the necessary paperwork.
9. Writing up the application for a 40-day license also presented challenges (the new ordinance only allows for a seven-day permit). I entered the effective dates according to the formula on the form—my date of application (August 31, 2009) to 40 days later (October 9, 2009). These dates were probably not going to work, from the city's perspective, because they did not parallel the effective date on the surety bond, which ended on October 7, 2011 according to the city's automatically generated bonding form.
10. Next, I was required to draft a "true and correct statement showing the kind and character of the goods and merchandise which will be exhibited or sold: Marked Exhibit 'A.'" So I wrote: "I, Wesley Hottot, will use the itinerant vendor's license to sell only used books," signed and dated it, marked it as "Exhibit A-1" and

made a photocopy of the cover of Jane Jacobs' *The Death and Life of Great American Cities* and marked it "Exhibit A-2."

11. Another burdensome requirement involved obtaining a notarized statement of consent from a property owner adjacent to the specific location where I intended to sell my books. Well, I was not sure where I wanted to sell and, in any event, the downtown core where permitted street vending is allowed is nothing but high rises. The city's requirement that I obtain the permission of the fee owner (that is, the underlying owner of the property, not its user) was completely impractical. The owner of those few downtown properties near which I would, in theory, be permitted to vend were in all likelihood multinational corporations and real estate investment trusts—not the sort of folks whom you can just call up and ask for notarized permission. Although the city's street vending application packet included the permission form, there was nothing in the code, at the time, which required written permission for the city's private property street-vending license.<sup>49</sup> I resolved to get my private property vending license in place and then try to find permission for the public property permit.
12. I gathered my paperwork and the required sum of \$50 in cash (the application states in bold and caps: "\$50-CASH") and made my way to Houston to file the application.
13. My experience at Houston's Finance and Administration Department,<sup>50</sup> posing as an aspiring small business owner, was far from welcoming. You can't get into the building without giving your driver's license number, submitting to a search and getting a visitor's badge. In the permitting department, there were two people waiting dejectedly. I told

the clerk that I wanted to apply for a street vendor's license and pulled out a packet of materials. "You'll need a surety bond," she told me. "I have one with me," I said. This clearly surprised her, their first line of defense having failed. "You'll also need permission from a downtown property owner," she said. Not having this permission, I pointed out that nothing in the city code required me to have written permission to get a license to vend on private property. I showed her a copy of the ordinances, but she refused to read it. I was asked to wait.

14. After 10 minutes, I went back and asked if I could apply for the private property vending license but not the public property permit (these are in entirely separate sections of the city code).<sup>51</sup> The clerk asked me to wait again.
15. After another 10 minutes, the clerk called me back to the permitting desk. No one can apply for the private property vending permit without obtaining the public property permit, she told me.
16. I asked if there was anyone else I could talk to about it. No, again. Frustrated, I decided to leave and turned to looking for a downtown property owner who would sign off on the permission form.
17. I walked around the 24-block area where I could potentially conduct business hoping to identify at least one building that was not a skyscraper. I walked the entire area and found just one structure—the Houston Heritage Society's museum in Sam Houston Park—that was not a high-rise or government building. They were closed. Finding an accessible property owner to sign the statement of consent proved impossible.
18. I returned to Austin with my \$250 surety bond and no street-vending license.

I spent nine and half hours trying, and failing, to get Houston's permission

to sell used books on public property. I spent six additional hours just trying to understand how the relevant ordinances work together and which city departments were responsible. With travel included, I spent nearly 20 hours trying to get what should be a simple permit. I cannot imagine how an aspiring street vendor would fare any better, nor can I imagine how the city of Houston expects anyone to comply with its unnecessarily restrictive street vending requirements.

*Houston needs to abolish both its private property and public property street-vending ordinances or, at least, make some major changes.*

*The city should abolish its surety bond requirements and allow would-be vendors to obtain insurance instead of surety bonds. Doctors, lawyers, and airlines operate without surety bonds; these businesses inarguably involve much more risk to consumers than street vending.*

*Further, the city should stop putting would-be vendors through the bureaucratic ringer every seven days.*

*The city should also grant year-long or even two-year-long permits, rather than creating unnecessary paperwork for would-be vendors and city bureaucrats alike.*

*For its public property vending permit, the city should also abolish its requirements that would-be vendors obtain the written, notarized permission of adjacent private property owners, who have no more claim to city streets than anyone else, and also abolish its restriction on sales outside of downtown's tiny "theater/entertainment district."*

My personal experience attempting to obtain a street-vending permit from the city of Houston demonstrates how city officials, currently, do not want anyone to obtain one.

## WINDOW SIGNS

Houston has drastically reduced the advertising options of its small businesses in the name of government-imposed “beautification.”

Amendments to the Houston Sign Code,<sup>52</sup> effective in September 2009, make it illegal for businesses to cover 20 percent or more of any glass storefront with advertising unless they obtain a permit for each sign.<sup>53</sup> Convenience stores are flatly prohibited from placing advertisements in their windows anywhere from three feet above the ground to six feet above the ground.<sup>54</sup> As a result, the simplest and most traditional form of advertising—putting a sign up in your window—has been dramatically limited in the city of Houston.

Obtaining a sign permit is far from easy. Permits require entrepreneurs to submit sworn applications to the city’s Sign Administrator.<sup>55</sup> Applications must be accompanied by drawings and a description of the sign to be permitted.<sup>56</sup> Each sign requires a permit and an accompanying fee of \$35.<sup>57</sup> A permit must be renewed every three years.<sup>58</sup>

Houston has made it much too difficult for a shop owner to tape an everyday message—like “50% OFF” or “SALE”—in his or her window. A shop owner who wants to put a “50% OFF”

sign in the window should not have to draw a picture of the sign, visit and pay a notary, pay the city a fee and travel to the Sign Administration for the privilege. But a shop owner who does not get a permit risks a criminal misdemeanor punishable by a \$300 to \$500 fine for each day his or her sign is up. A convenience store owner could not even get a permit to post this basic sign in a place where his or her customers could see it.<sup>59</sup>

The letter of the law exempts only painted signs that cover less than 20 percent of a glass storefront,<sup>60</sup> but in practice Houstonian entrepreneurs are far more likely to tape a paper sign to their store’s windows than they are to paint advertising onto their windows. As a result of the city’s permitting regime for paper signs, most businesses are subject to harassment by Sign Administration officials.

The sign code’s restrictions are content-based, targeting only commercial speech. Other types of speech, such as political or artistic speech, are allowed.<sup>61</sup> Businesses remain free to put up Houston Astros signs, signs supporting political candidates or even murals and other art—the rules only apply to signs that convey a commercial message. This is clearly at odds with Houston’s stated purpose of improving the city’s “look.” After all, political signs are just as likely as commercial signs to feature bold colors and strong messages, and art is often controversial or confrontational. Commercial signs, by comparison, intentionally try to be pleasing to the eye.

What this disparity really demonstrates is that the city understands that political and artistic speech enjoy broad First Amendment protection.<sup>62</sup> Meanwhile, Houston devalues the free speech rights of small businesses. Business owners have a constitutional right to communicate accurate information to customers.<sup>63</sup> The ability to attract customers and convey information about prices and services is crucial to the daily survival of small businesses. Without it, they are rendered mute and may soon find themselves out of business



and customers are left without valuable pricing and service information.

A similar ordinance in Dallas prompted the Institute for Justice to file a lawsuit against the city.<sup>64</sup> There, businesses are prohibited from covering more than 15 percent of any window or glass door with advertising and, in addition, advertising is restricted to the lower third of any window or glass door.<sup>65</sup> In Houston, small advertising companies are leading the campaign against the new sign code.

## Glenn Dodd

Glenn Dodd owns two FASTSIGNS franchises in Houston. Glenn has been in Houston since 1966 and got into the sign business 16 years ago after a successful career in engineering. He believes signs are an essential tool for the city's many small businesses and their customers. He is angered by the city's 20 percent limitation on window signage.

First of all, Glenn is understandably confused by what the city means by 20 percent "of a glass storefront." "It may be 20 percent of each pane of glass, I'm not sure," he said. "I'm hoping certainly that it's 20 percent of the total glass space, but either way, it's inequitable."

Glenn has seen two major revisions to the sign code. Each revision, he said, has added layers of expense and inconvenience to what used to be a simple process. "Are we trying to eliminate all signs? And if we are, I think that's a big mistake. Not because I'm in the business, but because I'm a consumer."

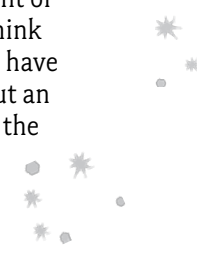


*FASTSIGNS owner Glenn Dodd.*

For example, FASTSIGNS does a lot of work advertising for real estate and leasing firms. Prior to the first major sign code revisions, Glenn was permitted to place a banner on an exterior wall as long as he got a permit. Today he is also required to "frame" the sign—that is, affix to the wall using some sort of rigid material like plywood or metal.<sup>66</sup>

The permit for a banner is good for no more than seven days in any 30-day period. Each new seven-day period requires a new permit, new site inspection, new construction permit and the appropriate fees.<sup>67</sup> Though onerous, Glenn describes the banner restrictions as the cost of doing business. He said, "Permits add to the cost of installing a sign and the cost passed on to my customer—the sign owner—and he ends up passing it on to his customer, and so on."

But Glenn is especially offended by the city's new permitting requirements for signs covering 20 percent or more of any glass storefront. "I think they've gone too far," he said. "If I have carrots on special and I want to put an eight-square-foot paper poster in the





window to let people know, ‘come here and get your carrots cheap,’ I should be able to do that without having to get a permit.”

Glenn said the paperwork necessary for a basic sign, combined with the required trip to the Sign Administration, takes his professional staff an average of four to five hours per permit. More complicated signs—like those placed on the exterior wall of a business—can take two or three times as long because they require multiple visits to the city’s Sign Administration. As a result, Glenn’s customers are increasingly giving up on placing signs on their businesses.

What the new ordinance has done, Glenn said, “is to move the sign code inside your business.” If you choose to turn signs outward toward the street, where customers can see them, then you are going to need a permit. “To me,” Glenn said, “it just makes no sense.”

Glenn participated in some of the city’s public hearings on the new sign code. He remembers proponents of the new code insisting that its provisions were pro-business, using a telling example: “Exxon, they said, could still have its name on a building. I’ll never forget sitting there in the audience and thinking, well, what about Joe’s Cleaners, he doesn’t have the budget that Exxon has, or Sally’s Laundromat, or Sam’s Garage, or Charles’ Gas Station, you know, these people don’t have a big budget for advertising. They may not have a budget that now allows them to advertise under the new sign code. It is just unfair.”

## INFLATABLE ADVERTISING

At the same time that Houston is limiting small businesses’ rights to display window signs, city officials have vindictively decided to ban another low-cost form of advertising. Inflatables—or large nylon balloons, often playfully shaped and painted with commercial messages—were recently outlawed by the city in response to a court ruling that its existing regulations of inflatables were unconstitutional.

Few advertising methods are as cost-effective and eye-catching as inflatables. Inflatables have become more



**“Something has to be done to make cities take the Constitution more seriously. I have a right to pursue my livelihood as long as I’m not doing anything illegal.”**

**-Jim Purtee**

popular in recent years because they are an inexpensive way to attract customers and because they are fun. For businesses that cannot afford to do one-time television, radio, print or direct mail advertising, inflatables offer effective advertising for about \$1.60 an hour, 24 hours a day. But the city of Houston has declared war on the inflatable advertising businesses, as well as the small businesses that rely on them.

Houston did not regulate inflatables—which it self-servingly refers to as “attention-getting devices”—until 1993. The city’s original ordinance exempted so-called “attention-getting devices” carrying generic messages, but required government-issued permits for devices carrying business-specific messages.<sup>68</sup> This meant that you needed government pre-approval to install a balloon advertising your business or its specific services—for example, “Lunch \$4.99”—but were free to install one that had little or nothing to do with your business—for example, “Sale” or “Merry Christmas.”

The old ordinance was confusing to say the least. It was seldom and selectively enforced. Car dealerships were given an unwritten pass. Code enforcers had an unreasonable amount of discretion to decide which signs fell within the city’s ordinance (and thus required permitting) and which fell outside of it. They seemed to only target inflatables, and even then only from time-to-time.

Fed up with the old ordinance, advertising entrepreneurs success-

fully challenged the city’s regulation of “attention-getting devices” in federal court. (See p. 14.) The court ruled Houston’s ordinance unconstitutional under the First Amendment’s guarantee of freedom of commercial speech because it made arbitrary distinctions between generic and business-oriented messages.<sup>69</sup> Houston was less than sportsmanlike about the ruling.

The city responded to their defeat in court by banning “attention-getting devices” altogether. Beginning January 1, 2010, Houston flatly prohibits inflatables and other “attention-getting devices.”<sup>70</sup> The city’s definition of an “attention-getting device” is exceedingly broad. It includes all devices “erected, placed or maintained outdoors so as to attract attention to any commercial business, or any goods, products or services[.]”<sup>71</sup> The ordinance provides a non-exclusive list of examples of the kind of commercial advertising prohibited in the city—banners, cut-out figures, strings of ribbons, pinwheels, balloons, non-governmental flags, pennants, whirligigs or wind devices.<sup>72</sup> Why a government flag concerns the city less than a commercial flag, the ordinance does not make clear.

Advertising entrepreneurs remain understandably frustrated with Houston’s war on commercial messages.

## *Jim Purtee*

Jim Purtee owned Houston Balloons & Promotions, LLC from 1998 until 2009. Jim recently sold his family business in large part because of the headache of dealing with the city of Houston’s new inflatable ban.

The story of Houston Balloons is a classic of American entrepreneurship. Jim had been in the restaurant business all of his adult life and he had become tired of it. He helped a friend open an inflatable advertising company in Florida and watched it grow quickly. Jim decided he was in the wrong business. He soon opened his own inflatable advertising company in Alabama.

Jim moved the business to Houston shortly after opening to take advantage of the city’s large and diverse market and because the city, at the time, allowed inflatable advertising. Existing inflatable advertising companies in Hous-





*Texas Boys Balloons owner Dallas Foster.*

ton focused on car dealers. When he entered the Houston market, Jim said to himself, “I’m going to give those guys the 200 or 300 car dealers and I’ll take the other 30,000 small businesses.” Jim spent his time going door-to-door to small businesses and making contacts. Houston Balloons is now the largest independent installer of inflatable advertising in the United States.

In 2005, Houston Balloons’ customers began to receive citations for having content on their inflatable advertisements. For example, one of Houston Balloons’ customers was told that they could not advertise their furniture business with an inflatable chair, because the chair bore too close a resemblance to the nature of their business. “You could put that same inflatable of a chair up on a service station,” Jim said, “but you couldn’t put it on a furniture store.”

More customers began coming to Jim and saying that if they could not advertise with custom messages, then they would no longer bother with inflatable advertising. “By 2006,” said Jim, “we were losing a lot of business; so we filed suit.”

Houston Balloons successfully fought the city’s old attention-getting device ordinance in federal court.<sup>73</sup> In the summer of 2009, a federal judge awarded Houston Balloons over \$900,000 in damages based on the city’s unconstitutional (and irrational) content-based regulation of inflatables. Under the First Amendment, governments cannot regulate advertising based on the content of the message.<sup>74</sup> Unfortunately, Houston responded to its defeat in court by banning all so-called “attention-getting devices.”

Hypocritically, the city of Houston has ordered inflatable advertising from Houston Balloons more than once (for a park dedication, police fundraisers and other municipal events). Even the Federal Emergency Management Agency has ordered advertising from Houston Balloons in

an effort to notify residents of the agency’s relocation after a major hurricane.

Jim had to spend about \$243,000 in legal fees to fight the fourth largest city in the United States over an ordinance that was clearly unconstitutional. “Something has to be done to make cities take the Constitution more seriously,” he said. “I have a right to pursue my livelihood as long as I’m not doing anything illegal.”

The prohibition on inflatables is even worse than the old, irrational and selectively enforced ordinance, Jim said. “You’re basically saying that we no longer are allowed to do business in Houston.” Indeed, Houston lost one of its greatest success stories when Jim Purtee pulled up his stakes and left town.

## *Dallas Foster*

Dallas Foster owns Texas Boys Balloons in Cypress, Texas, just outside of Houston. His business depends on the many small businesses in Houston that want to catch their customers’ eyes with customized inflatable advertising.

Dallas got into the inflatable business when he left college, first working for someone else’s company, and then, once he recognized the near-limitless



market for customized advertising, opening his own business. Explaining his love of playful, eye-catching advertising, Dallas said, “I decided it would be best if I found work that made me smile along with other people.”

Texas Boys Balloons started off as a small sole-proprietorship six years ago, but according to Dallas, “it got really big, really fast.” That is, until the government got involved.

When Dallas’ customers began to hear about Houston’s upcoming ban on inflatable advertising, business began to fall off. “The day after they passed this ban,” he said, “it was in the news.” Dallas received a call from a potential client that had decided not to purchase a balloon from him because she said she no longer saw the point in buying a balloon that she would only be able to use for no more than a year. “The ordinance,” said Dallas, “hurt me the next day and it’s hurting me today.”

Dallas is now looking for business opportunities outside of Texas—recently putting up balloons in Mississippi, Florida and Washington state—

when he would prefer to stay close to his customers.

In 2008, Mayor Bill White explained to Dallas that the city needed to ban inflatables because, “‘we just don’t like them,’ he said, ‘they’re ugly.’” But the city’s advertising ban, Dallas argues, will lead to a cycle of business closures that will not only hurt Houston’s economy, but will also undermine the city’s aesthetic justifications for its new ordinance. “A business with no sign is a sign of no business,” he said.

## TOW TRUCKS

Houston’s controversial SafeClear program has institutionalized government favoritism under the guise of freeway safety. In 2004, the city partitioned the freeways within its limits into 29 individual segments. It then auctioned off each segment to the highest bidder. Just 11 tow companies were given the exclusive right to operate on the freeways within city limits, relegating every other tow truck to the city’s surface streets.<sup>75</sup>

Since its inception, SafeClear has been unpopular with Houstonians.<sup>76</sup> The program eliminated their freedom to choose a tow truck company and, instead, imposed government-favored tow companies on everyone. SafeClear’s mandates initially required Houstonians to pay for the privilege of being towed off the freeway by a government monopoly. When it became clear that many residents could not afford to pay, the city announced that tows off the freeway would be free, prompting one city councilwoman to call SafeClear “socialized towing.”<sup>77</sup>

It took a federal lawsuit to convince Houston that granting an outright monopoly to 11 tow companies was not only unwise, it was illegal.<sup>78</sup> After SafeClear lost in court, the city could not openly sell exclusive rights to tow vehicles off freeways within the city limits. Instead, the city council preserved SafeClear by other means.

**Houston lost more than 500 trucks in one year after its insurance requirement and price controls went into place.**



*President of the Houston Professional Towing Association, Suzanne Poole, left, and owner of Nick's Towing Service, Nick Harris.*

First, the city amended its towing ordinance to add requirements for trucks that participate in so-called “police tows”—that is, any emergency tow supervised and approved by a police officer.<sup>79</sup> The city then made every freeway tow a “police tow” by assigning officers to monitor freeway cameras and approve the tows.<sup>80</sup>

Tow trucks that want to be in the business of police tows in Houston now must sign a contract with the city agreeing to work one of five predetermined zones.<sup>81</sup> Only some of them—the same 11 tow companies that participated in the SafeClear monopoly—have been given exclusive contracts to work freeway zones.<sup>82</sup>

Even a wrecker company that wants to perform “police tows” on surface streets must obtain a \$1 million insurance policy per truck.<sup>83</sup> (Houston used to require, in line with the state of Texas, \$500,000 in insurance per truck.<sup>84</sup>) Additionally, it must agree to accept no more than a government-prescribed rate for the tow.<sup>85</sup> Currently, that rate is \$140. No matter what you have to do or where you have to drive it's \$140. Houston lost more than 500 trucks in one year after its insurance requirement and price controls went into place. “We went from almost 1,300 to less than 700,” said Suzanne Poole, the president of the Houston Professional

Towing Association. “The intent was to knock out the better part of the competition.”

SafeClear was set to expire in June 2010, but the 11 chosen tow companies successfully fought to keep the program from expiring and from being put out to bid.<sup>86</sup> The continued anti-competitive efforts of the SafeClear participants (and the city's complicity) have profound consequences for smaller tow truck companies.

## *Suzanne Poole*

Suzanne Poole is the president of the Houston Professional Towing Association and the owner of A Best Towing Company. She was a corporate manager for an education firm in Houston when a terrible car accident took her out of the job market for



**“Our people are small business people.  
The idea of buying a brand new truck is  
not something they can do.”**

-Suzanne Poole



three years. Partially disabled, she went looking for whatever job she could find.

After bouncing around a few unsatisfying positions, Suzanne took a job working for a repossession company. She started out at the bottom of a seniority hierarchy that placed six men ahead of her, but she stuck with it—sometimes working with one of her young children alongside her in the truck. Over time, she worked her way to the top of the company and became a partner. She started her own company in 1983.

Prior to 1996, Houston had two specific “tags” (or license plates) for towing—a private wrecker tag, which allowed the tow truck to work non-accident jobs (for example, relocation of inoperative vehicles, repossession and impoundment) and an emergency wrecker tag, which allowed the tow truck to work accidents. Suzanne has always worked on the private tow side of the industry.

At the end of 1995, Congress de-regulated towing so that it became illegal for the city to continue to restrict tow trucks to emergency or non-emergency services.<sup>87</sup> Suzanne was ecstatic—the change meant she could double her potential business. But Houston was slow to comply with the new law. She said, “The people that had emergency tags had an extreme investment in keeping it regulated—in some cases, those tags were being sold to other tow operators for \$80,000 apiece.” In 1996, Suzanne joined the Houston Private Towing Association (a predecessor to her Professional Towing Association) when the organization successfully brought a lawsuit to force the city into compliance.

The genesis of SafeClear lies in the federally mandated end to the city’s restrictions on towing services. “Ever since,” Suzanne said, “the emergency folks have been trying to get their foothold back.” At the first city council meeting after the federal law went into effect, representatives of the emergency towing companies tried to get an exclusive contract for all of the city’s emergency tows. It didn’t work.

But then the traffic situation in Houston changed. Traffic congestion became a citywide menace in Houston throughout the 1990s. When the Katy Freeway was being expanded to eight lanes in 2004, SafeClear was instituted as a pilot program. “We automatically saw it as a threat,” Suzanne said. “After three months of the pilot, I started hearing that the city was thinking about expanding SafeClear and selling the freeway.”

Suzanne saw that the gains she had made in 1996 were about to be lost. “About eight miles of freeway sold for \$100,000 payable to the Houston Police Department.” There was no way that Suzanne’s small business could compete with larger companies at those kind of prices. She would have to give up emergency tows on the freeways.

As SafeClear was being rolled out, the city announced standards that tow trucks in the program could not be more than three-years old. “Our people are small business people,” Suzanne said. “The idea of buying a brand new truck is not something they can do. First of all, they have equipment already. They’re comfortable with it, it’s well-maintained. You’re talking about a \$60,000 investment for a basic wrecker by the time you pay for the inspection, the certification and everything else.”





SafeClear got up and running in January 2005. “By mid-February,” Suzanne said, “265 cars had been lost in storage because people couldn’t get them out. They were towed off the freeway at their expense, but they did not have the money to pay.” Suzanne said, “There was a great citizen protest. To preserve the program, the mayor had to give the tows away for free.” For each freeway tow, SafeClear operators are paid \$61, whereas many companies used to tow stranded motorists off the freeway for little or no cost, Suzanne said, because it was great advertising.

The free tows quickly created their own problems. “It took a long time to educate the public about SafeClear,” Suzanne said. “Even assuming everyone in Houston knows about the free tows (and they don’t), let’s say you’re from Louisiana and you have a blowout on I-10 in Houston. You don’t know there are free tows. This wrecker isn’t going to tell you there are free tows. So the wrecker will have the person sign the tow ticket and pay, then he’ll take the ticket to the city and get paid again.”<sup>88</sup> The city eventually tuned into this problem, Suzanne said. “Now we’ve got three or four city personnel just verifying tickets, adding hugely to the cost. The original design of SafeClear was to make money for the city. That is not happening.” Instead, the free tows have cost the city nearly \$8 million.<sup>89</sup>

Suzanne remembers a better time before SafeClear came along, when tow trucks traveling down the

freeway would see someone in danger, stop and give them a hand. Usually for free, the private tow companies would help folks off the freeway and hand them a business card. The driver then would call the tow company and pay them for a tow sometime in the future, or would recommend them to friends. “That good turn doesn’t happen anymore,” Suzanne said, “because it can’t.”

SafeClear hurts small businesses and should be repealed, Suzanne said: “The wreckers in this city are not only over-regulated and restricted as to where they can work and how they can work, they’re also severely economically crippled by the SafeClear monopoly.”

## *Nick Harris*

Nick Harris is the sole-proprietor of Nick’s Towing Service. He learned the business working as a AAA dispatcher while he was in school, but he wanted to start his own business. “In our society, we go to school and go to work for someone else,” he said. “I wanted to go out and start a business.” Nick worked for another wrecker service for eight months and then got his own business off the ground in 2003.


Nick works so-called “police tows” around Houston—he picks up cars involved in accidents or that the city wants removed from the roadway. When he started out, he could work anywhere in the city. “At the time,” he said, “it wasn’t regulated and we had an open zone. We worked all over Houston.”

But now Nick has to sign the city’s standard contract in order to conduct police tows, he has to agree to work only a certain area of the city and he has to agree to charge no more than \$140 for his work. Despite the successful court challenge to Houston’s regulations, Nick is still restricted to the city’s surface streets. Because he’s not in SafeClear, Nick’s towing badge says “Non-Freeway.”

“The city is hurting small businesses in so many ways,” Nick said. “I’m paying more for insurance to operate my truck than I pay to rent my apartment.”

It takes Nick only about 10 seconds to repossess a car on a surface street. But extracting a car from the freeway





is very different, he says, because of the city’s SafeClear regulations. Before assisting a car on the freeway, a truck has to contact TranStar—the city’s freeway monitoring system. The procedure for extracting a car from the freeway is tedious. The tow truck has to pull up behind the stranded vehicle; TranStar officials have to verify that the tow truck is visible; the driver has to radio the license plate of the car to be towed; the driver has to radio TranStar the vehicle identification number (“which means, you’re standing next to the bumper in traffic,” Nick said); then the driver has to get back in his truck, get the okay, get back out in traffic and get in front of the vehicle in order to tow it.


SafeClear makes it take longer to get cars off the freeway. “When the freeway was unregulated,” Nick said, “if we saw someone on the side of the road, we’d say ‘hey, you wanna get off the freeway’ and it took about five minutes to get it done.” Because of SafeClear, it now takes tow trucks at least 20 minutes to get a car off the freeway, Nick says. “What’s the purpose of having a program to keep traffic moving and keep the freeways clear,” he said, “if it takes longer than it used to in order to clear the freeway?”

## JITNEYS

Considering Houston’s traffic congestion problems, you would think the city would work to keep personal cars off the streets and to encourage ride-sharing. Instead, the city fought, and lost, a 10-year battle to keep jitneys off the road.


Jitneys are private vans that carry passengers on a fixed route, according to a flexible schedule, for a flat fee. Jitneys emerged with the growth of private automobiles in the early 20<sup>th</sup> century as an alternative to crowded and slow streetcar services.<sup>90</sup>

The history of jitney service nationwide provides an excellent illustration of why economic liberty—the basic right to earn an honest living in a chosen occupation without arbitrary government interference—is so important. Before jitneys emerged, urban transit was provided solely by electric street railways. After L.P. Draper began his jitney service in Los Angeles in 1914, however, the face of urban transportation changed, at least temporarily.<sup>91</sup>




An economic downturn during the First World War left many men unemployed or underemployed. Some invested their life savings in a Model T automobile and began picking up passengers along street car lines for a nickel (or a “jitney” as it was called). Operating jitneys gave them a chance to earn a living and provide for their families.<sup>92</sup> Jitneys provided more rapid and efficient service than streetcars. (At 15 miles per hour, they traveled up to 200 percent faster than streetcars.<sup>93</sup>) Most jitneys stayed on designated routes; others drove passengers to their doors.<sup>94</sup>

Houston was one of the earliest and most enthusiastic adopters of the nickel cars.<sup>95</sup> In some cities, hundreds of jitneys emerged within a few weeks.<sup>96</sup> By 1915, more than 60,000 jitneys served 175 cities.<sup>97</sup> Jitneys’ great success in the early 20<sup>th</sup> century was largely attributable to dissatisfaction with the electric streetcar. Passengers resented the fact that the companies that owned streetcars—many of whom lived outside their communities—took their customers for granted. As a monopoly, the streetcars tended to ignore customer needs and, as cities grew, increasing numbers of passengers made for long, uncomfortable trips.<sup>98</sup> Jitneys, on the other hand, were seen as “a liberating new form of transportation for the common man,”<sup>99</sup> because they did not make frequent, long stops like streetcars.<sup>100</sup> In some cases, jitneys appeared during streetcar workers’ strikes. When the strikes ended, the jitneys remained because they offered a service customers demanded.<sup>101</sup>




As jitneys became increasingly successful, streetcar companies saw their profits spiral downward and they began a concerted effort to eliminate jitneys' competitive threat. Eventually, streetcar companies used their clout to pass anticompetitive legislation restricting jitneys, including caps on the number of jitneys, substantial licensing fees and even outright prohibitions.<sup>102</sup> These laws made it increasingly difficult to provide jitney service. By the mid-1920s, jitneys had virtually disappeared from the streets of American cities.<sup>103</sup>



Houston banned jitneys in 1924 in response to pressure from streetcar companies that wanted protection from competition. The law prohibited jitneys from operating on any public street with streetcar tracks. It also prohibited jitneys with less than 15 seats from operating anywhere in the city.<sup>104</sup> Because jitneys were universally small vans or cars, the ordinance was effectively, and intentionally, a total ban.

Demonstrating the public's need for jitney services, the city repeatedly suspended its anti-jitney ordinance



during transit union strikes. In the 1980s, the city also operated its own mini-bus system downtown for 10 cents a ride. In fact, a 1984 report by the Federal Trade Commission found that there was no "economic justification for regulations that restrict shared-ride [...] jitney services" and that such regulations "impose a disproportionate impact on low income people."<sup>105</sup>

Seventy years after the city's jitney ban was put in place, a federal court ruled that the ban was unconstitutional and outdated.<sup>106</sup> The court found "no evidence that jitneys would currently pose any greater threat than similar vehicles operating on city streets today."<sup>107</sup> The ordinance was also found to "deprive[] the public of another form of public transportation which [was] desperately needed in the [c]ity of Houston."<sup>108</sup>

Under court order, Houston revised its ordinances in 1995 to permit jitneys.<sup>109</sup> The story behind this court case is a telling tale of entrepreneurship and the many challenges it faces in Houston.

## *Alfredo Santos*

Alfredo Santos (who goes by Santos) became a cab driver in Houston in 1980. "I made a lot of money back then, because the bus system was so bad," he said. But in 1983, the economy in Houston started to go down and Santos' profits dropped, so he took a brief vacation in Mexico.

One day he was trying to get around Mexico City when he could not find a bus or taxi. "I kept seeing these vans pull up and the doors open. I asked a lady what these were called





*Jitneys are more reliable than city buses and less expensive than private taxicabs. They help Houstonians fill the gaps between the city's public transportation options. "A person who has a lot of money but not a lot of time, they're going to flag a cab because money is not an object; a person that doesn't have a lot of money but that has a lot of time will wait for the bus; but what about a person who has a medium amount of money and a medium amount of time? I knew that they would jump in a jitney," says former jitney owner Alfredo Santos, right.*

and she said 'peseros.'" Peseros are the Mexican version of jitneys—cheap private vans that run along fixed routes. (They take their name from the fact that they once cost as little as a peso per ride.) In Mexico City, peseros are more popular than the government's buses. "I got in one and took a ride," Santos said, "and I said to myself, 'why didn't I think of this?'"

Santos knew that the simplicity of jitney service, along with its low cost, would be popular with Houstonians. "A person who has a lot of money but not a lot of time," he said, "they're going to flag a cab because money is not an object; a person that doesn't have a lot of money but that has a lot of time will wait for the bus; but what about a person who has a medium amount of money and a medium amount of time? I knew that they would jump in a jitney."

When he got back to Houston, Santos started a jitney service on the east side of town, "where all the Mexicans live," he said. Santos figured that because jitneys were popular in Mexico, Mexican-Americans would be the most likely to use them in Houston. He named his jitney service Pesero Service, used his licensed cab instead of a van and charged \$1 for every five miles. It worked like a charm. He said, "If people have more choices in transportation, then people fulfill their needs as they see fit."

Santos' Pesero Service grew very quickly and he could not handle all of the business himself. "In 1983, the economy in Houston has collapsed," he said. "There were cab drivers happy to make \$50 a day." Santos put almost 30 cab drivers to work in his jitney service. Everything went well until 1984, when Santos expanded his operations to the Westheimer/Galleria neighbor-

hood of Houston, an English speaking part of town.

Santos made up English language fliers and was featured on the news and in the *Houston Chronicle*. He quickly got a call from Houston's taxicab authorities, who called him to a meeting and told him he was violating city's 1924 anti-jitney law and, if he did not shut his jitney service down, they would take away his taxi license. "A couple days later," he said, "the cab inspectors found me. They would drive in front of my cab and slow me down and stop me, check my license, check my car, just killing me, but never giving me a ticket. They did this three or four times and I got mad."

Santos went to the city council to plead his case. "I didn't know if I was breaking any law or not," he said. "I told them if I was breaking a law that the inspectors should give me a ticket and stop harassing me." The next day the taxi inspectors called Santos and threatened to revoke his license. "They shut me down," he said, "and the other guys scattered."

Santos began researching the history of jitneys and worked on drum-



**Houston needs well-thought-out reasons for every regulation of its small businesses and city officials should never respond to losses in court with vindictive regulations.**



ming up support for his cause. He learned that Houston’s prohibition on jitneys was the result of an early 20<sup>th</sup> century deal between the owners of one electric streetcar company and the city. The streetcar company would improve downtown streets on the city’s behalf and would withdraw a request for a fare increase if the city would prohibit jitneys.<sup>110</sup> The city agreed and the anti-jitney ordinance was born. Taxi cab companies had worked to keep it in place over the years, fearing the competition that jitneys would bring.

Santos began spreading the word about Houston’s anti-competitive jitney ordinance. After *The Wall Street Journal* wrote about Santos’ struggle, public interest lawyers helped him sue the city, arguing that the government cannot constitutionally prohibit a business based on nothing more than a desire to protect private companies from competition. Santos won his case. The court ruled that “the ordinance, which was merely a result of the jitney business being used as a pawn in a chess game between the [c]ity and the Houston Electric Company, has no rational basis, even today.”<sup>111</sup> The court permanently enjoined the city from enforcing its anti-jitney ordinance and added, “the ordinance has long out-lived its ill-begotten existence.”<sup>112</sup>

But Santos’ fight for jitneys was not over. The Yellow Cab Company, which at the time controlled 60 percent of the city’s 2,000 taxi cab licenses, heavily lobbied the city council for restrictions on jitneys.<sup>113</sup> The president of Yellow Cab argued that jitneys should have to meet a test of “public use and necessity”—meaning they should have to show a public need for more jitneys before they could operate in a given neighborhood. Santos, with the help of his court ruling, successfully fought off the cab company’s efforts to keep jitneys out of the marketplace.<sup>114</sup> He even persuaded the city council to encourage owner-operation of jitneys as compared to the independent contractor model of the large cab companies (what Santos describes as “plantation transportation,” in which drivers rack up massive debts to the cab owners).<sup>115</sup>

The new ordinance is not perfect. It requires jitney operators to pay a \$400 annual permit fee<sup>116</sup> and to paint their chosen route on both sides of their vehicle.<sup>117</sup> “I suggested magnetic route signs,” Santos said, “because you should be able to take your vehicle out of service and drive it to the grocery store; but the city council was worried about people changing their routes.” Still, Santos thinks the ordinance lets entrepreneurs into the jitney business on fair terms because the number of jitneys is not arbitrarily limited, as it is for taxi cabs.<sup>118</sup>

Santos never got to operate a jitney in Houston. After working for 10 years to liberate Houston’s jitneys, he moved to Uvalde, Texas, to pursue an opportunity with the school district there. He later moved to Austin, where today he operates a small newspaper.

Santos predicted the resurgence of jitney entrepreneurship in Houston.<sup>119</sup> “I was probably 30 years too early,” Santos said. “Here in the 21<sup>st</sup> century, we are experiencing new levels of urban congestion, not unlike the level of congestion in the teens of the 20<sup>th</sup> century. Jitneys are the way of the future because they don’t cost a whole lot of money and when it’s 100 degrees in Texas, people are not going to walk five blocks—not unless they want to lose 10 pounds.”

## RECOMMENDATIONS

- Houston should permit taco trucks to contract with “vacuum trucks” for the on-site removal of waste water and grease. There is no reason to make taco trucks and other mobile food units move once every 24 hours. Brick-and-mortar restaurants use vacuum trucks and mobile vendors should not be held to a higher standard than every other food service establishment.
- The Texas Legislature should repeal its special laws requiring Houston, and no other Texas city, to enforce pointlessly burdensome mobile food vending ordinances. These laws are unfair because they discriminate against Houston’s businesses and because they make mobile vending all but impossible.
- Houston should open its streets to peddlers by repealing its street vendor ordinances. The city’s current regulations only allow street vending on paper, not in the real world, and they make criminals out of everyday people who harm no one.
- If Houston fails to repeal its street-vendor ordinances, it needs to make some major changes—including allowing would-be vendors to obtain insurance instead of surety bonds, granting year-long or even two-year-long permits, and abolishing the requirements that would-be vendors on public property obtain the written, notarized permission of all adjacent private property owners and restrict themselves to a small downtown area.
- Houston should repeal its permitting requirement for window advertisements.
- Houston should repeal its unconstitutional inflatable advertising ban.
- The city’s Sign Administration should join the 21st century and allow Houstonians to apply for sign permits online. There is no reason to require notarized applications or in-person visits. Both are a waste of time and money.
- Houston should abolish the protectionist elements of its Safe-Clear program and allow all tow trucks to service freeways within the city’s limits.
- Houston should allow tow trucks to assist the police without agreeing to fixed prices for tows. Fixed prices remove price competition and make tows more expensive for everyone.
- Houston must stop responding to court losses with vindictive regulations. The public trust requires city officials to be more rational about their defeats in court and, when a regulation is struck down, city officials should not retaliate by passing either the same or a more-restrictive law in a different form.
- Houston has served its residents well by opening the jitney market and allowing jitneys to serve riders in the city. To make things even better, Houston should revise its jitney ordinance to allow magnetic route signs on vehicles, rather than requiring routes to be painted on vehicles.



## CONCLUSION

Houston has a proud history of fostering entrepreneurship. As the city has taken its place as one of America's great cities, however, it has adopted some of the worst traditions of American municipal government—erecting barriers to entrepreneurship based on vague notions of “beautification” and protection of existing industries.

With a new mayoral administration, Houston now has an opportunity to reaffirm its commitment to being an opportunity city. And economic opportunity begins with small businesses. In fact, a 2006 study conducted by the U.S. Small Business Administration found, “Houston’s history of economic growth offers some interesting lessons for the rest of the country. Its experience shows that encouraging small firm growth plays an important role in urban economic development.”<sup>120</sup>

Houston does right by entrepreneurs in a number of important respects. The city provides would-be entrepreneurs

with a lot of easily accessible information.<sup>121</sup> The city has not undermined up-and-coming entrepreneurs by enacting many of the worst ordinances found in other cities around the country.<sup>122</sup> What the city needs to do better, however, is to pause before changing the status quo. Houston needs well-thought-out reasons for every regulation of its small businesses and city officials should never respond to losses in court with vindictive regulations.

Small businesses are the most vulnerable to the arbitrary conduct of city officials and every new regulation affects them in profound ways. Although big companies may have the time and money to exert political influence, Houston’s small businesses were the ones that got the city’s economy off the ground.

Now Houston should help its entrepreneurs reach for the stars.

## ENDNOTES

All Internet content was current as of October 1, 2010.

1 U.S. Census Bureau, online at <http://quickfacts.census.gov/qfd/states/48/4835000.html>.

2 U.S. Census Bureau, online at <http://www.census.gov/popest/cities/tables/SUB-EST2008-01.csv>.

3 U.S. Census Bureau, American Community Survey, 2006-2008, online at [http://factfinder.census.gov/servlet/ADPTable?\\_bm=y&-geo\\_id=16000US4835000&-qr\\_name=ACS\\_2008\\_3YR\\_G00\\_DP3YR2&-ds\\_name=&-lang=en&-redoLog=false](http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=16000US4835000&-qr_name=ACS_2008_3YR_G00_DP3YR2&-ds_name=&-lang=en&-redoLog=false).

4 See Houston, Tex., Code §§ 46-61, 63 and 64.

5 See, e.g., <http://www.houstontx.gov/onestop> (more than 200,000 small businesses have benefited from the city's free training program).

6 Joel Kotkin, "Lone Star Rising: How a combination of ambition, entrepreneurship, trade, and tolerance made Houston America's booming opportunity city," *The American*, March/April 2008, online at <http://www.american.com/archive/2008/march-april-magazine-contents/lone-star-rising>; <http://www.houstontx.gov/abouthouston/houstonfacts.html>.

7 <http://www.houstontx.gov/abouthouston/houstonfacts.html>.

8 *Id.*

9 See Kotkin, "Lone Star Rising," n. 6 above.

10 See, e.g., "Houston could be so pretty if only she'd try," *Houston Chronicle*, July 10, 2009, online at <http://www.chron.com/disp/story.mpl/editorial/6524013.html>).

11 See, e.g., Joel Kotkin, "Trust market to shape the new Houston: Planners' nightmare is a dream come true in creating an exuberant, workable hodgepodge," *Houston Chronicle*, June 23, 2007, online at <http://www.chron.com/disp/story.mpl/editorial/outlook/4915292.html>.

12 Kotkin, "Lone Star Rising," n. 6 above.

13 See Eric Berger, "Council Considers Tougher Regulations for Street Food Vendors," *Houston Chronicle*, Dec. 15, 1999, at A37:2; Matt Stiles, "Local Lawmakers are Taking Their Case to the State Capitol on How to Fairly Regulate Food Vendors and to Protect Their Customers," *Houston Chronicle*, Jan. 1, 2006, at B1.

14 Houston, Tex., Code § 20-37.

15 See Stiles, n. 13 above.

16 Normally, the Legislature cannot pass laws that do not apply equally to all municipalities. Tex. Const. art. III, § 56. However, Texas courts permit the Legislature to restrict the application of a law to municipalities that have particular characteristics. See, e.g., *Bd. of Managers of Harris County Hosp. Dist. v. Pension Bd. of Pension Sys. for City of Houston*, 449 S.W.2d 33, 38 (Tex. 1970). In Houston's case, this is as simple as applying the law exclusively to "[a] municipality with a population of 1.5 million or more[.]" See, e.g., Tex. Health & Safety Code § 121.0035(b). Houston, of course, is the only Texas city with more than 1.5 million inhabitants.

17 Tex. Health & Safety Code § 121.0035 (2005).

18 Tex. Health & Safety Code § 437.021 (2007).

19 Tex. Health & Safety Code § 437.0074 (2007).

20 Tex. Health & Safety Code § 437.0073 (2009).

21 See generally <http://www.houstontx.gov/health/Food/mobilefoodunits.html>.

22 Houston, Tex., Code §§ 20-22(c), -37.

23 Houston, Tex., Code § 20-22(c); Consumer Health Servs. Bureau, City of Houston Dep't of Health & Human Servs., Mobile Food Unit Specifications Checklist, <http://www.houston.tx.gov/health/Food/FORM--mobile%20unit%20checklist.pdf>.

24 Houston, Tex., Code § 20-37.

25 Consumer Health Servs. Bureau, City of Houston Dep't of Health & Human Servs., Document Checklist – Mobile Food Units, online at <http://www.houstontx.gov/health/Food/Documents%20Checklist.doc>.

26 HoustonTX.gov, City of Houston eGovernment Center – Health and Human Services Department, <http://www.houstontx.gov/health/Food/mobilefoodunits.html>.

27 Houston, Tex., Code § 20-22(c)(4).

28 *Id.*; Consumer Health Servs. Bureau, City of Houston Dep't of Health & Human Servs., Property Agreement Letter, online at <http://www.houstontx.gov/health/Food/PROPERTYAGREEMENTLETTER%5B1%5D.doc>.

29 Houston, Tex., Code § 20-22(e).

30 TheMightyWizard.com, “Firebolts, Lightning Bolts and Hellstorms,” Sept. 22, 2007, online at <http://www.themightywizard.com/weblog/archives/000253.html>.

31 See <http://www.houstontx.gov/health/Food/FORM--mobile%20menu%20disclosure.pdf>; cf. <http://www.houstontx.gov/health/Food/mobilefoodunits.html> (alternate form).

32 Houston, Tex., Code § 20-22(c)(7).

33 See Stiles, n. 13 above.

34 TheMightyWizard.com, n. 30 above.

35 See *Cortes v. City of Houston*, 536 F. Supp. 2d 783 (S.D. Tex. 2008).

36 *Id.* at 794.

37 See Texas Ethics Commission reporting, online at <http://www.ethics.state.tx.us/php/filer.php?acct=00032585coh>.

38 Houston, Tex., Code §§ 22-14 to -22(a); 40-8(a).

39 Houston, Tex., Code §§ 22-14 to -21 (setting forth requirements).

40 Houston, Tex., Code §§ 40-8(b); 40-261(b) (defining the city's “theater/entertainment district”). There is also an exemption from prosecution for people conducting business with the city in public buildings or on public property, see Houston, Tex. Code § 22-22(b)(1)-(2), but these are obviously extremely narrow exceptions of no use to someone who wants to make a living as a street vendor.

41 Houstonians are also allowed to sell newspapers and ice cream on public streets. Houston, Tex., Code § 40-8(b)-(c). The former exemption is the result of a court case that successfully challenged the city's prohibition on newspaper sales at the same time it allowed flower and ice cream sales. See *Houston Chronicle Publ'g Co. v. City of Houston*. 620 S.W.2d 833 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). Both exemptions, however, are subject to heavy regulation in their own right, requiring licenses and permits. See Houston, Tex., Code §§ 40-9 to -9.1 (requiring health code licenses and mobile food medallion); 40-451 to -460 (requiring permit and decal for news racks).

42 See Houston, Tex., Code §§ 22-14 to -24 (2010); see also Houston, Tex., Ordinance No. 09-953 (adopting restrictions).

43 Compare former Houston, Tex., Code §§ 22-16, -19 (1968) with Houston, Tex., Code §§ 22-16, -19 (2010).

44 Houston, Tex., Code §§ 22-15, -17; 40-263(3).

45 See Houston, Tex. Code § 40-268 (the city's departments of public works and engineering, parks and recreation and health and human services each review applications); <http://www.houstontx.gov/ara/regaffairs/commercial/itinerant.pdf> (application lists Administration and Regulatory Affairs Department as the entity that accepts applications).

46 Open records requests to the City of Houston, Sept. 2009 & Apr. 2010, on file with the Institute for Justice. We asked four different Houston departments to produce records for the city's *public* property permit and were told that no permits had been issued. The city's Administration and Regulatory Affairs Department responded, however, that its Commercial Permitting Group issued 3,013 permits between fiscal year 2004 and fiscal year 2009 for the sale of goods on *private* property. The city's Municipal Courts Administration Department, meanwhile, responded that 1,541 citations were issued from July 2004 until June 2008 for violations of the “Peddler's Ordinance” but, with the exception of 68 citations that it clearly marked as having been issued on public property, generally did not distinguish between public and private property.

47 Houston, Tex., Code § 22-91.

48 The current application has corrected some of these problems and is available at <http://www.houstontx.gov/ara/regaffairs/commercial/itinerant.pdf>.



49 The city has since amended its street-vending ordinance so that it now requires a property-owner permission form for a private property street-vending permit, just as it requires for its public property permit. See Houston, Tex., Code §§ 22-15(1); 40-263(3).

50 The old application lists this department as the one responsible for accepting street vendor permits, while the new application lists the city's Administration and Regulatory Affairs Department. See <http://www.houstontx.gov/ara/regaffairs/commercial/itinerant.pdf>.

51 Compare Houston, Tex., Code § 22-14, *et seq.* (private property license) with Houston, Tex., Code § 40-262, *et seq.* (public property permit).

52 Chapter 46 of the Houston Building Code is commonly referred to as the Houston Sign Code. The body text of this report refers to the Sign Code, but, for ease of reference, these endnotes cite the Building Code.

53 Houston Building Code § 4605(a) & (b)(1).

54 Houston, Tex., Code § 28-406 (2008); see also Houston, Tex. Ordinance No. 08-248 (adopting restriction).

55 Houston Building Code § 4605(c)(1)-(2).

56 *Id.*

57 See <http://www.publicworks.houstontx.gov/planning/fees.html> (signs worth more than \$7,000 require higher permit fees).

58 Houston Building Code § 4605(d).

59 See Houston, Tex., Code § 28-406 (2008) (convenience stores cannot place signs between three feet and six feet off the ground).

60 Houston Building Code § 4605(b)(1) (exempting “[s]igns painted on glass surfaces or windows or doors; provided however, [...] no more than twenty percent of a glass storefront may be covered with advertising content”).

61 Houston Building Code § 4605(b)(1) (“no more than twenty percent of a glass storefront may be covered with *advertising content*”) (emphasis added).

62 See, e.g., *Miller v. California*, 413 U.S. 15, 23-24 (1973) (obscenity laws may not undermine works of political and artistic merit).

63 *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563-66 (1980).

64 See <http://www.ij.org/2919>.

65 Dallas Dev. Code, Chapter 51A-7.305(d) (2008); Dallas, Tex., Ordinance No. 27253.

66 Houston Building Code § 4608(p).

67 *Id.*

68 See former Houston, Tex., Code § 28-37 (1993).

69 See *Houston Balloons & Promotions, LLC v. City of Houston*, No. H-06-3961, 2009 U.S. Dist. LEXIS 53693 (S.D. Tex. June 24, 2009).

70 Houston, Tex., Code § 28-37 (2010); see also Houston, Tex. Ordinance No. 08-992 (adopting restriction).

71 Houston, Tex., Code § 28-37(a).

72 *Id.*

73 See *Houston Balloons*, 2009 U.S. Dist. LEXIS 53693, n. 69 above.

74 See, e.g., *Regan v. Time, Inc.*, 468 U.S. 641 (1984); *Cohen v. California*, 403 U.S. 15 (1971).

75 See “Background checks find tow truck drivers with criminal records,” KPRC-TV (NBC 2), Jan. 25, 2005, online at <http://www.click2houston.com/automotive/4128089/detail.html>; “Big decision looms for Safe Clear,” KTRK-TV (ABC 13), Oct. 6, 2009, online at <http://abclocal.go.com/ktrk/story?section=news/local&id=7051215>.

76 “Local officials report drop in freeway crashes,” Associated Press, Feb. 15, 2006; “Background checks find tow truck drivers with criminal records,” KPRC-TV (NBC 2), Jan. 25, 2005, online at <http://www.click2houston.com/automotive/4128089/detail.html>; “White to ride with wrecker,” KPRC-TV (NBC 2), Jan. 5, 2005, online at <http://www.click2houston.com/auto>



motive/4049247/detail.html.

77 “Free tows get green light for Safe Clear,” KPRC-TV (NBC 2), Feb. 2, 2005, online at <http://www.click2houston.com/news/4156259/detail.html>.

78 See *Houston Prof'l Towing Ass'n v. City of Houston*, No. CA-H-05-0323, 2005 WL 2121552 (S.D. Tex. Aug. 31, 2005) (unpublished opinion); compare former Houston, Tex., Code § 8-127(a)(1), Ordinance No. 2004-497 (2004) with Houston, Tex., Code § 8-127, Ordinance No. 05-1271 (2005) (providing for non-exclusive agreements).

79 See Houston, Tex., Code § 8-126; Ordinance No. 05-1271 (2005).

80 See Houston, Tex., Code § 8-103; Ordinance No. 05-1271 (2005).

81 *Id.*

82 See Houston, Tex., Code § 8-127; Ordinance No. 05-1271 (2005); Carolyn Feibel, “Council could vote on extension of Safe Clear,” *Houston Chronicle*, Oct. 6, 2009, online at <http://www.chron.com/disp/story.mpl/metropolitan/6655504.html>.

83 See Houston, Tex., Code § 8-126; Ordinance No. 07-1040 (2007).

84 See Tex., Occ. Code § 2308.103(b)(2).

85 See Houston, Tex., Code § 8-126; Ordinance No. 07-1040 (2007).

86 “Big decision looms for Safe Clear,” KTRK-TV (ABC 13), Oct. 6, 2009, online at <http://abclocal.go.com/ktrk/story?section=news/local&id=7051215>; “SafeClear Gets Five-Year Extension,” KUHF Public Radio, Oct. 16, 2009, online at [http://app1.kuhf.org/houston\\_public\\_radio-news-display.php?articles\\_id=125553944](http://app1.kuhf.org/houston_public_radio-news-display.php?articles_id=125553944).

87 See 49 U.S.C. § 14501(c)(1).

88 See, e.g., “SAFEclear tow truck drivers accused of double billing,” <http://www.bloghouston.net/item/829> (citing unavailable KHOU report).

89 Open records request, Nov. 2009, on file with the Institute for Justice (figures Jan. 1, 2005 through June 30, 2009).

90 See, e.g., Michael Berryhill, “Jitney Jihad: Yellow Cab Goes to War to Keep Jitneys Off Houston Streets,” *Houston Press*, Feb. 2, 1995, online at <http://www.houstonpress.com/content/printVersion/216810>.

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92 “The New Jitney Jungle,” *Forbes*, Nov. 15, 1975, p. 78.

93 Ross D. Eckert and George W. Hilton, “The Jitneys,” *15 Journal of Law & Economics* p. 296 (1972).

94 *Id.*

95 “Jitney Bus Wins Favor Quickly: Several Thousand of the Nickel Motor Cars Are Now in Operation Throughout the United States,” *The New York Times*, March 21, 1915, at SM18, online at <http://query.nytimes.com/gst/abstract.html?res=9901E3D61439EF32A25752C2A9659C946496D6CF>.

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97 “The New Jitney Jungle,” *Forbes*, Nov. 15, 1975, p. 78.

98 See Schwantes, n. 96 above, p. 310.

99 *Id.*

100 *Id.*


101 *United Traction Co. v. Smith*, 115 Misc. 74 (1921) (jitneys emerged in Albany, N.Y. as the result of a mass transit strike).

102 See Schwantes, n. 96 above, pp. 321-22.

103 See Eckert & Hilton, n. 93 above, p. 322.

104 Houston, Tex., Ordinance No. 1137-B (1924).

105 Mark W. Frankena and Paul A. Pautler, “An Economic Analysis of Taxicab Regulation,” Federal Trade Commission, Bureau of Economics Staff Report, May 1984, p. 155.



106 *Santos v. City of Houston*, 852 F. Supp. 601, 603, 608-09 (S.D. Tex. 1994).

107 *Id.* at 606-07.

108 *Id.* at 608.

109 See Houston, Tex., Code §§ 46-321 to -355.

110 *Santos*, 852 F. Supp. at 608.

111 *Id.*

112 *Id.*

113 See Berryhill, “Jitney Jihad,” n. 90 above.


114 *Id.*

115 See Houston, Tex., Code § 46-339 (“[i]t is the express intent of the city council [...] to avoid any sort of scheme or artifice in which jitneys are operated by persons who ‘lease’ licenses or drive vehicles as ‘independent contractors’”).

116 See Houston, Tex., Code § 46-336 (\$400 annual fee is partially refundable if \$400 is greater than 2% of the gross receipts of the jitney business).

117 Houston, Tex., Code §§ 46-340(c), -352.

118 See Houston, Tex., Code §§ 46-63 to -66.




119 See, e.g., <http://www.thewashingtonwave.com>; <http://gorevgo.com>. Open records requests to Houston’s Administration and Regulatory Affairs Department show that there are two active jitney services in the city, which employ 13 drivers.

120 <http://www.sba.gov/advo/press/06-22.html>.

121 See, e.g., <http://www.houstontx.gov/onestop> (the city’s free small business information and training center).

122 See <http://www.ij.org/citystudies>.





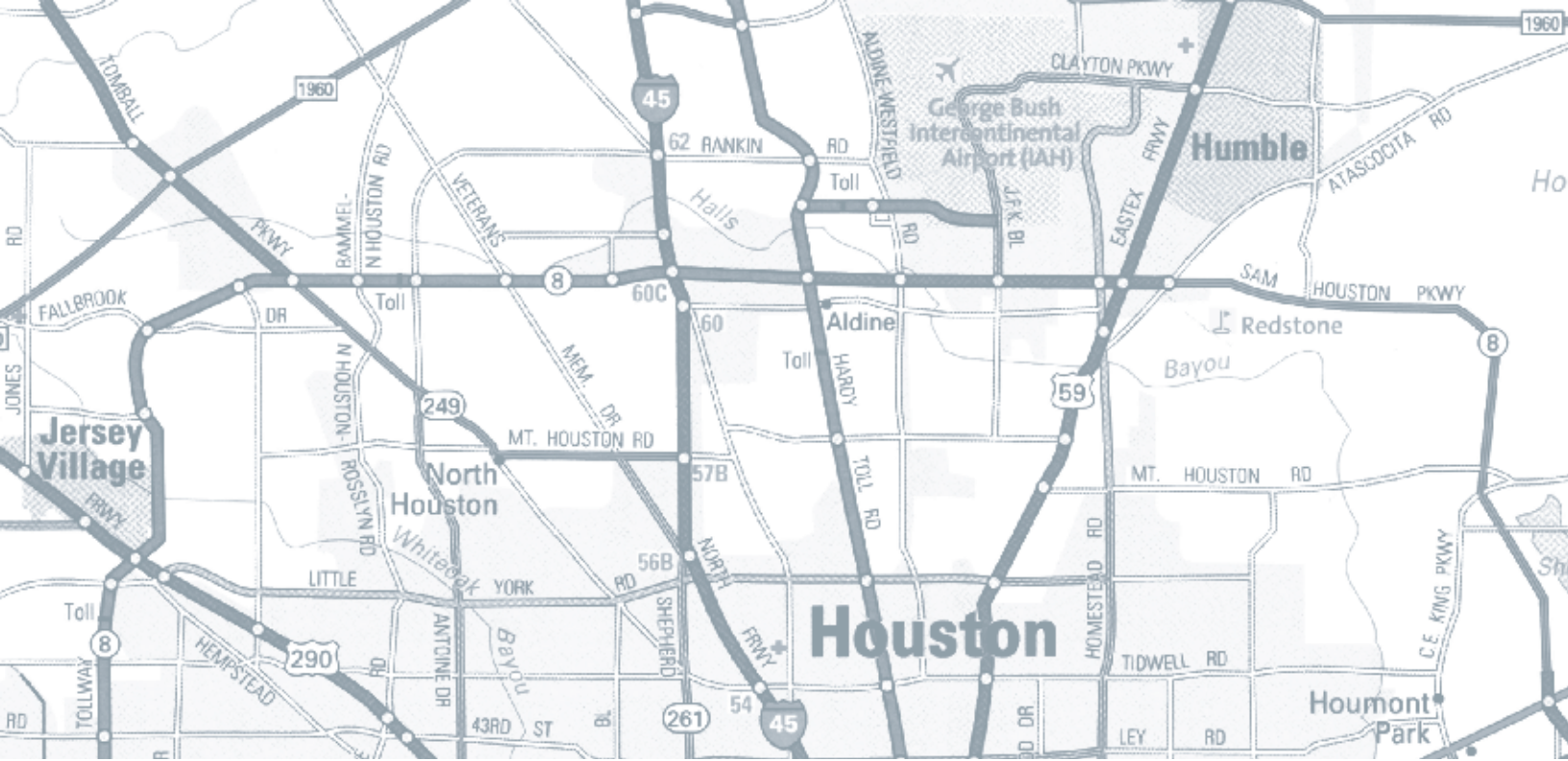
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