

# Houston



## Land Use in the UNZONED CITY

*Matthew Festa*

The city of Houston, Texas, is famous for many things. It is the fourth-largest city in America, with 2.1 million residents in the city, and nearly 6 million in the metropolitan area. It is the capital of the global energy industry. It is “Space City,” the home of NASA. The Texas Medical Center is the world’s largest. And, of course, Houston is the only major city in America without land-use zoning.

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

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

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

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

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

Popular belief—both within Houston and nationally—attributes Houston’s unzoned status to several, mostly cultural, ideas: that Houstonians place an inordinately high value on individual property rights and economic liberty; a western self-reliance ethic; a natural suspicion of excessive government regulation; the classic notion of one’s home as one’s castle; or a sort of cowboy libertarianism that values everyone’s right to do as they please with their land. There is some truth in these stereotypes, but they fall far short of explaining why Houston alone remains unzoned, because they are cultural images that have more to do with Texas generally than with Houston. And the fact that Dallas, San Antonio, Austin—and virtually every other Texas city—all have zoning codes undercuts this cultural explanation. Here in Houston, I have observed firsthand at numerous Planning Commission, city council, neighborhood organization, and advocacy group meetings, that there are a great many people in Houston who would love nothing more than to enact stricter controls over other people’s land.

The key difference that has kept Houston unzoned for all these years may owe something to those cultural explanations, but as a technical matter it is much simpler: Houston has a provision in its City Charter—roughly equivalent to a “constitutional” document that sets the basic rules of government—that forbids the city council from enacting a zoning ordinance without a popular referendum. If not for this requirement, I believe that the city council would have established zoning long ago—just as the city councils of Dallas, Austin, San Antonio, and virtually every other American municipality have done. But the referendum requirement in Houston means that the issue has to be subject to popular vote after a public debate, and the three times this has been tried, in 1948, 1962, and 1993, zoning was defeated by a close margin. Other scholars have studied



Aerial view of Houston: "Houston's land-use regulations know only two zones: the urban and the suburban. The black-and-white demarcation line between the zones is marked by the ring of Interstate Highway 610, known in Houston as the Loop."

these events extensively, but generally it is fair to say that a significant part of the anti-zoning forces were disparate groups motivated by a variety of specific concerns, at least as much as by any sort of general "Texan" anti-government/pro-property-rights sentiment.

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

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

The popular conception that Houston is unzoned because it is some sort of ultra-Texan free-market landscape is not accurate. Houston's land use is in fact highly regulated. While no Houston ordinance explicitly uses the "z-word," and its rules for the most part don't prescribe limitations on use, there are numerous land-use regulations that, in any other city, would be part of the zoning code. Houston defines certain areas as "urban" versus "suburban," with different regulations. There are laws prescribing minimum lot sizes, which in turn restrict density. There are setbacks from the street, buffer zones for development, and regulated street widths. There are other laws that affect land use, such as the new historical preservation ordinance, which allows citizens to petition the council for designation as a historic area, which comes with additional restrictions. These are all government measures that, in my opinion, operate as "de facto zoning"—they prescribe different land-use rules based partly on geographic location. And even these rules pale in comparison to the extensive regime of private covenants and deed restrictions that govern a majority of the property in Houston.

Even though Houston is highly regulated, it is still true that Houston's land-use regime is less restricted and affords more

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

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

*This article was first published in Spring 2012 in InRe, the South Texas College of Law Alumni Magazine. This version, with minor revisions to the original text, is reprinted here with permission of the author.*