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ZONING AROUND



OUR CITY'S AD HOC SYSTEM OF ZONING IS NO GAME. OFTEN APPLIED ARBITRARILY AND UNFAIRLY, IT'S INEFFICIENT AND BORDERLINE ILLEGAL. YET IT REMAINS THE HOUSTON WAY.

Houston touts itself as a model of enlightened differentness: a public-private combination better at managing growth than traditional zoning. But beneath that chamber-of-commerce gloss, Houston's land use is a far cry from free enterprise in action.

"The Houston Way" combines an adamant refusal to use government power to guide growth and protect existing investment, with a willingness to conduct ad hoc mediation of constant developer-citizen conflicts through the city planning commission. Rejection of traditional land use solutions often places the city at the borderline between legal and not-so-legal regulation.

From the day a couple of 1830s hucksters named their promotional development after the hero of Texas independence, Houston has catered to real estate promoters who assumed that their own financial interests unerringly reflected the public good. Mid-range land developers and entrepreneurs convinced the public to defeat zoning in three referenda. However, the margin of defeat has diminished with each referendum, indicating The Houston Way might be at risk in the twenty-first century.

Actually Houston's disdain for zoning is more façade than fact as the city institutes a variety of complex de facto zoning-type regulations. How



does Houston's cozy public-private system play out in reality? The following vignettes illustrate how Houston handles land use warfare while maintaining the fiction that impersonal, efficient private markets determine land use in a city of happy homeowners.

THE ASHBY HIGHRISE

The Ashby Highrise controversy has received substantial coverage in local papers and was the subject of an opinion piece in *Cite* (73). The reports, however, never fully explain the legal history behind the debate.

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. Several nearby subdivisions faced expiration of their restrictions after the 1962 zoning referendum failed, and nervous residents looked for a way to preserve their neighborhoods' single-family residential character. Ordinary property law would make restrictions renewal difficult, if not impossible, by requiring near unanimous approval by lot owners.

Accordingly, in 1965 a responsive legislature empowered Houston residents to renew residential restrictions by a majority vote of lot owners. The renewal would apply to all lots whose owners failed to "opt out" within one year after the effective date. While Southampton was not involved in this statutory renewal because its original restrictions allowed a onetime 50-year renewal, which happened in 1973, efforts are

already under way to invoke the statutory renewal procedures in 2023. Other residential areas near the Ashby-Bissonnet intersection remain largely protected by original or renewed restrictions.

To add punch to private deed restrictions, the city attorney can sue to enjoin violations, and the city requires applicants for building permits to certify that proposed construction will not violate residential restrictions. The resulting system looks and works a great deal like zoning by a different name. 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 of Bissonnet itself posed an obvious and constant development threat.

The threat became imminent when Buckhead Investment Partners bought a 67-unit garden apartment project at the intersection of Ashby and Bissonnet to develop a mixed-use project featuring a 23-story condominium. While not especially welcome, the aging garden apartments had not been a bad neighbor. A highrise tower was something else. 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. Furthermore, the tower's shadow would rob residents of light and air (which might be a blessing, considering Houston's heat and pollution). Even more irritating, the developers themselves had been raised in the elite neighborhood. More than one fuming resident asked why Buckhead (or a vulgarization of the name) didn't build the tacky highrise in somebody else's backyard.

When yellow signs opposing the "Tower of Traffic" sprouted on virtually every yard within a mile of the Ashby site, it was clear that Houston's city government had to respond—but how? The city used various strategies to delay the permit for two years, 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.

The Ashby project would require driveway access to Bissonnet and/or Ashby. Without public works' approval, there would be no permit and no driveway. If the director decided the proposed development would generate more traffic than Bissonnet's two lanes could handle, the department could refuse the permit. The developers provided traffic studies. Alas for the protestors, traffic flowing from a condominium, even a highrise condominium, is not substantial.

Inasmuch as 67 units would be demolished to make way for the new housing, traffic enhancement would not start from zero. The



director, however, determined that the proposed commercial uses would cause a traffic jam. Under protest, the developers applied for a permit for a reduced project, one without the spa, retail space, and executive offices, and with residential units reduced from 226 to 210. The director approved the driveway for this reduced permit.

The developers 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 developers have now sued for \$42 million, alleging violation of constitutional rights. The drama will continue well after this article is published.

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

Despite the Ashby controversy, no mayoral candidate in the 2010 election mentioned that conventional land use zoning would have protected the neighborhood and disabused the developers of the notion that Houston is a free enterprise city.

PARTY-WALL DUPLEXES BLOCKED BY NEIGHBORS

The Southampton Extension is a south-of-Bissonnet subdivision about a mile west of the Ashby highrise 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 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. 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. Splitting a platted lot into two separately owned parcels produces a "re-plat" that requires city planning commission approval.

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. 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?

The city's response to this unwanted lot splitting is typical of The Houston Way. An existing city ordinance allows a majority of lot owners to initiate minimum lot size regulations block by block. 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 block faces 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 percent 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 percent vote. The minimum lot size is awkwardly, but precisely, calculated as "the largest existing size that lots in 70 percent of the area . . . in the special minimum lot size area are equal to or greater than." The average split lot in the Extension could not come close to meeting this requirement.

The minimum lot size ordinance effectively empowers 51 percent of private lot owners in a block to initiate a process that arbitrarily destroys their neighbors' traditional property rights.

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

The Supreme Court's decision in *Kelo v. City of New London* generated party-line Republican and Libertarian outrage against local governments using eminent domain to acquire land for economic development. The plurality decision found the Fifth Amendment's "public purpose" satisfied by economic improvement in the city. 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.

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 . . ."

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 party . . .

Kelo would ordinarily be a non-issue in Houston, where eminent domain is rarely used except for right-of-way acquisition and where the 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 one politically powerful real estate developer wanted to dress up the front yard of his proposed project.

The problem was a very visible palm reader who rented a poorly maintained home from two brothers who owned a 0.16-acre lot. The brothers refused to sell at the developer's price. No doubt, the splashy advertisement of "fortunes for a fee" would detract from the multimillion-dollar, mixed-use, upscale development next door. Even worse, the offensive lot



THE EFFORT TO ENACT THE NEIGHBORHOOD ZONING BILL FAILED WHEN THE REAL ESTATE LOBBY DISCOVERED IT AND KILLED IT.

threatened to nix the sale of a residential tower site that was expressly conditioned on dressing up the ugly tract. When the developer's private negotiations stalled, the city graciously stepped forward and condemned a portion of the lot to widen the public street (an admittedly legitimate use) and the rest of the tiny tract to create a public park (not so legitimate).

The postage stamp park violates Houston's expressed policy against park dedications smaller than one acre. Moreover, the speck of green at issue here was purely surplus because a 4.7-acre park stands just two blocks away. 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 that the city had acquired park land by eminent domain. 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. 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 Justice 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 a 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 various elected officials, and specific council members have questionable financial connections with the development entity.



City officials are undoubtedly proud of the successful "public-private partnership" park that may indeed eventually benefit the city. Whether the action disregarded statutory and constitutional limits clearly does not count. It's The Houston Way.

THE THWARTED NEIGHBORHOOD ZONING BILL

Some 20 years ago, a proposal was made to empower a 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. The neighborhood zoning proposal was

shelved in favor of citywide zoning, which seemed a cinch to pass in 1993 but nevertheless failed at referendum.

The concept of neighborhood zoning was revived in 2009, partly—but not entirely—as a result of the Ashby highrise controversy. House Bill 4648 would have authorized less-than-citywide zoning in complying neighborhoods, euphemistically titled "management districts." The 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. The special zoning bill was introduced on the last day for new legislation in hopes it would slip through without the anti-zoning lobby noticing it.

This legislative effort was different from previous zoning attempts in that Garnet Coleman, a legislator from a predominately African-American and Hispanic district, sponsored it. Zoning referenda in

HOUSTON'S LAND USE PROBLEMS RUN DEEPER THAN ITS LACK OF ZONING. THEY POINT TO THE FUNDAMENTAL ETHICAL ISSUE WHETHER LAND USE LAWS AND CITY GOVERNMENT SHOULD OPERATE FOR THE ENTIRE CITIZENRY OR JUST FOR THE ELITE.

Houston traditionally receive an overwhelmingly negative vote from low-income voters in minority districts. In traditionally zoned cities before the civil rights movement, minority neighborhoods were often placed adjacent to the least desirable industries, dumps, and treatment plants. It is rumored that money to defeat the 1993 referendum was passed by owners of sexually oriented businesses, which apparently feared even tighter control through zoning, to minority ministers who preached against “white man’s zoning.” What has happened since 1993 to make zoning a more attractive option to minorities?

Houston has some very upscale minority neighborhoods. They have the same problems, and perhaps the same political power, as wealthy white neighborhoods. As documented in Jon Schwartz's film *This Is Our Home, It is Not for Sale*, once the neighborhood of Riverside became the home of upwardly mobile African Americans, the status quo was threatened by expanding universities, freeway construction, and the placement of a psychiatric hospital.

Moreover, though zoning has a legacy of working against minorities, in this day and age it is low-income residents of every ethnicity who are most adversely affected by the city’s squeaky-wheel attitude toward land use control with its actions against “hot sheet” motels, liquor stores, cantinas, and trashy front yard businesses, and most recently in favor of block-busting developers who destroy traditional African-American neighborhoods by gentrifying any land standing in the path of white residential expansion.

The effort to enact the neighborhood zoning bill failed when the real estate lobby discovered it and killed it, according to a Southampton advocate following the progress of the “submarine proposal.” 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. The successful candidate, current mayor Annise Parker, has said she does “not believe that zoning is workable for Houston.”

Though the neighborhood zoning bill failed, the collaboration across neighborhoods and communities could mean a shift in the political climate.

TIME FOR A NEW VOTE ON ZONING?

What do these vignettes indicate? First, Houston may be unique but not in a way its boosters would like to trumpet. 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 and affluent neighborhoods that influence city government

today would undoubtedly hold power over citywide municipal zoning.

Third, low-income areas are ignored or at best viewed as gentrification opportunities. The biggest land use problem is that low-income residents must suffer whatever next-door uses the market provides while waiting for the poodle-owners to arrive. Zoning could eliminate the worst offenders from low-income residential areas.

Houston lives in its own dreamworld of free enterprise, where real estate interests cynically control city government (though less directly than in the past) and where slogans prevail over substance. Houston’s land use problems run deeper than its lack of zoning. They point to the fundamental ethical issue whether land use laws and city government should operate for the entire citizenry or just for the elite.

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. Though it is easy to overestimate zoning as a tool for creating a planned urban environment, anything that identifies, protects, and reinforces community—that essential quality of human existence—is useful in a sprawling urban amoeba such as Houston.

Maybe it is time for another vote on zoning. **c**