

Honor Thy Neighbor

A Zoning Starter Kit
For Houston

Before 1916, no American city was zoned. By 1925, more than 500 cities were zoned; by 1968, more than 9,000 local governments exercised zoning powers, including 97 percent of all cities with a population greater than 5,000. Today the only major city without zoning is Houston. Although such pillars of the Houston community as J. S. Cullinan, Will C. Hogg (both developers of landmark residential enclaves), and Jesse H. Jones (the city's most accomplished investment builder of his day) favored zoning as a desirable accoutrement of rational urban growth and a safeguard for investment, zoning referenda failed the popular vote test in 1948 and again in 1962. But land-use zoning is suddenly a hot topic in Houston. What has caused the once-taboo subject to be discussed, and even approved, by developers as well as homeowners?

The most deeply rooted support for conventional zoning comes from Houston homeowners who have grown tired of offensive commercial and industrial uses intruding into residential neighborhoods. In Harrisburg and parts of the Heights, bars operating in converted residences create a late-night annoyance in otherwise quiet and attractive neighborhoods. Liquor-licensing authorities simply shrug when residents protest a location next to residential areas. They note that without zoning, the neighbors have no legal grounds for complaint about private owners' use of their own land. Throughout the city's older sections, mini-warehouses, lube shops, sexually oriented businesses, and convenience stores sprout up without regard for their devastating impact on fragile residential property. Poorly designed apartment complexes have the same effect in Montrose and Heights neighborhoods. The hardest-hit areas are residential neighborhoods that were never protected by private deed restrictions or whose restrictions have lapsed. But even deed restrictions do not always protect neighborhoods.

For years, Houstonians accepted the notion that deed restrictions precluded any need for zoning. Restrictions are certainly useful, and even essential, for protecting subdivisions outside city limits, because Texas counties have no general zoning power. Private restrictions also seem to work in the middle of large, homogeneous neighborhoods such as River Oaks and Southampton Place. But even such highly restricted areas have no protection at their fringes, as attested by the presence of raucous fraternity houses next to the exclusive residential area on South MacGregor Way and a highly visible lube shop and mini-warehouse complex at the Southampton area's northwest corner. The desirability of elite housing areas even increases the incidence of land-use problems at their fringes: office and condominium towers nestle up against them to trade on their lustre, at the same time destroying the character that makes the location valuable.

The oil boom did make it look as if unzoned Houston had found an answer in perpetual growth. Older sections seemed hardly worth saving when compared with the new buildings that were bound to replace them. Deed restrictions could not stop boom growth from invading, and even replacing, restricted neighborhoods.

Much of Greenway Plaza sits on land that was residentially restricted. How, then, was it converted to office tower use? The developer simply bought the entire subdivision, at which point the restrictions became irrelevant. Restrictions are enforceable only by lot owners in the restricted subdivision; if one person owns the entire tract, no one can sue to enforce. The former owners in the purchased subdivision, of course, moved on. The "buy the subdivision" ploy was so seductive that in the early 1980s another developer lined up all the homeowners in a large section of Meyerland, and only the bursting of the city's real estate bubble kept the sale from going through. The residents of Lamar Terrace, just west of the Galleria, were not so lucky. Developers turned the subdivision into an instant slum in order to pressure recalcitrant residents to forget renewing the restrictions and sell cheap. When the bubble burst, the developers vanished; Lamar Terrace remains a slum, albeit a restricted one. Had either of these projects prospered, it would have led to new commercial development sure to devalue the remaining and adjacent sections that did not sell.

Deed restrictions at their best are not very efficient. If an individual or a subdivision's civic association has to sue to prevent a violation, the legal costs can be substantial. For this reason, the West MacGregor Protective Association did not pursue legal action against the University of Houston chapter of Sigma Chi Fraternity, which inhabits a house on South MacGregor designed by John F. Staub for the uncle of Secretary of State James A. Baker III. The fraternity's national organization was willing to wage a legal battle that West MacGregor could not afford. Therefore, the civic association acquiesced in the violation. Even if suit is brought, success is not at all certain. For example, if lot owners fail to sue when they first learn of the violation, the violator can claim the defense of *laches* (the plaintiff waited too long to sue). Or if the subdivision has allowed a substantial number of violations in the past, the violator can claim that conditions have so changed that the court should hold the restrictions unenforceable. The last straw for private enforcement came during 1989, when violators and offensive next-door commercial operators adopted a strategy of bringing retaliatory suits against civic association officers for interfering with their businesses. Although the suits may eventually fail, they have had an understandably chilling effect on active enforcement. The city of Houston provides some support for deed restriction enforcement through permit denial and bearing the cost of some enforcement suits, but its efforts are incomplete and erratic. Zoning, by comparison, can be enforced efficiently by municipal court citations and suits by the city to enjoin violations.

For middle-income Houstonians seeking protected residential neighborhoods, only two sure courses are presently available: move out to a new "planned and restricted community" 20 to 30 commuting miles from downtown, or buy into one of the smaller incorporated municipalities that dot parts of the Houston map. Most of these small suburban cities followed the urban trend of the past half-century and adopted conventional zoning laws. The

phenomenal success of new housing development in West University Place, Southside Place, Bellaire, and the Memorial Villages now makes it clear that more inner-city dwellers than these cities can accommodate want the security that comes from reliable land-use controls.

A less visible source of support for zoning has emerged among respected members of the Houston development community, including Gerald D. Hines, Jerry J. Moore, and local officials of the Trammell Crow Company. More than community concern lies behind the endorsement of these upscale developers: they have taken note that the local stock of resplendent office buildings stands underleased, even at bargain-basement prices, while corporate tenants move to other locations with a more stable image. Lack of zoning may seldom be mentioned directly when the city's courtship fails and yet another corporate client locates in a zoned city. But the urban hodgepodge of broken neighborhoods and incongruous juxtapositions that assails the visitor riding in from the airport cannot be ignored. Spurred by visual shock and the notoriety of the city's lack of zoning, the visiting executive is bound to wonder just where the company's employees would live if the decision is made to relocate. The corporate president might be able to buy in a highly restricted area, but lower-paid managers and office workers would be forced to settle in distant subdivisions. Few would be likely to choose one of Houston's uncertain inner-city neighborhoods: the gentrification that has been so evident in other cities is largely precluded by unsightly and noisy intrusions. Who among us will take the risk of fixing up a sound house in a fragile residential neighborhood when tomorrow may produce a bar or a welding shop next door?

Even with the shortcomings of the city's unzoned condition apparent, the prospect of change was still not an acceptable Houston conversation topic in late 1989. Two office-seekers, Herman Lauhoff (who ran two years earlier for city council) and Rosie Walker (who ran in 1989 for mayor), had tried valiantly to reach concerned voters, but as minor players they were ignored by the media. Neither major candidate in 1989 had a kind word to say about zoning. The topic was clearly placed on the city's agenda only when an elected official, city councilman Jim Greenwood, started asking residential-area audiences how many favored zoning. A surprising 90 percent response convinced him that the city was ignoring an emerging groundswell of popular support for conventional land-use zoning. The show of hands confirmed what pollsters had established as early as 1982 — that at least 60 percent of Houstonians favored land-use zoning.¹ About this time, with the legislature in session, Houston state senator Gene Green offered an amendment to H.B. 3160 (which authorized creation of a municipal management district for downtown Houston) that would enable Houston to adopt a modified and limited land-use zoning system called "neighborhood zoning."

Neighborhood zoning was based on several assumptions: (1) Houston in 1989 was not ready for full-scale, comprehensive zoning; (2) even if the city were to opt for regular citywide comprehensive

zoning, the sheer task of classifying the incorporated area of almost 600 square miles would take an enormous amount of time, money, and effort by city officials, contract planners, and citizen volunteers; (3) most visible problems that lack of zoning has produced are in neighborhoods, and neighborhood residents might organize enough political power to overcome anticipated opposition from developers; (4) the success of West University Place and other incorporated municipalities could be duplicated in eager subdivisions that wanted to devise plans and regulations for themselves to keep out offensive uses; and (5) meaningful zoning could take place in areas of five square miles, even though the rest of the city was not zoned. A five-square-mile area of moderate urban density can accommodate as many as 30,000 people – more than the average zoned American city.

Neighborhood zoning as contemplated for Houston probably cannot be accomplished without legislative action because the state's zoning enabling act requires zoning to be "in accordance with a comprehensive plan." The term "comprehensive" certainly anticipates that planning will be citywide in scope, and might require that zoning be citywide as well – an interpretation that would certainly be argued in court. Even though the act authorizes small-scale "neighborhood zoning areas" in zoned cities, it does no more than provide neighborhoods with a strong advisory role when a city's zoning commission considers amending a neighborhood's particular regulations. It is not at all clear that the act's comprehensive plan requirement means that a city must zone all the land within its political boundaries. But because a court might so hold, a safer course for "neighborhood zoning" was to have a friendly state legislature specifically authorize unzoned cities such as Houston to adopt land-use regulations in designated neighborhood areas without having to zone the entire city. A five-square-mile minimum was selected because a too-small neighborhood zoning area might be declared an arbitrary and unequal exercise of governmental power, and therefore unconstitutional. Actual boundaries would have to be carefully drawn so the particular neighborhood zoning area and the entire program would pass the constitutional test of rationality. Neighborhood zoning power would not be delegated to the neighborhood zoning advisory council members, because state law requires that the legislative power of the city be exercised by duly elected officials; so the city of Houston's mayor and council would make the final decision on whether to create neighborhood zoning areas and how to plan and zone them. And, although the neighborhood council would represent the zoned neighborhood, it would similarly not have formal and final power over the planning process, for the enabling act requires that the citywide zoning commission make final recommendation of a zoning plan and ordinance to the mayor and council and review all proposed amendments. Nevertheless, the neighborhood zoning advisory council, made up of people from the neighborhood and appointed by the mayor and council, would undoubtedly influence the land-use plans and regulations that would apply in the neighborhood.



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Morse at Fairview, Montrose area.

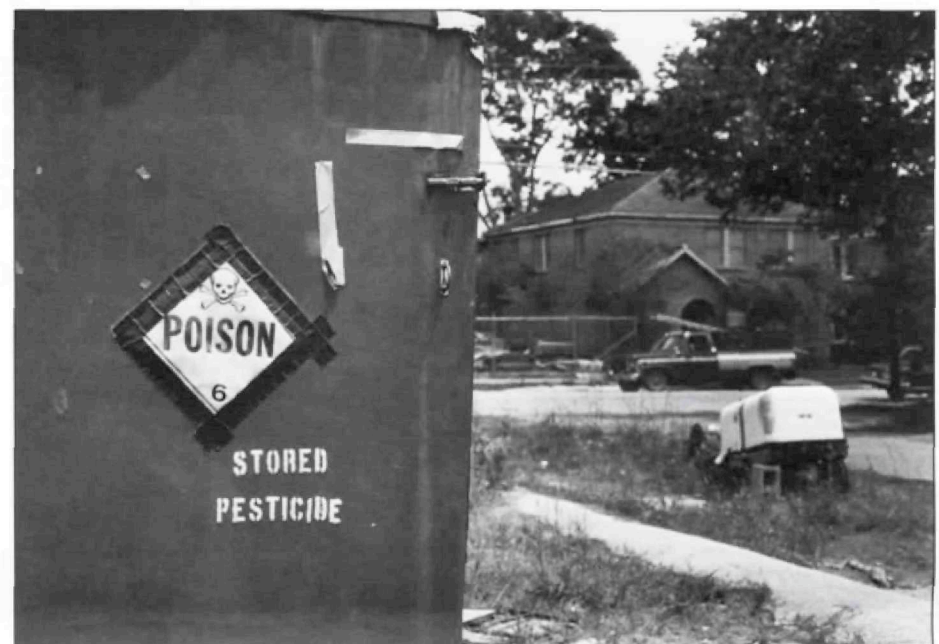
Neighborhood zoning, thus envisioned, could even have some advantages over citywide zoning in Houston. Its neighborhood focus could create and reinforce a healthy community identification for people who live in this sprawling city. While today many Houstonians feel isolated and powerless in their housing situation, a formal planning task that focused on their particular neighborhood could give local residents a sense of control over their environment; zoning regulations would give them actual power to protect their houses from mini-warehouses, chicken-packing plants, bars, and sex shops. Moreover, the planning produced by volunteer efforts of neighborhood residents might be more sensitively devised than if the city simply hired consultants to impose a land-use plan from above.

The neighborhood zoning amendment caught city officials by surprise. Wanting more time to study it, they withheld support, and the amendment died in the 1989 session. Just as news of the neighborhood zoning alternative was spreading, Councilman Greenwood proposed that Houston adopt full-scale comprehensive zoning with maximum neighborhood involvement. He formed a committee that includes members of the business and development community, representatives from the city planning commission, community representatives, lawyers, and academicians. Soon thereafter the news media discovered the zoning issue. Early this year the city planning commission held a meeting, after which a surprising number of civic leaders and real estate developers voiced support for land-use zoning in Houston.

Where this leaves neighborhood zoning is not clear. Houston appears to be at the threshold of some sort of serious zoning action. Neighborhood zoning and comprehensive zoning are not mutually exclusive, and one could argue that the city should proceed on both fronts at once. Comprehensive zoning cannot be accomplished quickly, and neighborhoods that want immediate protection would benefit from an ordinance that imposed regulations in their area more quickly. Neighborhood land-use planning would not go to waste, because local zoning efforts could easily be absorbed into a subsequent comprehensive zoning system. These considerations suggest that the two proposals are heading in the same direction, and side-by-side implementation may make sense. But there are arguments that suggest adoption of conventional comprehensive zoning instead of the local variety.

Comprehensive zoning is the proven form; any effort to adopt neighborhood zoning is sure to draw lawsuits contesting its legality. Greenwood correctly points out that neighborhoods can participate actively in land-use planning even if the

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Indiana Street, Montrose area.

city adopts the comprehensive approach. Under Greenwood's plan, the neighborhood advisory councils authorized by the existing legislation would be intimately involved in formulating a land-use map and the district regulations that apply to their neighborhoods. Further, if the city undertakes comprehensive zoning, it could implement zoning one sector, or neighborhood, at a time. The city could, for example, without amending existing legislation, adopt a time-phased comprehensive zoning program that would apply immediately in those sectors and neighborhoods where consensus prevails, while delaying implementation in areas that require more study. Regardless of the outcome, both concepts are sure to get a full discussion in the city's new era of *glasnost*.

Zoning is not a cure-all for urban ills. It can't reinstate the old South End, Montrose, or the Heights as cohesive residential neighborhoods. Nor can it unscramble the city's chaotic pattern of development overall. But, even at this late date, a partial, neighborhood-based zoning initiative can offer some security for individuals and developers willing to reclaim some of the wasteland that lies between downtown and Montrose, and it can allow the still-viable residential neighborhood to ward off the threat of yet another used-car lot at its periphery. ■

Notes

- 1 Archie Henderson, "Land Use Controls in Houston: What Protection for Owners of Restricted Property?" *South Texas Law Review* 29 (1987), p. 143, n. 74.