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NEWS & ANALYSIS

Land Use Regulation in Houston Contradicts the City's Free Market Reputation

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Throughout the 20th century, government agencies increasingly regulated the use of private land in the United States.¹ In particular, zoning spread across the country as the principal regulatory tool for land use control. Although many citizens and commentators welcomed this trend as a means to protect property interests and the neighborhood environment, zoning has faced increased criticism in recent decades.² Among other charges, dissenters contend that zoning intrudes unwarrantedly into the realm of private property,³ interferes with the optimal market allocation of land uses,⁴ and works to segregate communities along racial and economic lines.⁵ The debate whether to pursue more regulation or to deregulate land development

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1. ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 721 (2d ed. 2000).

2. *See id.* at 722.

3. *See, e.g.*, RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 131-33 (1985).

4. *See, e.g.*, Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973). Ellickson argues that an overarching mechanism for internalizing land use externalities is necessary and advocates a system of private deed restrictions supplemented by upgraded public enforcement of nuisance laws to replace governmental zoning and planning. *See id.* at 713, 738-48. He endorses an economic model of land markets and advances the thesis that "conflicts among neighboring landowners are generally better resolved by systems less centralized than master planning and zoning." *Id.* at 682.

5. *See generally* WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS* (1985) (presenting allocative and distributive impacts of land use regulation).

continues today. New York City Mayor Michael Bloomberg has proposed zoning law reforms to spur new housing construction.⁶ Gov. Mitt Romney (R-Mass.) has commissioned zoning reform studies to curb sprawl and encourage more diverse land uses.⁷ And Chicago Mayor Richard Daley has embarked on extensive zoning law revisions to update Chicago's 1957 zoning ordinance.⁸ In contexts such as these, lawmakers nationwide contemplate the appropriate level of government regulation.

Market advocates point triumphantly to Houston, Texas, to contend that the city's lack of zoning demonstrates that market mechanisms for land use management can distribute physical space efficiently and equitably.⁹ For instance, Bernard Siegan, who first brought Houston's land use approach to the attention of the scholarly community,¹⁰ maintains that the absence of zoning in Houston illustrates that economic forces tend to produce land use results that are very similar to zoned communities.¹¹ In the search for an alternative to government regulation, commentators suggest that Houston's success presents the case for the market model.¹² Despite these claims, this Article finds that Houston is not the exemplar of a free market system. First, extensive government regulation belies the city's free market reputation in land use management. Although Houston is the largest American city without a zoning ordinance,¹³ government

policies have altered land use decisions for decades, and recent interventions continue the trend toward greater regulation. Second, campaign messages employed during zoning referenda undermine the perception that Houston voters rejected successive zoning proposals due to their preference for the free market. Rather than a shared free market ideology, scare tactics sponsored by the anti-zoning campaign help explain the narrow margin of defeat of the 1993 zoning referendum.

Part I of this Article provides a general overview of zoning and identifies four categories of zoning critiques. Part II underscores that contrary to its free market reputation, the city of Houston (the City) has directed land use allocations by intervening in private deed restrictions and enacting land management controls such as subdivision regulations, street design standards, tax increment reinvestment zones, and prevailing lot size requirements. Part III challenges another claim by free market adherents that the City voters' rejection of zoning proposals demonstrates their shared belief in market principles. It analyzes the most recent referendum campaign and contends that anti-zoning scare tactics propelled the surprising defeat in 1993. Finally, Part IV assesses the Article's findings and highlights various policy and legal implications.

I. Background: Zoning and Its Critics

A. Zoning

After New York City passed its landmark comprehensive zoning ordinance in 1916, zoning laws spread in popularity and governed more than one-half of the U.S. urban population by 1926.¹⁴ Although some residents viewed zoning laws as an infringement on personal property rights by collective authority, many supported them because they afforded neighborhoods a new property right to prevent uses that were forbidden by zoning ordinances.¹⁵ Zoning arose as a means to protect neighborhoods from incompatible uses that threatened to reduce both property values and the quality of the neighborhood environment at a time of rampant growth in municipal areas.¹⁶ June Carbone explains that cities tried zoning to overcome inherent limitations of private ordering common to a framework of restrictive covenants and common-law nuisance doctrine.¹⁷ Restrictive covenants, which enabled adjoining landowners to negotiate mutually advantageous contracts concerning land uses, fell into disfavor because of their complexity and susceptibility to technical error.¹⁸ Similarly, nuisance law, which allowed legal claims against activities that threatened the use and enjoyment of neighboring property, encountered opposition because it grew difficult both to define standards for enjoyment and to identify which party caused the harm.¹⁹

Zoning ordinances place various restrictions on the use of land in cities across the nation. Due to the different roles

6. Roland Lewis, *Now We Can Begin to Solve the Housing Crisis*, NEWSDAY, Dec. 11, 2002, at A34; *Big Ideas Need to Stay at Crux*, CRAIN'S N.Y. BUS., Dec. 16, 2002.

7. John J. Monahan, *Romney Seeks Zoning Reforms: Study Would Target Suburban Sprawl*, WORCESTER TELEGRAM & GAZETTE, July 25, 2003, at A1.

8. Fran Spielman, *Daley to Seek Licensing of Contractors*, CHI. SUN-TIMES, Sept. 4, 2003, at 2003 WL 9566900; Metro Briefs, CHI. SUN-TIMES, Mar. 5, 2003, at 2003 WL 9543799.

9. Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179, 181 (1995).

10. *Id.*

11. Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71, 142 (1970).

12. Douglas Kmiec contends that "[b]ased on Professor Siegan's extensive studies of Houston, it appears that private decision-makers, motivated by market forces, will make type and location decisions quite rationally. Indeed, Siegan's work tends to confirm what one might have suspected: the separation induced by zoning merely mirrors market choices." Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 97 (1981/1982). Further referencing Siegan's work, Kmiec contends that "[w]hile zoning may reduce nuisance costs by segregating incompatible land uses, the available research indicates that the operation of the land market itself would have accomplished a similar segregation without the corresponding administrative costs." *Id.* at 46. Orlando Delogu refers to Houston and asserts that "[s]ome major municipalities and countless smaller cities and towns survive quite well today with few, if any, such [local land use] controls." Orlando E. Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 ME. L. REV. 261, 272 (1994); R.H. Coase explains that

[w]hat Mr. Siegan shows, and it is this which makes his study of interest to a much wider audience than those professionally concerned with zoning, is that the market can be used effectively to solve problems which it is commonly thought can only be handled by government regulation. It suggests that the market might be used more often than it is at present to deal with other social problems.

R.H. Coase, in BERNARD SIEGAN, *LAND USE WITHOUT ZONING* xv (1972).

13. Many articles about Houston's land use policies highlight this fact. E.g., Archie Henderson, *Land Use Controls in Houston: What Protection for Owners of Restricted Property?*, 29 S. TEX. L. REV. 131, 132 (1987).

14. ROBERT H. NELSON, *ZONING AND PROPERTY RIGHTS* 8-9 (1977).

15. *See id.* at 9-10, 16-18, 45-51; *see also* Robert H. Nelson, *A Private Property Right Theory of Zoning*, 11 URB. LAW. 713, 714-20 (1979).

16. *See* NELSON, *supra* note 14, at 3, 7, 11.

17. June Carbone, *Dukeminier and Krier as Narrative: The Stories We Tell in the First Year Property Course*, 32 HOUS. L. REV. 723, 732 (1995).

18. *See* ELLICKSON & BEEN, *supra* note 1, at 650-51.

19. *Id.* at 604-09.

zoning plays in each city, no single definition fully describes its regulatory functions. Zoning ordinances essentially control building bulks, the size and shape of lots, the placement of buildings on lots, and the uses to which land and buildings may be put. They typically define the boundaries of various zones, and the actual controls differ from zone to zone. Each zoning ordinance is comprised of a map and text. The map classifies the city's land into zoning districts, whereas the text details the uses permitted in each zone.²⁰

Generally, local officials require that developers comply with zoning ordinances. They often condition the grant of building permits upon official approval of building plans, conduct site inspections of the projects as they are being developed, and impose both civil and criminal sanctions to ensure compliance.²¹ A local official pursuing civil enforcement likely will order the landowner to remove or modify the offending structure or cease the unlawful use. The official may revoke the developers building permit or issue a stop-work order pending correction of the violation if construction is underway. If the landowner fails to correct the problem, the city may impose a fine or petition a court to issue a mandatory injunction that the landowner comply.²² Although infrequent, prosecutors pursuing criminal enforcement may bring misdemeanor charges and seek imprisonment.²³

B. Critics

The array of zoning critiques falls into four general categories. First, some scholars advocate replacing zoning with complete deregulation of land use controls. Second, rather than dismantle zoning completely, other scholars endorse different regulations that make better use of market incentives. A third perspective criticizes zoning for unjust distributional effects. Finally, some New Urbanist scholars support the idea of municipal land use controls but seek regulations that foster an improved sense of public life and inclusiveness. These critiques call for varying degrees of government regulation, yet they express a shared call for zoning reform nationwide.

1. Deregulation

Siegan, a persistent advocate of deregulation, argues that privately arranged covenant schemes can coordinate land uses more efficiently than zoning can coordinate them.²⁴ According to Siegan, land use planning is not essential to ur-

ban geography or livability of cities.²⁵ Siegan points to Houston to bolster his case and contends that commercial, residential, and industrial land uses are about as separated in Houston as they would be under zoning.²⁶

In addition to finding similar land use distributions in Houston and zoned cities, Siegan identifies three limitations of zoning and presents Houston's reliance on private restrictive covenants as a preferred alternative. First, Siegan asserts that lower housing prices are a major benefit of Houston's system of land use controls. Zoning regulations, he claims, "raise needlessly the price of housing."²⁷ Second, he contends that zoning and restrictive covenants serve the same purpose of maintaining income exclusivity, but restrictive covenants are advantageous because they prevent homeowners from controlling the use of land beyond what they or their neighbors own. Due to their more limited scope, restrictive covenants' exclusionary effects inflict less harm on nonresidents than similar effects caused by zoning.²⁸ Finally, Siegan contends that without zoning, subdivision controversies can be resolved within a neighborhood and would not escalate to citywide concerns that the city council would have to resolve.²⁹

Other critics do not address Houston specifically, but they provide different reasons in support of deregulation. Robert Ellickson and Jan Krasnowiecki represent two examples.³⁰ After subjecting zoning to an economic analysis, Ellickson concludes that zoning is an inequitable and inefficient system for regulating development to prevent harmful externalities. He advocates replacing zoning with a system of private deed restrictions supplemented by upgraded administration and judicial review of nuisance laws.³¹ Krasnowiecki agrees that zoning is unworkable but argues that Ellickson's proposal would, in practice, "be even more costly and chaotic."³² Krasnowiecki seeks to protect developers from unexpected expenditures caused by zoning law changes.³³ He advocates giving local authorities significant discretion over site-planning matters and calls for decisions to be made on case-by-case bases.³⁴

20. *Id.* at 86, 100-04.

21. *Id.* at 107-08.

22. *Id.* See, e.g., *Kosciusko County Bd. of Zoning Appeals v. Wygant*, 644 N.E.2d 112 (Ind. 1994) (ruling that the trial court abused its discretion in denying a mandatory injunction after the county had proved a violation of a valid zoning ordinance, at least where the violation threatens "important interests of the community").

23. *ELICKSON & BEEN*, *supra* note 1, at 108-09. See, e.g., *People v. Multari*, 517 N.Y.S.2d 374 (Albany County Ct. 1987) (upholding imprisonment for student convicted of violating "grouper" ordinance prohibiting more than three unrelated adults from living together in a single-family residence).

24. *ELICKSON & BEEN*, *supra* note 1, at 722. "It is time that we apply the clear and unmistakable lesson of the past fifty years: zoning has been a failure and should be eliminated! . . . In the absence of most governmental controls, the private sector is much more likely to utilize the land to provide better for the environmental and material needs of the people." *SIEGAN*, *supra* note 12, at 247.

25. See *Larson*, *supra* note 9, at 182; Bernard H. Siegan, *Smart Growth and Other Infirmities of Land Use Controls*, 28 *SAN DIEGO L. REV.* 693, 742 (2001).

26. Siegan, *supra* note 25, at 741. See also Siegan, *supra* note 11, at 142 (concluding that the first lesson from his examination of Houston's system of non-zoning is that "economic forces tend to make for a separation of uses even without zoning").

27. Siegan, *supra* note 25, at 742; BERNARD H. SIEGAN, *PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND USE REGULATION* 189 (1997).

28. Siegan, *supra* note 25, at 744-45.

29. *Id.* at 745.

30. Other scholars support deregulation. See, e.g., Kmeic, *supra* note 12; George Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 *S. CAL. L. REV.* 447 (1981); Mark S. Pulliam, *Brandeis Brief for Decontrol of Land Use: A Plea for Constitutional Reform*, 13 *SW. U. L. REV.* 435 (1983); Norman Williams Jr., *Planning Law and Democratic Living*, 20 *LAW & CONTEMP. PROBS.* 317 (1955); Delogu, *supra* note 12.

31. Ellickson, *supra* note 4, at 713-14, 738-48. See also Jan Z. Krasnowiecki, *Abolish Zoning*, 31 *SYRACUSE L. REV.* 719, 721 (1980).

32. Krasnowiecki, *supra* note 31, at 721.

33. *Id.* at 721-22.

34. *Id.* at 750-52.

2. Better Market Tools

Other zoning critics who resist regulation advocate minimal government oversight coupled with greater reliance on market forces to improve land use allocations. Unlike Siegan, Ellickson, and Krasnowiecki who have little faith in government, scholars such as Orlando Delogu endorse a shift away from municipal land use power toward a range of minimal state and regional controls.³⁵ Delogu identifies various challenges that local planning efforts are unable to address. For example, he claims that local planning cannot equitably allocate socially necessary but undesirable uses including landfills and juvenile detention centers.³⁶ Delogu suggests that local governments renounce their land use control powers. In their place, he recommends that state governments establish performance standards to address potential harms that may arise from development activities.³⁷ These performance standards would require developments to meet benchmarks such as carrying capacity, safety, and environmental protection.³⁸ Market advocates prefer performance standards to zoning laws because they allow landowners considerably more freedom to develop their property in different ways.³⁹

Other recommendations call for specific market-based tools. One such example of a modern innovation from traditional Euclidian zoning includes transferable development rights (TDR) systems. Using a TDR system, a municipality may authorize landowners in certain designated areas to buy zoning rights, e.g., permitted building bulk, from landowners in other designated areas. Often the designated transferor area is located in a historic district or other area the municipality seeks to preserve. Landowners in that area are compensated with TDRs for the site's unused development potential, and the landowners in the transferee area bear all the costs of the preservation program. TDR ordinances allow greater market influence because certain landowners can buy zoning rights from landowners in other designated areas.⁴⁰

35. See Delogu, *supra* note 12, at 263.

36. *Id.* at 290-96.

37. *Id.* at 264, 297, 308. For other works that endorse performance standards, see L. KENDIG ET AL., *PERFORMANCE ZONING* (1980); C. THUROW ET AL., *PERFORMANCE CONTROLS FOR SENSITIVE LANDS: A PRACTICAL GUIDE FOR LOCAL ADMINISTRATORS* (1974); Norman Karlin, *Zoning and Other Land Use Controls: From the Supply Side*, 12 SW. U. L. REV. 561 (1981).

38. See Delogu, *supra* note 12, at 301. Luther McDougal also endorses performance standards. He explains that instead of establishing use-districts, performance standards would afford protection from undesirable byproducts by imposing performance standards on each use of land.

These performance standards would specify a maximum level of byproduct production, to which each use of land must conform. The specific byproducts a community would regulate include noise, smoke, noxious gases, fire hazards, wastes, dust and dirt, glare, heat, odor, traffic, electromagnetic emissions, radioactive emissions, aesthetics, psychological effects, and vibrations. . . . [T]he preferable method is to specify the acceptable levels of performance in terms of available scientific data, whenever possible.

Luther L. McDougal III, *Performance Standards: A Viable Alternative to Euclidian Zoning?*, 47 TUL. L. REV. 255, 259-60 (1972/1973) (footnotes omitted).

39. See Delogu, *supra* note 12, at 301.

40. ELLICKSON & BEEN, *supra* note 1, at 107, 191.

3. Distributional Critiques

Some critics have ascribed "exclusionary" motives to zoning laws because they have been used to exclude people who are less fortunate or pursue different lifestyles from certain neighborhoods. These critics generally contend that zoning could work if its exclusionary motives were curbed.⁴¹ They argue that zoning is employed as an indirect strategy for raising the cost of residential housing, making it too expensive for low-income groups and a disproportionate number of minorities to locate in wealthier communities.⁴²

Other distributional perspectives criticize zoning administration for depriving minority communities of the land use protections fundamental to Euclidian zoning.⁴³ Jon Dubin, in particular, has explored the history and legal ramifications of the government's failure to provide protective zoning to low-income communities of color.⁴⁴ His analysis shows a legacy of systematic discrimination in land use policy and identifies new insidious practices that threaten minority neighborhoods such as disparate siting of toxic waste facilities in low-income communities of color.⁴⁵ Similar to Dubin's critique, Yale Rubin observes instances of "expulsive zoning" where zoning authorizes noxious commercial or industrial uses that undermine the quality of the neighborhood environment and discourage people from residing in the area.⁴⁶

4. New Urbanist Perspective

Set within a broader critique of American suburbs, some scholars criticize zoning for banishing from communities the variety of people, buildings, and uses that foster a valuable sense of public life.⁴⁷ In particular, James Kunstler criticizes zoning's use of minimum lot sizes and set-back requirements to create socially one-dimensional communities comprised of monotonous built environments and economically homogenous residents.⁴⁸

New Urbanist Peter Calthorpe shares this perspective. In his attempt to map out a new direction for growth, Calthorpe's vision of the new "American Metropolis" includes "communities more diverse and integrated in use and population; more walkable and human-scaled; communities which openly acknowledge and formalize the decentraliza-

41. See Krasnowiecki, *supra* note 31, at 720.

42. Delogu, *supra* note 12, at 282-83. See also, e.g., Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

43. Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 741 (1992/1993). The term "Euclidian zoning" refers to the extension of police powers regulating health, safety, and the general welfare to protect single-family residences from the encroachment of commerce and industry. The term refers to the famous zoning case that provided judicial validation of this practice. *Id.* at 740 n.5.

44. *Id.* at 743.

45. *Id.* at 801.

46. *Id.* at 742 (citing Yale Rubin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in *ZONING AND THE AMERICAN DREAM* 101 (Charles M. Haar & Jerold S. Kayden eds., 1989)).

47. JAMES HOWARD KUNTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE* 273-75 (1993).

48. See *id.* at 52, 136, 169-70.

tion at work in our times.”⁴⁹ He encourages mixed-use development that allows people to work and shop within walking distance of their homes, promotes a greater sense of community, and reduces dependence on environmentally unfriendly automobiles.⁵⁰ Calthorpe criticizes zoning laws and developments for segregating age groups, income groups, ethnic groups, and family types. He maintains that the predominant system of zoning laws increasingly “isolate people and activities in an inefficient network of congestion and pollution—rather than joining them in diverse and human scaled communities.”⁵¹ Furthermore, Calthorpe argues that the resultant suburban sprawl erodes people’s faith in government and the sense of commonality important to a vital democracy.⁵²

5. Houston as a Free Market Alternative to Zoning

Zoning ordinances generally identify the specific uses permitted in different zones and detail restrictions on issues such as lot size, building placement, and building height. This basic description of zoning along with the four zoning critiques analyzed above provide a framework within which to compare Houston’s land use controls. The four diagnoses prescribe reforms that call for varying levels of government regulation. Scholars and lawmakers have considerable experience assessing land use management in regulated communities, but they lack similar richness of data about the consequences of proposed free market alternatives.⁵³

In the search for a case study of a free market in land use management, some scholars have identified Houston as the best example.⁵⁴ This perception of Houston as the benchmark of deregulation has informed, directly and indirectly, the different zoning critiques. For instance, market advocates such as Siegan and Delogu frequently point to Houston to suggest that government involvement in land use decisions sometimes is unimportant.⁵⁵ Additionally, in response to critiques about zoning’s distributional impacts, Houston’s lack of zoning has been cited as a reason for the City’s low level of racial segregation.⁵⁶ Finally, scholars even have referenced Houston to assess New Urbanist efforts, asserting that regulations in Houston do not prohibit

builders from erecting homes near jobs, schools, parks, shops, civil services, and transit.⁵⁷

II. Land Use Controls in Houston

Although scholars reference Houston to criticize zoning and advance calls for deregulation, these arguments appear misguided. Houston is not a free market model for land use control. In fact, government regulations pervade land use decisions in numerous contexts, and recent ordinances indicate a trend toward greater regulation. Rather than represent an alternative to zoning, Houston’s system of land use management appears to resemble zoning more closely than deregulation.

A. Deed Restrictions

Deed restrictions have been the primary method of land use regulation in Houston. They have been imposed frequently by subdivision developers and other landowners on the property they convey.⁵⁸ Houston landowners possess the legal right to create these restrictions,⁵⁹ and each owner of restricted property has the right to sue to enforce them.⁶⁰ Restrictive covenants generally are considered the free market alternative to zoning because they involve consensual private agreements.⁶¹ Deed restrictions in Houston, however, are uniquely characterized by greater government involvement in enforcement, approval, and amendment procedures than in other cities.

State and local authorities altered the private nature of deed restrictions after Houston voters disapproved of a zoning proposal in the 1962 referendum. During the referendum campaign, many residents came to believe that neighborhoods suffered greater financial hardship through enforcement by private lawsuit compared to zoning’s easier enforcement through municipal court citation and prosecution.⁶² The mayor recognized that city enforcement would be the only possibility of public land use control in the absence of zoning and brought together diverse factions to

49. PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM* 9 (1993).

50. *See id.* at chs. 5C, 9D.

51. *Id.* at 16.

52. *See id.*

53. Larson, *supra* note 9, at 182 (arguing that instead of Houston, housing subdivisions along the Texas-Mexico border known as Colonias better represent an unregulated land use market).

54. *See supra* note 12 and accompanying text.

55. In his lobby for greater trust of the market, Delogu references Siegan’s analysis of Houston. Delogu writes: “As for market constraints, it may be well to remember Siegan’s observation: ‘Economic forces tend to make for a separation of uses even without zoning.’” Delogu, *supra* note 12, at 300 (citing Siegan, *supra* note 11, at 75). *See also supra* notes 12, 24-26, and accompanying text.

56. *See, e.g.,* Siegan, *supra* note 25, at 741. Siegan cites a readers’ choice survey published by *Black Enterprise* magazine and points out that Houston was selected the best city in the nation for African Americans in part because of a low level of segregation that enables African Americans to live throughout the city. *Id.* *See* Monique R. Brown & David A. Padgett, *10 Best Cities for African Americans*, *BLACK ENTERPRISE*, July 2001, at 74. *See also supra* note 28 and accompanying text.

57. Siegan, *supra* note 25, at 734.

58. Henderson, *supra* note 13, at 142.

59. *Id.*; TEX. PROP. CODE ANN. §5.022(c) (Vernon 2003). *See also* Parker v. Delcoure, 455 S.W.2d 339, 343 (Tex. Civ. App.—Fort Worth 1970, writ ref’d n.r.e.); Bein v. McPhaul, 357 S.W.2d 420, 425 (Tex. Civ. App.—Amarillo 1962, no writ); Benbow v. Boney, 240 S.W.2d 438, 441 (Tex. Civ. App.—Waco 1951, writ ref’d).

60. Henderson, *supra* note 13, at 142, 151; Siegan, *supra* note 25, at 742; First State Bank v. James, 471 S.W.2d 868, 873 (Tex. Civ. App.—Corpus Christi 1971, no writ); Painter v. McDonald, 427 S.W.2d 127, 134 (Tex. Civ. App.—Austin 1968), *rev’d on other grounds*, 441 S.W.2d 179 (Tex. 1969); Benbow v. Boney, 240 S.W.2d 438, 441 (Tex. Civ. App.—Waco 1951, writ ref’d); Scaling v. Sutton, 167 S.W.2d 275, 279-80 (Tex. Civ. App.—Fort Worth 1942, writ ref’d w.o.m.).

61. *See* Ellickson, *supra* note 4, at 683, 711-19. “Covenants serve as a representative example of these consensual transactions between landowners; this category encompasses affirmative and negative obligations and is perhaps the most prevalent type of private agreement between neighbors.” *Id.* at 713. In his analysis of alternatives to zoning, Ellickson views covenants as valuable market tools for private adjustment of any initial rights distribution. *Id.* at 719.

62. John Mixon, *Neighborhood Zoning in Houston*, 31 S. TEX. L. REV. 1, 5-6 (1990); Thomas M. Susman, *Municipal Enforcement of Private Restrictive Covenants: An Innovation in Land-Use Control*, 44 TEX. L. REV. 741, 743 (1965-1966).

press the state for enabling legislation.⁶³ State leaders responded to these demands, and in 1965, the Texas Legislature authorized the use of tax money and city power to enforce private residential restrictions.⁶⁴

1. Active Enforcement

Traditional deed restrictions are enforceable through court action only by property owners who retain an interest in restricted property and, in some areas, by homeowner associations. This was the law in Texas until 1965 when the state legislature authorized the City to enforce private restrictions on property in which it did not have a legal interest.⁶⁵ Article 974a-1 empowered Houston to enforce private deed restrictions in a manner similar to the enforcement of zoning ordinances in other Texas cities.⁶⁶ Houston then adopted the enforcement power, and state and municipal enactments together provide that Houston may sue to enjoin or abate a violation of any restriction contained or incorporated by reference in a recorded plan, plat, replat, or other instrument affecting a subdivision inside the City's boundaries.⁶⁷

The Houston Code of Ordinances defines enforceable restrictions to include limitations on the use to which the property may be put, the set-back requirements, the size of a lot, and the size, type, and number of structures that may be built on a lot.⁶⁸ The city attorney is authorized to file a lawsuit to enjoin or abate a violation and also may seek to compel the repair or demolition of any portion of the structure that is not in compliance.⁶⁹ Property owners who, after receiving notice, fail to comply with a restriction may face civil penalties up to \$1,000 per day.⁷⁰

A new state law effective September 1, 2003, allows for cities to bring civil actions to enforce an even broader range of restrictions.⁷¹ State law expands the previous definition of enforceable restrictions to include landscaping, garbage disposal, noise levels, the character of use to which real property may be put, the type of activity that may take place

on the property, the architectural features, the construction of fences, and the type of maintenance that must be performed.⁷² The choice to adopt this expansive definition is before the Houston City Council. If the City adopts this definition, it will be able to impose more stringent regulations on the use of land than it does today and thereby exercise government power in a manner increasingly similar to zoning enforcement.

Archie Henderson summarizes the general procedure the City follows when it enforces deed restrictions. For each instance of an alleged violation, the City Legal Department first requests the private plaintiff or neighborhood civic club to furnish a certified copy of the deed restriction instrument along with a letter providing details of the violation. If the department determines that the complaint is actionable, it will send the violator a letter demanding compliance with the restrictions. This letter often is sufficient to stop the violation, but if not, the City may ask the state district court to enjoin it. If the violation involves construction work, the Legal Department, under the authority of Texas Local Government Code §214.166, can compel compliance by advising the Department of Public Works to deny a building permit. Finally, the City will bear the litigation costs if the case proceeds to court, but it will require that at least three persons be willing to testify about the violation.⁷³ Municipal enforcement accordingly eases the financial burden on owners of restricted property who wish to enforce the restrictions. The private plaintiff can assert his rights, and taxes from other residents are used to share costs of the suit carried out by the City.⁷⁴ As a result, City enforcement encourages the participation of property owners in deed restriction abatement suits.⁷⁵

The City's effort to actively enforce violations extends beyond the realm of deed restrictions. Under another state statute passed during the 1980s, Houston received authorization and adopted the power to bring civil actions to enforce certain categories of ordinances relating to building codes, fire safety, land subdivision, and the discharge of pollutants into sewer systems.⁷⁶

2. Permit Approval

Initially passed in 1965 as a companion statute to the restriction enforcement Article 974a-1, Chapter 214, Subchapter E of the Texas Local Government Code allows the City to deny certain permits based on the proposed user's compliance with deed restrictions.⁷⁷ The state measure along with municipal enactments authorize Houston to withhold an applicant's

63. Susman, *supra* note 62, at 743; *Deed Restrictions May Be City Weapon*, HOUS. PRESS, Nov. 8, 1962, at 9.

64. Mixon, *supra* note 62, at 6; Susman, *supra* note 62, at 743.

65. Henderson, *supra* note 13, at 144; Siegan, *supra* note 11, at 77.

66. Henderson, *supra* note 13, at 153.

67. Due to subsequent statutory revisions, the grant of municipal enforcement power now resides in Texas Local Government Code, Chapter 212, Municipal Regulation of Subdivisions and Property Development. TEX. LOC. GOV'T CODE ANN. §212.131-.137 (Vernon 2003). Houston adopted the power, which currently is found in HOUSTON, TEX., CODE OF ORDINANCES ch. 10, art. XV, §§10-551 to 10-555 (2003). The City's enforcement powers previously were codified in §41-9 of the Houston, Tex., Code of Ordinances. Ordinance No. 94-1154, §5 repealed §41-9 but substantially repeated them in Chapter 10, art. XV. In 1987, the Texas Legislature passed a parallel statute that authorized county attorneys in Harris County, in which Houston is located, to sue to enforce deed restrictions. Act of June 18, 1987, ch. 712, §1 (codified at TEX. PROP. CODE ANN. §§203.001-.005 (Vernon Supp. 2003).

68. HOUSTON, TEX., CODE OF ORDINANCES §10-551 (2003); TEX. LOC. GOV'T CODE ANN. §212.132 (Vernon 2001).

69. HOUSTON, TEX., CODE OF ORDINANCES §§10-551, 10-553 (2003).

70. *Id.* §10-552.

71. H.B. No. 1129 was passed by the Texas Senate on June 2, 2003. The governor signed the bill on June 20, 2003. It was codified as TEX. LOC. GOV'T CODE ANN. §212.132 (Vernon 2003). See <http://www.capitol.state.tx.us/cgi-bin/db2www/tlo/billhist/actions.d2w/report?LEG=78&SESS=R&CHAMBER=H&BILLTYPE=B&BILLSUFFIX=01129&SORT=Asc>.

72. *Id.*

73. Henderson, *supra* note 13, at 146 n.84.

74. *Id.* at 154.

75. *Id.* at 155. In addition to other benefits of city enforcement, the four-year statute of limitations applicable to private suits to enforce restrictive covenants does not run against an incorporated city. *Id.* at 154.

76. TEX. LOC. GOV'T CODE ANN. §54.012 (Vernon 2003); TEX. LOC. GOV'T CODE ANN. §214.0015 (Vernon 2003) (specifically allowing civil penalties for substandard buildings). The City adopted these enforcement powers in Chapter 10 of the Code of Ordinances. See, e.g., §10-311 (regulating fire hazards); §10-376 (regulating building codes); §10-458 (regulating neighborhood nuisances), HOUSTON, TEX., CODE OF ORDINANCES ch. 10 (2003).

77. See Henderson, *supra* note 13, at 146; see also Siegan, *supra* note 11, at 77. The statute first was passed in 1965 as Article 974-2.

building permit when the proposed use would violate a restriction contained in a deed or other similar instrument.⁷⁸

Parties must obtain a commercial building permit if they seek to construct any building other than a single-family residence, make substantial repairs to a commercial building located within a subdivision, or convert a single-family residence into a commercial building.⁷⁹ Individuals must file with the permit application a certified copy of any instrument that contains a restriction on the use or construction of the affected property. They also must submit an affidavit stating that the construction, alteration, or repair for which the permit is sought will not violate the deed restrictions running with the land.⁸⁰ The permit department is authorized to deny permits if the proposals fail to comply with all of the restrictions.⁸¹ Furthermore, if the person fails to obtain a permit, the City may join with an interested property owner in a suit to enjoin the maintenance or further construction of the building.⁸²

These permit approval statutes further indicate that the legislature responded to competing interests of Houston property owners reflected in the 1962 zoning referendum.⁸³ Middle income and upper income residents supported zoning in the 1962 referendum,⁸⁴ and authorities subsequently enacted permit approval provisions to improve neighborhood control through segregation of commercial and residential uses in restricted areas. Because the statutes are unenforceable in unrestricted and often poorer neighborhoods, these communities receive less protection than restricted and often wealthier subdivisions.⁸⁵ The City does not maintain records of the amount of land covered by restrictions, but reports indicate that approximately three-fourths of Houston's land area lack deed restrictions.⁸⁶

Rather than allow market forces to determine where commercial uses will locate, these permit requirements alter land use allocation decisions. Moreover, the government establishes a system of laws that lacks uniformity across all residential areas because the permit requirements apply selectively to neighborhoods protected by deed restrictions. By withholding building permits for commercial development on residentially *restricted* land, the City effectively segregates land uses in a manner similar to zoning.⁸⁷ Less stringent permit requirements for commercial developments on *unrestricted* residential land create an incentive for

commercial development to occur in these neighborhoods. The government thus intervenes in the market allocation, and the regulatory disparity encourages commercial development in unrestricted and often poorer areas.

3. Amendment

Generally in the absence of contractual provisions governing the right to modify deed restrictions, Texas law requires that property owners unanimously approve any modifications.⁸⁸ The Texas Legislature, however, eased these requirements for deed restrictions in unzoned Texas cities by enacting a statute that allows a majority of lot owners to extend, renew, or create restrictions and a three-fourths majority to modify or add to existing restrictions.⁸⁹ Legislative findings for the statute indicate that the Texas Legislature sought to make Houston's system of land use management more similar to zoned cities. The legislature found that pending expiration of restrictions where there is a lack of zoning creates uncertainty in living conditions and discourages investments in affected subdivisions. As a result, owners are reluctant or unable to provide proper maintenance, and financial institutions cannot or will not lend money for investments in these areas. The legislature concluded that these conditions cause building dilapidation and unsanitary living conditions.⁹⁰ To address these problems, lawmakers facilitated the creation and renewal of deed restrictions and believed that stronger regulations would promote neighborhood investment as well as improve residents' health, safety, and welfare.⁹¹

The statute enables residents of unzoned subdivisions to file a petition with the county clerk's office to create a restriction, or extend, renew, add to, or modify an existing restriction.⁹² In order to create, extend, or renew restrictions, the petition must be signed and acknowledged by owners who own, in the aggregate, at least one of the following: a majority of the total number of lots, a majority of the total number of separately owned parcels, tracts, or buildings, or a majority of the square footage within all of the lots in the

78. Henderson, *supra* note 13, at 146. See also Siegan, *supra* note 11, at 77. HOUSTON, TEX., CODE OF ORDINANCES §§10-552, 10-555 (2003).

79. TEX. LOC. GOV'T CODE ANN. §§214.162, 214.163, 214.165 (Vernon 2003).

80. *Id.*

81. *Id.* §214.163; HOUSTON, TEX. CODE OF ORDINANCES §10-2 (2003).

82. TEX. LOCAL GOV'T CODE ANN. §214.166 (Vernon 2003); HOUSTON, TEX. CODE OF ORDINANCES §§10-552, 10-553 (2003).

83. See Susman, *supra* note 62, at 742-44.

84. Siegan, *supra* note 11, at 74 n.12.

85. See Henderson, *supra* note 13, at 147.

86. "Probably no more than twenty-five percent of the land area of Houston is subject to restrictive covenants." Siegan, *supra* note 25, at 744. See Matt Schwartz, *Council to Vote on Controversial Development Ordinance*, HOUS. CHRON., Mar 22, 1999, A1 (citing Houston Homeowners Association President, Mike O'Brien, that two-thirds of the land inside Houston's 610 beltway lack deed restrictions).

87. See Mixon, *supra* note 62, at 6-7. See generally *The Municipal Enforcement of Deed Restrictions: An Alternative to Zoning*, 9 HOUS. L. REV. 816 (1972).

88. Henderson, *supra* note 13, at 150-51; Williams v. Smith, 409 S.W.2d 572, 579 (Tex. Civ. App.—Fort Worth 1966), *rev'd on other grounds*, 422 S.W.2d 168 (Tex. 1967); Hanchett v. East Sunside Civic League, 696 S.W.2d 613, 615 (Tex. Civ. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (holding concurrence of all required where no procedure provided for amendment); Farmer v. Thompson, 289 S.W.2d 351, 355 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.) "All the property owners . . . had the right to modify the contractual restrictions. But it requires the same mutuality to vary the restrictions as it did to create them. One party cannot modify a completed contract, nor can one owner in a restricted subdivision modify the restrictions without the concurrence of all the others." *Id.* at 355.

89. TEX. PROP. CODE ANN. §201.006 (Vernon 2003); see generally TEX. PROP. CODE tit. 11, ch. 201 (Vernon 2003). See Henderson, *supra* note 13, at 170. The statute seems to essentially be a variation of the Neighborhood Improvement Act, a state enabling statute proposed by the National Association of Real Estate Boards in 1937. *Id.* at 170 n.205. Under the Act, "[t]he owners of sixty (60) per cent of the area of privately owned land in any duly constituted neighborhood area may, in writing, present to the governing body of the city a plan for the development and restriction of such neighborhood area." C. PERRY, HOUSING FOR THE MACHINE AGE 247 (1939).

90. TEX. PROP. CODE ANN. §201.002 (Vernon 2003).

91. See *id.* §201.002(a)(4) (stating that the purpose of the statute is to address the problem of dilapidated structures that "cause unhealthful and unsanitary conditions in affected subdivisions, contrary to the health, safety, and welfare of the citizens").

92. *Id.* §§201.004.

subdivision.⁹³ In contrast, this signature and acknowledgment requirement increases to 75% for petitions to add to or modify existing restrictions.⁹⁴ The majority and super-majority requirements lessen the harshness of the state common-law rule calling for unanimity and represent yet another instance of government intervention in land use controls.⁹⁵ Rather than encourage private contract among all landowners, state law enables a majority of landowners to impose their will more easily on other residents.⁹⁶

4. Summary

A municipality that is not a party to restrictive covenants generally may not enforce them. The Texas municipal enforcement statutes create an exception to this rule. They authorize the City to sue to abate violations of private restrictions and to deny permits to deter construction of incompatible uses. Although zoning has been politically infeasible, the statutes allow a greater degree of municipal control over land use than otherwise would be possible in a city without a zoning ordinance.⁹⁷ Considered alone, deed restrictions in a nonzoned city are a relatively weak form of land use control; in Houston, however, where the City takes a role in enforcing them, it appears that deed restrictions act similar to zoning with regard to restricted property.⁹⁸

B. Development Controls

In addition to its participation in deed restrictions, the government has adopted an increasingly active role in controlling development. The series of revisions to subdivision regulations and the development ordinance reflect this trend.

1. 1940: Creation of the City Planning Department and Municipal Plat Review

In 1940, pursuant to Article 974a authorizing municipal platting and subdivision controls in Texas, the City took an early step toward regulation by creating a City Planning Department and charging it to enforce existing City Planning

Commission subdivision regulations using plat review.⁹⁹ The subdivision regulations sought to control growth in newly developing areas and protect public investment in facilities and services. These regulations often contained some land use controls common to zoning. For instance, they set standards for public improvements such as streets, sidewalks, drainage pipes, and sewer outlets.¹⁰⁰ Additionally, these regulations set housing quality and density standards through restraints on height, minimum lot sizes, and minimum floor area ratios.¹⁰¹ Developers' compliance with the subdivision regulations technically was voluntary because the City had not yet passed a subdivision control ordinance. Nonetheless, compliance was the norm, and plat approval authority served as an effective tool for control.¹⁰²

2. 1963: Subdivision Regulations Officially Adopted

Passed in 1963, the Texas Municipal Annexation Act¹⁰³ supplemented Article 974a and strengthened Houston's regulatory powers by authorizing the City to legally enforce subdivision regulations on land within their corporate limits as well as within the unincorporated area up to five miles beyond their corporate limits.¹⁰⁴

City Planning Commission subdivision regulations placed restrictions on all residential developments.¹⁰⁵ Notably, the regulations specified a 25-foot front yard requirement for new buildings,¹⁰⁶ "a minimum residential lot size of 5,000 square feet where sewer and water services were available, and a minimum residential lot size of 7,000 square feet where they were not available."¹⁰⁷ These types of controls generally appear in zoning ordinances, and they had important impacts on Houston's development. Whereas in cities without subdivision regulations, only approximately 80% of new residential developments had included site improvements, all new Houston developments were required to provide normal site improvements to comply with

93. *Id.* §§201.006(b)(1)-(3).

94. *Id.* §§201.006(b)(4)-(6).

95. Henderson, *supra* note 13, at 170. See Cannon v. Ferguson, 190 S.W.2d 831, 834-35 (Tex. Civ. App.—Fort Worth 1945, no writ) (holding that signatures from owners of 75% of lots were insufficient to give effect to a restrictive covenant designating that the lots be used for residential purposes only).

96. However, the statute provides that owners may elect to exclude their property from the operation of restrictions by filing the required statement. TEX. PROP. CODE ANN. §201.007(9) (Vernon 2003). Owners who do not exclude their property cannot challenge the application of the restrictions on the ground of lack of mutuality. *Id.* §201.011. If the owner proves that the restrictions are incompatible with the conditions in the neighborhood, a court may alter the restrictions as they apply to the owner's parcel. *Id.* §201.010(c). Even before this statute, Texas courts had refused to enforce restrictive covenants where there had been such a change of conditions that it was no longer possible to secure to a substantial degree the benefits sought to be realized through the covenants. See, e.g., Cowling v. Colligan, 158 Tex. 458, 462-63, 312 S.W.2d 943, 945 (1958); City of Houston v. Emmanuel United Pentecostal Church, 429 S.W.2d 679, 681 (Tex. Civ. App.—Houston [14th Dist.], writ ref'd n.r.e. per curiam, 433 S.W.2d 680 (Tex. 1968).

97. Henderson, *supra* note 13, at 155.

98. *Id.* at 170.

99. Henderson, *supra* note 13, at 139-40; Michael A. Pohl, *Establishing and Altering the Character of Texas Subdivisions*, 27 BAYLOR L. REV. 639, 639-41, 673-74 (1975). See TEX. REV. CIV. STAT. ANN. art. 974a (Vernon Supp. 1986). Article 974a was supplemented by the Texas Municipal Annexation Act, which allowed cities to extend their subdivision regulations into the area of their extraterritorial jurisdiction. TEX. REV. CIV. STAT. art. 970a, §1 (Vernon 1963); HOUSTON, TEX., CODE OF ORDINANCES §42-1(c), (d) (1984) (creating the City Planning Department). The City Planning Department has been renamed the Department of Planning and Development. *Id.* §33-1 (2003).

100. Henderson, *supra* note 13, at 139. See Pohl, *supra* note 99, at 644. "Harris County has established general subdivision regulations which control, among other things, the contents of the developer's plat, lot size, easements and particularly the design, construction and drainage of streets and roads." *Id.*

101. Henderson, *supra* note 13, at 139; Siegan, *supra* note 25, at 76.

102. *Id.* at 140 n.55.

103. TEX. REV. CIV. STAT. art. 970a, §1 (Vernon 1963); Pohl, *supra* note 99, at 641; Henderson, *supra* note 13, at 140 nn.53, 55.

104. Henderson, *supra* note 13, at 140 n.53. See also Pohl, *supra* note 99, at 640, 673-74. Houston was able to impose its subdivision regulations on development in extraterritorial jurisdiction water districts by threatening to deny consent for water district creation. Henderson, *supra* note 13, at 180 n.55.

105. Henderson, *supra* note 13, at 141; Bernard Siegan, *The Houston Solution: The Case for Removing Public Land-Use Controls*, 4 LAND-USE CONTROLS Q. 1, 5 (1970).

106. Henderson, *supra* note 13, at 141; Siegan, *supra* note 24, at 30; Ellickson, *supra* note 4, at 781 n.321.

107. Henderson, *supra* note 13, at 141. See Siegan, *supra* note 105, at 5.

the subdivision regulations.¹⁰⁸ Most importantly, this review process began before the period of Houston's greatest growth, and therefore, subdivision controls have regulated much of the development in the greater Houston area.¹⁰⁹

3. 1982: Stringent Controls on Residential and Commercial Plats

The Houston City Council promulgated a more stringent set of controls in 1982.¹¹⁰ Chapter 42: Subdivisions, Developments, and Platting of the City Code of Ordinances (the Development Ordinance) authorized the City Planning Commission to review apartment and commercial developments, "conditioning plat approval on compliance with developmental standards for frontage, off-street parking, common open space, maximum block length, and building setbacks."¹¹¹ In addition, the ordinance established a 10-foot set-back requirement along local streets and a 25-foot set-back requirement along major thoroughfares.¹¹² The Development Ordinance did not segregate land uses as would zoning. It did impose, however, significant government restrictions on commercial and residential developments.¹¹³

4. 1998: Use Classifications and Urban/Suburban Designations

Extensive revisions to the Development Ordinance in 1998 imposed even more rules on the subdivision of land in Houston. A result of a comprehensive review conducted by a citizen committee and the Planning Commission, the 1998 revisions sought to accomplish two primary objectives: (1) make the ordinance more accessible through improved organization, language, and illustrations; and (2) establish new standards to support urban revitalization.¹¹⁴ Before the city council approved the measure, Planning and Development Director Robert Litke explained that the changes would allow developers to use inner-city land more efficiently and build denser developments that would give the area a more urban aesthetic and pedestrian-friendly feel.¹¹⁵ He continued: "Our goal is to improve the pedestrian use of sidewalks to make the area seem more urban than suburban and to encourage stores to develop along the sidewalk

so people can look at the windows, with parking in the rear in order to create an attractive urban environment."¹¹⁶

The changes embraced a fundamentally new idea in Houston that recognized that urban and suburban developments have different requirements and should have separate standards.¹¹⁷ Consequently, the revised ordinance divides the city into urban and suburban classifications and promulgates separate standards for land use characteristics such as lot sizes, open spaces, building setbacks, street widths, and curb cuts.¹¹⁸ In contrast to the 5,000-square-foot-minimum lot size requirement for single-family development in suburban areas, the minimum lot size requirement in urban areas is 3,500 square feet, allowing for a denser urban environment.¹¹⁹ Lots may be developed smaller than the minimum lot sizes provided that developers set aside a certain amount of land as compensating open space for use by subdivision property owners.¹²⁰ As examples of the compensating open space requirements in urban areas, a 3,000-square-foot lot must provide an additional 240 square feet of surrounding open space, and a 1,400-square-foot lot must compensate with 600 square feet of open space.¹²¹ The revised ordinance also allows building setbacks in urban areas to range from the previous standard 25-foot requirement to as little as 5 feet for residential construction.¹²² Retail commercial centers can be built with no setbacks, depending on right-of-way and off-street parking considerations.¹²³

The 1998 amended Development Ordinance contrasts starkly with the minimal land use regulations in place in 1940 when Houston first created its Planning Department. Deed restrictions remain the principal method of land use regulation in the greater Houston area today because they supersede the Development Ordinance.¹²⁴ The Development Ordinance, however, may play a more influential role in the central city area because approximately two-thirds of this land lacks deed restrictions.¹²⁵

By adopting varying standards for different areas, the City imposes controls that are similar to zoning. Stuart Meck, Senior Researcher for the American Planning Association in Chicago, notes that even though specific land use relationships are not controlled, the mere division of Houston into urban and suburban areas approaches zoning. He argues that "[a]nytime you create a code that establishes den-

108. Henderson, *supra* note 13, at 141.

109. *Id.* at 140-41.

110. *Id.* at 141; HOUSTON, TEX., ORDINANCE 82-1010, §1, *codified as* HOUSTON, TEX., CODE OF ORDINANCES §42-1 (1985). Similar ordinances seeking to formalize City Planning Commission regulations had been proposed and defeated in 1965, 1967, and 1975. *See* HOUSTON CITY PLANNING DEP'T, 1975 ANNUAL REP. 18; *Subdivision Park Land Ordinance Rejected*, HOUS. CHRON., Apr. 24, 1975, at 13. After Houston passed the development ordinance, the Texas Legislature passed enabling legislation in House Bill 2370. Tex. H.B. 2370, 69th Leg. (1985), *codified as* TEX. REV. CIV. STAT. ANN. art. 974a-3 (Vernon Supp. 1986). *See* Henderson, *supra* note 13, at 141 n.62.

111. Henderson, *supra* note 13, at 141; HOUSTON, TEX., CODE OF ORDINANCES §42-85 (1985). *See also* *Houston Adopts Limited Development Controls*, LAND USE L. & ZONING DIG., Aug. 1982, at 3.

112. Henderson, *supra* note 13, at 141-42; HOUSTON, TEX., CODE OF ORDINANCES §42-85(b)(1)-(2) (1985); *see also* *Proposed Ordinance Would Control Development in City*, HOUS. POST, May 7, 1982, at D4.

113. Henderson, *supra* note 13, at 141-42.

114. CITY OF HOUSTON, CHAPTER 42: HOUSTON'S LAND DEVELOPMENT ORDINANCE 1 (2003).

115. Schwartz, *supra* note 86.

116. *Id.*

117. Matt Schwartz, *Inner Loop Bid Faces Vote Next Week: Proposed Ordinance Would Designate Urban Neighborhoods*, HOUS. CHRON., Mar. 20, 1999, at A31; HOUSTON, TEX., CODE OF ORDINANCES §42-101 (2003) (allowing the city council to designate urban areas); *id.* §42-1 (defining suburban areas as areas of the City or its extrajurisdictional jurisdiction that have not been designated urban areas).

118. Schwartz, *supra* note 117. *See also* Schwartz, *supra* note 86.

119. HOUSTON, TEX., CODE OF ORDINANCES §42-182-183 (2003) (establishing minimum lot sizes for suburban and urban areas).

120. *Id.* §42-184. *See also* Schwartz, *supra* note 86.

121. HOUSTON, TEX., CODE OF ORDINANCES §42-185 (2003); Schwartz, *supra* note 86.

122. HOUSTON, TEX., CODE OF ORDINANCES §42-150 (2003); Schwartz, *supra* note 86.

123. HOUSTON, TEX., CODE OF ORDINANCES §42-150 (2003); Schwartz, *supra* note 86.

124. *See* Schwartz, *supra* note 86.

125. *Id.* (citing Houston Homeowners Association President Mike O'Brien's statement that two-thirds of the land inside the 610 beltway lacks deed restrictions).

sity limits, that's zoning."¹²⁶ Many scholars would disagree that Houston has stealthily transformed into a zoned city, but few can contest that the evolution of the city's subdivision regulations and Development Ordinance represents a persistent trend toward greater regulation.

C. Miscellaneous Land Use Policies

Supplementing these development controls, the state and city government has passed a constant flow of statutes targeting specific uses such as off-street parking,¹²⁷ billboards and signs,¹²⁸ businesses licensed to sell alcoholic beverages,¹²⁹ cellular towers,¹³⁰ and heliports and airports.¹³¹ Rather than represent a comprehensive regulatory strategy, these ordinances and other narrow initiatives have been stitched together to form a patchwork of land use control efforts. Examples of other initiatives include the regulation of traffic, strict permit controls, and financial incentives and zoning power within tax increment reinvestment zones.

1. The Major Thoroughfare and Freeway Plan and City Design Guidelines

Although Houston does not employ specific use and bulk provisions in a zoning ordinance to segregate traffic that accompanies each of the various land uses,¹³² the City controls traffic indirectly through management of city streets. Many developers and city officials point to Houston's major thoroughfare and freeway plan (MTFP) as evidence that the City employs planning controls.¹³³ The MTFP identifies sections of roadways that need to be expanded and serves notice to the public of both future road development and the City's requirements for developing land adjacent to the identified roads.¹³⁴

The MTFP is binding on residential and commercial development, and it conditions plat approval and the issuance of building permits on compliance with its terms.¹³⁵ To be in compliance with the plan, developers must dedicate rights-of-way of varying widths depending on the street hierarchy classification established by the MTFP.¹³⁶ This ded-

ication requirement enables the City to prevent construction at curb lines of existing streets and allows it to widen streets as necessary in the future without incurring the expense of condemnation proceedings. As a result of this planning effort, Houston homeowners in new subdivisions enjoy some assurance that streets in and around their subdivisions can be widened as traffic pressures increase over time.¹³⁷

In addition to controls established by the MTFP, other city ordinance provisions establish specific design standards to manage traffic movement. For instance, major thoroughfares must intersect with some other street of any class at least every 2,600 feet, and intersections along a major thoroughfare must be spaced a minimum of 600 feet apart.¹³⁸ Other provisions go as far as to require minimum angles of intersection between classes of streets and a specific radius for a certain type of intersection.¹³⁹

2. Strict Permit Requirements for Various Industries

Other chapters of the Houston Code of Ordinances establish strict permit requirements that regulate the location of selected land uses. Permits for junkyards, sexually oriented businesses, correctional facilities, hotels, hazardous enterprises, and manufactured and mobile homes may be denied if location requirements are violated.

The following provisions are examples of these location restrictions:

Junkyards are prohibited within 300 feet of a school, church, or residence.¹⁴⁰

Sexually oriented businesses may not locate within 1,500 feet of any school, church, public park, or licensed day care center, and they may not locate within 1,000 feet of any other sexually oriented enterprise. They also are prohibited to locate in an area in which 75% or more of the tracts within a circular area are residential. The designated circular area has a 1,500-foot radius, and the center corresponds to the midpoint of a line joining the two most distant points of the tract on which the enterprise is located.¹⁴¹

Correctional facilities may not locate within 750 feet of any church, community center, facility for the elderly, licensed day care center, public park, recreation facility, or school, and they may not lo-

quired for major thoroughfares is: (1) the lesser of 100 feet or the right-of-way specified by the street hierarchy classification established by the MTFP; or (2) 100 feet for streets designated on the MTFP for which a street hierarchy classification is not established. The minimum right-of-way for local streets is: (1) 50 feet if adjacent to exclusively single-family residential lots; or (2) 60 feet if adjacent to any other development. *Id.* §42-122.

137. Henderson, *supra* note 13, at 174.

138. HOUSTON, TEX., CODE OF ORDINANCES §42-127(a), (b) (2003).

139. "Intersections along type 2 permanent access easements shall be spaced a minimum of 65 feet apart and shall not intersect at less than an 80 degree angle." *Id.* §42-129(a) (diagram omitted). "When a type 2 permanent access easement intersects with another type 2 permanent access easement at a 90-degree angle, the type 2 permanent access easement shall provide a 20-foot radius at the intersection." *Id.* §42-129(b) (diagram omitted).

140. *See id.* §28-34(a).

141. *Id.* §28-125(b). This ordinance has been held to be constitutional. *See* SDJ v. City of Houston, 837 F.2d 1268 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1310 (1989).

126. *Id.*

127. HOUSTON, TEX., CODE OF ORDINANCES §26-27 (2003).

128. HOUSTON, TEX., BUILDING CODE ch. 46 (1980).

129. HOUSTON, TEX., CODE OF ORDINANCES ch. 3 (2003).

130. *Id.* ch. 41.

131. *Id.* §9-323 (regulating the location of heliports and helistops), §§9-1-9-200 (regulating airport landside areas and airside areas).

132. *See* Henderson, *supra* note 13, at 172.

133. *See* Mixon, *supra* note 62, at 4 n.5.

134. City of Houston website, http://www.ci.houston.tx.us/departme/planning/planning_dev_web/dev_regs/frwy_plan.htm. The City calls for the Planning Commission to prepare and submit to the city council each year a MTFP adopted with the concurrence of the public works and engineering department. HOUSTON, TEX. CODE OF ORDINANCES §33-25 (2003).

135. HOUSTON, TEX., CODE OF ORDINANCES §§42-70, 42-120 (2003); Henderson, *supra* note 13, at 174; *Homeowners Want Alternate to Route Sought by Eckels*, HOUS. CHRON., Oct. 11, 1985, at 25 (explaining that the MTFP is enforceable through the City's plat approval process). *See also* *Dedications of Rights of Way Spur Questions*, HOUS. CHRON., Oct. 17, 1986, at 19 (stating that the issuance of building permits requires compliance with the MTFP).

136. HOUSTON, TEX., CODE OF ORDINANCES §§42-120-122 (2003). Section 42-122 specifies the right-of-ways for different street hierarchy classifications. For instance, the minimum right-of-way re-

cate within 1,000 feet of any other correctional facility. Similar to the restriction on sexually oriented businesses, correctional facilities are prohibited to locate in an area in which 75% or more of the tracts within a circular area are residential. The designated circular area for these facilities has a 1,000-foot radius.¹⁴²

Hotels are regulated by specific buffer, direct frontage, and primary access requirements. In addition to meeting other restrictions, hotels must take primary access from at least one major thoroughfare that is not a residential street. When they abut residential tracts, hotels also must provide a buffer that includes canopy trees, ornamental trees, and shrubs located at specified intervals along the property line.¹⁴³

Businesses that use hazardous materials can locate only in a designated area in which fewer than one-third of the tracts are used for residential purposes and no portion of the tracts is used for child care facilities, hospitals, nursing homes, or schools.¹⁴⁴

Finally, manufactured homes, camping trailers, travel trailers, and motor homes can locate only in specific areas the City designates.¹⁴⁵

The City does not create zoning districts to separate uses, but these ordinances, nevertheless, enable Houston to target certain industries and separate them from incompatible uses such as residential areas, schools, and churches.

3. Financial Incentives and Zoning Within Tax Increment Reinvestment Zones (TIRZ)

Houston also has pursued strategies to control land use by establishing TIRZ and allowing zoning within them.¹⁴⁶ Known as tax increment finance districts in other cities, TIRZ offer a method to finance improvements in specifically designated areas using property tax increment funds. The City may designate a particular area as a TIRZ to help fund public improvements and services that would not occur in the foreseeable future solely through private investment.¹⁴⁷

Tax increment financing refers to the use of tax revenue generated on the increased property values resulting from development improvements in a TIRZ. A zone's base taxable value is established at the time the TIRZ is created. As the assessed value of the area rises, taxing units receive tax

revenue only on the base taxable value, and taxes on the remaining incremental value accrues to the zone for a specified number of years to help pay for projects such as sewer lines, streets, and sidewalks.¹⁴⁸

TIRZ have expanded quickly throughout Houston and have subsidized substantial amounts of development. While only 10 such zones had been created by 1998, Houston had 20 by 2003.¹⁴⁹ The combined total appraised base-year value for the 20 TIRZ in the Houston area exceeds \$5 billion.¹⁵⁰ The life span of most of the TIRZ extends beyond the year 2020,¹⁵¹ and already by 2002, their combined total taxable value had appreciated over 30% to more than \$7 billion.¹⁵² A significant portion of this increment value goes to pay developers and fund community improvements. The City projects total developers' reimbursements to exceed \$1.2 billion.¹⁵³

In addition to government involvement in creating TIRZ, state regulations allow TIRZ to enact zoning ordinances.¹⁵⁴ Currently, only one TIRZ, St. George Place or TIRZ Number One, has implemented a zoning plan. The St. George Place zoning ordinance establishes four districts and specifies permitted uses as well as height and area regulations.¹⁵⁵ Although explicit zoning thus far has been limited to this TIRZ, St. George Place may serve as a harbinger of future zoning efforts in Houston.

D. Recent Regulations

Policies targeting specific uses, street planning, strict permit controls, tax increment financing, and instances of explicit zoning ordinances all reflect the diverse collection of land use strategies employed in Houston. Recent enactments of the prevailing lot size provision, tree and shrub requirements, and the City's new proposal for small area plans reflect the City's continued pursuit for more land use control.

1. Prevailing Lot Size Provision

The City repeatedly amended the Development Ordinance to direct compact development and greater pedestrian traf-

142. HOUSTON, TEX., CODE OF ORDINANCES §28-155(b) (2003).

143. *Id.* §28-202.

144. *Id.* §§28-222, 28-233. The designated "land use test area" is determined by creating a closed curve with a radius of 1,000 feet from the tract perimeters for an unrestricted permit or 1,000 feet from the outer walls (existing or proposed) of the building(s) or structure(s) in which hazardous materials will be manufactured, processed, generated, stored or used for a restricted permit. Each tract, including the applicant's tract, that is situated in whole or in part within the radius so created shall be a part of the land use test area.

Id. §28-222.

145. *See id.* §§29-1, 29-15, 29-16.

146. TEX. TAX CODE ANN. §§311.008(a)(3), 311.010(c) (Vernon 2003) (giving the municipality the authority to exercise zoning power within TIRZ as granted by Tex. Local Gov't Code Chapter 211: Municipal Zoning Authority).

147. TEX. TAX CODE ANN. §311.003 (Vernon 2003).

148. *See* James Robinson, *The Urban Frontier: New Tool for Change May Prove Dramatic: TIFs Funnel Tax Money Back to Source*, HOUS. CHRON., May 29, 1995, at A2. *See also* description of TIRZ offered by Hawes Hill & Associates at <http://www.haweshill.com/Site/NewHHA/Pages/Tirzs.htm>.

149. City of Houston, *Economic Development: Tax Increment Reinvestment Zones*, at http://www.ci.houston.tx.us/departme/planning/planning_dev_web/economic_dev/tirz.htm.

150. The actual reported value is \$5,474,569,520. CITY OF HOUSTON, DEPARTMENT OF PLANNING & DEVELOPMENT, TIRZ STATUS REPORT FOR FEBRUARY 2003 (2003) [hereinafter TIRZ STATUS REPORT].

151. The terms of 17 of the 20 TIRZ extend beyond the year 2020. TIRZ STATUS REPORT, *supra* note 150. *See also* http://www.ci.houston.tx.us/departme/planning/planning_dev_web/economic_dev/tirz.htm.

152. Based on Harris County Appraisal District certified values effective August 2002, the combined Tax Year 2002 total value for the 20 TIRZ was \$7,860,106,489. *See* TIRZ STATUS REPORT, *supra* note 150.

153. *Id.*

154. *See supra* note 146 and accompanying text.

155. Planning and Zoning Regulations, Reinvestment Zone Number 1, City of Houston, Article IV: Zone Districts; The St. George Place zoning ordinance is available online at <http://www.haweshill.com/Site/NewHHA/Docs/Zoning%20Regulations.pdf>.

fic in urban areas.¹⁵⁶ Its December 2001 enactment of the prevailing lot size provision, however, changes course to protect the residential character of traditional, single-family homes in certain neighborhoods.¹⁵⁷ Appended to the Development Ordinance, the prevailing lot size provision allows property owners to petition the Planning Commission and city council to establish a prevailing lot size that would prevent developers from splitting residential lots.¹⁵⁸ The provision enables neighborhoods that do not have a minimum lot size established by deed restrictions to apply for one that would encompass a designated area and prevail over any lesser minimum lot size established in the Development Ordinance.¹⁵⁹

Owners of at least 51% of lots or tracts within the area proposed for the special minimum lot size must sign a petition to endorse the designation.¹⁶⁰ After the Director of the Planning and Development Department notifies property owners within the area that an application has been received, they have up to 15 days to file a written protest.¹⁶¹ If there is a protest or the Director for any other reason is unable to promptly approve the application, the Planning Commission must conduct public hearings and decide whether to recommend that the city council establish a minimum lot size area.¹⁶² With the commission's positive recommendation, the city council may then approve the designation by passing an ordinance.¹⁶³

Although recently introduced, the prevailing lot provision has been employed extensively.¹⁶⁴ Houston Planning

and Development Department officials maintain that the provision responds to constituent opposition toward developers who split lots and create two or more homes on existing single-family lots.¹⁶⁵ Nonetheless, it represents another legislative effort to control development. Rather than allow the free market to determine the size and uses of new developments in urban areas, this provision allows further municipal involvement in land use decisions.

2. City Beautification Efforts

In February 2003, the Houston City Council passed the Tree and Shrub Ordinance that enables the government to exert control over the city's aesthetic character.¹⁶⁶ Based on a property's size, the ordinance establishes minimum requirements for installing landscape buffers and planting trees and shrubs. It further provides for "tree credits" that can be claimed against a development's total tree requirement. Applicants can earn credits by preserving on-site existing trees, planting trees that exceed the minimum caliper required, and depositing money into a special tree fund.¹⁶⁷

The regulations cover a broad range of development and vary according to the property type. The ordinance applies to all new nonresidential and multifamily residential developments that require a building permit, property expansions exceeding 1,000 square feet that require a building permit, new and expanded parking lots, and all new single-family construction.¹⁶⁸ For instance, new multifamily developments must plant 1 tree for every 30 feet of street frontage,¹⁶⁹ and parking lots must plant 1 tree for every 10 spaces.¹⁷⁰ For new single-family construction, lots less than 5,000 square feet must provide one tree and larger lots must provide two.¹⁷¹ In addition to quantity requirements, the ordinance delineates the species of shrubs and trees that may be planted and requires applicants to submit both a landscape plan and a tree preservation plan when they apply for a development plat or building permit.¹⁷² The Tree and Shrub Ordinance responds to threats posed by continued development and demonstrates the City's concerted effort to protect Houston's greenspace.

156. See Schwartz, *supra* note 117. See Part II.B.4.

157. See Mike Snyder, *Neighborhoods Gain Control: Ordinances Lead to Petitions to Limit Developers*, HOUS. CHRON., June, 8, 2002, at A36. Robin Franklin, who organized the first prevailing lot size petition, explained: "The reason we're doing it is, we're tired of the little 19-foot-wide houses on 20-foot-wide lots. . . . It's OK if you get a whole block of those, but it looks stupid if you just have one in the middle of a bunch of bungalows." *Id.* See also HOUSTON, TEX., CODE OF ORDINANCES §42-213(a) (2003); HOUSTON, TEX., ORD. No. 01-1100, §6 (Dec. 12, 2001).

158. See HOUSTON, TEX., CODE OF ORDINANCES §42-213 (2003).

159. *Id.* §42-213(a). The prevailing lot size provision may face constitutional challenges. In *Eubank v. City of Richmond*, 226 U.S. 137 (1912), the U.S. Supreme Court invalidated a statute that allowed owners of two-thirds of the property abutting a street to petition the city to establish building lines which the city enforced by denying permits that failed to comply with the line. The Court held: "The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously." *Id.* at 143. Similarly, in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), the Court invalidated a statute that allowed "a philanthropic home for children or for old people" to be located within a residential district when two-thirds of the owners of property within 400 feet of the building consented. The Court again opposed that neighbors were "uncontrolled by any standard or rule" and could "withhold consent for selfish reasons or arbitrarily." *Id.* at 122. For further discussion of these types of claims, see *ELICKSON & BEEN, supra* note 1, at 452-64.

160. HOUSTON, TEX., CODE OF ORDINANCES §42-213(e)(2) (2003).

161. *Id.* §42-213(d).

162. *Id.* §§42-213(f), (g).

163. *Id.* §42-213(g), (h).

164. Conversation with Shannon Murphy, Planner, Development Services Division, Planning and Development Department (Mar. 2003). "In the five months since City Council approved an ordinance allowing neighborhoods to petition for minimum lot sizes, 38 applications have been submitted and dozens more are being prepared." Snyder, *supra* note 157.

165. Conversation with Murphy, *supra* note 164. See HOUSTON, TEX., CODE OF ORDINANCES §42-213 (2003) (indicating that prevailing lot size provisions aim "to preserve the character of existing residential neighborhoods in urban areas that do not have minimum lot sizes established by deed restrictions"); In a February 20, 2003, conversation with the author, resident Lenya Gould recounted her efforts to protect lots in the South Hampton Extension subdivision from being split by developers to create denser townhome developments.

166. HOUSTON, TEX. ORDINANCE No. 03-159, §5 (Feb. 2, 2003) (codified as HOUSTON, TEX. CODE OF ORDINANCES ch. 33, art. V (2003)).

167. See HOUSTON, TEX., CODE OF ORDINANCES §33-123 (2003).

168. *Id.* §33-121 (providing requirements for nonresidential and multifamily residential buildings, property expansions, and parking lots); §33-110 (providing requirements for single-family residential properties); §33-102 (providing generally that the ordinance applies to all persons, including governmental agencies). The ordinance does not extend to real property owned or controlled by the state of Texas or the United States. *Id.* §33-102.

169. See HOUSTON, TEX., CODE OF ORDINANCES §33-126 (2003).

170. *Id.* §33-127.

171. *Id.* §33-110.

172. The Parks Department Director may designate the trees that are required for parking lots and streets. *Id.* §33-101; see, e.g., art. V, apps. A-1, A-2, and D (listing some allowable species of trees and shrubs); see *id.* §33-122 (explaining the landscape plan requirements); see *id.* §33-130 (explaining the tree preservation requirements).

3. New Proposal for Small Area Plans

City officials released in February 2003 an outline for a new area plan ordinance that would enable the City to further control Houston's development. As proposed, the area plan ordinance would allow certain neighborhoods to craft their own development guidelines to reflect the area's redevelopment goals. These plans may deviate from the City's general requirements for lot sizes, building setbacks, density, open space, parking, and other characteristics. The ordinance also would require developers who build commercial projects in single-family neighborhoods to include features such as landscaping to reduce noise, traffic, and other nuisances.¹⁷³

The area plan concept grew out of recommendations from the Urban Land Institute (ULI), which has been contributing to redevelopment plans for Houston's Main Street corridor. The ULI maintains that current laws obstruct efforts to complete the master plan for Main Street. "For example, all of Main Street except the downtown segment falls under a city rule requiring buildings to be set back 25 feet from the street. This is inconsistent with plans for Main Street Midtown, where planners hope to create a more urban, pedestrian oriented environment with storefronts facing broad sidewalks."¹⁷⁴ According to the ULI and city officials, an area plan would facilitate revisions of the set-back requirements and allow development that better serves community needs.¹⁷⁵

Litke, Houston's Planning Director, has indicated that the City Planning Commission would hold public hearings on the measure, and a public comment draft of the proposed ordinance was made available online in August 2003.¹⁷⁶

E. Summary

Clearly the government plays an active role regulating land use in Houston. Traditionally private deed restrictions are subject to municipal oversight and enforcement. The City's powerful Development Ordinance, specific-use restrictions, traffic management initiatives, permit controls, tax increment financing, authorized zoning in TIRZ, the prevailing lot size provision, and greenspace preservation regulations all reflect a deliberate assertion of government power over land use. Moreover, new proposals introduced in 2003 reveal a motivation to empower considerable community-based control over development. These efforts are strikingly similar to zoning authority exercised in other cities. The City can enforce deed restrictions in the same manner other Texas cities enforce zoning laws. Subdivision regulations establish standards for public improvements, housing quality, and neighborhood density that are common to zoning. Different development regulations for urban and suburban areas resemble requirements for zoned communities. The major thoroughfare and freeway plan enables the government to manage the expansion of city streets. The govern-

173. Mike Snyder, *New Concept Promoted for City Planning*, HOUS. CHRON., Feb. 21, 2003, at A25. The delegation of these powers to neighborhoods may face constitutional attack. See Mixon, *supra* note 62, at 20-30 (assessing potential constitutional challenges to neighborhood zoning in Houston).

174. Snyder, *supra* note 173.

175. *Id.*

176. *Id.* The Proposed Area Plan Ordinance is available online at http://www.ci.houston.tx.us/departme/planning/planning_dev_web/dev_regs/area_plan/Ordinance.pdf.

ment's ability to withhold building permits helps segregate land uses in a way similar to zoning. And finally, the area plan proposal approximates neighborhood zoning. Houston does not have a zoning ordinance, but this analysis should dispel myths that the free market has been the only powerful force underlying Houston's development.

III. Referenda Failed to Enact Zoning in Houston

Strong land use regulations in Houston belie the City's free market reputation for land management. A closer look at the referenda to enact zoning in 1948, 1962, and 1993 contradicts a similar perception that Houston residents rejected zoning due to a pervasive free market ideology. Because of the aforementioned land use regulations in place at the time of the 1962 and 1993 referenda, the two most recent referenda defeats cannot be interpreted as an endorsement of the free market. Furthermore, the 1993 referendum campaign reveals that the proposal's narrow defeat more likely resulted from scare tactics employed by the anti-zoning campaign than from persuasive arguments advocating deregulation.¹⁷⁷ Commentators should not interpret low-income minority residents' particularly strong opposition toward zoning as a demonstration of support for the free market.¹⁷⁸ Instead, their opposition may be in response to campaign messages that enliven fears of racial discrimination.

This section begins with a review of Houston's first two zoning referenda and academic interpretations of their defeats. It then provides a contextual framework for the 1993 referendum. Finally, the section concludes with an assessment of the 1993 campaign and the factors contributing to zoning's third defeat.

A. Interpreting the 1948 and 1962 Zoning Referenda

Voters in Houston rejected the first proposed zoning ordinance in 1948 by a margin of greater than two to one.¹⁷⁹ In that election only property owners were allowed to vote.¹⁸⁰ The election was viewed as a contest between two distinguished Houston residents—Jesse Jones, an enthusiastic supporter of zoning, and Roy Cullen, who bitterly opposed it.¹⁸¹

In 1962, the proposed ordinance failed by a slimmer 57% to 43% margin.¹⁸² Election results indicate that, "in general, middle and upper-income precincts in newer areas of the city supported zoning, while lower income precincts in

177. This type of analysis is not new. For instance, Scott Greer finds that scare tactics or "purification ritual" strategies have been used frequently by political actors in referenda movements in urban America. See SCOTT GREER, *METROPOLITICS: A STUDY OF POLITICAL CULTURE* (1963).

178. *But see* Siegan, *supra* note 25, at 695-96. Siegan interprets the election results in the Houston zoning referenda, the 1972 California Coastal initiative, and the no-growth initiatives in San Diego in 1985 and 1994 to "confirm that most low-income people reject government land use controls." *Id.* See also SIEGAN, *PROPERTY AND FREEDOM*, *supra* note 27, at 182-83, 208-09.

179. Henderson, *supra* note 13, at 134; DAVID MCCOMB, *HOUSTON: A HISTORY* 157 (1981).

180. Siegan, *supra* note 11, at 73 n.9.

181. RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 26 (1966).

182. Henderson, *supra* note 13, at 135; MCCOMB, *supra* note 179, at 158; Siegan, *supra* note 11, at 73 n.9.

older areas opposed [it].”¹⁸³ Additionally, widespread opposition from African-American voters surprised most observers.¹⁸⁴ Although an organization comprised of 65 African-American organizations supported zoning, more than 71% of voters in the city’s predominantly African-American districts voted against the referendum.¹⁸⁵ Considered together, African-American and Mexican-American neighborhoods opposed zoning by a 4-1 margin.¹⁸⁶ This overwhelming rejection of the proposed zoning ordinance by African-American voters helped ensure the referendum’s failure.¹⁸⁷

Legal scholars have offered four general interpretations of zoning’s defeat in 1948 and 1962. First, Richard Babcock, Siegan, and Barry Kaplan interpret the referenda defeats to indicate that middle income and lower income homeowners opposed zoning to preserve their ability to use or sell their property for commercial or industrial purposes.¹⁸⁸ Second, Henderson contends that opposition among lower income voters may have developed because they feared zoning would cause uses such as apartments and small commercial enterprises to move out of their unrestricted neighborhoods.¹⁸⁹ A third perspective attributes voter opposition to the arguments zoning opponents presented in newspapers that criticized abuses they claimed were inherent in government control of property.¹⁹⁰ The underlying assertion of these interpretations contends that voters opposed zoning because they possessed a free market ideology founded upon opposition to government control and a desire for few restraints on their use of personal property.

John Mixon offers a fourth explanation that contends that African-American voters opposed zoning in 1962 because of its discriminatory history. Mixon explains that zoning’s history includes both outright racial segregation of residential districts and subtle discrimination through exclusionary practices that prevent apartment development and thereby raise the entry price into affluent suburbs for lower income and disproportionately minority families.¹⁹¹ Specifically addressing the 1962 referendum in Houston, Mixon finds that the anti-zoning campaign capitalized on fears that zoning was discriminatory by warning African-American resi-

dents that police would enter their homes to enforce the zoning ordinance.¹⁹²

These perspectives may explain why the zoning proposal was defeated in 1962. In particular, African-American voters’ opposition to government control is less surprising in light of zoning’s legacy of discrimination and the struggle for civil rights that occurred during that period. Between 1962 and 1993, however, times changed substantially. By 1993, federal laws prohibited the use of zoning as an instrument of racial segregation,¹⁹³ and minorities were represented better in Houston’s political structure as demonstrated by the 1982 appointment of the city’s first African-American police chief Lee Brown who was elected Mayor of Houston in 1997.¹⁹⁴ Because of these advancements, one would expect race to play a much smaller role in the 1993 referendum. Moreover, many observers anticipated strong support for zoning among African-American voters because they persistently demanded better protection against incompatible noxious uses such as incinerators and landfills.¹⁹⁵ Similar to polling figures leading up to the 1962 referendum, a survey conducted by Rice University Sociology Prof. Stephen Klineberg in late 1992 indicated that zoning enjoyed the support of 70% of Houston’s population.¹⁹⁶

B. The 1993 Zoning Referendum

Despite these expectations the 1993 zoning proposal failed, and low-income African-American voters strongly opposed the ordinance. Analogous to strategies they employed in 1962, anti-zoning activists again stressed racial issues and capitalized on fears that zoning would cause segregation.

1. Political Landscape

Observers were surprised by the zoning proposal’s defeat because residents had demanded better regulatory tools to manage Houston’s growth during the years prior to the referendum. Houston grew rapidly during the 1970s and early

183. Siegan, *supra* note 11, at 74 n.12.

184. *Zoning Proposition Is Defeated Here 2nd Time*, HOUS. POST, Nov. 7, 1962, at A19.

185. *Id.*

186. R.A. Dyer, *Zoning Defeated by Narrow Margin*, HOUS. CHRON., Nov. 3, 1993, at A1.

187. Mixon, *supra* note 62, at 37.

188. BABCOCK, *supra* note 181, at 27; Siegan, *supra* note 11, at 74-75; Barry J. Kaplan, *Urban Development, Economic Growth, and Personal Liberty: The Rhetoric of the Houston Anti-Zoning Movements: 1947-1962*, 84 S.W. HIST. Q. 133, 167 (1980).

189. Henderson, *supra* note 13, at 143-44. Henderson further posits that support for zoning among voters in higher income brackets may have occurred because they sought to maintain their property values and viewed zoning as a tool to reinforce the strength of existing deed restrictions in their communities. *Id.* at 143. This interpretation also may help explain the election results among African-American voters because higher income African-American voters were more likely to endorse zoning. See Siegan, *supra* note 11, at 74 n.12.

190. Siegan, *supra* note 11, at 75.

191. Mixon, *supra* note 62, at 37.

192. *Id.* at 37 & n.147; In *The Zoning Game*, Babcock reproduces an advertising cartoon targeted at African-American neighborhoods that depicts a zoning inspector armed with a club forcibly entering a home. See BABCOCK, *supra* note 181, at 27-28.

193. “Federal laws prevent, not only obvious use of zoning to carry out segregation strategies, but also subtle uses. If, for example a city employs zoning to reinforce racial segregation, federal courts can impose liability on the city and sometimes on its officials under the Civil Rights Act.” Mixon, *supra* note 62, at 37-38.

194. *Id.* at 37-38. Lee Brown served as the Chief of the Houston Police Department from April 19, 1982, to January 19, 1990.

195. Tom Kennedy, *Zoning Has Been Inclusive Process*, HOUS. POST, May 9, 1993, at C1 (reporting that Planning and Zoning Commission Chairman Marvin Katz most frequently receives calls for zoning protections from minority leaders); “Most of Houston’s land-use abuses probably occur in minority neighborhoods where deed restrictions do not protect residential areas.” Mixon, *supra* note 62, at 39. See also JOE R. FEAGIN, *FREE ENTERPRISE CITY: HOUSTON IN POLITICAL-ECONOMIC PERSPECTIVE* 247 (1988) (identifying that garbage incinerators and landfills usually are located in Houston’s minority neighborhoods).

196. Donna H. Kristaponis, *Zoning Houston—Not*, 31 CITE 56, 56 (1994). Another poll conducted October 9-13, 1993, less than one month before the November 2 referendum, found continued support for the zoning proposal. Conducted by the University of Houston Center for Public Policy under the direction of political scientist Richard Murray, the poll found that 43% of the voters surveyed said they supported zoning, 30% opposed it, and 28% replied that they were unsure. Alan Bernstein, *Zoning Still Holds Favor; Poll Finds*, HOUS. CHRON., Oct. 17, 1993, at A1.

1980s, 48% in a single decade.¹⁹⁷ Because many areas lacked deed restrictions, commentators argued that the uses for which land was developed were difficult to control or predict.¹⁹⁸ David Dillon recalled that unprecedented urban blight accompanied skyscrapers and shopping centers, and some neighborhoods became overnight slums because of reckless land speculation.¹⁹⁹ The downturn in the oil market along with the savings and loan crisis further challenged the faith many residents had in the free market. By the early 1990s many residents no longer believed that market forces could turn vacant lots into income-producing hotels or skyscrapers.²⁰⁰

Widespread agreement emerged among residents that Houston would progress best and compete with other cities most effectively if it better managed its rapid growth. University of Houston Economist Barton Smith articulated this view. In 1993 he explained: "As businesses look around with plans to move, they look at Houston and ask, 'Are there alternatives?' They are finding there are places just as cheap as Houston and with a higher perceived quality of life."²⁰¹

In response to changing public sentiments, the Houston City Council adopted new regulations governing signs, parking, setbacks, and sexually oriented businesses. Deed restrictions remained the principle tool for land use control, but they began to lose favor among many neighborhood groups. Zoning arose as the strategy of choice because residents recognized that only about one-half of Houston's neighborhoods had deed restrictions, and implementing them in other neighborhoods required extensive neighborhood coordination.²⁰² On September 15, 1993, the city council voted unanimously to enact a zoning ordinance in Houston. In a separate vote, the city council also approved to put the zoning decision before Houston voters in a November referendum.²⁰³

2. Results

Houston voters rejected zoning for a third time in 1993, by a margin of 51.9% to 48.1%.²⁰⁴ Most surprising to many ob-

197. David Dillon, *Houston's Zoning Battle*, ARCHITECTURE, Mar. 1994, at 47.

198. *Id.* David Dillon also offered this perspective about Houston's growth. "Skyscrapers and shopping centers popped up like mushrooms after a rain, along with fight-a-night bars next to townhouses and sex shops around the corner from schools." *Id.*

199. David Dillon, *The Scoop on Houston*, PLANNING, Apr. 1991, at 15. According to Dillon, other neighborhoods such as the Midtown area, bordering Hermann Park and Rice University, "ended up with 50 percent of the state's halfway houses for parolees, while inner-city Nertown lost 10 percent of its housing in a few years." *Id.*

200. *Id.*

201. Lynn Ashby, *Naysayers Need to Reveal Vision*, HOUS. POST, Nov. 16, 1993, at A13. Similarly, Klineberg offered a global perspective. He explained: "Now there is a clearer recognition that Houston must compete with other cities, and other countries, on quality of life issues." Dillon, *supra* note 199, at 15.

202. Dillon, *supra* note 197. See also John F. McDonald, *Houston Remains Unzoned*, 71 LAND ECON. 137, 138 (1995) (explaining that there are high transaction costs to set up a system of deed restrictions in developed areas).

203. R.A. Dyer, *City Council Passes Zoning Ordinance, Approves Nov. 2 Vote*, HOUS. CHRON., Sept. 16, 1993, at A23. The ordinance approved by the city council divided land use into 11 separate districts and one overlay district. "These include industrial, open, major activity center, urban neighborhood, green space, special districts such as museum areas, four residential classifications and a landmark and historic overlay district." *Id.*

204. *Election '93 at a Glance*, HOUS. CHRON., Nov. 4, 1993, at A28.

servers, an overwhelming majority of voters from low-income African-American communities opposed the proposal. The *Houston Chronicle* reported that 72.1% of lower income African-American voters rejected the zoning measure while 62.6% of middle income African-American voters supported it. According to precinct sampling, 56% of affluent white voters opposed the measure, but 55% of middle income white voters favored it.²⁰⁵ An estimated 58% of voters in predominantly Hispanic areas opposed zoning.²⁰⁶ The renter community did not perceive a stake in the outcome, and consequently few renters voted.²⁰⁷

John McDonald provides a clear tabulation of the precinct voting results²⁰⁸:

Area	Turnout	For Zoning
Low-Income Black	11.1%	27.9%
Low-Income Anglo	17.6	31.8
Middle-Income Black	23.1	62.6
Middle-Income Anglo	28.1	55.6
Predominantly Hispanic	13.1	42.0
Upper-Income Anglo	34.5	43.8

C. The 1993 Zoning Campaign

Similar to the responses after the previous referenda, scholars have offered various interpretations of the zoning proposal's defeat in 1993. For instance, Joe Feagin endorses a free market interpretation similar to those proposed after the 1962 referendum. He interprets the 1993 result to "keep alive the City's image as a holdout of in-your-face capitalism, a bastion of market-driven development."²⁰⁹ In contrast, McDonald assesses the 1993 voting patterns to suggest that low-income voters opposed zoning because of its use as a device for excluding them from certain areas.²¹⁰ Offering a third perspective, Mixon attributes minority opposition to the segregationist themes employed by the anti-zoning campaign.²¹¹ Complementing these interpretations, the following analysis sheds light on why voters rejected zoning for a third time. Although zoning opponents employed market-based arguments, evidence from the campaign indicates that scare tactics Mixon identified in the 1962 referendum again played a key role in defeating zoning in 1993.

1. Free Market Arguments

The anti-zoning campaign initially employed market themes that threatened economic loss and government con-

205. Dyer, *supra* note 186.

206. Julie Mason, *Haves, Have-Nots Joined Same Side to Defeat Zoning*, HOUS. CHRON., Nov. 4, 1993, at A25. The U.S. Census reports the following racial composition for Houston in 1990: 41% White, 27% Black or African American, 28% Hispanic or Latino, 4% American Indian/Asian/Pacific Islander, 0% Other. Census 2000 Redistricting Data (Public Law 94-171) Summary File, at http://www.ci.houston.tx.us/departments/planning/download/demographics/2000census_race.pdf.

207. Kristaponis, *supra* note 196, at 56.

208. McDonald, *supra* note 202, at 137 (1995).

209. Mike Tolson, *Election '93: Zoning Opponents Relieved at Prospect of "Free City"*, HOUS. CHRON., Nov. 3, 1993, at A21.

210. McDonald, *supra* note 202, at 139-40.

211. Mixon's view is presented in various news reports. See, e.g., Mason, *supra* note 206.

trol to mobilize opposition to zoning. Anti-zoners argued that zoning raises taxes, increases rents, eliminates jobs, and stifles businesses.²¹² Ominous government control was another theme stressed by a flier distributed by the Houston Property Rights Association. Depicting a man in dark glasses threatening a mother and her two children, the flyer urged voters to keep city zoning inspectors out of their homes.²¹³ This flier closely resembled an anti-zoning advertisement targeted at African-American communities during the 1962 zoning campaign.²¹⁴ Several television and radio advertisements further argued that the ordinance incorporated insufficient long-term land planning and would create a \$10 million bureaucracy.²¹⁵ By employing these arguments, zoning opponents sought to discredit the zoning plan as reckless and wasteful.

2. Scare Tactic Arguments

a. Strategy and Anticipation

In addition to market-based arguments, the anti-zoning campaign employed racial scare tactics to persuade potential swing voters. Led by business and residential leaders who felt secure in a system of deed restrictions and preferred the status quo, zoning opponents hired the consulting firm Calabrese & Associates to help refine their campaign strategy. An executive summary prepared by the firm sheds light on the goals of the anti-zoning campaign. It stated: "Our arguments are most effective with minorities (especially blacks), low incomes, females and Democrats."²¹⁶ Because zoning opponents had capitalized on fears of segregation in the 1962 referendum, zoning advocates anticipated that the anti-zoning campaign would target minority- and low-income voters with similar messages again in 1993.²¹⁷ Despite their anticipation, zoning advocates felt secure that support among minority- and low-income voters was strong enough to withstand these tactics. Commentators recognized that in 1962 African-American voters feared zoning would serve as government-sanctioned segregation, but they expected their support in 1993 because minority leaders were among zoning's strongest supporters.²¹⁸ In February, well before the campaign came into full swing, minority city council members Al Calloway and Ben Reyes both publicly supported the proposed zoning ordinance and believed it would help their constituents.²¹⁹

212. Tolson, *supra* note 209; Mason, *supra* note 206.

213. Tolson, *supra* note 209.

214. BABCOCK, *supra* note 181, at 28. *See also supra* note 181 and accompanying text.

215. Dyer, *supra* note 186. *See also* Mason, *supra* note 206.

216. Kristaponis, *supra* note 196, at 56.

217. Tom Kennedy, *Scare Tactics Should Be Zoned*, HOUS. POST, Apr. 11, 1993, at C1. As early as April 1993, reporter Tom Kennedy recognized that scare tactics had been used in "every political campaign that ever crossed Buffalo Bayou" and predicted they likely would be used in the November zoning referendum. *Id.* Community leaders shared this view. In May 1993, Zoning Commissioners Marcia Oliveraz, Talmadge Sharp, and other minority leaders expressed dismay that zoning opponents would portray zoning as an effort to promote segregation. *Id.*

218. Karen Weintraub, *Black Leaders Among Supporters of Zoning*, HOUS. POST, Feb. 10, 1993, at A1, A8.

219. *Id.*

Moreover, zoning advocates believed that voters in minority communities would support the proposed ordinance because it served their rational interests. Planning and Zoning Commission Chairman Marvin Katz observed: "The black and Hispanic leaders in the community are the people who call me most frequently to say they want a zoning ordinance. The neighborhood people—both blacks and Hispanics—are demanding stricter rules and regulations."²²⁰ Pastor Ed Lockett, a minister in a minority community and contributing author of the proposed ordinance, asserted that zoning would benefit low-income homeowners by protecting the residential character of their neighborhoods.²²¹ In addition, planners predicted that any increases in housing prices would benefit minority homeowners as much as white homeowners.²²²

b. Targeting Minority Communities

In spite of seemingly strong support for zoning among minority voters, the anti-zoning campaign persisted to target them with scare tactics and secured the referendum's defeat. The anti-zoning campaign relied heavily on arguments that zoning would lead to greater segregation and discrimination. For instance, another flier distributed by the Houston Property Rights Association alleged that zoning would encourage harassment of African Americans "when driving through zoned white neighborhoods" and "would make apartments illegal so poor people can't find places to live."²²³ Commentators such as *Houston Post* reporter Tom Kennedy challenged the credibility of these arguments. He wrote that anti-zoning campaigners were lying and using racism as a scare tactic to persuade voters.²²⁴

The deliberate effort by the anti-zoning campaign to target minority voters became more evident when news reports revealed that the Black Ministers Association of Houston and Vicinity (BMA), comprised of 650 African-American ministers, had received financial contributions from anti-zoning organizations.²²⁵ In October, reports emerged that the BMA had entered into a contract with the Houston Prop-

220. Kennedy, *supra* note 217.

221. Weintraub, *supra* note 218, at A8.

222. *Id.* Mixon shared this perspective. In February, he assured reporters that "[t]oday, the zoning effort has substantial support from black homeowners who recognize that their interests are the same as white homeowners." *Id.*

223. Dillon, *supra* note 197. Community leaders feared that despite the best efforts of the Zoning Commission and city officials these arguments would succeed because minorities were not well informed about zoning. Weintraub, *supra* note 218 (citing then City Council Member Ben Reyes).

224. Tom Kennedy, *You Go for Lies? I Got Some Here*, HOUS. POST, Nov. 7, 1993, at C4.

225. Bennett Roth & Jim Simmon, *Campaign Tool or Bribery? Use of "Walk-Around Money" Comes Under Fire*, HOUS. CHRON., Nov. 14, 1993, at A15; Lynn Ashby, *Praying, Paying for Zoning Votes*, HOUS. POST, Oct. 7, 1993, at A17; R.A. Dyer, *Preaching Against Zoning: Groups Stepping Up Referendum Battle in Black Precincts*, HOUS. CHRON., Oct. 4, 1993, at A1. When the proposed zoning ordinance was announced, several prominent ministers from the African-American community endorsed the plan. Controversy later arose during the campaign when other black ministers publicly opposed zoning. The high visibility of Rev. William Lawson, pastor of the Wheeler Avenue Baptist Church and treasurer of Citizens for Zoning, at pro-zoning fundraisers in May 1993 was indicative of the early support among black ministers. *See* Karen Weintraub, *Group Ready to Make Pitch Backing Zoning*, HOUS. CHRON., May, 27, 1993, at A26.

erty Rights Association in which “the ministers agreed to preach against zoning from the pulpit as well as distribute pamphlets, buy advertising on black radio stations and debate at civic clubs.”²²⁶ At a news conference held by the BMA, members purportedly expressed “that zoning is a tool of segregation, will raise rent and taxes, breed slums and hurt the black church.”²²⁷ This public opposition by African-American ministers afforded credibility to messages that zoning was harmful to minority residents. In response to allegations of wrongdoing, Rev. M.L. Jackson, the BMA’s secretary, maintained that the money was being used solely to print and distribute campaign materials.²²⁸ Similarly, Kevin Southwick, media advisor to the Houston Property Rights Association, explained that “[Houston Property Rights Association] did not purchase a position by the ministers. The ministers, who were already preaching against zoning, wished to take part in defeating it.”²²⁹

Forty other African-American community leaders subsequently endorsed the proposed zoning ordinance in an effort to offset the BMA’s opposition to zoning and counter charges that zoning would contribute to racism.²³⁰ Rev. William Lawson of Wheeler Avenue Baptist Church and Treasurer of Citizens for Zoning assured residents that zoning would not create segregation and may help reduce it by strengthening minority neighborhoods.²³¹

Although the impact of the scare tactic arguments and the stance adopted by the BMA are difficult to quantify, these messages most likely influenced the votes of many minority residents. Because of the overwhelming opposition to zoning in minority communities and the referendum’s close margin of defeat, these anti-zoning strategies may be key reasons why Houston remains unzoned today.

3. Summary

The anti-zoning campaign appealed to free market ideals but also clearly employed scare tactic strategies. The lack of an existing pure free market system of land use regulations and the anti-zoning campaign’s deliberate targeting of minority residents indicate that zoning was not defeated in 1993 due to voters’ faith in market principles.

This Article does not assert that the anti-zoning campaign’s strategies explain entirely why voters rejected the zoning proposal in 1993. As in all elections, many factors deserve consideration. For example, only 23% of eligible voters participated in the 1993 referendum.²³² Fundraising also played a critical role because the anti-zoning campaign outspent the zoning campaign by a three-to-one margin.²³³

226. Roth & Simmon, *supra* note 225. See also Dyer, *supra* note 225; see Ashby, *supra* note 225.

227. Ashby, *supra* note 225. See also Karen Weintraub, *40 Black Leaders Speak Out for Zoning*, Hous. Post, Oct. 14, 1993, at A23. The BMA adopted an official stance in opposition to the zoning proposal despite that at least 12 of the 16 specific candidates the association endorsed had taken pro-zoning stands. Mark Horvit, *Zoning Foes Back Pro-Zoning City Candidates*, Hous. Post, Oct. 16, 1993, at A26.

228. Horvit, *supra* note 227.

229. Kevin M. Southwick, *Ashby, Kennedy Wrong About Anti-Zoning Effort*, Hous. Post, Oct. 24, 1993, at C1, C6.

230. Weintraub, *supra* note 227.

231. *Id.*

232. Kristaponis, *supra* note 196, at 56.

233. Tolson, *supra* note 209. The disparity in campaign financing sparked strong resentment among some observers. Lori Rodriguez wrote:

This fundraising disparity, however, does not indicate that wealthy interests lined up against zoning. Business leaders took both sides, prompting some of the city’s biggest business organizations such as the Greater Houston Partnership, the Houston Association of Realtors, and the Greater Houston Builders Association to adopt a neutral stance.²³⁴ A letter released in early 1993 reflects the support for zoning among some prominent leaders. Developer Gerald Hines, former U.S. Energy Secretary and Chairman of Rice University’s Board of Governors Charles Duncan, oilman Jack Blanton, Vinson & Elkins former Managing Partner Harry Reasoner, and President of Friendswood Development Company John Walsh all signed the endorsement letter.²³⁵

This analysis challenges the notion that Houston remains unzoned because voters share a belief in market principles. Moreover, it demonstrates the danger of relying solely on election results to interpret voter sentiments. Overwhelming opposition to zoning from low-income minority voters may have been in response to persuasive market-based messages, but they also likely responded to the barrage of allegations that zoning would sanction racial segregation and harm minority-owned businesses.

IV. Implications

Houston is not a good example of a free market in land use, as neither deregulation nor free market ideology characterize the Houston experience. Although Houston does not have a comprehensive zoning ordinance, the government has intervened in land use decisions for decades.

Houston’s free market reputation has led market advocates to suggest that the city represents a viable alternative to government regulation. This Article’s analysis, however, gives pause to that recommendation. It aims to provide Houston residents as well as scholars and policymakers nationwide a better understanding of how land uses are managed in Houston and offer insights as to why Houston remains the largest unzoned city in America.

For those residing in Houston, this analysis may help clarify the interplay between the city’s land use laws. Houston continues to confront questions about a perceived low quality of life, and an improved understanding of the strong regulations in place may help residents protect their property investments and help the city attract businesses and professionals to the Houston area.²³⁶

Money bought this election. There were minority voters who sincerely were scared that zoning would close their businesses and segregate their neighborhoods. There were struggling workers who sincerely feared that zoning would cost them jobs and raise their taxes. And there were foes of government who sincerely believed zoning would add bureaucracy and intrude in their personal business. But without the money that fueled the advertising that pushed all those buttons, over and over and over, those voters more easily could have separated fact from fiction.

Lori Rodriguez, *Can We Live With the Zoning Vote?*, Hous. Chron., Nov. 6, 1993, at A33.

234. Ralph Bivins, *Divided by Zoning: Business People in Houston Are Deeply Split as Vote Nears That Could Change the City’s Economic Climate Forever*, Hous. Chron., Oct. 31, 1993, at B1.

235. Jay Root, *Group of Business Leaders Supports City Zoning Plan*, Hous. Post, Mar. 6, 1993, at A22.

236. Commercial realtor Howard Horne has argued that Houston’s perceived low quality of life and lack of zoning has deterred businesses and residents from locating in the city. He attributes Houston’s un-

For commentators looking to Houston for guidance concerning land use reforms in other cities, this analysis should dispel the perception that Houston is the exemplar of a free market model in land use management. Houston's growth cannot be attributed to market forces alone. Moreover, cities should appreciate the extent of regulation in Houston before they attempt to model the Houston approach with a broad repeal of zoning laws. The remainder of this section addresses several misperceptions founded upon Houston's free market reputation. It challenges three specific claims about Houston's land allocation, housing prices, and free market ideology.

A. Houston's Land Use Allocations Are Not Attributable to Market Forces

First, the collection of strong land use controls in Houston calls into question previous analyses that have attributed the allocation of land in Houston solely to market forces. For instance, Siegan's assertion that the market itself will separate incompatible land uses is misdirected. Siegan argues that economic constraints upon commercial uses such as gas stations and fast food franchises require them to locate on major thoroughfares rather than on cheaper residential streets.²³⁷ He generalizes to conclude that "[n]ormally, without any governmental coercion and in their own self-interest, these commercial operations will locate on the major thoroughfares and the inside streets will be free of them."²³⁸ Moreover, Siegan calls attention to the Houston experience to assert that the market contains its own growth controls. He asserts:

No large-lot or snob zoning exists there [in Houston] because the builders and developers determine the size of most building lots, not the planners and politicians. There are very few regulatory curbs limiting density and height of multifamily housing or of shopping centers and other commercial stores in central or other areas. No laws prohibit erection of buildings containing both residential and commercial uses. Nor does Houston have growth controls, which cause builders to bypass restricted areas in order to build further out in less restricted areas.²³⁹

These arguments oversimplify the regulatory forces guiding land use allocations in Houston. Deed restrictions, permit requirements, the major thoroughfare and freeway plan's right-of-way requirements and design standards, and the assortment of other location restrictions deter commercial development in residential areas. Furthermore, regulatory tools impose growth restrictions beyond market controls. For instance, the prevailing lot size ordinance restricts developers from splitting lots. And the Development Ordinance establishes different standards for urban and suburban areas concerning lot density, building setbacks, common open spaces, and street widths. Generally, lawmakers

zoned reputation for why the American Cancer Society decided to relocate its headquarters to Atlanta instead of Houston. Howard Home, *Houston Must Have Zoning or It Will Lag Further Behind*, Hous. Post, C1 (Oct. 24, 1993).

237. Bernard H. Siegan, *Oregon Land Use Symposium: Opening Remark: Keynote Address*, 14 ENVTL. L. 645, 649 (1984). See Siegan, *supra* note 25, at 741-42. See also Siegan, *supra* note 11, at 142.

238. Siegan, *supra* note 237, at 649.

239. Siegan, *supra* note 25, at 734.

should not interpret the Houston experience to indicate that market forces alone will separate land uses.

B. Houston Does Not Demonstrate That Dismantling Zoning Will Lower Housing Prices

Similarly, commentators should not rely on the Houston experience to predict that cities will enjoy lower housing prices if they dismantle their zoning regimes. Siegan recently has cited the lack of regulations in Houston to bolster his argument that the Silicon Valley area should reduce zoning in order to spur housing construction and lower housing prices.²⁴⁰ Houston's land use management techniques, however, call into question Siegan's argument.²⁴¹ Because Houston's land use regulations restrict development in a manner similar to zoning, cities should not rely on Houston's experience to indicate that housing prices will decline solely by eliminating zoning controls. Less stringent zoning measures indeed may lower housing prices by expanding housing supply,²⁴² but lawmakers should be careful not to rely on Houston as the test case for a deregulatory strategy.

Assuming the perception is accurate that housing prices are lower in Houston than in comparable zoned cities,²⁴³ what factors other than the absence of zoning underlie this observation? I offer two suggestions. First, Houston's lower housing prices may indicate that the function of particular regulations influences prices. Second, the Houston experience may suggest that determinants of housing demand play a more critical role than regulatory factors that influence housing supply. The first consideration underscores the need to investigate further how particular land use regulations interact to affect housing prices. Rather than view the debate through a binary lens of regulation and deregulation, studies may do better to assess how various legal regimes in cities impact prices differently.²⁴⁴ The second consideration moves outside the regulatory framework toward analysis of factors that influence housing demand. Important causes of demand may include access to employment opportunities,

240. *Id.* at 694.

241. William Fischel also challenges Siegan's evidence for lower housing prices in Houston. See WILLIAM A. FISCHEL, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 232-49 (1985). Fischel criticizes Siegan's study and asserts that housing prices reflect a variety of attributes, such as access to employment and an effect of an adjacent undesirable use. Lower housing prices also may indicate the presence of nuisances that zoning may have prevented. *Id.* at 233.

242. See, e.g., EDWARD L. GLAESER & JOSEPH GYOURKO, *THE IMPACT OF ZONING ON HOUSING AFFORDABILITY* (Harvard Institute of Economic Research, Discussion Paper No. 1948, 2002), available at <http://post.economics.harvard.edu/hier/2002papers/HIER1948.pdf> (finding that in the areas where housing is significantly higher than construction costs, zoning and other land use controls play the dominant role in making housing expensive).

243. See, e.g., Richard B. Peiser, *Land Development Regulation: A Case Study of Dallas and Houston, Texas*, 9 AM. REAL ESTATE & URB. ECON. ASS'N J. 397-417 (1981). See also SIEGAN, *PROPERTY AND FREEDOM*, *supra* note 27, at 192-97 (asserting that housing prices are lower in Houston than in comparable cities).

244. See, e.g., ARTHUR C. NELSON ET AL., *THE LINK BETWEEN GROWTH MANAGEMENT AND HOUSING AFFORDABILITY: THE ACADEMIC EVIDENCE* (Brookings Inst. Center on Urban and Metropolitan Policy Feb. 2002), available at <http://www.brook.edu/es/urban/publications/growthmang.pdf> (reviewing how different land use regulations may act to raise and lower housing prices.)

proximity of undesirable uses, weather preferences, and quality of schools.²⁴⁵

Houston's free market reputation may mislead commentators to attribute Houston's housing prices to its lack of zoning; but the situation is far more complicated. Housing prices are determined by many interacting factors that alter supply and demand,²⁴⁶ and further analysis should be conducted to better understand how Houston's unique land use controls influence them.

C. Election Results Alone Do Not Indicate Support for Free Market Principles

Finally, the role of scare tactics in Houston's 1993 zoning referendum challenges assertions that low-income residents are more likely to embrace a free market ideology. Once again, Siegan asserts that, "the less affluent members of our society are quite aware of the virtues of the free market in housing."²⁴⁷ He claims that election results from referenda to regulate land in areas ranging from Texas to California confirm "that most low-income people reject government land use controls."²⁴⁸ Rather than indicate a faith in the free market, election results in Houston's lower income commu-

nities reflect the persuasiveness of scare tactic strategies. Moreover, the 1993 campaign demonstrates that telling insights can be gained by looking beyond election results to campaign messages. As local leaders entrust land use decisions to voters in Houston and other cities, they should recognize the potential for these strategies in other elections.²⁴⁹

V. Conclusion

Many commentators have compared the benefits of zoning and nonzoning, and the search for an alternative to zoning remains an important goal on scholarly and policymaking agendas. Although deregulation and market incentives present attractive strategies for land use reform, reliance on Houston as the exemplar of the free market is misplaced. Houston, indeed, has grown into a world-class city with the help of strong regulations.

This Article is not an endorsement for a traditional zoning ordinance in Houston. Further analysis should study the attributes of citywide zoning and alternative proposals such as small area plans and neighborhood zoning.²⁵⁰ This Article, however, does underscore the importance for residents and lawmakers to appreciate the extensive patchwork of regulations in place in Houston. The City continues to change as residents and development return to the city center. Houston can best address these changes with an informed understanding of the existing regulations and the political forces that helped set them in place.

245. Many scholars have considered the determinants of housing demand. *See, e.g.*, WILLIAM ALONSO, *LOCATION AND LAND USE: TOWARD A GENERAL THEORY OF LAND RENT* (Harvard Univ. Press 1964); RICHARD F. MUTH, *CITIES AND HOUSING: THE SPATIAL PATTERN OF URBAN RESIDENTIAL LAND USE* (University of Chicago Press 1969); Jennifer Roback, *Wages, Rents, and the Quality of Life*, 90 J. OF POL. ECON. 1257-78 (1982); Sherwin Rosen, *Wage-Based Indices of Urban Quality of Life*, in *CURRENT ISSUES IN URBAN ECONOMICS* (Mahlon R. Straszheim & Peter M. Mieszkowski eds., 1979).

246. NELSON ET AL., *supra* note 244, at Exec. Summary.

247. Seigan, *supra* note 25, at 695-96.

248. *Id.* at 695-96; *See also supra* note 178 and accompanying text.

249. For Houston, in particular, former City Council Member Jim Greenwood observed that scare tactics have "driven this city in terms of its land-use policy and its politics for 157 years." Tolson, *supra* note 209.

250. Mixon proposes the use of neighborhood zoning in his article, *Neighborhood Zoning for Houston*, *supra* note 62. Additionally, the City already is considering proposals for small area plans. *See supra* Part II.D.3.