

# Land Use in the Unzoned City

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Photography by Thinkstock*

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**THE CITY OF HOUSTON, TEXAS**—which all students at South Texas College of Law call home for at least the better part of three years—is famous for many things. It is the fourth-largest city in America, with 2.1 million residents in the city, and nearly 6 million in the metropolitan area. It is the capital of the global energy industry. It is “Space City,” the home of NASA. The Texas Medical Center is the world’s largest. It is home to major-league sports teams and world-class arts. And, of course, Houston is the only major city in America without land use zoning.

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You might be surprised at how far that last item—being the “unzoned city”—carries Houston’s reputation outside the state. To get a sense of how truly unique Houston is in this regard, consider the second-largest unzoned city in America: neighboring Pasadena, Texas—with a population less than 150,000. No other city even comes close. Houston’s non-zoning regime gets at least a mention if not an extended discussion in most property law classes and textbooks across the U.S. Routinely, when I speak at property law and land use conferences across the country, I get some version of the cocked eyebrow or the muffled chortle when I meet people and tell them that I teach land use at a law school in Houston. “Why bother?” seems to be the bemused reaction from those who are familiar with Houston’s reputation.

It turns out that Houston, despite its famous (or infamous) lack of zoning, has a plethora of land use regulations that are not codified in a formal zoning ordinance; it also has an extensive regime of private covenants that are often even stricter than government zoning. But even more importantly, I believe there is no better place in America for teachers and students to study land use law than in the one place that isn’t subject to a strict and longstanding zoning code. But first, let’s address the question of why Houston is unzoned.

#### WHY HOUSTON IS AMERICA’S ONLY MAJOR UNZONED CITY

Zoning is the regulation of land use by prescribing different rules for different places within a municipality based on their geographic location. The typical zoning ordinance establishes different districts on the map for different land uses, such as residential, commercial, industrial, and so on. Almost every zoning law also regulates “site requirements” within each district to control things such as building height, setbacks from the road, minimum or maximum lot sizes, density, and even specific factors such as form and aesthetics.

New York City enacted the first comprehensive zoning ordinance in 1916. The early advocates of zoning were the founders of the urban planning profession, and zoning was part of the Progressive movement. Planners believed they could improve the quality of life for all by prescribing land use rules based on their administrative expertise and what were then perceived to be universal principles. After the U.S. Supreme Court ruled that zoning was not a violation of constitutional property rights in the famous case of *Euclid v. Ambler Realty Co.* in 1926, nearly every city in America—except, of course, Houston—enacted a zoning ordinance in the next few decades. Putting aside the fact that Houston does in fact prescribe numerous land use rules, why is it the only major city without a zoning code?

Popular belief—both within Houston and nationally—attributes Houston’s unzoned status to several, mostly cultural, ideas: that Houstonians place an inordinately high value on individual property rights and economic liberty; a western self-reliance ethic; a natural suspicion of excessive government regulation; the classic notion of one’s home as one’s castle; or a sort of cowboy libertarianism that values everyone’s right to do as they please with their land. There is some truth in these stereotypes, but they fall far short of explaining why Houston alone remains unzoned, because they are cultural images that have more to do with Texas generally than with Houston. And the fact that Dallas, San Antonio, Austin—and virtually every other Texas city—all have zoning, undercuts this cultural explanation. Here in Houston, I have observed firsthand at numerous meetings of the

Planning Commission, City Council, neighborhood organizations, and advocacy groups, that there are a great many people in Houston who would love nothing more than to enact stricter controls over other people’s land.

The key difference that has kept Houston unzoned for all these years may owe something to those cultural explanations, but as a technical matter it is much simpler: Houston has a provision in its City Charter—roughly equivalent to a “constitutional” document that sets the basic rules of government—that forbids the City Council from enacting a zoning ordinance without a popular referendum. If not for this requirement, I believe that the City Council would have established zoning long ago—just as the city councils of Dallas, Austin, San Antonio, and virtually every other American municipality have done. But the referendum requirement in Houston means that the issue has to be subject to popular vote after a public debate, and the three times this has been tried, in 1948, 1962, and 1993, zoning was defeated by a close margin. Other scholars have studied these events extensively, but it is fair to say generally that a significant part of the anti-zoning forces were disparate groups motivated by a variety of specific concerns, at least as much as by any sort of general “Texan” anti-government/pro-property rights sentiment.

So Houston is the only major unzoned city primarily because zoning is simply harder to do here, legally. But what is the effect of this unique status? Is Houston really an unregulated land use free-for-all? Does it matter?

#### THE UNZONED CITY HAS EXTENSIVE LAND USE REGULATIONS

The popular conception that Houston is unzoned because it is some sort of ultra-Texan free-market landscape is not accurate. Houston’s land use is in fact highly regulated. While no Houston ordinance explicitly uses the “z-word,” and its rules for the most part don’t prescribe limitations on use, there are numerous land use regulations that, in any other city, would be part of the zoning code. Houston defines certain areas as “urban” versus “suburban,” with different regulations. There are





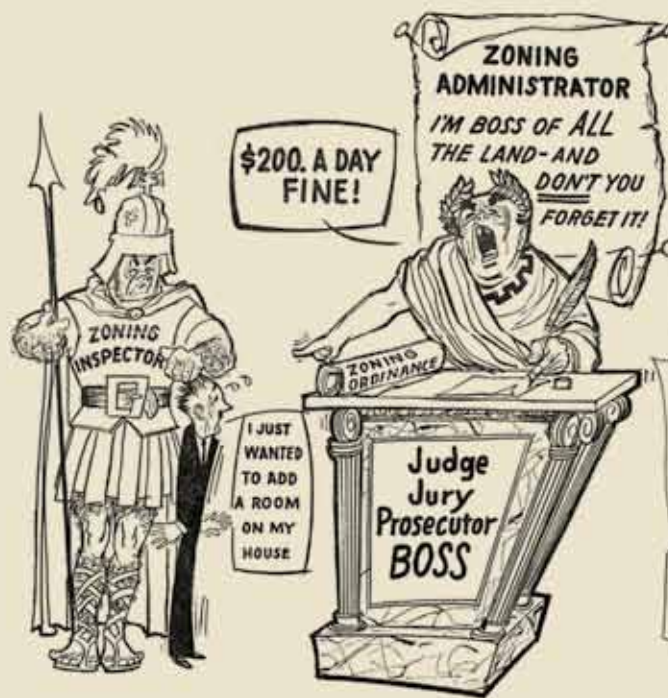
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Houston, Texas

# Zoning Means 1-Man Rule



## Boss Calls Shots On All Land Use

The basic issue in the Nov. 6 zoning election is whether eggheads, pinheads and politicians should control property in Houston.

Zoning places a lien on everybody's property in Houston.

The value of a piece of land depends on the whim of a Zoning Boss.

Zoning benefits the large land-owners, not the home-owners.

The man with the influence to get a zone changed makes a killing. The man without that influence gets killed.

### Search Without Warrant

The proposed zoning ordinance provides for the city to send a zoning inspector to enter a home or a place of business without a search warrant.

The zoning ordinance is made to order for police power abuses and, for harrassment. It calls for stiff fines of up to \$200 a day for every day's violation.

It even allows an unspecified fee to be charged a property-owner for a zoning inspection EVEN if the complaint against him turns out to be unfounded!

### All Power in One Man

Virtually all power—complete control over Houston's land—rests with one man. He would bear the title of Zoning Administrator. He would have—in the language of the proposed ordinance itself—UNLIMITED control over all land use.

Hundreds of thousands of Houstonians fail to realize this, for the simple reason that they have not read the zoning ordinance. Many don't know that changes affecting them vitally have been made since they last saw the zoning maps originally drawn.

### What The Ordinance Provides

The proposed zoning ordinance provides for a Zoning Administrator, to be appointed by the mayor, for a

Planning and Zoning Commission and for a Zoning Board of Adjustment, the latter to consist of five members with two alternate members to fill in when

needed for a quorum.

The measure provides that any property owner with a complaint on zoning must go to the Zoning Administrator.

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## \$200 Daily Fine Penalty For Any Zone Violation

A fine of up to \$200 a day is provided in the final draft of the zoning ordinance for anyone found guilty of any violation.

No search warrant need be carried by the city representative who checks up on a real or imagined violation.

The ordinance simply provides that the inspector (he can be a zoning inspector, a policeman or any other city representative) has the right to enter a home or a place of business "at any reasonable hour."

In the language of the ordinance this is described as "a compliance test."

There's also a fee chargeable against the property owner for the zoning inspector's visit.

## Anti-Zoners Will Furnish Speakers

Any organization wishing to hear a speaker against the zoning ordinance is urged to call Anti-Zoning Headquarters, 2403 South Main, FA 3-6216 or get in touch with W. K. King, 4112 Dennis, CA 3-4529.

The Greater Houston Planning Association will be glad to furnish speakers to discuss zoning or debate the issue with zoning advocates any place, any time.

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to Keep Houston free of zoning by supporting the

Greater Houston Planning Association

4112 Dennis, Houston, Texas

W. K. King, Chairman Executive Committee

Name \_\_\_\_\_

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laws prescribing minimum lot sizes, which in turn restrict density. There are setbacks from the street, buffer zones for development, and regulated street widths. There are other laws that affect land use, such as the new historical preservation ordinance, which allows citizens to petition the council for designation as a historic area, which comes with additional restrictions. These are all government measures that, in my opinion, operate as "de facto zoning"—they prescribe different land use rules based partly on geographic location. And even these rules pale in comparison to the extensive regime of private covenants and deed restrictions that govern a majority of the property in Houston.

Even though Houston is highly regulated, it is still true that Houston's land use regime is less restricted and affords more freedom than in most American cities. This freedom has allowed much of the innovative development that has made Houston an interesting modern city, with housing prices among the most affordable among major American cities. Indeed, one of the reasons that Houston has fared relatively well during the recent recession is that its lack of artificial restrictions on development prevented Houston from having much of a housing "bubble" in the first place. Houston's relative land use freedom also provides us with a better opportunity to take advantage of modern "progressive" land use ideas such as "new urbanism" and mixed-use, pedestrian-friendly, transit-oriented development—which could be necessary to work with the expanded light rail system.

But the unzoned City of Houston is still subject to pressures to regulate land use. In 2007, a proposal to build a residential high-rise tower in a mostly single-family neighborhood was the subject of intense controversy. While the proposed "Ashby High Rise" was technically legal—there were neither any public laws nor private covenants standing in the tower's way—civic groups and neighborhood advocates pushed city hall to pass stricter restrictions on development. As this article goes to press, the city council is considering a new law that will restrict high-rise development in Houston. While in my opinion the proposal is another instance of "de facto zoning," the fact is that Houstonians continue to debate the proper balance of freedom versus land use control. This is an essential part of the larger tension—with which all lawyers are familiar—between individual rights and the common good.

## THE UNZONED CITY FOR STUDENTS, LAWYERS, AND CITIZENS

Increasingly, I find that engaged citizens—lawyers and non-lawyers alike—care passionately about land use. Each of us lives in a certain place, and the character of our communities is one of the most important parts of our lives. Most of our students at South Texas have a sophisticated sense of place—the places where they are from; where they live; and where they will practice, with the hope of advancing their clients' interests. When I teach my upper-level courses in Land Use and State & Local Government, I am continually impressed by our students' reporting, engagement, and research on a wide variety of important land use issues. I am confident that South Texas is continuing to produce new lawyers with a mature appreciation of, and devotion to, the betterment of their communities.

Houston provides a fascinating opportunity for our students to observe and engage in land use discussions in the singular place that offers citizens the possibilities of experimentation and evolution in regulation and development. It's a great place for tomorrow's lawyers to study property law and land use, and Houston is the city—America's Unzoned City—that is the most important ground of the quintessentially American legal struggle between individual property rights and the common good.

"Zoning Facts" published by the Greater Houston Planning Association, October 1962. HMRC, Litterst-Dixon Collection, MSS 1248-3714