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Houston Texas Zoning

Approximately ninety-eight percent of all cities with populations more than 5,000 are zoned. Few cities in the U.S. with populations more than 100,000 do not have zoning, but the three largest cities in Harris County (Houston, Pasadena and Baytown) do not have zoning.

Houston has become the fourth largest city in the United States because of its strategic location, infrastructure, oil, and, some say, lack of zoning. In 1929 the City Planning Commission recommends that Houston adopt a zoning ordinance, but found scant support. In 1948 Houston voters rejected another proposed zoning ordinance. In 1962, a fully drafted zoning ordinance for Houston was submitted as part of a rejected referendum. Then in 1991 the Houston City Council mandated development of zoning regulations, only to be defeated in 1993.⁽¹⁾

The concept of land use controls by cities originated in the early 1900s in the industrialized northeast. The adoption of a comprehensive zoning ordinance by the City of New York in 1916 is generally considered the genesis of the zoning movement. In 1921, then Secretary of Commerce Herbert Hoover appointed a zoning advisory committee which prepared the Standard State Zoning Enabling Act (the "Standard Act"). The Standard Act was promptly adopted, with some variation, in most states, including Texas in 1927. Zoning as a permissive exercise of municipal power was validated by the 1927 U.S. Supreme Court case, Village of Euclid et. al. v. Ambler Realty Company.⁽²⁾ Euclid interpreted the Ohio Zoning Enabling Act, a Standard Act variation, and validated all Standard Act derivatives. The Texas Supreme Court upheld the Dallas Comprehensive Zoning Ordinance and the Enabling Act in 1934.⁽³⁾

(1) The margin was 52% to 48%. R. A. Dyer, *Zoning Defeated by Narrow Margin*, HOUSTON CHRON., Nov. 3, 1993, at A1; Peter Cooney, *Houston Voters Reject Zoning for Third Time*, REUTERS NEWS SERVICE, Nov. 3, 1993; and Sam Howe Verhovek, *"Anything Goes" Houston May Go the Limit: Zoning*, N.Y. TIMES, Oct. 27, 1993, at A14.)

(2) 272 U.S. 365 (1927)

(3) Lombardo v. City of Dallas, 47 S.W.2d 495 (Tex. Civ. App.--Dallas 1932) aff'd, 124 Tex. 1, 73 S.W.2d 475 (1934).

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Extensive academic literature critical of zoning has accumulated in the last twenty years, beginning with Bernard Siegan's landmark 1970 study lauding Houston's non-zoning approach, ⁽⁴⁾ and followed shortly thereafter by Robert Ellickson's broader theoretical critique of zoning. ⁽⁵⁾ Subsequent academic literature has been almost as uniformly critical of zoning ⁽⁶⁾ as public policy has been uniformly in favor of it.

Houston holds the distinction of being the largest U.S. city without a comprehensive zoning ordinance. Therefore, deed restrictions written by developers and homeowners' associations play an important role in how the city is developed. The number of homeowner associations (HOAs) has proliferated in Houston, and deed restrictions currently serve as the private equivalent of municipal zoning. The Texas Legislature enacted Section 204 of the Texas Property Code (TPC) specifically to address issues related to Harris County subdivisions.

A network of land use covenants has evolved into an efficient and relatively sophisticated system in Houston. Imposed either by subdivision developers before sale or by agreement of an association of neighbors, covenants affect single-family homes, townhouses, and industrial parks in about one-quarter of Houston's total area. ⁽⁷⁾ Most provide for the agreement to run 25 or 30 years, with automatic extension unless a majority of the participating owners vote to terminate or amend the covenant at the end of the initial period or any following 10-year period. ⁽⁸⁾ In this way, change can come if a majority desire it--but the requirement to wait until the covenant expires protects minority owners' interests as well. Obviously, the authority of private covenants extends only to those who participate; this means that the resulting diversity of land use restriction found in the community provides many avenues of choice to the property purchaser, without sacrificing his sense of security in the character of the immediate neighborhood he finally chooses. Private covenants deliver what government zoning and subdivision regulation cannot even promise: security and flexibility.

(4) Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71 (1970) (arguing that land use patterns in Houston are similar to those in other cities, but the patterns are achieved more efficiently because of the absence of zoning).

(5) Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 779-80 (1973).

(6) William A. Fischel, *The Economics of Zoning Laws: a Property Rights Approach to American Land Use Controls* (1985); Robert H. Nelson, *Zoning and Property Rights: an Analysis of the American System of Land Use Regulation* (1977); Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. Pa. L. Rev. 28 (1981); Jan Z. Krasnowiecki, *Abolish Zoning*, 31 Syracuse L. Rev. 719 (1980); Andrew J. Cappel, Note, *A Walk Along Willow: Patterns of Land Use Coordination in Pre-Zoning New Haven (1870-1926)*, 101 Yale L.J. 617 (1991).

(7) Bernard H. Siegan, "No Zoning Is the Best Zoning," p. 166.

(8) *Ibid.*, p. 159.

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"Almost every acre of land in the city is subjected to private restrictions over use, size, or cost of house, yard requirements, height of building, and all the other baggage customarily found in our zoning ordinances" (Babcock 1966, p. 25). According to Babcock's classic study, the primary effect of Houston's lack of zoning has been the "invasion" by commercial buildings of middle income suburban neighborhoods. High income neighborhoods have been preserved by the employment of private covenants and low income neighborhoods have sought in-home commercial development (like a small repair shop) as a way to add value to otherwise low value homes (Babcock 1966, P. 28).

What this all means to modern developers in Houston is that they have more choices and power to develop what they perceive is needed, diligent research is necessary to determine the legal status of prospective sites, and the risks of non conforming development can be mitigated by restrictive covenants.



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