

1994

## ADDRESS: Non-Zoning is the Best Zoning

Bernard H. Siegan

Follow this and additional works at: <http://scholarlycommons.law.cwsl.edu/cwlr>

---

### Recommended Citation

Siegan, Bernard H. (1994) "ADDRESS: Non-Zoning is the Best Zoning," *California Western Law Review*: Vol. 31: No. 1, Article 7.  
Available at: <http://scholarlycommons.law.cwsl.edu/cwlr/vol31/iss1/7>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized administrator of CWSL Scholarly Commons. For more information, please contact [alm@cwsl.edu](mailto:alm@cwsl.edu).

## ADDRESS

### NON-ZONING IS THE BEST ZONING

BERNARD H. SIEGAN\*

#### INTRODUCTION

In this presentation, I find myself in a different position than has been my experience in recent years. For the past few years, I have been advising officials and interested groups in some former communist countries about drafting new constitutions.<sup>1</sup> Most Eastern Europeans I encountered were not friendly to planning and regulation. They associate them with misery. People ask, "Do you know what happens if a state planning committee moves to the desert?" The answer is, "First, nothing happens. Then there will be a shortage of sand."

The great lesson of our times is that the forces of production, conservation and creativity exist principally in the marketplace and not in government. True, private entrepreneurs act largely in their self-interest, but probably no more so than government officials, and the endeavors of entrepreneurs in the economic area are much more directed to the general public welfare.<sup>2</sup>

Indeed, most ex-communist nations, as well as many other countries, are eagerly seeking to privatize and deregulate. Nevertheless, although the world trend is away from regulation, Houston considers imposing a powerful new level of government controls. To be sure, zoning in Houston will not bring about a communist economy, but it will greatly reduce the many benefits of free enterprise.

---

\* Bernard H. Siegan is Distinguished Professor of Law at the University of San Diego School of Law.

On November 2, 1993, the voters of Houston rejected for the third time in its history the adoption of a zoning ordinance, leaving Houston as the only major city in the nation without zoning.

During the pre-voting campaign, Professor Siegan delivered a series of speeches urging voters to reject zoning and the proposed zoning ordinance. What follows is a composite prepared by him of the speeches he presented.

1. See Bernard H. Siegan, *Constitutional Protections of Property and Economic Rights*, 29 SAN DIEGO L. REV. 161 (1992).

2. This view is consistent with the "public choice perspective" advanced by James M. Buchanan, Nobel Laureate in Economics for 1986. He emphasizes self interest as the motivating factor in both private and political choice. However, the forces of the economics marketplace are more likely to channel individual self-interest into socially desirable outcomes. See generally J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1965); James M. Buchanan, *The Constitution of Economic Policy*, 77 AM. ECON. REV. 243 (1987).

The proposed Houston zoning ordinance is supposed to be moderate, largely intended to preserve neighborhoods.<sup>3</sup> Government is to be given only such powers as are necessary to accomplish this purpose. Well, please do not be misled. While the proposed ordinance imposes fewer rules than exist under older zoning ordinances, it establishes the typical zoning mechanisms that will enable the city council to impose these rules in the future without much difficulty. Almost all regulatory legislation begins modestly, since it might not be adopted if it disturbs too many people. Like the others, this zoning ordinance gives Houston's planners and politicians enormous power over land use and development.

Houston's proposed zoning ordinance provides for eight base zoning districts that entitle an owner whose proposed structure meets the requirements of a district to obtain a building permit as a matter of right. But many owners will not be so lucky. Their properties will not be zoned for the use they desire, and they will have to seek special dispensation from the zoning authorities. This will be quite difficult because the ordinance prescribes a complex procedure for securing zoning amendments and special permissions.<sup>4</sup>

### I. PUDS AND PUBLIC HEARINGS

As an illustration, consider the requirements for obtaining permission to erect a planned unit development (PUD), which is a very important and widely applied development technique.<sup>5</sup> PUD zoning provisions allow the developer of property to arrange with flexibility his building, supporting facilities, and streets without having to comply with the rules of a district. Zoning ordinances generally contain PUD provisions to authorize residential, commercial, or industrial development for significant amounts of acreage. Houston's proposed ordinance authorizes a PUD for two or more contiguous acres.

The bulk of larger apartment and townhouse developments built within recent years in zoned areas has been approved as PUD's. The problem with

---

3. Houston, Tex. Dept. of Planning and Development Zoning Ordinance (Proposed Jan. 27, 1993) [hereinafter Proposed Zoning Ordinance].

4. But it is said that development will be chaotic and disorderly in the absence of zoning. The experience of Houston disproves this assertion. If one compares the land use maps of Los Angeles and Dallas with those of Houston—cities often compared to Houston—it is difficult to determine which city is zoned and which is not. Land use development in the absence of zoning is quite orderly, surely as compare with what occurs under zoning. Many uses will locate in the same place whether zoning is in effect or not. Thus, gas stations and shopping centers will only locate on major thoroughfares because they require ready auto accessibility to succeed. Accessibility is also a major factor in multi-family and industrial construction. Single-family developers will generally seek to purchase land that will not adjoin undesirable uses. They impose restrictive covenants on their subdivisions to maintain single family exclusivity. Many lower income resident prefer living in mixed use districts and the absence of zoning enables some such development to occur. These persons among others reject zoning and have voted against it. See generally BERNARD H. SIEGAN, LAND USE WITHOUT ZONING (1972).

5. *Id.* at art. V.

PUD provisions is that they accord city councils almost complete authority over these projects. If the city council is unhappy with what is proposed, it is unlikely that it will be built unless so ordered by a court.

Reflect on what an owner must do to obtain a PUD under Houston's proposed zoning ordinance. The owner must file an application detailing the contemplated development to the planning director. It will then be reviewed by the planning staff and considered at a public hearing by the Planning and Zoning Commission. After this hearing the Commission will submit a recommendation to the city council which must thereafter conduct its own public hearing.<sup>6</sup>

If, at this second public hearing, new information is presented that was not considered by the Planning and Zoning Commission, the city council may refer the application back to the Commission for reconsideration at another public hearing. Thereafter, the city council must hold still another public hearing subsequent to which it must make a final decision by majority vote. However, if the PUD comprehends an amendment of the zoning map, which is often likely to be the case, and 20% of adjoining owners protest, approval requires a *three-quarters vote of all members* of the city council—a very difficult requirement to meet.<sup>7</sup>

To succeed an owner will require the services of attorneys, probably a planner, an architect to prepare drawings—and plenty of luck and fortitude. If the city rejects the project, all of the preparatory work and fees will have been wasted. The process is a very expensive ordeal that may take many months or even years. These costs will be excessive for many would-be developers and they will not undertake such projects.

As this illustration reveals, the zoning process is very time-consuming and costly to the public. Before recessionary conditions occurred, the city council of San Diego set aside two-thirds of its meeting time to land use matters. Because zoning controversies occupy a great amount of time, city councils and their staffs devote much less time than they should to many other major local concerns.

## II. THE LAND USE THEATER

These public hearings bring theater to land use. Participants at the hearings include the owner and his agents, of course, and often a great many others, including the neighbors, the local civic or homeowners groups, political organizations, the school and park boards, the chamber of commerce and labor groups. Many times, the media will express its opinions on the project. A large variety of interests except probably those who will directly benefit from the development, such as potential homeowners, tenants, and

---

6. *Id.* at art. VI, § 48-6302(d)(4).

7. *Id.* at art V, § 48-5112(c), and art. VI § 48-6302(c).

shoppers may enter the fray. Each side will have no difficulty in producing a planner to prove “conclusively” that its position is the only correct one.

How it will come out will depend on who are or what is best able to influence or pressure the city council. Members of the city council can be expected to act in their own self-interest—they usually are not given to self immolation.

By contrast, consider the outcome in Houston under its present land use system. There usually will be no public hearings. The site in question will in all likelihood be developed for the uses that society values the most, thereby satisfying the predominant consumer demand. A developer will erect those structures that he believes will bring the greatest return. Thus, if he believes that a demand exists for apartments, he will build apartments; if the demand is for office space, he will erect these kinds of units. Since most developers obtain most or much of their funds from lenders, it can be expected that the latter will participate in development decisions.<sup>8</sup> Of course, builders and lenders go astray, but their decisions are much more likely to succeed in the market than decisions made for political reasons.<sup>9</sup>

The modern world demands a high degree of expertise. Why then are we so willing to allow inexperienced and untrained people to have a major voice in the development of the land? If the experts in this field are the builders and the developers, why, paradoxically, does zoning require them to submit their proposals for final decision to politicians whose expertise usually is in other areas?

Nor should society give an important role to those who have no stake in the success of a venture and may even prefer its demise. I have attended zoning hearings where home owners, who had no training or experience in land development or real estate construction, condemned complex plans prepared by highly skilled specialists. Worst of all, local authorities weigh such comments heavily because they emanate from sources with a powerful weapon: the ability to vote them out of office.

### III. THE MERCEDES APPROACH

The zoning experience of this nation has revealed that, frequently city councils try to upgrade proposed developments. I refer to what has been called the “Mercedes” approach. Builders who seek to erect moderate cost housing projects are often hampered by the local residents and officials who understandably want more luxurious structures in their communities and more affluent residents. At times, the real objective is to exclude minorities.<sup>10</sup> The result is that either a “Volkswagen” level of development is

---

8. Society does have an interest in maintaining public and private nuisance laws and these should be enforced in addition to other development rules.

9. See generally ADAM SMITH, *THE WEALTH OF NATIONS* (1776); MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE* (1980).

10. Cf. *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977).

prohibited or it must be elevated to a "Mercedes" status to obtain zoning approval. Of course, most people would rather have an expensive Mercedes than an inexpensive Volkswagen. But where will the poorer people live? Aren't we fortunate that zoning does not control automobile production?

Developers may seek to pass on the cost of upgrading the project by raising prices or rents. If market conditions do not allow for such increases, the projects become economically infeasible and are not erected. And this, of course, brings joy to the people who never wanted the project.

Another possibility is that the developer will compensate for the added expense by reducing the quantity or quality of some amenities. He may attempt to offset the cost of required park dedications, special architectural treatment, special recreational facilities, or lower density by, say, lessening the quality of the windows, doors, plumbing, heating, fixtures, etc. He may reduce the amount of insulation and soundproofing. As a result, a purchaser or renter obtains a less desirable structure.<sup>11</sup>

#### IV. PUBLIC v. PRIVATE DECISION MAKING

The foregoing describes zoning in action and reveals the difference between the private and public planning process. The owners of any business have to conduct it with maximum efficiency; otherwise their profits will diminish or disappear. They must purchase and produce with minimal waste and create a saleable product.

Consider, for example, the factors an apartment builder must evaluate to succeed. Apartment buildings do get built with many amenities not required by government in both zoned and nonzoned areas. The decision as to what should be included as part of the building is invariably a difficult one for a builder due to the financial limitations of any project, a situation which anyone who has ever built a home should understand. He must determine the quality of the refrigerators, air-conditioning, stoves, windows, light fixtures, and dozens of other items. He cannot possibly install the best of each, and must forego the installation of many amenities. This would be necessary even if he were erecting a super-luxury building. The decision as to what is installed and what is omitted will be based on an evaluation of the rental market; he will do those things within the limits of his budget that will cause his apartments to rent better.

No such limitations confine the public regulators. They make decisions for a large variety of reasons, and consumer satisfaction or economic efficiency is rarely a primary one, for there is little they can personally gain from encouraging either. The dominant factors in zoning have been public pressures and political influences—the factors to which officeholders who

---

11. It is also possible that the developer may petition the zoning authorities for more than he actually wants, thereby enabling the authorities to reduce the project without limiting the developer's objectives. Such maneuvering, which probably happens frequently, makes a mockery of the entire process.

control zoning respond. Public participation makes it most difficult to obtain a detached analysis and evaluation of the issues. In the hearings, the input from the public may run the gamut from professional analysis to hysterical outbursts with considerable doubt as to which is more effective. Questions involving municipal finances, law, and economics are much too complex for most laymen, yet their conclusions in these matters may be most critical in deciding the controversy. However, for local legislators concerned about the approval of their constituency, the most important factors probably are the amount and composition of objections to the petition for rezoning or a variance. Thus, a study of the Philadelphia Zoning Board of Adjustment in 1955 showed that the single most important variable in determining a petitioner's success was the presence of objectors. In the forty-six cases where protestors appeared, only eleven variances were granted. Matters such as efficiency, productivity, competition, taxes, demand, and environment have been subordinate and often non-existent considerations unless they coincide with political concerns.<sup>12</sup>

Zoning has been a colossal flop because it is supposed to do things it cannot do. What, for instance, is the "right" mix of homes and apartments? How much industry is "too much?" Where is business to be allowed, and what kinds? Is there some objective measurement available to determine the "best" use of some or all of the land, of growth and antigrowth proposals, and whether the land is better suited for open space, mobile homes, industry or the housing of people? Should the land be developed with one, two or four housing units to the acre?

Typically, zoners and planners confront Herculean problems in determining land use. Questions of compatibility, desirability, economic feasibility, property values, existing uses, adjoining and nearby uses, traffic, topography, utilities, schools, future growth, conservation, and environment have to be considered for countless locations covering hundreds of square miles. Yet to determine just economic feasibility for a certain use at any one site for any one period of time would require a professional market survey costing thousands of dollars and taking months to complete.

By now, after seven decades of zoning experience in the United States, it should be clear that there are respectable, distinguished and knowledgeable planners who would disagree in many if not most instances to any or all of the aforementioned alternatives. Planning is unquestionably highly subjective, lacking those standards and measurements that are requisites of a scientific discipline.

---

12. Note, *Zoning Variances and Exceptions: The Philadelphia Experience*, 103 U. PA. L. REV. 516 (1955). A study of a seventeen-month period of work by the Lexington-Fayette County Zoning Board of Adjustment (Kentucky) in 1960-61 shows that 63 percent of petitions were granted in the presence of objectors while 85 percent were granted in their absence. *Jesse Dukeminier, Jr. & Clyde L. Stapleton, The Zoning Board of Adjustment: A Case Study In Misrule*, 50 KY. L.J. 273, 328 (1962).

Planners confront serious problems in evaluating the present and forecasting the future, whether it be on a micro or macro level. With respect to zoning, overruling market-based decisions on land use would seem to require economic expertise that relatively few planners or politicians can be expected to possess. They are far less knowledgeable than the developers and lenders in using and developing land. Zoning experience is replete with instances where planners classified land either to allow uses unacceptable in the market or to deny uses eagerly sought in the market.<sup>13</sup>

For over twenty years I practiced law in Illinois. In every major zoning case in which I was involved or had knowledge of, each side of the controversy was able to hire a professional planner to testify in support of its position. Many of the cases were basically verbal duels between planners with opposing views. There are so many values and factors that comprise a planning decision that conclusions about a particular development will likely vary widely among planners.

## V. MASTER PLANNING AND PLANS

This desire to control extensively economic activity is an application of the master plan mentality that is totally discredited in the former communist nations which had long experienced it. Government planning was a major factor in the economic collapse of these countries.

I was in Ukraine in October 1992, and learned first hand about that nation's miserable experience under communism. Before it achieved independence, Ukraine's economy was completely controlled by planners located in Moscow. All firms in Ukraine were government-owned and the operation of each was directed from the Soviet capitol. The Moscow planners told each firm from whom to buy the raw materials, at what prices, how many people to employ, at what wages, how much to produce and to whom to sell and at what prices. A firm's managers were supposed to do little more than follow these instructions.

This system is inherently irrational. In the absence of the material incentives that fuel capitalist societies, the base ones of greed, avarice and stupidity were often the order of the day in that economy. Worse still, there was no incentive for the planners to change or improve a firm's products. Companies continued to make the same products year after year while producers in the non-Communist world were creating new or improved products.

---

13. See MARK L. POLLOT, *GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA* (1993).

## VI. THE NATION'S ZONING EXPERIENCE

It is said, however, that zoning is accepted and not rejected by the vast majority of American cities. The truth is, while zoning exists in most places, it is invariably found wanting and in need of change. Consider the history of zoning. Area-wide land use controls arrived in this nation in 1916 in the form of the New York Zoning Resolution, the country's first zoning ordinance. This modest ordinance contained three use districts (residential, commercial and unrestricted), five classes of height districts, and three classes of area districts.<sup>14</sup> The New York City zoning ordinance now runs in excess of one thousand pages, and has vastly more zoning districts and a host of other controls never contemplated by the framers of the original ordinance.<sup>15</sup>

My home city of San Diego had eight zoning districts in 1952, sixteen in 1962 and over 200.<sup>16</sup> Under most ordinances presently in effect in this nation, the zoning regulators frequently have power to determine building design, building materials, the land plan, and sometimes even to influence sales prices.<sup>17</sup>

The story is now a familiar one. Small, modest zoning ordinances grow into very complex and complicated ones. One reason is, of course, the change in conditions, techniques and thinking that occurs over the years and is reflected in our laws. But there are two other explanations for the uncontrolled growth of zoning. The first is that zoning has been the story of unrealized expectations. It simply does not work as represented.<sup>18</sup> To date we have had five or six different zoning strategies in this country and new ones continue to evolve. Each has been introduced with what has turned out to be greatly inflated rhetoric as to what would be accomplished.

Each zoning strategy, in turn, has for the most part failed to meet the expectations created by that rhetoric. The result, every time, is a new effort at the drawing boards, producing more and increasingly severe rules and regulations that, experience suggests, are not likely to be more successful than the previous one.

Another reason for the proliferation of zoning regulations is that the process is basically one of resolving differences among various special interest groups in the community. No matter how perfect a zoning plan, it will help some people and hurt others. Soon after passage of the ordinance,

---

14. SEYMOUR I. TOLL, *ZONED AMERICAN* 172-87 (1969).

15. Zoning Resolution, City of New York (1984) (adopted Dec. 15, 1960, as amended through May 24, 1984).

16. Letter from Joseph T. Flynn, Deputy Director, Neighborhood Code Compliance Department, to author (June 21, 1993) (on file with author).

17. By having the power to delay, something which may be very costly to a developer obligated to pay loans and taxes, the zoning authorities can extract substantial concessions. A developer may seek legal redress, but this is also expensive.

18. See Toll, *supra* note 13, at 181.

the losers, experience shows, start doing those things that will make them winners. Landowners will seek to rezone their property to increase its value. Homeowners and environmentalists will lobby to make the rules more stringent and exclusionary, and civic groups will move to make their reforms. The courts may also affect significant changes. Before long the original plan will be largely history. And many who relied on it for their protection may indeed be very disillusioned.

## VII. CONSTITUTIONAL PROTECTIONS FOR PRIVATE PROPERTY

Nor can a law be labelled as mild or moderate that will deprive many people who have done no wrong of their business investments. I refer to the proposed ordinance's provisions on nonconforming and noncomplying uses.<sup>19</sup> A basic principle of our society is that government shall not take private property for public use without just compensation.<sup>20</sup> Yet, the proposed ordinance will make a great many businesses nonconforming, limiting the right of the owner to enlarge, renovate or otherwise change significantly the current use. The board of adjustment will have the power to force some nonconforming businesses to terminate after a certain number of years, a concept referred to as amortizing the investment. Monetary compensation would not be required. The ordinance provides for administrative relief but only in special circumstances.

Since 1987, the U.S. Supreme Court has become much more protective of property rights than previously and has substantially limited the land use powers of states and municipalities.<sup>21</sup> My guess is that the proposed Houston ordinance will contain many legally questionable restrictions, such as the nonconforming provisions. If the courts find that a particular restraint is an unconstitutional deprivation of property, the remedy likely would be payment of compensation to the owner. As a result, the cost to the city of adopting zoning may be much more than anticipated. Federal and state governments have paid out millions of dollars in recent years to compensate owners for deprivation of their property rights.

## VIII. FEDERAL COMMISSIONS CRITICIZE ZONING

From what I have said, it should be apparent why zoning is one of the most criticized and condemned regulatory systems in the United States. Each of the three presidential housing commissions appointed within recent

---

19. Proposed Zoning Ordinance, *supra* note 3, at art. III.

20. "[N]or shall private property be taken for public use without just compensation. . ." U.S. CONST. Amend. V.

21. See *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Lucas v. South Carolina Coastal Comm.*, 112 S. Ct. 2886 (1992); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987).

years—two by President Johnson and one by President Reagan—has been strongly critical. Every major law review in the nation has run one or more articles similarly critical.<sup>22</sup> The term “exclusionary zoning” has become a pejorative part of the language.

In 1968, the Douglas Commission appointed by President Johnson, asserted: “In short, although the basic justification for zoning is to protect the overall public good, this often appears to be the last consideration as zoning is now practiced.”<sup>23</sup> Johnson’s Kaiser Commission asserted zoning “tends to reduce the supply of new housing and raise prices or rents especially for those least able to pay.”<sup>24</sup> Reagan’s Commission (of which I was a member) urged the elimination of all zoning regulations denying or limiting the development of housing unless their existence or adoption is necessary to achieve a vital and pressing governmental interest.<sup>25</sup> The Commission concluded that unnecessary zoning and related requirements may often elevate the cost of housing by 25 percent or more.<sup>26</sup>

The most recent national attack on zoning occurred in July 1991, when the Commission on Regulatory Barriers to Affordable Housing, appointed by then-Department of Housing and Urban Development Secretary Jack Kemp, concluded that excessive and unnecessary local government regulation (including zoning) caused substantial increases in housing prices. Kemp charged that local regulation was denying many the American dream of home ownership.<sup>27</sup>

Anthony Downs, a member of the commission and senior fellow at Brookings Institute, estimated “probably well over half of the cost of building new housing in the average U.S. community is a direct result of local government regulations rather than of any minimum requirements truly necessary for the occupants’ health and safety.”<sup>28</sup>

Critics condemn zoning as exclusionary.<sup>29</sup> The term “exclusionary zoning” is actually redundant. The objective of zoning is to exclude certain uses of property, and often thereby those people who would live in the property are excluded. When housing is involved, a zoning controversy is not simply one of a municipality versus landowner, or a case of people

22. See JANE JACOBS, *DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961); Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896 (1970); Note, *Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 SO. CAL. L. REV. 335 (1972); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969).

23. NAT’L COMM. ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 20 (1969).

24. PRESIDENT’S COMMITTEE ON URBAN HOUSING, *A DECENT HOME* 143 (1969).

25. REPORT OF PRESIDENT’S COMM’N ON HOUSING 175 (1982).

26. *Id.* at 180.

27. ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, *NOT IN MY BACK YARD* 1-2 (1991).

28. Anthony Downs, *The Advisory Commission on Regulatory Barriers to Affordable Housing: Its Behavior and Accomplishments*, 2 HOUSING POLICY DEBATE 1095, 1109 (1991).

29. See *supra* notes 13 and 22 and accompanying text.

versus property; it is one of people versus people. It is usually a dispute between those who already live in a certain area and those who want to live in that or an adjoining area. Zoning allows existing residents to greatly influence or even determine who can or cannot move into an area. One group, those who got there first, exercises considerable restraints over the production of housing intended to benefit many other groups. These exclusionary powers also can be applied covertly to exclude minorities. As I have explained, when projects are permitted, they are usually of a more expensive character than the developers intended. Studies reveal the following practices exist in zoned communities:

Snob or large-lot zoning. Developers seek to build one unit per acre, but the zoning ordinance requires one unit for every two or even more acres. The result is big lots costing more, and reduced densities, leading to greater construction costs.

Large size dwelling units. Developers want to build houses or apartments containing, say, one thousand square feet per unit, but the zoning ordinance requires twelve to fifteen hundred square feet. Again, this requirement reduces availability of housing for lower income groups.

Growth controls—The NIMBY approach. NIMBY stands for “not in my backyard.” Now that I live in the area, build a barrier so no one else can get in. Cities have used zoning to reduce production, increasing land and property prices and lowering the availability of housing and commercial and industrial facilities.<sup>30</sup>

#### IX. ZONING CAUSES SOCIETAL PROBLEMS

The above practices cause various societal problems, as follows:

First, zoning increases prices. The absence of zoning has enabled Houston to keep rents and housing prices relatively low.<sup>31</sup> Houston’s rents have been far less than Dallas’ because of the absence of zoning.<sup>32</sup>

Second, zoning wastes land. Zoning usually increases the land area required for building. Bigger lots consume considerably more land for housing and urban purposes, reducing the supply for other uses, such as farming and grazing. The proposed Houston ordinance restricts density over what it would otherwise be, and the operation of the zoning process is likely to restrict it even more.

---

30. PRESIDENT’S COMM’N ON HOUSING, *supra* note 23, at 199-208.

31. In a report released June, 1994, the accounting firm of Ernst and Young ranked the greater Houston area as the nation’s most affordable of seventy metropolitan areas surveyed. It was ranked third most affordable in 1993. The ranking is based on the extent to which housing cost is a percentage of household income. Pat Rosen, *Houston Rates Well When Considering Housing Costs*, HOU. POST, June 29, 1994, at B1.

32. Bernard H. Siegan, *Conserving and Developing the Land*, 27 SAN DIEGO L. REV. 299-304 (1990).

Third, zoning stifles competition. By limiting development, regulation reduces competition and the creativity, ingenuity, and productivity that go with it. In zoned cities, these talents are often spent in persuading or outmaneuvering the zoning authorities. By contrast, competition thrives in Houston. One result is that Houston is probably the best provider of housing of any major city in the world.

Fourth, zoning eliminates smaller developers. Zoning causes us to lose the talents of small and moderate sized developers. The smaller builders do not have the resources to pay for zoning experts, zoning attorneys, and the cost of keeping the land vacant and unproductive while the zoners meditate. This leaves the market limited to only "the big guys" with the big resources, who, as a result, are often quite satisfied with zoning.

Fifth, zoning promotes politics and graft. Politics in Houston at the present time isn't exactly a minor industry. But with zoning, it will boom. The largest political contributors in zoned cities frequently are developers who require approval for their projects.

Zoning transforms city council members into modern alchemists. They are able to change land zoned worthless to land zoned golden simply by passing a law. Allowing either two units to the acre, or three or four units to the acre may make a difference in profits of thousands of dollars for a developer.

Obviously, developers and speculators will seek to secure zoning that will increase the value of their property. This includes hiring the "right" attorneys and experts, and maybe contributing money, either above or under the table, to those well connected. It is said the greatest virtue in a prince is to know his friends. Is there any wonder why there is so much corruption in zoning?<sup>33</sup> When I was seeking a title for a book critical of zoning, one developer suggested the title, "Goodbye Graft."

Finally, zoning curtails development. As a negative device, zoning has curtailed growth and development, reducing construction activity, business, employment and real estate and other tax collections.

There will be less production of commercial, industrial and multi-family real estate, each of which yields substantial taxes, to the financial detriment of the city.

## X. HOUSTON'S 1962 VOTE ON ZONING

There is a pattern in the 1962 Houston straw vote on zoning that appears to explain why people vote as they do on this issue;<sup>34</sup> it is based on income level. The same pattern prevails in the other zoning elections I have

---

33. See Alfred Balk, *The Easy Chair—Invitation to Bribery*, HARPER'S MAGAZINE, Oct. 1966, at 18.

34. In 1962, the vote was 56.6 percent opposed to 43.4 percent in favor with a turnout of about 48.5 percent. BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* 25 (1972).

analyzed; those of Baytown, Texas; Wichita Falls, Texas (1963); and Escambia County, Florida.<sup>35</sup>

In these localities, the less affluent voted against, and the more affluent for, zoning. Houston's 1962 vote reveals that in the Lindale, Melrose, Little York, Magnolia Park and Heights areas, low and moderate income areas, 78 percent to 84 percent of the voters opposed zoning. Among African-American voters, the figure was 72 percent against. In contrast, about 58 percent to 68 percent approved it in the wealthier sections. The well-to-do came out in much larger percentages to vote, but couldn't overcome the greater margins that prevailed in the poorer sections.<sup>36</sup>

For those who are economically better off, zoning is a luxury. In its absence, reasonable protection of their urban environment can be accomplished by imposing and enforcing restrictive covenants<sup>37</sup> and a limited number of laws. The considerations are different for those of lesser means. When zoning excludes stores, restricts construction, or raises housing costs, it creates barriers to a better life for poorer people. Evidently, they are quite aware of these problems. In the 1962 Houston vote, residential areas containing commercial uses were among the strongest opponents of zoning.<sup>38</sup> The zoners insist they are trying to help these homeowners by eliminating non-residential uses, but the truth is that with such friends you don't need enemies.

The pressures for zoning in Houston come largely from affluent homeowner groups who complain about two things. First, the city is not adequately enforcing restrictive covenants, and second, harmful uses may locate near residences, hurting property values. These problems hardly require that every square inch of Houston's 600 square miles be shackled with political controls.

With respect to harmful uses, the city presently has full authority to pass ordinances limiting the location of these uses. Instead of zoning, this city should make every effort to preserve and enforce deed restrictions. Under powers granted by the state in recent years, Houston could adopt ordinances giving homeowners additional powers to create, renew, modify, or repeal deed restrictions.

To solve Houston's land use problems by forcing zoning on the entire city is like using a cannon to kill a fly. Much more will be destroyed than gained.

---

35. *Id.* at 25-26; BERNARD H. SIEGAN, *OTHER PEOPLE'S PROPERTY* 52-54 (1976).

36. SIEGAN, *LAND USE WITHOUT ZONING*, *supra* note 31, at 28-29.

37. Most single family developments in Houston are subject to restrictive covenants imposed by the developer. Covenants also affect some multi-family developments and industrial parks.

38. SIEGAN, *LAND USE WITHOUT ZONING*, *supra* note 31, at 41.

*Post Script: The socio-economic breakdown in the 1993 voting was similar to that in 1962, except that the affluent group voted against zoning in 1993. It had favored the proposed ordinance in 1962. The vote was 52.1 percent against adopting the ordinance and 47.4 percent for it, broken down according to the Houston Post by groups as follows.*

<u>Group</u>	<u>Turnout</u>	<u>For</u>	<u>Against</u>
<i>Low-income Black</i>	11.59%	29.21%	70.79%
<i>Middle-income Black</i>	23.16%	62.55%	37.45%
<i>Predominantly Hispanic</i>	13.72%	41.05%	58.95%
<i>Low-Mid-income White</i>	17.63%	31.82%	68.18%
<i>Middle-income White</i>	28.96%	56.20%	43.80%
<i>Affluent</i>	34.52%	43.83%	56.17% <sup>39</sup>

---

39. Karen Weintraub, *Zoning Goes Down for the Third Time*, HOUS. POST, Nov. 3, 1993, at A-1, A-18.