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FOUR LAND USE VIGNETTES FROM UNZONED(?) HOUSTON

JOHN MIXON*

I. HOUSTON'S FREE ENTERPRISE IMAGE IS OVERBLOWN

Houston has been called “the hair shirt of the city planners.”¹ The profession’s discomfort stems from the city’s repeated rejection of land use zoning—the essential tool of their craft.² The unrepentant city touts itself as a model of enlightened differentness: a public-private combination that provides a better formula for managing growth in a modern city. But beneath that Chamber of Commerce gloss,³ Houston’s land use is a far cry from free enterprise in action.

What this article calls “The Houston Way” combines: (1) An adamant refusal to use government power prospectively to guide growth and protect existing investment; with (2) A willingness to respond to specific developer-citizen conflicts with ad hoc solutions that assign the City Planning Commission a unique role in mediating the constant battle between homeowners and developers. Rejection of traditional land use solutions oftentimes places the city at the borderline between legal and not-so-legal regulation.

A. *Real Estate Developers Use City Power as an Extension of Their Private Enterprise*

From the day a couple of 1830s hucksters named their promotional development after the hero of Texas independence,⁴ Houston has catered to real estate promoters who assumed their own financial interests unerringly reflected the public good. The self-appointed power elite got an early grip on local government, and their successors still use it to advance

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1. RICHARD F. BABCOCK, THE ZONING GAME 25 (1966).

2. Houston has rejected traditional land use zoning on three separate occasions by referendum—1948, 1962, and 1993. Teddy M. Kapur, *Land Use Regulation in Houston Contradicts the City's Free Market Reputation*, 34 ENVTL. L. REP. 10045, 10057 (2004).

3. The Chamber is known locally as the Greater Houston Partnership. See Greater Houston Partnership, <http://www.houston.org/greater-houston-partnership> (last visited May 25, 2010).

4. JOE R. FEAGIN, FREE ENTERPRISE CITY: HOUSTON IN POLITICAL-ECONOMIC PERSPECTIVE 48 (1988) (“Houston began in the 1830s as a speculative real estate venture by two northern capitalists, J. K. Allen and A. C. Allen, in a swampy Gulf Coast area.”).

what they (perhaps honestly) believe is best for the city.⁵ Real estate influence affects citizen voters as well as city hall, as mid-range land developers and entrepreneurs have convinced the public to defeat zoning in three referenda.⁶ However, the margin of defeat diminished with each referendum, indicating The Houston Way might be at risk if traditional zoning is reconsidered in the twenty-first century.⁷

Whether Houston's lack of zoning has had good or bad effects has been debated. Neoclassical economists tend to bask in the city's success; critics question whether the lack of zoning makes any difference, and assert that the city's abandonment of traditional controls has irrevocably damaged the city's residential neighborhoods.⁸ This article describes the city's hypocritical responses as it tries to satisfy homeowners without threatening developers' political power to veto traditional zoning.

B. *Lack of Zoning Has Not Produced a Better City*

The Houston Way has not produced a consumer-driven marketplace filled with better housing and glistening commercial uses. Instead, the alliance between private interests and public power has committed the city to conventional twentieth-century assumptions that low density is good, industry and growth are worth all their external costs,⁹ and auto-

5. *Id.* at 109. The 2009 mayoral race produced no candidate who supports zoning. See *infra* Part II.G.

6. The last two referenda on zoning have been heavily influenced by interests that poured money and advertising strategically into minority communities to defeat zoning. See Kapur, *supra* note 2, at 10058, 10060–61. Several of the city's most prominent developers and community leaders did not join the opposition. See *id.* at 10061 ("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.")

7. See Kapur, *supra* note 2 at 10057 ("Voters in Houston rejected the first proposed zoning ordinance in 1948 by a margin of greater than two to one."); *id.* at 182 ("In 1962, the proposed ordinance failed by a slimmer 57% to 43% margin."); *id.* at 10059 ("Houston voters rejected zoning for a third time in 1993, by a margin of 51.9% to 48.1 %.")

8. R. A. Dyer, *Zoning Defeated By Narrow Margin*, HOUSTON CHRONICLE, Nov. 3, 1993, at A1 ("City Councilman Jim Greenwood, architect of the proposed ordinance, conceded defeat at about 10:45 p.m. 'It looks like neighborhoods are going to lose tonight—but the neighborhoods are not going to die tonight,' he said.") As a zoning advocate, I made over 100 public speeches supporting the failed ordinance, pointing out numerous inappropriate adjacencies, including a chicken packing plant across the street from my mother's house in an unzoned residential neighborhood.

9. See NASA, Getting the Big Picture on Houston's Air Pollution, http://www.nasa.gov/vision/earth/everydaylife/archives/HP_ILP_Feature_03.html (last visited May 25, 2010) ("Houston has a serious air quality problem. Since 1999, the Texas city has exchanged titles with Los Angeles as having the most polluted air in the United States defined by the number of days each city violates federal smog standards.")

mobiles are better than mass transit for moving people. Not incidentally, these policies further the interests of subdivision developers and builders, whose outlying developments are favored by and dependent on outward sprawl.

C. *Overregulation, Not Under-Regulation,
Plagues Free Enterprise City*

At the same time, Michael Lewyn challenges Houston's image of minimal regulation, blaming overregulation—not under-regulation—for a variety of land use ailments.¹⁰ The government's stubborn requirement of minimum lot sizes¹¹ contributes to costly and inefficient sprawl,¹² with consequent air pollution¹³ and traffic congestion.¹⁴ The expanding ring of freeways ensures that new subdivisions will extend urban sprawl ever outward—a growth pattern that is life's blood for single-family subdivision developers.

D. *Ad Hoc Regulations Resemble Traditional Zoning*

Even Houston's disdain for zoning is more façade than fact. Although rejecting traditional enabling act procedures, the city provides a variety of complex, de facto zoning-type regulations. A hallmark of zoning is drawing district lines and adopting regulations that vary from district to district.¹⁵

10. Michael Lewyn, *How Overregulation Creates Sprawl (Even in a City Without Zoning)*, 50 WAYNE L. REV. 1171, 1200–01 (2004) (“Houston’s setback requirements and minimum parking requirements force pedestrians to walk through seas of parking in order to reach apartments, shops, and jobs. Minimum parking requirements force landowners to build parking lots, and setback rules encourage businesses to place those parking lots in front of buildings by preventing landowners from placing buildings in the twenty-five feet in front of those buildings. Such regulations have combined to make Houston more automobile-dependent—by reducing density, subsidizing driving, and making pedestrian travel uncomfortable.”).

11. HOUSTON, TEX., CODE OF ORDINANCES § 42-182 (1999) sets a beginning standard of 5000 feet minimum lot size for suburban areas, and HOUSTON, TEX., CODE OF ORDINANCES § 42-183 (1999 & 2007) sets a beginning standard of ,500 feet for urban areas. Lots with compensating open space may be reduced to 1400 square feet. *See Id.*

12. Lewyn, *supra* note 10, at 1176.

13. *Id.* at 1196 (“Houston’s air is more polluted than that of all but a few American cities, at least partially because of heavy automobile use.”). *See* NASA, *supra* note 9.

14. Lewyn, *supra* note 10, at 1177, 1200 (“Houston’s anti-density rules may have increased congestion by increasing driving: residents of low-density communities generally must drive more than other Americans, and Houstonians in particular drive more miles daily than residents of more densely populated regions. So, by increasing driving, Houston’s minimum lot size requirements may have actually increased congestion.” (citations omitted)).

15. For an example of a zoning enabling law, see the Texas Land Use Regulations Districts, TEX. LOC. GOV’T CODE ANN. § 211.005 (Vernon 2008), stating: “(a) The governing body of a municipality may divide the municipality into districts of a number,

1. The Standard Zoning Enabling Act Declares: “(a) The governing body . . . may divide the municipality into districts
(b) Zoning regulations must be uniform for each class or kind of building in a district, but the regulations may vary from district to district”¹⁶

Early zoning cases assumed that district-specific regulations required a carefully thought-out plan, followed by rational implementation, to survive constitutional scrutiny.¹⁷ That assumption ordinarily translates into following the Standard Zoning Enabling Act to produce a rational pattern of land use districts and regulations “in accordance with a comprehensive plan.”¹⁸ The enabling act tracks the constitutional requirement that to be valid, government action must be rational and substantially advance a conceivable public purpose.¹⁹ Texas’ Home Rule

shape, and size the governing body considers best for carrying out this subchapter. Within each district, the governing body may regulate the erection, construction, reconstruction, alternation, repair, or use of buildings, other structures, or land. (b) Zoning regulations must be uniform for each class or kind of building in a district, but the regulations may vary from district to district.” HOUSTON, TEX., CODE OF ORDINANCES § 33-4 (1991) defines “zoning” to mean “a system of land use regulation including, but not limited to, the designation of specific parcels or areas of land where the use, or the performance or development standards affecting such use, are or may be prescribed to achieve the goals of an approved comprehensive plan for the unique circumstances of the city.” By its own definition, when Houston divides itself into specific areas or parcels of land where performance or development standards are prescribed, it engages in “zoning.”

16. TEX. LOC. GOV’T CODE ANN. § 211.005 (Vernon 2008). See ADVISORY COMMITTEE ON ZONING, U.S. DEPT. OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT: UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS § 2 (1926) [hereinafter STANDARD ZONING ENABLING ACT].

17. See, e.g., *Longley v. Rumsey*, 224 N.Y.S. 165, 166–67 (Sup. Ct. 1927) (“The ordinance in question does not divide the village into geographical subdivisions, but, in lieu thereof, attempts to establish, as a separate district in itself, each village block; that is, two sides of one street between the nearest intersections. Whether or not each of those districts is residential or otherwise depends, not upon the decision of the trustees, but upon the number of residences and vacant lots found within that so-called district. . . . Because of the failure of this ordinance to deal with the matter in accordance with a comprehensive plan, and because of the arbitrary method by which the character of the so-called districts is determined, it follows that this ordinance is not a valid restriction upon the use of the premises . . .”).

18. STANDARD ZONING ENABLING ACT, *supra* note 16, at § 2. TEX. LOC. GOV’T CODE ANN. §§ 211.006–211.007 (Vernon 2008) (detailing the required procedures).

19. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (“[I]t must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834 (1987) (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)) (“We have long recognized that land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’ and does not ‘den[y] an owner economically viable use of his land.’”); *Lombardo v. City of Dallas*, 73 S.W.2d 475, 478 (Tex. 1934) (“The ordinance before the court in the Spann Case was fatally defective for various reasons. That case, however, did not involve a comprehensive zoning plan adopted in accordance with and in compliance

Cities, as well as general law municipalities, are required to follow enabling act procedures if they choose to employ zoning regulations.²⁰

Presumably, if Houston were to designate land use districts and impose zoning-type regulations without following the enabling act's procedures, its action would not be authorized under state law, and might even be unconstitutional as arbitrary and unrelated to a legitimate public purpose.

2. Like Zoning, Houston Regulations Vary from District to District

Houston routinely establishes regulations that differ from district to district without following enabling act procedures.²¹ For example, planning and platting ordinances prescribe different minimum lot sizes in the central business district, "urban" areas, and "suburban" areas.²² Regulations in "Green Corridors"²³ and within designated historic districts²⁴

with statutory authority, and we do not regard it as an authority against the integrity of the statute and ordinance before us.").

20. *Peters v. Gough*, 86 S.W.2d 515, 517 (Tex. Civ. App. 1935) ("In this connection . . . it is appellants' contention that the authority to enact zoning ordinances was granted to cities operating under the home-rule amendment by the provisions of Revised Statutes, art. 1175, subd. 26, and since that act does not contain any express limitation on the manner in which the right is to be exercised, said city was left free to exercise the right so conferred in any manner satisfactory to its legislative body. We are of the opinion, however, that the act of 1927 above referred to is a general law and was intended to be applicable to cities operating under the home-rule amendment, and since it was enacted subsequent to the adoption of Revised Statutes, art. 1175, the powers granted under said article 1175 must be exercised in conformity with the provisions of the latter act.").

21. See Kapur, *supra* note 2, at 10057. See also HOUSTON, TEX., CODE OF ORDINANCES § 33-4 (1991), *supra* note 15, for Houston's definition of zoning as including district designations.

22. HOUSTON, TEX., CODE OF ORDINANCES § 42-150 (1999 & 2009) sets different building lines, depending on whether construction lies in urban, suburban, or central business district. For examples of *de facto* division of the city into separate districts without following traditional zoning requirements, see HOUSTON, TEX., CODE OF ORDINANCES § 42-123 (1999 & 2001) (setting forth the boundaries of Houston's central business district); HOUSTON, TEX., CODE OF ORDINANCES § 42-101 (1999) (setting forth the requirements for designation as an "urban area"). See also City of Houston, Minimum Lot Size and Minimum Building Line Ord., <http://www.houstontx.gov/planning/DevelopmentRegs/prevailLotBldg.htm> (last visited Apr. 10, 2010).

23. HOUSTON, TEX., CODE OF ORDINANCES § 33-104 (2003).

24. HOUSTON, TEX., CODE OF ORDINANCES §§ 33-201–204 (1995, 2002, 2005 & 2007). The procedures for designating historic districts are detailed in HOUSTON, TEX., CODE OF ORDINANCES § 33-225 (1995, 2005 & 2006), and include city council designation. HOUSTON, TEX., CODE OF ORDINANCES § 33-236 (1995, 1998, 2002, 2004, & 2005) prohibits certain actions in historic districts without a "certificate of appropriateness." HOUSTON, TEX., CODE OF ORDINANCES § 33-242 (1995) requires new construction in a historic district to satisfy design criteria appropriate for the district. HOUSTON, TEX., CODE OF ORDINANCES § 33-247 (1995 & 2005) regulates demolition. HOUSTON, TEX., CODE OF ORDINANCES § 33-275 (2007) designates a specific historic district and establishes rules for it.

differ from those that apply outside the districts. Front yard parking prohibitions apply only in designated districts.²⁵ Proposed rules for transit corridors would apply only along metro rail lines.²⁶ Creating land use districts with regulations that vary from district to district amounts to zoning, and Houston's districting does not follow the enabling act's requirements.

3. A Pretense of Performance Standards Conceals De Facto Land Use Zoning

Houston skirts the different treatment objection by enacting ordinances that, in theory, apply citywide, but are brought to bear on specific areas by "performance standards" implemented through the Planning Commission's plat approval power.²⁷ Although these devices have some claim to legitimacy, the regulatory process would clearly be illegal if tested by the standard of review applied to traditional zoning.²⁸

4. "Zoning regulations must be adopted in accordance with a comprehensive plan . . ." ²⁹

Houston's regulations are not keyed to comprehensive planning as envisioned and required by zoning. The Planning Commission prepares elaborate plans for other purposes, but they do not drive Houston's district-specific regulations. The city has a practice of delegating power to private lot owners to initiate regulations to prevent their neighbors' unwanted, but otherwise legal, land use. To the extent this amounts to a delegation of legislative authority that advances private, not public, inter-

25. HOUSTON, TEX., CODE OF ORDINANCES § 28-303 prohibits yard parking only in districts designated by specific area ordinance.

26. HOUSTON LEGAL DEPARTMENT, INTERNAL DISCUSSION DRAFT JULY 15, 2009 (2009), available at <http://www.houstontx.gov/planning/Urban/ProposedTransitCorridorOrdinance.pdf> (discussing potential amendment regarding transit corridors that impose restrictions and requirements that apply only within the defined areas).

27. See, e.g., *infra* Part III.A (discussing re-plat requirements and procedures).

28. See Luther L. McDougal III, *Performance Standards: A Viable Alternative to Euclidean Zoning*, 47 TUL. L. REV. 255 (1973) (advocating the use of performance standards for mitigating land use impacts). McDougal acknowledges that ad hoc decisions are not acceptable: "The opposite of a detailed plan, *ad hoc* administrative approval or disapproval of each proposed land use, would permit administrative consideration of all the changing factors in the community. But even assuming judicial approval of such an alternative, which is extremely doubtful, this alternative appears to be the antithesis of planning and therefore unacceptable." *Id.* at 265–66.

29. TEX. LOC. GOV'T CODE ANN. § 211.004 (Vernon 1987 & Supp. 1989, 1997); see also STANDARD ZONING ENABLING ACT, *supra* note 16, at § 3.

ests, Houston acts unconstitutionally.³⁰ Consider, for example, the ordinance prohibiting front-yard parking in self-selecting districts.”³¹

Prohibitions against front-yard parking are not unusual, but ordinary zoning prohibitions are pre-planned and imposed within rationally drawn land use districts. The Houston solution does not pre-plan and tailor regulations for specific districts. Instead, it delegates power to homeowner associations, civic clubs, or 60% of owners in any neighborhood to initiate a planning commission recommendation to the governing body to prohibit front-yard parking in the target district by ordinance.³² If the governing body automatically validates the private preferences, the procedure blatantly employs government power for private purpose, no matter how sensible the decisions may be as a matter of land use policy. Regardless of whether sympathetic Texas courts would declare Houston’s delegation of power to private persons illegal, the procedure primarily benefits self-organizing neighborhoods with active civic clubs.³³ It is of little use to low-income neighborhoods where front-yard parking and front-yard auto repairs are more likely to present a real problem.³⁴

30. *Washington v. Roberge*, 278 U. S. 116 (1928) (declaring unconstitutional an ordinance permitting philanthropic home for children and aged within a residential district only if two-thirds of property owners consent). A Westlaw search of ALLCASES on April 10, 2010 for “un! w/10 delegat! w/5 legislat! w/5 power” produced 6,343 responses. Although many cases discuss and distinguish the doctrine, the undoubted beginning point is that government cannot lawfully or constitutionally delegate its police power to legislate for the public good to private parties who employ it for their own arbitrary purposes.

31. HOUSTON, TEX., CODE OF ORDINANCES §§ 28-301–305 (2009).

32. If the governing body actually exercises independent judgment and makes a decision on the basis of a record made before the city council, then the delegation of power is less blatant. If, however, the council hearing is a sham, then it appears to be a pure delegation of arbitrary power authorizing private parties to infringe their neighbors’ property rights.

33. *See, e.g., Sheretta R. Edwards*, Residents Claim Third Ward Not for Sale, *World Internet News*, April 15, 2004, available at http://soc.hfac.uh.edu/artman/publish/article_87.shtml (“Residents of Houston’s Third Ward say they fear unsympathetic urban developers will succeed in taking over a community that holds a legacy of history and fond memories for them. Signs that read ‘Third Ward Is Our Home and It Is Not For Sale’ have been erected in many yards as a sign of residents’ opposition to selling their property. Developers have made unsolicited phone calls to Third Ward residents offering to buy their homes. Residents say the townhomes developers want to build will cause their taxes to go up, forcing the elderly and the poor out of the neighborhood.”).

34. Third Ward Demographic Data, Point2Homes, <http://homes.point2.com/Neighborhood/US/Texas/Harris-County/Houston-Fort-Bend-County/Third-Ward-Demographics.aspx> (last visited June 12, 2010).

5. Four Vignettes Reveal Outright Warfare and Unsettling Coziness in the Unzoned City

So much for musing. How does Houston's cozy public-private system play out in reality? Here are four vignettes that illustrate how Houston handles land use warfare while maintaining the façade that impersonal, efficient private markets determine land use in a city of happy homeowners.

The first vignette relates to traditional zoning regulation of the "height, number of stories, and size of buildings."³⁵ The second describes Houston's unorthodox way of implementing zoning's stated goal of "preventing overcrowding."³⁶ The third illustrates real estate interests' fear of traditional zoning, even on a small, neighborhood scale. The fourth vignette highlights the intertwining of public and private interests that prompted the city to use its power of eminent domain to subsidize profit-seeking developers in direct violation of state statutory limitations.

II. THE ASHBY HIGH-RISE—A "TOWER OF TRAFFIC"

Ashby Street runs lazily through an elite residential Houston subdivision, then abruptly intersects Bissonnet, a busy mixed-use street that runs east and west. Bissonnet provides wide lanes for two-way traffic; it could accommodate three, but it is not wide enough for four. Light commercial uses, garden apartments, and single-family houses mingle peacefully on both sides of the street, separating two wealthy, restricted residential areas—Southampton and Boulevard Oaks. Both subdivisions butt up to opposite backsides of Bissonnet block fronts near the Ashby intersection.

A. *Public Power and "Private" Deed Restrictions Keep Commercial Uses out of Residential Neighborhoods*

The residential restrictions along Ashby Street require some explaining. Along with many other inner-city residential neighborhoods, the Southampton subdivision was platted with traditional residential deed restrictions set to expire after a specific time. Southampton residents are understandably concerned about an unrestricted and uncertain future in unzoned Houston.³⁷ If Houston development were truly driven by economic forces, a free market in land use would eagerly inject higher-den-

35. TEX. LOC. GOV'T CODE ANN. § 211.003(a)(1) (Vernon 1987 & Supp. 2003).

36. U. S. DEP'T OF COMMERCE, A STANDARD ZONING ENABLING ACT § 3 (rev. ed. 1926).

37. E-mail from Evalyn Krudy, Executive Director, Southampton Civic Club, Inc., to author (Oct. 7, 2009) (on file with author) ("Southampton's restrictions were set forth on 4/15/1923, and filed with the City of Houston on June 25, 1923, allows for a one-time, 50-year extension. They will permanently expire on 4/15/2023 unless they are

sity residential and commercial uses into these affluent neighborhoods and destroy their single-family exclusiveness. A fair number of less affluent inner-city Houston neighborhoods have suffered that fate, and the results are not pretty.³⁸

A traditionally zoned city would preserve high-income neighborhoods by classifying them as single-family districts and prohibiting commercial uses and apartments. But in a city that rejects zoning, residential neighborhoods must rely on private deed restrictions to keep the market at bay. Several nearby subdivisions faced expiration of their restrictions after the 1962 zoning referendum failed,³⁹ and nervous residents looked for a way to preserve their single-family residential character. Ordinary property law would make renewal difficult, if not impossible, by requiring near unanimous approval by lot owners.⁴⁰

B. *Legislation on Demand Has Diverted Homeowner Pressure for Zoning*

Houston maintains its façade of free enterprise by periodically running to the Texas legislature for rifle-shot solutions whenever zoning raises its ugly head or affluence needs tending to. Accordingly, in 1965, a responsive legislature empowered Houston residents to renew residential restrictions by a majority vote of lot owners.⁴¹ The renewal would apply to all lots whose owners failed to “opt out” within one year after the effective date.⁴² Southampton was not involved in statutory renewal because its original restrictions allowed a one-time, 50-year renewal, which happened in 1973. Its renewed restrictions expire in 2023, and efforts are already underway to invoke the statutory renewal proce-

renewed or extended (in original or amended form) through CH 201 or 204 of the TXRPC.”).

38. See, e.g., *supra* notes 8 and 33 and accompanying text.

39. Kapur, *supra* note 2, at 10049–50.

40. See *Williams v. Smith*, 409 S.W.2d 572, 579 (Tex. Civ. App. 1966), *rev'd on other grounds*, 422 S.W.2d 168 (Tex. 1967); *Hanchett v. East Sunnyside Civic League*, 696 S.W.2d 613, 615 (Tex. App. 1985); *Farmer v. Thompson*, 289 S.W.2d 351, 355 (Tex. Civ. App. 1956).

41. Kapur, *supra* note 2, at 10050–52. The original act was TEX. REV. CIV. STAT. ANN. art. 974a-1 (Vernon 1963 & Supp. 1965), which was repealed in 1987. TEX. REV. CIV. STAT. ANN. art. 974a-1 (Supp. 2009). Most of that law was later codified at TEX. PROP. CODE ANN. §§ 201.001–201.013 (Vernon 2007 & Supp. 2009).

42. TEX. PROP. CODE ANN. §§ 201.009 (Vernon 2007); Kapur, *supra* note 2, at 10050 n.67.

dures.⁴³ Other residential areas near the Ashby-Bissonnet intersection remain largely protected by original or renewed restrictions.⁴⁴

C. *The City Attorney's Office Enforces Deed Restrictions*

To add punch to private deed restrictions, the city attorney can sue to enjoin violations,⁴⁵ and the city requires applicants for building permits to certify that proposed construction will not violate residential restrictions.⁴⁶ The resulting system looks and works a great deal like zoning by a different name *within the boundaries of restricted subdivisions*. With intact and enforceable restrictions, affluent residents near the intersection of Bissonnet and Ashby could feel reasonably safe from unwelcome commercialism, but they knew the unrestricted land along the busy street itself posed an obvious and constant development threat.

D. *Development at the Fringe of Restricted Subdivisions Highlights Weakness of Non-Zoning*

The threat became imminent a few years ago, when Buckhead Investment Partners bought a sixty-seven unit garden apartment project at the intersection of Ashby and Bissonnet to develop a mixed-use project featuring a twenty-three-story condominium.⁴⁷ While not especially welcome, the aging garden apartments had not been a bad neighbor. A high-

43. See Sarah Kortemeier, *Southampton Deed Restrictions Ending; Civic Club Hopes to Establish New Ones*, Village News, Nov. 27, 2007, available at http://www.buckfund.com/docs/press_archive/Village%20News%2011-27-07.pdf (describing the earlier and current renewal efforts).

44. Boulevard Oaks is not a single, restricted subdivision. There are instead a number of subdivisions with different restrictions and different expiration dates. See Deed Restrictions of Boulevard Oaks Civic Association, <http://www.daveshine.org/BOCADeedRestr/BOCADeedRestrictions.htm> (last visited on May 25, 2010) (showing some of the subdivisions restrictions and renewals). The city's planning department now offers technical assistance for areas that want to use the statutory process to impose or renew residential deed restrictions. See City of Houston Deed Restrictions Department, http://www.houstontx.gov/planning/ComPlanning/deed_restr.htm (last visited May 25, 2010).

45. TEX. LOC. GOV'T CODE ANN. § 212.153 (Vernon 2010). See also Lewyn, *supra* note 10, at 1204 ("If the city stopped subsidizing covenant enforcement, Houstonians would be less likely to enforce covenants that zone neighborhoods for just one possible form of use, thus increasing the number of mixed-use neighborhoods in which residents can walk to shops and jobs.").

46. HOUSTON, TEX., CODE OF ORDINANCES §§ 10-552, 10-555 (2010) (imposing the permit requirement). To view the permit notice, see CITY OF HOUSTON, DEED RESTRICTION COMPLIANCE NOTICE (June 15, 2004), available at <http://documents.publicworks.houstontx.gov/documents/divisions/planning/enforcement/deedcompliance.pdf>. See also TEX. LOC. GOV'T CODE ANN. § 212.156 (Vernon 2010) (authorizing enforcement of restrictions by ordinance).

47. Mike Snyder, *City OKs Plans for Ashby High-Rise: Apartment Number Reduced, but the Height Remains the Same; Ashby: Opponents Vow to Continue Fighting*, HOUS. CHRON., Aug. 22, 2009, at A1 [hereinafter Snyder, *City OKs Plans*].

rise tower was something else.⁴⁸ Condominium owners would undoubtedly have been as affluent as many of the single-family residential owners, but that wasn't the point. An often-heard complaint is that condominium owners could look into homeowners' backyards, and God knows what they might see. In words reminiscent of the Zoning Enabling Act, the tower's shadow would rob residents of light and air (which might be a blessing, considering Houston's heat and pollution).⁴⁹ Even more irritating, the developers had been raised in the elite neighborhood.⁵⁰ More than one fuming resident asked why Buckhead (or a vulgarization of the name) didn't build the tacky high-rise in somebody else's back yard.⁵¹

If free enterprise actually determined Houston land uses, the upscale development would have quickly added fancy housing, a spa, shopping facilities, and executive offices on the unzoned, unrestricted tract. Admittedly, no zoned city would allow such a dramatic height departure from surrounding low-rise residential uses. But Houston was supposed to be different, and homeowners suddenly had to deal with that difference. Without zoning to provide a conventional forum to respond to their complaints, residential landowners began a visual and verbal rebellion. Yellow signs opposing the "Tower of Traffic" sprouted on virtually every yard within a mile of the Ashby site. Sympathetic homeowners located far away joined the yard sign brigade.⁵²

E. *Without Zoning, the City Responds to Citizen Complaints in Ad Hoc, Arbitrary Ways*

It was clear that Houston's city government had to respond—but how? Houston routinely accepts whatever land use atrocities middling and major developers inflict on less powerful neighborhoods, but complaints by rich and powerful homeowners had to be attended to.⁵³ The fact that many of the outraged residents had voted against zoning in the

48. *Id.* ("'It's out of place for the neighborhood,' said Leslie Miller, who lives in a townhouse next to the site.")

49. TEX. LOC. GOV'T CODE ANN. § 211.004(a) (Vernon 2010) ("Zoning Regulations must be adopted in accordance with a comprehensive plan and must be designed to: . . . (4) provide adequate light and air; (5) prevent the overcrowding of land . . .").

50. Telephone Interview with Mike Snyder, Journalist, Houston Chronicle, in Houston, Tex. (Oct. 7, 2009) [hereinafter Snyder Telephone Interview].

51. *Id.*

52. The author lives in West University Place, a separately incorporated and fully zoned city a mile or so from the proposed construction site. A few sympathetic signs appeared in West University Place during the height of the controversy. A number of signs remain within a half mile of the controversial site. A search for signs on May 30, 2010, six months after the city's final refusal, located a protest sign at 2323 Dunstan, 0.8 miles from the proposed site, 1717 Bissonnet Street, according to Google Maps.

53. See Snyder, *City Ok's Plans*, *supra* note 40 ("Mayor Bill White visited the site and told neighbors in November 2007 that the city would use 'any appropriate power under law' to block the project as proposed.")

last referendum (or did not bother to vote) did not temper their rage at this unwelcome “tower of traffic.”⁵⁴

The Ashby high-rise posed a real problem for the zoning-shy, elected governing body. After quickly siding with homeowners, elected officials looked for a way to use government power to stop the project. It was hard to find. They used various strategies to delay the permit for two years,⁵⁵ but the developers’ persistence finally reduced the city to its last shot—a 1940 ordinance giving the public works director power to regulate driveways that intersect with city streets.⁵⁶

F. *Traffic as a Control Device Slows Down a Contested Project*

The Ashby project would require driveway access to Bissonnet and/or Ashby.⁵⁷ Without Public Works’ approval, there would be no permit and no driveway. If, in the opinion of the director, the proposed development generated more traffic than Bissonnet’s two lanes could handle, the department could refuse the permit.⁵⁸ The developer provided traffic

54. See Kapur, *supra* note 2, at 10059 (noting that of the 34.5% of upper-income Anglo voters who turned out to vote, only 43.8% supported zoning).

55. The developers applied ten times for permits, and got final approval on their eleventh attempt for a scaled-down project applied for under protest. For a copy of the developer’s petition, see Stop the Ashby High Rise, <http://stopashbyhighrise.org/site/wp-content/uploads/2010/02/plaintifforiginalpetition2-11-10.pdf> (last visited June 19, 2010).

56. Carolyn Feibel, *High-Rise Would Fail New City Standards*, HOUS. CHRON., Feb. 27, 2008, at B1 (“The driveway law dates back to 1940, though its current form began to take shape in 1968. [Mayor] White acknowledged that reviving this broadly worded law might have a ‘chilling’ effect on growth, so he circulated a memo Wednesday with criteria on how it would be applied. The memo said that developments that meet three criteria will receive ‘more intense scrutiny’ of their traffic loads. The criteria are: [1] A location where 60% or more of the properties within a 500-foot radius are residential[;] [2] Driveways that feed onto local or collector streets instead of a major thoroughfare[;] [3] A net increase of 50 additional vehicles going to and from the development during rush hours.”). See also HOUSTON, TEX., CODE OF ORDINANCES §§ 45-365–376 (2010) (listing process for review of traffic ramifications).

57. The City Planning Commission administers HOUSTON, TEX., CODE OF ORDINANCES § 42-22 (2010), which requires a development plat for new construction outside the central business district, except for single-family residential use. The proposed development apparently met the requirements for approval under this section.

58. HOUSTON, TEX., CODE OF ORDINANCES § 40-86 (c)(5) (2010) (requiring a permit for driveways connecting private streets with public streets, and requires refusal of applications “[if] the proposed use of the driveway would create an extraordinary traffic hazard or would excessively interfere with the normal use of the street right-of-way”). There is a serious procedural due process question whether the director makes a decision on driveway permits on the basis of standards adopted before the decision. The author attended the board of adjustment hearing on the developer’s appeal of permit denial, and the city attorney justified the director’s decision as his “professional opinion” as to traffic impact. As viewed by a bystander, it is as likely that the director’s decision was prompted

studies. Alas, traffic flowing from a condominium, even a high-rise condominium, is not substantial.

Inasmuch as sixty-seven units would be demolished to make way for the new housing, traffic enhancement would not start from zero. In the director's opinion, it was the proposed commercial uses that would cause a traffic jam. Under protest, the developer applied for a permit for a reduced project without the spa, retail space, and executive offices, and with residential units reduced from 226 to 210.⁵⁹ The director approved the driveway for this reduced permit. Undeterred, angry homeowners scheduled a meeting to look for other ways to bludgeon the "tower of traffic" into submission.⁶⁰

The developer appealed the denial of a permit for the full project to the General Appeals Board, a city panel composed mostly of city employees, which affirmed denial of the permit. The city has made its final denial, and the developer has sued for \$42 million, alleging violation of constitutional rights.⁶¹ The drama will continue well after this article is published.

What is abundantly clear from the Ashby dispute is that the city used its formal power to withhold driveway permits as leverage to impose zoning-type limits on development. The driveway procedure operates without clear standards, and the application of the driveway ordinance to control use may be unprecedented in local practice.

G. *City Politicians Dare Not Whisper the Z Word*

Even in the middle of a city election last fall, no mayoral candidate mentioned that conventional land use zoning would have protected the neighborhood and saved the developer from assuming that Houston is a free enterprise city. As the city's primary newspaper described, one candidate advocated "develop[ing] a citywide deed restriction database [and] creat[ing] [an] 'ultra-urban' development code category for neighborhoods such as Midtown." Another wanted to "[s]implify [the] development code to make it 'business friendly' [and] enable planned development districts where property owners and developers could create

by political objection to the project voiced by the mayor as by considerations of traffic congestion.

59. Snyder Telephone Interview, *supra* note 42.

60. The neighborhood blog opposing the Ashby development, Stop the Ashby High Rise, reported on April 13, 2010, that the developers have filed a \$42 million suit against the city, and states the neighborhood's continuing opposition. Stop the Ashby High Rise, <http://www.stopashbyhighrise.org> (last visited June 19, 2010) ("We will monitor this litigation and keep you informed. We will also be evaluating our options with respect to participating in the suit.") The blog also reproduces the yard signs that still stand throughout the subdivision.

61. See Mike Snyder, *Ashby Developers Push for Original Plan*, HOUS. CHRON., Oct. 21, 2009, at B2.

their own codes.” And a third candidate said “city neighborhoods should be made competitive with suburban ones and ‘edge development’ [should be] encouraged in underdeveloped areas.” Finally, the fourth said, “[s]upport property rights; continue to provide choice of deed-restricted and unrestricted neighborhoods.” None of the four major mayoral candidates supported zoning.⁶²

The Ashby controversy highlights the efforts of Houston residential neighborhoods to accomplish traditional zoning’s separation of conflicting land uses, and the inability of the city to respond in a traditional and legal way. A related land use aim recited in the enabling act is to “prevent overcrowding.”⁶³

III. PARTY-WALL DUPLEXES ALLOWED BY DEED RESTRICTIONS CAN BE PROHIBITED BY NEIGHBORS’ OBJECTION

Southampton Extension is a south-of-Bissonnet subdivision about a mile west of the Ashby high-rise site. Like adjacent Southampton, the Extension was developed as a restricted, low-density residential community. Unlike their across-the-street Southampton neighbors, the less restrictive Extension’s restrictions allowed duplexes. Expectations in the 1930s were that an owner might build a duplex, live in one unit, and rent out the other. Over time, the Extension became trendy, and some duplexes were converted to single-family structures or replaced by large new houses.⁶⁴ But the exception for duplexes remained and opened the door for a more profitable type of dwelling—two separately owned residences joined by a party wall, with separate fee ownership of a split lot.⁶⁵ Splitting a platted lot into two separately owned parcels produces a “replat” that requires City Planning Commission approval.⁶⁶

62. Mike Snyder, *Mayoral Race: A Plan to Guide the Way the City Grows; Candidates Differ on New Development in Unzoned Houston; Mayor: No Top Candidate Backs Zoning Laws in City*, HOUS. CHRON., Oct. 18, 2009, at B1. See also *infra* note 95 and accompanying text.

63. TEX. LOC. GOV’T CODE ANN. § 211.004(a) (Vernon 2010) (“Zoning regulations must be . . . designed to: . . . (5) prevent the overcrowding of land; (6) avoid undue concentration of population . . .”). What this means in practice is that local governments employ zoning to maintain the character and value in predominately affluent subdivisions by prohibiting construction on lots that are smaller than the area’s norm. Imposing minimum lot sizes in a zoned city or in Houston increases urban sprawl by prohibiting higher density. One might think that Houston’s purported reliance on economic forces would free developers to convert inner-city land to higher density to accommodate demand for row houses or zero-lot-line residences. But that has not turned out to be the case, as the next vignette illustrates.

64. The author has lived in or near the described area for more than 30 years and makes this observation from first-hand experience.

65. As full disclosure, the author bought one such unit on a split lot in 1980 and sold it to good friends in 1984. The new owners broke through the party wall and turned the two units into a large single-family residence.

66. TEX. LOC. GOV’T CODE ANN. § 212.004 (Vernon 2010).

A. *Lot Splitting Requires City Planning Commission Approval as a Re-Plat*⁶⁷

If the lot split satisfies local regulations and does not affect restrictions, Texas Local Government Code authorizes the planning commission to approve a re-plat after a public hearing.⁶⁸ If considered as a contested variance, approval must receive a three-fourths vote of the commission.⁶⁹

67. The Planning Department (an administrative department, not the Planning Commission) forthrightly declares in its web site that the Department “[r]egulates land development in Houston and the extra territorial jurisdiction.” City of Houston Planning and Development Department, <http://www.houstontx.gov/planning/AboutPD/AbtPlanning.htm> (last visited Apr. 10, 2010).

68. TEX. LOC. GOV'T CODE ANN. §§ 212.004, 212.014, 212.0146, 212.015 (Vernon 2010); HOUSTON, TEX., CODE OF ORDINANCES §§ 42-49 (2010) (requiring notice to property owners within 200 feet of a proposed re-plat and a public hearing before action by the Planning Commission).

69. The planning commission is “a 26-member board appointed by the Mayor and confirmed by City Council[, and] includes citizens, elected officials and the Director of Planning and Development. The Commission reviews and approves subdivision and development plats. The Commission also studies and makes recommendations to City Council on development issues in Houston.” City of Houston, Houston Planning Commission: About the Commission, <http://www.houstontx.gov/planning/PlanningCommission/plan.htm> (last visited June 19, 2010).

It is not clear what standard the Planning Commission does apply or should apply when reviewing a re-plat application.

There are two logical beginning points: (1) The re-plat would be denied absent undue hardship; or (2) The lot owner has a property right to split the lot unless it creates a problem that justifies denial. In a zoning context, the first approach resembles a variance; the second a special exception. *See* *W. Texas Water Refiners v. S & B Beverage Co.*, 915 S.W.2d 623 (Tex. App. 1996) (recognizing the distinction).

One might argue that approved subdivision plats create expectations of stability, particularly in urban residential areas. Re-plats may therefore reasonably be viewed as departures from the desirable and approved condition, justifying rejection unless special circumstances show undue hardship. An applicant for a split lot in Southampton Extension would have to apply for a variance, give notice to neighbors, and present evidence at a hearing. But evidence of what?

It is rare that an applicant who wants to split a platted lot could show undue hardship if the lot is like every other lot in the subdivision, and the owner can realize full value by building a single house. The only hardship is that the developer would make more money from selling two units. This would not justify a variance by ordinary zoning principles or by the standards in the Houston ordinance.

The alternative approach is that, if the re-plat conforms to all other city regulations, then lot splitting is a matter of right, and the application should be systematically approved unless circumstances present some unusual problem. If this analysis is accepted, then the rules for special exception, not variances, would logically apply, and the burden should be on opponents of the particular split to show some sort of special harm to the neighborhood resulting from the re-plat.

Houston's special exception provisions are confusingly crafted in variance terms, so it is not clear what logic applies.

Although the split-lot dwellings were expensive and architectural, a number of Extension residents did not welcome half-sized houses joined at the hip on half-sized lots, and they looked for a way to stop the infill development.⁷⁰ If their city were zoned, the entire subdivision might have been originally classified for single-family residential use, with existing duplexes continuing as nonconforming uses. Even if initially zoned to allow duplexes, a district-wide zoning amendment could accommodate the residents' desire to exclude them. But in unzoned Houston, the offended residents lacked access to traditional remedies. What to do?

B. *Lot Owners Can Invoke a Minimum Lot Size Ordinance to Prevent Lot Splitting*

The city's response to unwanted lot splitting is typical of The Houston Way. A city ordinance authorizes a majority of lot owners to initiate minimum lot size regulations block by block.⁷¹ Any lot owner can petition the city planning director for a minimum lot size to apply *within that owner's block face* (or to opposing blockfaces in the same block). The director must approve and send the application directly to the city council for legislative approval if owner(s) of 51% of the lots in the block agree and no lot owner objects. If an objection is filed, the entire planning commission conducts a hearing and, if it so decides, sends to the city council a minimum lot size ordinance applying just to that block. Planning Commission approval appears to be automatically keyed to the same 51% vote.⁷² The minimum lot size is awkwardly, but precisely, calculated as "the largest existing size that lots in 70% of the area . . . in the special minimum lot size area are equal to or greater than."⁷³ The average split lot in the Extension could not come close to meeting this requirement.

70. For an example of a resolution of such a dispute, see *infra* note 74. The author submitted an opinion opposing the particular application of the ordinance as illegal and unconstitutional.

71. HOUSTON, TEX., CODE OF ORDINANCES § 42-194 (2010). The ordinance is remarkably similar to that considered in *Longley v. Rumsey*, 224 N.Y.S. at 166 ("The ordinance in question does not divide the village into geographical subdivisions, but, in lieu thereof, attempts to establish, as a separate district in itself, each village block; that is, two sides of one street between the nearest intersections. Whether or not each of those districts is residential or otherwise depends, not upon the decision of the trustees, but upon the number of residences and vacant lots found within that so-called district. . . . Because of the failure of this ordinance to deal with the matter in accordance with a comprehensive plan, and because of the arbitrary method by which the character of the so-called districts is determined, it follows that this ordinance is not a valid restriction upon the use of the premises . . .").

72. HOUSTON, TEX., CODE OF ORDINANCES § 42-194 (1999) (describing the procedure).

73. HOUSTON, TEX., CODE OF ORDINANCES § 42-194(e) (2010).

If a lot owner in the Extension proposes to split a lot, the application triggers formal notice to the neighbors who can quickly respond with a request for a minimum lot size ordinance to apply within the block. If successful, the lot owners can disable splits in their entire block for twenty years. Only a developer who has acquired 51% of lots in an entire block face can fend off the neighbors and build on split lots. No surprise there.

C. *Houston's Minimum Lot Size Ordinance is a Land Use Law Disaster*

The minimum lot size ordinance effectively empowers 51% of private lot owners in a block to initiate a process that arbitrarily destroys their neighbors' traditional property rights.⁷⁴ With application limited to a single block, the ordinance creates tiny land use districts without any rational connection to comprehensive planning. Minimum lot size adds to urban sprawl by preventing higher density infill. The procedure injects the legislative body into what is essentially an adjudicative, individualized imposition of regulations.⁷⁵ An apt zoning analogy is illegal spot zoning that singles out an individual tract for advantageous or disadvantageous treatment.⁷⁶

Substantive due process is offended by a delegation of arbitrary power to neighbors to use government power to advance private preferences,⁷⁷ not public purposes.⁷⁸ Procedural due process is implicated by

74. See *Appolo Development, Inc. v. City of Garland*, 476 S.W.2d 365 (Tex. Civ. App. 1972) (holding that the Zoning Enabling Act, which empowered cities to regulate use of property within their boundaries, and set out procedures therefore and for enforcement of relevant ordinances, had to be complied with in detail and rigidly performed; compliance was necessary for the validity of all zoning ordinances, whether amendatory, temporary, or emergency).

75. Jim Guidry & Garrett Bryce, *Houston City Council*, GUIDRYNEWS.COM, Apr. 29, 2009, available at <http://www.guidrynews.com/story.aspx?id=1000017303> ("The city council voted 11-1 . . . to approve an ordinance establishing the north and south sides of the 2300 block of Albans Road as a special minimum lot size area.").

76. The spot zoning doctrine is alive and well in Texas. See *City of Pharr v. Tippitt*, 616 S.W.2d 173 (Tex. 1981) (attempting to spell out objective criteria for spot zoning); *Bernard v. City of Bedford*, 593 S.W.2d 809, 811 (Tex. Civ. App. 1980) (clearly defining "spot zoning" as "zoning a particular tract of land differently from the surrounding area without regard to a plan or design or without justification," which is a void use of zoning).

77. See Kapur, *supra* note 2, at 10056 n.159; Kenneth B. Bley, *Use of the Civil Rights Acts to Recover Damages in Land Use Cases* (ALI-ABA Course of Study, Apr. 12-14, 2007) WL SM040 A.L.I.-A.B.A. 207, 263 ("Denying or revoking a land use approval merely because neighbors object to a project is a violation of substantive due process."); see generally *FM Properties v. City of Austin*, 22 S.W.3d 868, 874 (2000) (listing eight factors in determining whether a delegation to private parties is legal in Texas); compare Guidry & Bryce, *supra* note 75 ("Council member . . . noted that most members of the neighborhood support the new lot size restriction."), with *Larkin v. Grendel's Den*, 459 U.S. 116 (1981) (declaring delegation of veto power to churches located within 500 feet

the adjudicative nature of the minimum lot size decision,⁷⁹ and any procedural shortcoming contaminates the governing body's decision.⁸⁰ The city council is supposed to legislate, not apply regulations to specific situations.⁸¹ Undertaking an adjudicative role even makes individual council members vulnerable to civil rights suits in their personal capacity, along with the city.⁸² Legislative bodies are entirely political, and they are not accustomed to acting in an adjudicative role that requires at least minimal procedural due process. The only supporting analogy from zoning law is the questionable specific-use permit, whereby the governing body

of a liquor licensee application unconstitutional), *and* State of Washington v. Roberge, 278 U.S. 116 (1928) (declaring unconstitutional an ordinance permitting philanthropic home for children and aged within a residential district only if two-thirds of property owners consent). The minimum lot size ordinance seems to flunk most of the listed standards. In particular, *FM Properties* points out that landowners have a pecuniary interest that may conflict with their public function—a factor clearly at work in the minimum lot size petition. *FM Properties*, 22 S.W.3d at 877. The only legitimization would come from a pattern of serious consideration by the legislative body itself. If it acts as a rubber stamp, then the delegation grants effective power to the 51% of lot owners in a block.

78. *Tippitt*, 616 S.W.2d at 176–77 (outlining four legal criteria or standards for review of zoning ordinances, including that “[t]he amendatory ordinance must bear a substantial relationship to the public health, safety, morals or general welfare or protect and preserve historical and cultural places and areas”).

79. See *Developments in the Law: Zoning*, 91 HARV. L. REV. 1427 (1978), for an influential and prescient discussion of the difference between legislative actions that apply generally, and adjudicative actions that apply to specific situations. *Fasano v. Board of County Commissioners*, 507 P.2d 23 (Or. 1973), boldly applied the distinction to place a heightened review standard on zoning amendments. However, *Fasano's* popularity diminished as complications and criticism emerged. The distinction itself remains, however, as illustrated by *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

80. *Dolan*, 512 U.S. at 385 (“The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel.”). See also Bley, *supra* note 77, at 275 (“Procedural due process requires a hearing . . .”); *id.* at 276 (“Allowing revocation of a permit through the referendum process violates the right to procedural due process.”).

81. *City of West University Place v. Ellis*, 134 S.W.2d 1038 (1940). See also Bley, *supra* note 77. The most dramatic application of the difference between legislative and adjudicative action is described in *Fasano*, 507 P.2d at 23 (classifying zoning amendment as quasi-adjudicative, not legislative).

82. *Butz v. Economou*, 438 U.S. 478 (1978), applied a functional test for determining whether an act is legislative, judicial, or administrative. Bley, *supra* note 77, at 273–74 (“Procedural due process generally requires notice and hearing before an individual landowner is deprived of property through administrative action. . . . Legislative acts do not require notice or hearings. . . . A legislature cannot deprive a landowner of due process rights associated with administrative actions merely by declaring them to be legislative. . . . However, even acts which are normally legislative may be held to require notice and hearing when they are aimed at only one piece of land.”); *id.* at 350 (“Local legislative officials acting in an administrative or executive capacity have only a qualified immunity.”).

approves special exceptions that should be administered by the Board of Adjustment.⁸³

Having the governing body act adjudicatively is less disturbing than Houston's growing practice of delegating effective legislative power to private lot owners to restrict their neighbors' ordinary property rights. But that is The Houston Way.

The next vignette illustrates the total antipathy of development interests to anything called zoning.

IV. THE THWARTED NEIGHBORHOOD ZONING BILL

Traditional zoning could provide a simple and direct resolution for the Ashby controversy and lot splitting in Southampton Extension. Zoning regulations need not even apply city-wide to serve this function. Some twenty years ago, a proposal was made to empower the governing body to identify districts within the city and employ traditional zoning regulations within those districts, but not city-wide. The entire proceeding would be carried out "in accordance with a comprehensive plan" both as to the entire city and within the land use districts themselves.⁸⁴

The neighborhood zoning proposal was shelved in favor of city-wide zoning, which seemed a cinch to pass in 1993, but nevertheless failed the referendum.⁸⁵ The concept of neighborhood zoning was revived in 2009, partly—but not entirely—as a result of the Ashby high-rise controversy. House Bill 4648 would have authorized less-than-city-wide zoning in complying neighborhoods, euphemistically titled "management districts."⁸⁶ The less-than-city-wide zoning proposal had some local precedent. Houston now hosts several Tax Increment Reinvestment Zones with traditional land use zoning power granted by specific enabling statutes, though most do not exercise the power.⁸⁷ The special zoning bill was introduced on the last day for new legislation with some chance it would slip through without the anti-zoning lobby noticing it.

83. This procedure was approved by *City of Lubbock v. Whitacre*, 414 S.W.2d 497 (Tex. Civ. App. 1967).

84. John Mixon, *Neighborhood Zoning in Houston*, 31 S. TEX. L. REV. 1 (1990).

85. Kapur, *supra* note 2, at 10059.

86. H.B. 4648, 81st Sess., at 1 (Tex. 2009). The bill would apply only to "a municipality the majority of the population of which is located in a county with a population of more than three million," *id.* at 1, i.e., Houston. It provided for residential management districts to be created on petition by more than 60% of the owners of land within the proposed district, and required the municipality to create a Residential Management District if the conditions were met. *Id.* at 2. It authorized "establishment of land use regulations to the extent authorized by Texas law, subject to approval by the municipality." *Id.* at 3.

87. Kapur, *supra* note 2, at 10055.

A. Support from an Unexpected Constituency

This legislative effort was different from previous zoning attempts, in that a legislator from a predominately African American and Hispanic district sponsored it.⁸⁸ Zoning referenda in Houston traditionally receive an overwhelmingly negative vote from low-income voters in minority districts.⁸⁹ It is rumored that money to defeat the 1993 referendum was passed by owners of sexually oriented businesses to minority ministers who preached against “white man’s zoning.” The sexually oriented businesses, although already regulated as to distance and location,⁹⁰ apparently feared even tighter control through zoning. What has happened since 1993 to make zoning a more attractive option to minorities?

There may be several answers. First, Houston has some very upscale minority neighborhoods. They have the same problems, and perhaps the same political power, as wealthy white neighborhoods.⁹¹ It is low-income residents of every ethnicity who are most adversely affected by the city’s squeaky wheel attitude toward land use control. They do not have access to power, and they live next to the worst uses.⁹² No local government is interested in controlling industrial polluters that belch waste onto nearby minority residential areas.⁹³ Minority neighborhoods harbor some of the worst land use offenders, such as “hot sheet” motels, liquor stores, cantinas, trashy front-yard businesses, and most recently, blockbusting developers who destroy traditional African American neighborhoods by gentrifying any land standing in the path of white residential expansion.

88. Garnet Coleman, sponsor of the bill, represents Houston’s 147th district, which is almost 50% African American. TEXAS LEGISLATIVE COUNCIL, DISTRICT POPULATION ANALYSIS WITH COUNTY SUBTOTALS (2008), <http://www.fyi.legis.state.tx.us/fyiwebdocs/PDF/house/dist147/r4.pdf>.

89. Kapur, *supra* note 2, at 10060–61.

90. 7 TEX. LOCAL GOV’T CODE ANN. § 243.001 (Vernon 2010).

91. See Jon Schwartz, *This Is Our Home It Is Not for Sale*: Synopsis, <http://thisishomeitisnotforsale.com> (last visited June 19, 2010) (“Riverside emerged as one of the leading minority communities in the U.S. For upwardly mobile blacks who had found the good life here, their status quo was threatened by: 1) the expansion of two universities into the area; 2) the construction of a freeway displacing the western edge of the neighborhood; 3) the placement of a county psychiatric hospital within the neighborhood; and 4) the reappearance of white home buyers into the area.”) See also Kapur, *supra* note 2, at 10059 (showing that 62.6% of middle-income African American voters supported zoning in the 1993 referendum, whereas fewer than 28% of low-income African Americans supported zoning in that referendum).

92. See *id.* at 10060 (“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’ Pastor Ed Lockett, a minister in a minority community . . . asserted that zoning would benefit low-income homeowners by protecting the residential character of their neighborhoods.”) (citing Karen Weintraub, *Black Leaders Among Supporters of Zoning*, HOUS. POST, Feb. 10, 1993, at A1).

93. Sprol, *Worst Place in the World: Shipping Through East Houston*, <http://www.sprol.com/2005/07/shipping-through-east-houston> (last visited June 19, 2010 (describing environmental pollution that primarily affects low-income areas).

Low-income homeowners do not often have active civic associations with political power, such as the “stop Ashby” movement. Could it be that real estate interests can no longer count on manipulating the minority vote in another zoning referendum? That question is not likely to be answered in the near future.

B. *The Real Estate Lobby Ambushed Neighborhood Zoning*

The effort to enact the neighborhood zoning bill failed when the real estate lobby discovered it and killed it.⁹⁴ Candidates in the recent mayoral race disowned the proposal, along with zoning of all kinds, and their campaigns offered only platitudinous commitment to “smart” codes, “neighborhood preservation” and more police.⁹⁵ The successful candidate, current mayor Annise Parker, has said she does “not believe that zoning is workable for Houston.”⁹⁶ Business as usual prevails in Houston land use politics, despite the narrow defeat of zoning in 1993 and apparently increased support today.

The next vignette illustrates the hypocrisy that passes for gospel in the church of public-private religion.

V. EMINENT DOMAIN IS AVAILABLE ON DEMAND (FOR THE RIGHT PEOPLE)

The Supreme Court’s decision in *Kelo v. City of New London*⁹⁷ generated party-line Republican and Libertarian outrage against local governments using eminent domain to acquire land for economic development.⁹⁸ The liberal members of the Court had to convince Justice Kennedy to concur that the Fifth Amendment’s “public use” require-

94. See E-mail from a Southampton advocate for the bill (May 18, 2009) (on file with author) (“I’m afraid that House Bill 4648 is dead for this session. We were on track with a submarine proposal that was headed for the House local and uncontested docket. However, the anti-zoning development lobby finally did discover the bill, and its progress promptly stopped.”).

95. Mike Snyder, Houston Politics Blog, HOUSTON CHRONICLE, Sketching an Urban Blueprint (Sept. 9, 2009), http://blogs.chron.com/houstonpolitics/2009/09/sketching_an_urban_blueprint.html (“‘Smart development’ sounds a lot like ‘smart growth,’ an approach to metropolitan development that supports compact, interconnected neighborhoods and seeks to limit suburban sprawl. . . . In past interviews . . . [a mayoral candidate] has said he believes Houston should adopt a form-based development code, which doesn’t segregate land uses as conventional ‘Euclidian’ zoning does (commercial, residential etc.) [sic] but regulates based on buildings’ shape and size in the context of their surroundings.”).

96. Press Release, Annise Parker, Statement by Annise Parker on the Ashby High Rise (Aug. 22, 2009), available at <http://stopashbyhighrise.org/?p=136>.

97. 545 U.S. 469 (2005).

98. For a particularly virulent attack, see Gideon Kanner, “[Un]equal Justice Under Law”: *The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065 (2007).

ment allowed the city of New London, Connecticut to take private land that would eventually be conveyed to a private entity.⁹⁹ The plurality decision found the Fifth Amendment's "public purpose" satisfied by economic improvement in the city.¹⁰⁰ Justice O'Connor's dissent, by contrast, would have limited eminent domain to two circumstances: (1) where true public use obtains (as with streets and parks); and (2) where transfer of title to private entities alleviates a public *harm*, as opposed to providing an economic *benefit*.¹⁰¹

Justice Kennedy's concurring opinion was more pointed. Although he agreed that economic development satisfied the public purpose test, he would prohibit all takings that "favor a particular private party, with only incidental or pretextual public benefits"¹⁰²

A. *The Texas Legislature Enacted Kennedy's Concurring View*

The 2005 Texas legislature picked up on Kennedy's warning against pretextual takings and enacted a "Limitation on Eminent Domain for Private Parties or Economic Development" statute, commanding that:

(b) A governmental or private entity may not take private property through the use of eminent domain if the taking: (1) confers a private benefit on a particular private party through the use of the property; (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party¹⁰³

B. *But When a Private Developer Needs a Pretty Park, Houston Obliging Condemns the Land*

Kelo would ordinarily be a non-issue in Houston, where eminent domain is rarely used except for right-of-way acquisition.¹⁰⁴ Moreover, Houston's supposed free market in land use would superficially translate into a hands-off role for the city. But neither ideology nor statute stood in the way of aggressive condemnation when a politically powerful real estate developer wanted to dress up the front yard of his proposed project.

99. *Kelo*, 545 U.S. at 492 (Kennedy, J., concurring).

100. *Id.* at 484–85.

101. *Id.* at 500 (O'Connor, J., dissenting) ("In [*Berman* and *Midkiff*] the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society . . . a public purpose was realized when the harmful use was eliminated.").

102. *Id.* at 491 (Kennedy, J., concurring).

103. TEX. GOV'T CODE ANN. § 2206.001 (Vernon 2005).

104. Houston refused to participate in urban renewal and for the most part did not use eminent domain to acquire land for public housing. Carolyn Feibel et al., *Tiny Bit of Land Triggers Big Fight Over City Powers: Case Centers on Whether Eminent Domain Used on Developer's Behalf*, HOUS. CHRON., Dec. 28, 2008, at A1 ("[The park director] said he did not want to seize the land for the park and has never used condemnation to create parkland in Houston during his four-and-a-half-year tenure.").

The problem was a very visible palm reader who rented a poorly maintained home from two brothers who owned a 0.16-acre lot as investors.¹⁰⁵ The brothers refused to sell at the developer's price.¹⁰⁶ No doubt, the splashy advertisement of fortunes for a fee would detract from a multi-million-dollar, mixed-use, upscale, next-door development.¹⁰⁷ Even worse, the offensive lot threatened to nix the sale of a residential tower site that was expressly conditioned on dressing up the ugly tract.¹⁰⁸ When the developer's private negotiations stalled, the city gracefully stepped forward and condemned a portion of the lot to widen a public street (an admittedly legitimate use), and the rest of the tiny tract for a public park (not so legitimate).¹⁰⁹

The postage stamp park violates Houston's expressed policy against park dedications smaller than one acre.¹¹⁰ The speck of green at issue here was purely surplus because a 4.7-acre park stands just two blocks away.¹¹¹ The park director opposed condemnation and testified in a deposition that he was simply handed an approving memo to sign—the first time in his four-and-a-half-year tenure the city had acquired park land by eminent domain.¹¹² The city's tender of \$433,800 is far less than the developer's last offer of \$1.4 million, which the lot owners refused.¹¹³ There could not be a better bargain for the developer, who did not even have to use his own money for the "park."

The taking is probably constitutional under the liberal "public purpose" test of *Kelo's* majority opinion, and the tiny tract's ultimate use by the public satisfies O'Connor's public use requirement. But it runs head-on into Justice Kennedy's warning that eminent domain should not be used for strictly private purposes—a prohibition that is restated in the Texas statute.

Only true believers in The Houston Way would defend using city funds to dress up the favored developer's front door. But this developer serves on the board of the public management district that orchestrated the acquisition, he contributed substantial sums to campaign funds of

105. The portion of the tract to be used as a park is .09 acres. The entire tract is 7230 square feet, which is approximately .16 acres. *Id.*

106. See Mike Snyder, *Brothers Say City Hall Trying To Pull a Fast One: They Claim Their Nest Egg Is Being Scrambled to Help Developer*, HOUS. CHRON., Mar. 3, 2008, at B1 [hereinafter Snyder, *Brothers*]; Feibel et al., *supra* note 104.

107. Snyder, *Brothers*, *supra* note 106.

108. Feibel, *supra* note 104.

109. HOUSTON, TEX., CODE OF ORDINANCES § 42-257 (2007) sets a minimum of one acre for park dedication.

110. *Id.* ("Unless determined otherwise by the parks director pursuant to subsection (f) of section 42-252 of this Code, the minimum size of land dedicated for a park in the urban area shall be one acre.")

111. Feibel, *supra* note 104.

112. *Id.*

113. *Id.*

various elected officials, and specific council members have questionable financial connections with the development entity.¹¹⁴

City officials are undoubtedly proud of the successful “public-private partnership” park that may indeed eventually benefit the city. Whether the action was legal, corrupt, or a brazen disregard of statutory and constitutional limits clearly does not count. It’s The Houston Way.

VI. DISSECTING THE VIGNETTES

What do these vignettes indicate? First, that Houston may be unique, but not in a way its boosters would like to project. Free enterprise drives land use only when it is politically palatable. Government power is available for affluent homeowners and developers alike who have access to city hall.

Second, enacting a formal and traditional zoning ordinance might not make much difference in the city. The same real estate interests that influence city government today would undoubtedly hold power over city-wide municipal zoning. Without zoning, subdivision developers plan large-scale subdivisions, fully aware the unzoned market requires deed restrictions that automatically renew and may last long after their usefulness. At least in the short run, the virtually perpetual restrictions keep interior residential lots safe from commercial intrusion in new subdivisions. Houston has produced some pleasant and vibrant inner-city neighborhoods that may fare better without traditional zoning, which might have overregulated them. Older, affluent subdivisions that can swing the vote to renew and revitalize their restrictions have a handy statutory mechanism for preserving exclusivity. As a result, Houston’s elite and gentrifying neighborhoods may not need zoning, although, as Ashby showed, they are vulnerable at the fringes.

Third, low-income areas are ignored, or at best viewed as gentrification opportunities whenever a demand arises for upscale inner-city housing. Gentrification is regarded as a good thing by the city, by developers, and by upwardly mobile seekers of new, close-in housing. It is a problem only for the people and the neighborhoods that are displaced. The biggest land use problem is that low-income residents must suffer whatever next-door uses the market provides while waiting for the poodles.¹¹⁵ Zoning could eliminate the worst offenders from low-income residential

114. *Id.* (“[The named developer] has given [the mayor] \$10,000 in campaign contributions since 2005, while [the apartment site purchaser] executives have donated at least \$21,000 to the mayor. [A councilman], whose wife is an investor in the BLVD Place development, received at least \$3,500 from [the developer] and \$6,500 from [the apartment site purchaser] executives during the same period.”).

115. The reference is to a scene in the movie “Blow Up” showing a professional photographer buying land in shaky areas when it began to have people walking poodles—a sure sign of gentrification.

areas. But worrying about these citizens' land use problems would not be The Houston Way.

Houston lives in its own dream world of free enterprise, where real estate interests cynically control city government (though less directly than in the past), and where slogans prevail over substance. The antipathy to zoning has become a fetish, not a substantive objection. In a zoned city, the Ashby controversy would have been resolved in favor of the neighborhoods. The residents lost in Houston because the city can only respond in questionable, ad hoc, probably illegal, and arbitrary measures that keep just enough peace to maintain the status quo. Ad hoc objection failed to stop Ashby's scaled-down twenty-three story condominium.

Houston's land use problems run deeper than lack of zoning. They invoke the fundamental ethical issue whether land use laws and city government should operate for the entire citizenry or just for the elite.

VII. FAINT PRAISE FOR THE HOUSTON WAY

It is easy to overestimate zoning as a tool for creating a planned urban environment.¹¹⁶ At best, zoning may provide a process for keeping the various interests in the city in some sort of equilibrium. The Zoning Enabling Act's stated objectives, such as preventing overcrowding, cannot withstand serious analysis in a world that is far different from that envisioned when the Supreme Court justified zoning as an act of the police power in *Village of Euclid v. Ambler Realty Co.* by declaring that

the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the

116. McDougal, *supra* note 28, at 256 ("[W]hatever reasons underlie its failure, the significant fact is that zoning has not been an effective land-use planning device.").

sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities-until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.¹¹⁷

Illegal and awkward though they are, Houston's haphazard procedures provide mechanisms that keep homeowners (at least those who are rich and organized enough to count) and developers from engaging in even more drastic confrontation. The only villains are real estate operators who sacrifice homeowners' (and sometimes their own) best interests to serve the ideological imperative of keeping Houston free from traditional zoning. The neighborhoods have legitimate needs, and they use whatever devices, legal or not, that are available to them. City Planning Commission members are decent, public-spirited citizens who carry out a constant, probably unconstitutional delegation of new tasks. Could an optimist find a pony anywhere in this mass of *excrementum ex equus*?¹¹⁸ Maybe.

The dominant pattern of Houston's land use regulations requires self-identifying neighborhoods to organize themselves to advance and protect a perceived common interest. These local interests are totally selfish, but the selfish residents are engaged in bloody warfare against another selfish group of profit-seekers who would destroy everyone's personal and property values to make a buck. Deed restriction renewal, front-yard parking prohibition, minimum lot size, and howling opposition to a high-rise are all based on the notion that people in a neighborhood know what is best for them and their very local community.

Houston is so sprawling and discontinuous that neighborhoods are hard to identify and identify with. The political process is so dominated by real estate and business interests that there is no legitimate procedure whereby homeowners can protect their greatest investment. Anything

117. *Euclid*, 272 U.S. at 394-95.

118. Translation of "horse manure" into Latin is courtesy of a learned colleague, Michael Olivas. The reference is to a story about two children, one of whom is an extreme pessimist and the other an extreme optimist. On a gifting holiday, the parents addressed the problem by giving the pessimist thousands of dollars worth of toys, while giving the optimist nothing but a pile of horse manure. On seeing the toys, the pessimist burst into tears, crying that the toys would soon break and bring sadness. But the optimist joyfully shouted "with all this horse (manure), there has to be a pony somewhere."

that identifies, protects, and reinforces community—that essential quality of human existence—is useful in a sprawling urban amoeba such as Houston. But few, if any, Houston practices are worth exporting to other cities.

