LAND USE CONTROL IN HOUSTON, TEXAS:

A LEGAL ANALYSIS OF

MARKET APPROACH TECHNIQUES

by

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ABSTRACT

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CHARLES STEPHEN LUNA

Submitted to the Department of Urban Studies and Planning on May , 1977 in partial fulfillment of the requirements for the degree of Master in City Planning.

The City of Houston, Texas, rather than adopt a zoning ordinance, utilizes a variety of land use control mechanisms. The major land control techniques employed by the City of Houston are regulation of subdivision development, regulation of the issuance of building permits and municipal enforcement of private deed restrictions. The underlying principle unifying the various measures is a primary reliance on market forces and a repudiation of the governmental manipulation which zoning is seen to symbolize.

After first developing the general context within which the City of Houston endeavors to regulate land usage, the thesis evaluates each of these control mechanisms. Since there has been no analysis of the legal underpinnings of the specific techniques in operation, the focus of this thesis is on the legal validity of the Houston procedure.

The nature of the City of Houston and the attitude of the local citizenry are central to the decision to utilize each of the techniques, so certain aspects of the City are presented prior to the individual analyses.

Subdivision regulation, due to the recent nature of most growth in Houston, has taken on increased significance, yet fundamental legal shortcomings still exist.

Regulation of the issuance of building permits in Houston has become a settled practice, yet is subject to basic legal objections.

Municipal enforcement of private deed restrictions, while not an area of general activity, Houston apparently being the only major city to employ such a technique, raises a number of serious legal questions.

Each mechanism is first presented as a general concept. Previous judicial decisions are examined to reveal legal deficiencies, if any, in the procedures and to present the legal requirements and criteria the particular control must meet. The application of the technique in Houston is studied, with an indication of particular areas of legal concern. The effectiveness of these techniques in the absence of more comprehensive efforts and the ability of the City of Houston to control and direct development is also indicated.

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From the time that the Allen Brothers came here from New York in 1836 and bought the featureless land at the junction of two bayous (they could not get the sight they really wanted), this city has been an act of real estate, rather than an act of God or man. Houston has been willed on the flat, uniform prairie not by some planned ideal, but by the expediency of land investment economics, at first, and later by oil and petrochemical prosperity.

-Ada Louise Huxtable, "Space City Odyssey", TEXAS MONTHLY, May 1976.

Chapter I

INTRODUCTION

1. The Nature of the Controversy

Urban America has increasingly looked to public efforts to help solve the many and varied problems which have come to accompany urban living. The existing governmental structure has borne a large share of the cost attached to such massive efforts. Whether it be the local municipality which expands public services[1] or the federal government which increases monetary assistance[2], the role of governmental entities is substantial. From the water you drink and the streets and sidewalks upon which you travel to the schools and parks you utilize, public involvement has become pervasive.

In part due to a need to coordinate these diverse elements, but also in order to assure that certain harms were avoided while benefit obtained, planning has taken on an increased significance, particularly at the municipal level.[3] One aspect of this increased governmental presence has been regulation of the urban land market.

Historically land use controls have been exercised by local governments.[4] One such local government is the City of Houston, Texas. Founded in 1836, the City of Houston is generally regarded as a maverick, money-ladden youngster amid the seasoned likes of New York, Chicago and Los Angeles. And

in one area such a view is correct: Houston is not only a babe, it is completely inexperienced when it comes to zoning. Among the many unique characteristics of Houston is its status as the only major U.S. city without zoning. [5] In Texas, no city stands for the private market system of land management and for pride in the lack of land use controls as much as Houston does.[6]

In the past few years this singular status has attracted increased comment.[7] Houston has been used as the talisman for an anti-zoning movement based upon the tenets of the market economy.[8] The thrust of the argument, however is not merely an attack upon zoning. In the foreward to Benard Siegan's book on non-zoning in Houston, Professor Coase noted that:

> What Mr. Siegan shows, and it is this which makes his study of interst to a much wider audience than those professionally concerned with zoning, is that the market can be used effectively to solve problems which it is commonly thought can only be handled by government regulation. It suggests that the market might be used more often than it is at present to deal with other social problems.[9]

What seems to be an argument regarding zoning, then, is in reality a battle amongst conflicting conceptions of economic organization. Yet to recognize that is to recognize that:

> what appears to be a technical issue... tends to carry political, ethical and philosophical overtones...it carries implications with regard to

> interpersonal relations, political organization and the tension between social cohesion and conflict.[10]

Recognizing the nature of the controversy, I make no claim to complete scientific or legal objectivity. As a resident of the Heights on the north side of Houston I carry a strong attachment to and deep interest in the development of Houston. As a resident of this, "less-advantaged" neighborhood, however, I also feel deeply the need for public involvement in this development.[11]

2. Focus of the Analysis

Although there have been innumerable observations made regarding the growth and development of Houston, very little analysis has been devoted to the actual operation of the regulatory mechanisms employed by the City of Houston which influence that growth. The research effort of Siegan stands alone as an attempt at going beyond initial appearance and dissecting the Houston approach to land regulation.[12] Drawing upon this base, recent commentators have almost universally hailed this no-zoning approach and advocated wider utilization of private land controls, particularly restrictive covenants.[13]

It seems appropriate at this point in the controversy, then to illuminate certain aspects of the discussion which have as yet gone unmentioned. It is crucial that these factors be included since they are, at least to this author, significant enough to shift the balance against increased

adoption of the Houston approach. This seems to be true for three reasons.

First, although none of the commentators have completely recognized this fact, the growth and development of Houston is sufficiently unique that such an example is virtually useless as a model for much of urban America. Second, and perhaps more importantly, the record is not as meritorious as has been presented. Finally, the techniques utilized by the City of Houston are of questionable legality.

The analysis contained herein will deal with each of these issues. The focus, however, will be on the legal validity of the major land use controls utilized by the City of Houston. Despite the rash of endorsements of the Houston approach to land use regulation, there has been virtually no analysis of the legal underpinnings of the specific techniques. Such an inquiry raises substantial doubts as to the legality, and, therefore, the continued viability of the Houston approach.

Chapter II

THE CITY OF GROWTH

1. Introduction

The City of Houston is a young city, born as a real estate speculators dream in 1836 and developed, for the most part, in the age of the automobile, modern technology and affected by dynamic physical and economic forces which continue to stimulate rapid and extensive growth, development and redevelopment. By nearly any standards Houston is a large, sprawling, rapidly growing city. Statistical information quickly becomes outdated.

According to the 1970 Census, the City of Houston contained 1,232,802 inhabitants, makingit the sixth largest city in the United States.[1] Houston officials estimate that the City is gaining almost 1,000 new residents weekly and has moved ahead of Detroit and is now the fifth largest U.S. city. The majority of this increase has occurred in the Post World War II period.

Growth has become synonymous with the general attitude of Houston and is applicable to all phases of the local demographic base. Obviously, population growth and physical growth are closely related and the City of Houston has often found it to its advantage to enlarge its corporate limits to incorporate this growth. Utilizing very liberal annexation laws, Houston is the third largest city in area in the nation.[2]

Starting from the 147 acres (.22 square miles) of the original town plat, the City now covers approximately 510 square miles.

This expansion has been facilitated by Houston's unique location: there are no physical barriers, such as valleys, mountains or great bodies of water, to impede its growth.[3] This advantageous location, along with the discovery and development of abundant natural resources, the development of transportation facilities and the effort of the local citizenry, has proven a successful combination and has resulted in continued growth and urbanization of the area.

The geographic location of the City has been important to its economic development and growth. Situated near the center of a Coastal Prairie agricultural region, Houston has from its early days been a focal point for the marketing, processing, packaging and distribution of agricultural commodities. The city is located only fifty miles from the Gulf of Mexico and the completion in 1915 of the Houston Ship Channel (Buffalo Bayou), an inland waterway from the City to the Gulf, opened the City to the sea lanes of the world and further stimulated the growth of the City.[4] Houston is now the third largest seaport in total tonnage in the U.S.

The location of the City near the rich oilfields which were discovered in Southeast Texas in the early decades of this century also resulted in important benefits to the City. Today, the Houston-Gulf Coast area constitutes a major petroleum refining complex, one of the nation's greatest concen-

tration of chemical and petrochemical industries.[5]

The potential of the Houston area was recognized early. In June 1928, Southwestern Bell Telephone Company observed:

> Houston is admirably situated to share in the commercial and industrial growth of the Southwest. It's excellent rail connections, the ship channel which enables ocean going vessels to come right up to its wharves and docks, a plentiful supply of attractive industrial sites, and a strategic position in respect to raw materials, all combine to justify high expections in regard to Houston's population growth.[6]

As the industry of the City and the City's population grew, the area of the City increased accordingly through annexation. This chapter will provide an overview of some of these various aspects of the growth of Houston. Special attention will be paid to the growth in population and land area which has been experienced in the last thirty years. This should indicate the peculiar nature of Houston, and the unique features influencing the growth of the city.

2. The Availability of Land

A common criticism of zoning and other methods of public regulation is that they unnaturally constrict the availability of land. Since the land market depends upon the forces of supply and demand, such manipulation is seen as distorting the urban land market and, ultimately, leading to higher housing costs.[7] Siegan points to the lack of zoning in Houston as an explanation for the low housing costs in Houston, especially for renters.[8]

Such a conclusion, however, seems much less valid once the Houston scene is closely examined. If price is determined by the interaction between supply and demand, it seems particularly inappropriate to use Houston to highlight the manipulative quality of zoning. More than any city in the State of Texas, perhaps than any city in the entire nation, the City of Houston has employed the tool of annexation to constantly expand the available supply of land.[9]

(1) Annexation

During the past 140 years, the Houston City Council has passed over 120 ordinances affecting the boundaries of the City. From the period of original incorporation in 1836 to 1948 the area of the City expanded slowly and covered only 76 square miles at the end of 1948.

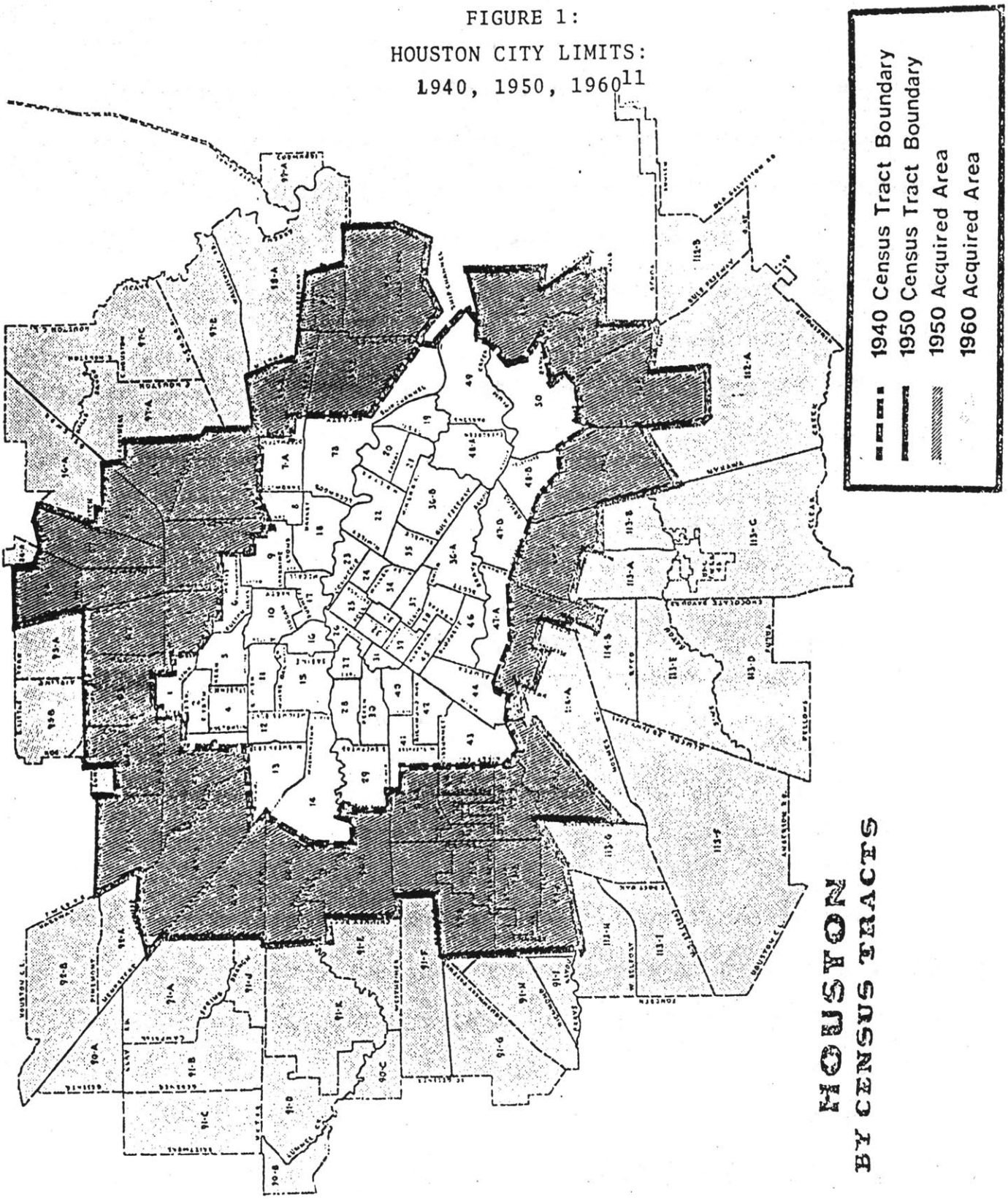
The post-World War II era has been the period of the most dramatic growth of the City with major annexations occuring in 1949 (83.74 square miles), and in 1956 (183.80 square miles), both doubling the area of the then existing city.[10] Figure 1 shows the city limits of Houston in 1940, 1950 and 1960. Similar large annexation have occurred in 1965 (86.98 square miles) and in 1972 (53.96 square miles). Other smaller annexation actions were also authorized during this period and these actions along with the major actions mentioned above, have resulted in the present city area of 510 square miles.

Annexation fever probably reached its peak during the 1960 Harris Count annexation war. When a number of small municipalities in Southeast Harris County, with recent annexation ef-

FIGURE 1:

HOUSTON CITY LIMITS:

1940, 1950, 1960[11]



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forts by the city of Houston no doubt on their minds, moved to annex a large part of Houston's potential growing room, the Houston City Council responded by approving the first reading of an ordinance to annex all of unicorporated Harris County-over 1100 square miles. When the smaller cities abandoned their plans, the annexation effort by the City of Houston was similarly abandoned.[12]

The city's annexation policy is based upon three broad objectives:

> 1) To bring areas and population under administrative control of the city so that growth will contribute to the city's financial stability;
>
> 2) to increase the city's population totals in each decennial census; and
>
> 3) to prevent encirclement of the city by satellite communities as has been the case in many older cities of the nation, such encirclements making it impossible for cities to participate taxwise and administratively in the area's economic growth.[13]

One of the most serious problems encountered by many large American cities is the apparent conflict created by the rapid growth and proliferation of small suburban incorporated cities around the edges of the central city and the inability of the central city to prevent the creation of these satellite independent municipal governments.[14] The central city, by circumstance or legal prohibition, is therefore confined to fixed and restricted corporate boundaries.

Under these circumstances, the central city, which usually

is the center of the economic base of the urban area, finds itself plagued with an ever-declining tax base caused by a continuing out-migration of population, businesses and industries which, for one reason or another, desire to escape into other smaller political jursidictions. The move might be for tax advantages, political power, more or less development controls and restrictions, racial and ethnic relationships, or to generally avoid being involved in the urban problems, of whatever nature, existing in the central city. The net result of the situation, however, is that the economic base of the central city becomes seriously diluted and those persons, businesses and industries which withdrew from the central city become only consumers of the central city's vast facilities, resources and services without any responsibility for the support of these necessary and essential municipal funtions.

The City of Houston is acutely aware of this danger, but has also recognized that cities in Texas are able to prevent, or at least minimize the effects of the central city- suburb conflict by utilizing the powers and legal authority granted to it by the State and has historically maintained an aggressive policy toward annexation. This policy allows the City to protect its interests in the unincorporated territory within its authorized extraterritorial jurisdiction, insuring that the City of Houston will have the capability to continue to expand its corporate boundaries as it determines to be appropriate and in the best interests of the citizens of the City of Houston, both present and future.[15]

The annexation of territory by the City is regulated under the provisions of Texas Municipal Annexation Act which became effective on August 23, 1963.[16] Prior to that date, cities having a population over 5000 persons and having a duly adopted home rule charter (Houston qualified on both counts) could annex contigous property without limitation or restriction. Several provisions in the Municipal Annexation Act now serve to restrict the aggressive city annexation policy. The City may no longer employ""finger" annexations to extend its extraterritorial jurisdiction.[17] In addition, The City may only annex ten percent of its total corporate area in any one year (although this provision is cumulative for three years).[18]

At the same time, other provisions give the City important control, especially in preventing encirclement. The consent of the resident population is not necessary before the City may annex additional territory. No city within the extra-territorial jurisdiction of Houston may annex additional land nor may there be any incorporation unless the City of Houston gives its approval. Although the evidence is less than complete, it is generally acknowledged that:

> The power of the City of Houston to annex its fringes as they became a part of the urban community enabled it to bypass many of the problems that arise because of the non-coincidence of tax and service boundaries.[19]

An indication that fiscal considerations still heavily influence annexation decisions is the recommendation by City Controller Leonel Castillo to annex the Ship Channel area after the expiration in October, 1977 of contracts that provide a

tax break for channel industries.[21]

The combination of the ability to annex substantial area while simultaneously exercising extraterritorial jurisdiction, thus thwarting annexation attempts by others within a 2000 square mile area, has caused some to consider the City of Houston a "region" as envisioned by proponents of regional planning.[21]

(2) Land Utilization

Corrollary to the amount of available land is the amount of undeveloped land. As a big young city, Houston contains a much greater amount of undeveloped land than similarly populated cities in the U.S. As of April 1970 almost 75% (1,309 square miles) of the total area of Harris County was undeveloped while 41% (185 square miles) of the corporate area of Houston was undeveloped. This represents a 6% increase in the developed area of the City since 1966. Table 1 shows the distribution of land use within Harris County and the City of Houston in 1970. Since a large amount of the area annexed in 1972 is part of the Addicks and Barker Reservoirs in Southwest Harris County, the percent of undeveloped area in the city has probably increased since 1970.

While much of the undeveloped land is in outlying parts of the City, substantial undeveloped acreage remains in every section of the City. Almost 10% of the Central Business District is undeveloped as is slightly over 10% of the land area within the pre-1949 city limits.[23] Figure 2 shows the amount of undeveloped land by census tract in Harris County.

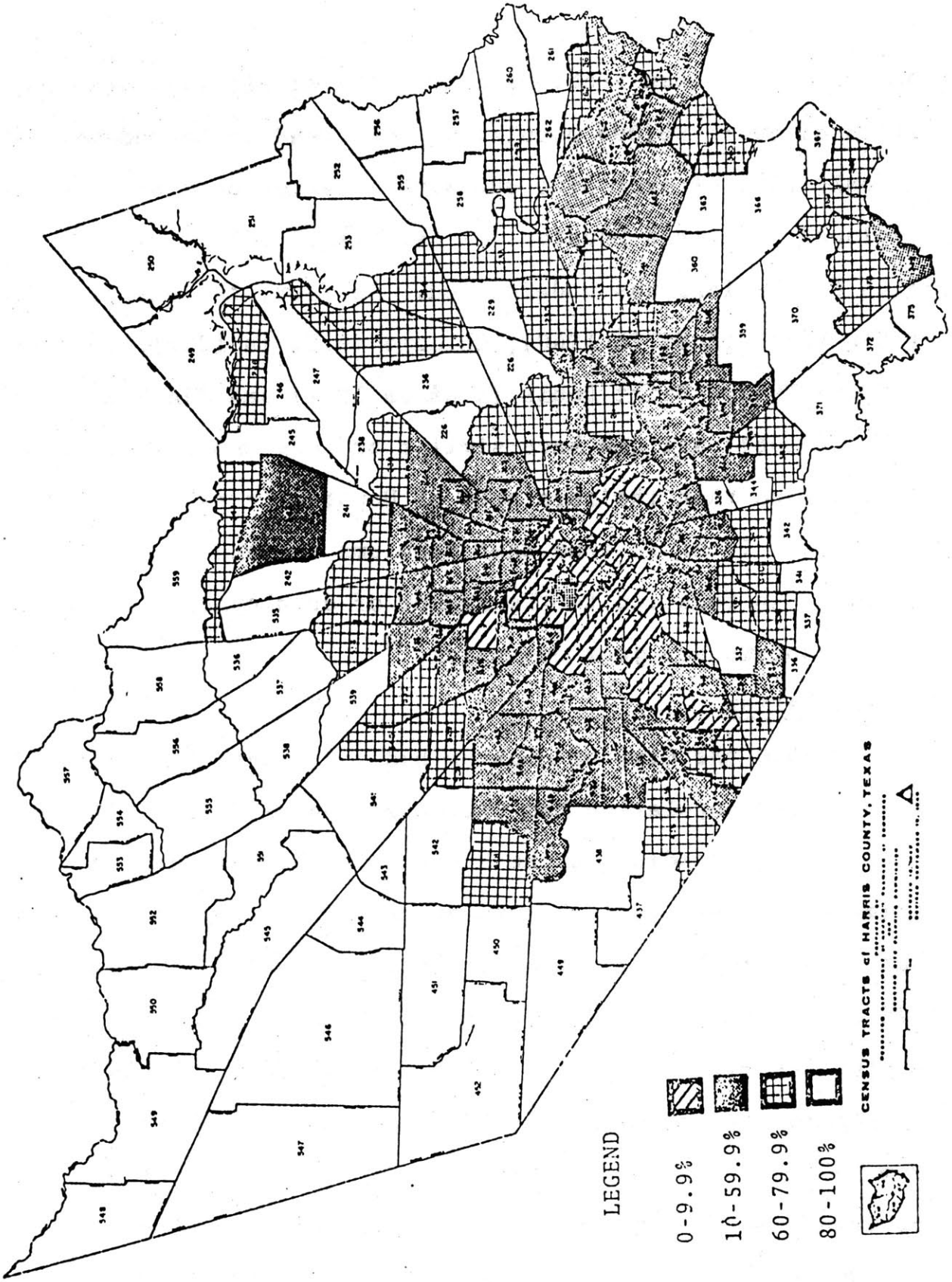
The large amount of undeveloped land in Houston is in marked contrast with most large U.S. cities where there is

Table 1: DISTRIBUTION OF LAND USE IN HARRIS COUNTY, 1970[22]

	Harris County		City of Houston		Remainder of Harris County	
	Sq. Mi.	%	Sq. Mi.	%	Sq. Mi.	%
TOTAL AREA	1,773		447		1,326	
LAND USES:						
RESIDENTIAL:						
Single-Family	212	12	124	28	88	7
Multi-Family	13	1	10	2	3	0
COMMERCIAL AND SERVICES:	48	3	34	8	14	1
INDUSTRIAL:	62	3	37	8	25	2
EDUCATIONAL:	11	1	7	2	4	0
OPEN SPACE:	25	1	13	3	12	1
WATER:	61	3	26	6	35	3
RESOURCE PRODUCTION:	9	1	2	0	7	0
FREEWAYS:	23	1	9	2	14	1
UNDEVELOPED:	1,309	74	185	41	1,124	85

FIGURE 2:

UNDEVELOPED LAND: 1970 [24]



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little vacant land.[25] In research conducted for the National Commission on Urban Problems only 12.5% of all land area in cities of over 250,000 population was found to be undeveloped.[26] The only city of over 5000,000 with a larger percentage of undeveloped land than Houston was San Diego, California where 53.6% of the land was undeveloped. In fact, the entire cities of New York (12.5% in 1960), Chicago (6.3% in 1966), Detroit (5.9% in 1962), Saint Louis (5.2% in 1964) and San Francisco (4.7% in 1964) all now have similar or less amounts of undeveloped land than the core area of Houston is expected to have in 1990.[27] If it is true that problems of land use planning "increase in relation to the amount of development" then Houston's problems are just beginning.[28]

3. Population

In 1960 the City of Houston had a population of 938,219. By 1970, the population had increased approximately 31% to 1,232,802. According to the Houston Chamber of Commerce, the estimated January 1, 1977 population of the City was 1,501,000.[29] That figure represents an approximate 22% increase from the 1970 census and, according to the Chamber of Commerce, makes Houston the fifth largest city in the nation.[30] Table 2 shows the population, population change and population growth rate from 1970 to 1975 for the top ten cities in each category among the twenty most populous cities in the United States. Since 1960 there has been no city with a larger population than Houston which has experienced a greater rate of growth than has Houston.

Table 2: POPULATION, POPULATION CHANGE, AND POPULATION GROWTH RATE[31]

Rank(a)	City	1975 Population(b)	City	Amount of Change 1971-1975	City	% Change 1971-1975
1	New York	7,572,900	Phoenix	+136,700	Phoenix	+23.0
2	Chicago	3,266,200	San Antonio	+124,600	San Antonio	+18.8
3	Los Angeles	2,735,600	San Diego	+101,600	San Diego	+14.5
4	Philadelphia	1,825,600	HOUSTON (c)	+ 57,200	Columbus	+ 5.6
5	Detroit	1,383,300	Columbus	+ 30,200	Memphis	+ 4.7
6	HOUSTON (c)	1,318,700	Memphis	+ 29,900	HOUSTON(c)	+ 4.5
7	Dallas	870,400	Dallas	+ 10,600	Dallas	+ 1.2
8	Baltimore	945,200	Boston	+ 500	Boston	+ 0.1
9	San Diego	801,200	Indianopolis	+ 300	Indianapolis	+ 0.0
10	San Antonio	788,700	New Orleans	- 16,200	New Orleans	- 2.7

(a) Ranking among the ten most populous U.S. Cities
(b) Estimates as of January 1
(c) Houston Chamber of Commerce estimated Houston population at 1,430,000 on January 1, 1975 and 1971-1975 gain at 172,000 or 13.7%. The Chamber also estimates that Houston is now the fifth largest city rather than sixth.

Fortunately, this growth in population has not resulted in the usual high cost of living associated with metropolitan living. In 1975 the cost of maintaining a moderate standard of living in Houston was fifth lowest among 40 metropolitan areas of the United States.[32] While the urban U.S. average intermediate family budget was $15,479, the Houston cost of living was only $14,165. In contrast, the Boston cost of living was 29.3% higher, at $18,315.

Even more profound than the increase in the general population has been the increase in the Black and Chicano populations in the City. From 1960 to 1970 while the City population grew by 31%, the Black population rose 47% and the

Chicano population increased by a startling 136%. Tables 3 and 4 trace the increase in these populations throughout the City's history.[33] Figure 3 shows areas of ethnic concentration in 1970.

Table 3: POPULATION BY ETHNIC GROUP

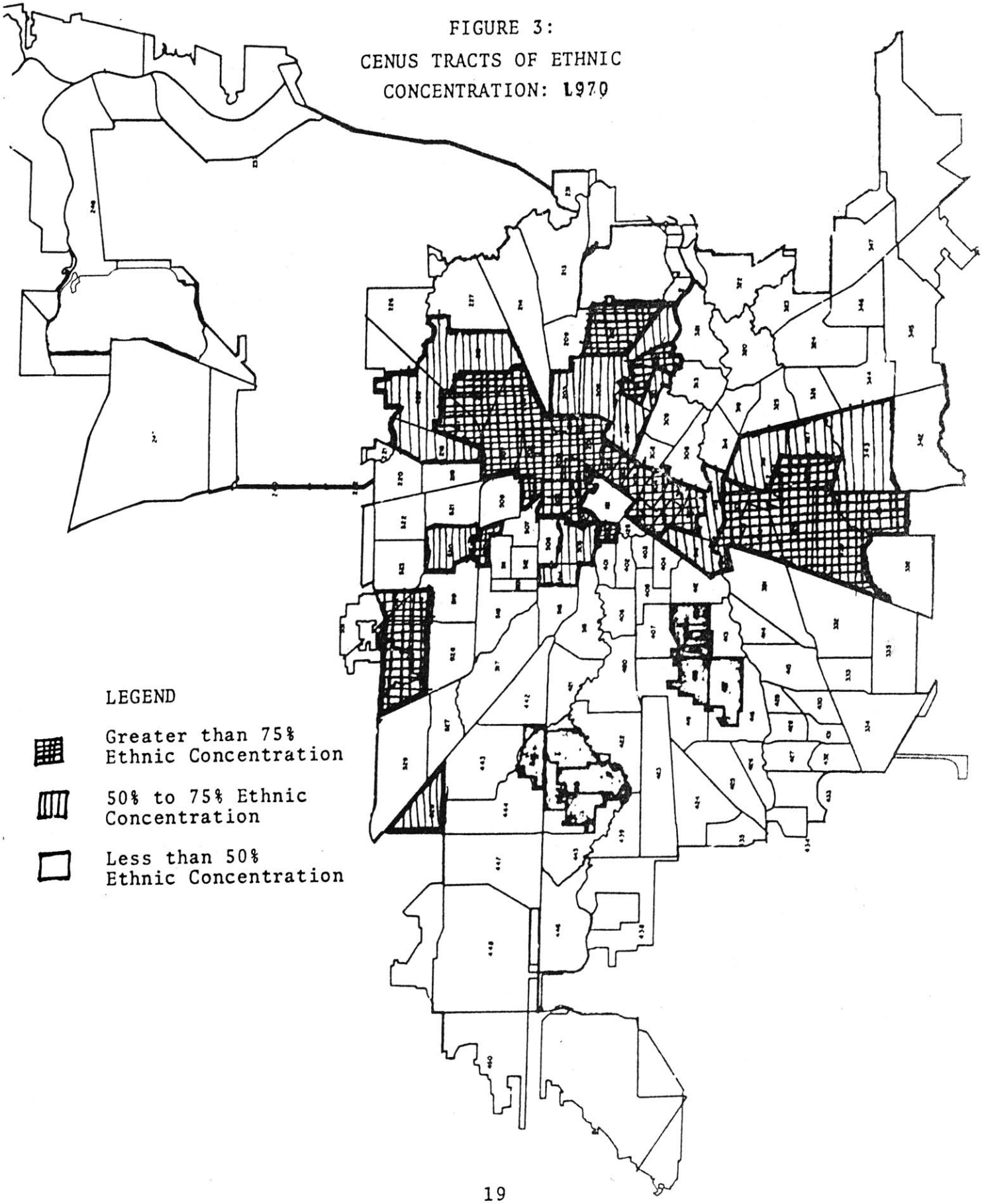
Year	Total Population	Black Population Number	Black Population % of Total	Chicano Population Number	Chicano Population % of Total
1850	2,396	-	-	-	-
1860	4,845	1,077	22.2	-	-
1870	9,382	3,691	39.3	-	-
1880	16,513	6,471	39.2	-	-
1890	27,557	10,370	37.6	-	-
1900	44,633	14,608	32.7	207	.5
1910	78,800	23,929	30.4	830	1.1
1920	138,276	33,960	24.6	6,318	4.6
1930	292,352	63,337	21.7	14,149	4.8
1940	384,514	86,302	22.4	20,230	5.3
1950	596,163	124,766	20.9	34,363	3.8
1960	938,219	215,037	22.9	63,372	6.8
1970	1,232,802	316,551	25.7	149,727	12.2

Table 4: POPULATION INCREASE BY ETHNIC GROUP

Year	Total Population No.[11]	Total Population % of Total	Black Population No.	Black Population %of Total	Chicano Population No.	Chicano Population % of Total
1860	2,449	102.2	-	-	-	-
1870	4,537	93.6	2,614	242.7	-	-
1880	7,130	76.0	2,780	75.3	-	-
1890	11,044	66.9	3,899	60.3	-	-
1900	17,076	62.0	4,238	40.9	-	-
1910	34,167	76.6	9,321	63.8	624	302.9
1920	59,476	75.5	10,031	41.9	5,488	661.2
1930	154,076	111.4	29,377	86.5	7,831	123.9
1940	92,162	31.5	22,965	36.3	6,081	42.9
1950	211,649	55.0	38,464	44.6	14,133	69.9
1960	342,056	57.4	90,271	72.4	29,009	84.4
1970	294,583	31.4	101,514	47.2	86,355	136.3

These same population groups, however, have not received similar benefits from Houston's growth as have the Anglo majority. In the areas of education,[34] employment,[35] income,[36] and

FIGURE 3:
CENUS TRACTS OF ETHNIC
CONCENTRATION: 1970



housing,[37] the Black and Chicano populations of Houston share the common "disadvantage" of color.[38]

Only 4.8% of Anglo families had income below the poverty level in 1970 while 15.9% of Chicano families and 25.3% of Black families were similarly situated. Figure 4 shows areas of low income population in 1970. Almost all these areas of low income population are also areas of ethnic concentration as shown in Figure 3. Tables 5 and 6 show median family income and median income per individual family member by ethnic group in the City. Because of larger family size among minority groups, the income disparity is more profound when income per individual family member is utilized.

Table 5: MEDIAN FAMILY INCOME

	1960		1970	
	Amount	% of Anglo	Amount	% of Anglo
City	$5,902		$ 9,786	
Anglo	6,727	100.0	11,377	100.0
Black	3,426	50.9	6,392	56.2
Chicano	4,273	63.5	8,118	71.4

Table 6: MEDIAN INCOME PER INDIVIDUAL FAMILY MEMBER

	1960		1970	
	Amount	% of Anglo	Amount	% of Anglo
City	$1,498		$2,469	
Anglo	1,794	100.0	3,026	100.0
Black	783	43.6	1,446	47.8
Chicano	858	47.2	1,749	57.8

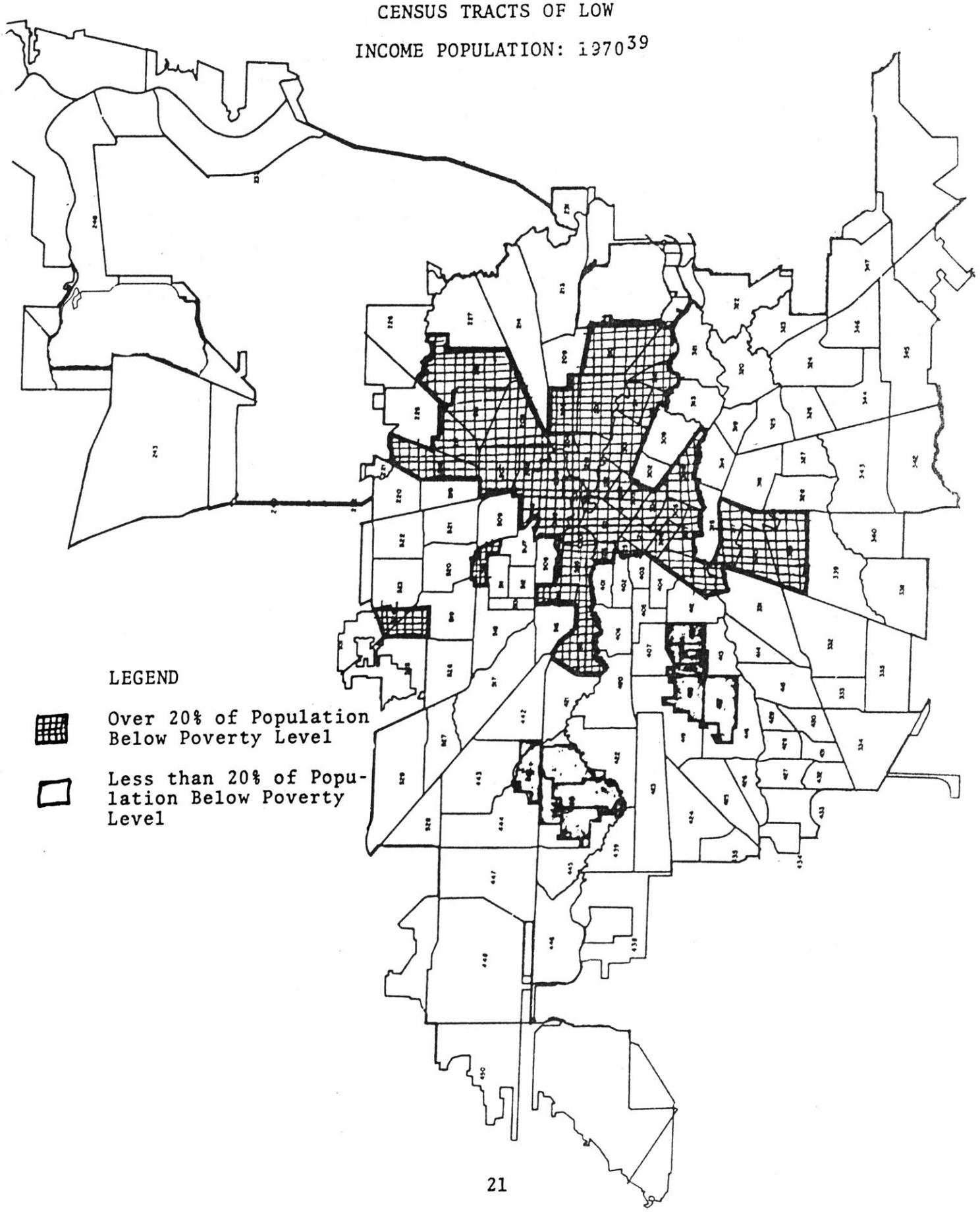
4. Industry and Employment

The growth in population in Houston has been accompanied by a similar expansion in the job market. Houston has his-

FIGURE 4:

CENSUS TRACTS OF LOW

INCOME POPULATION: 1970[39]



torically had a diverse economic base. Manufacturing firms now located in the City include companies engaged in producing food and kindred products, lumber and wood products, non-electrical machinery, professional and scientific instruments, primary metals and fabricated metal products. Table 7 summarizes past employment and projected trends by industry divisions for Harris County.

This growth in employment has resulted in the Houston SMSA maintaining a low unemployment rate, particularly in relation to the national recession of the past several years. Table 8 shows total employment and unemployment in the Houston SMSA.

Further evidence of the increased business activity in Houston is the City's fourth place ranking in total retail sales in 1974 (behind only New York, Chicago and Los Angeles) after experiencing the fastest growth rate among the twenty most populous U.S. cities during the period 1970-1974,[42] and second place ranking in construction activity in 1975, (behind only Los Angeles).[43]

This increased business activity, however, has not benefited all areas of the city. Figure 5 shows the concentration of locations of business and professional establishments. A comparison with Figures 3 and 4 indicates areas of low-income population and ethic concentration as primarily in the eastern half of the city while business activity is more concentrated in the western half.

A final indication of the business activity in Houston is the City's leading the nation in housing starts this year

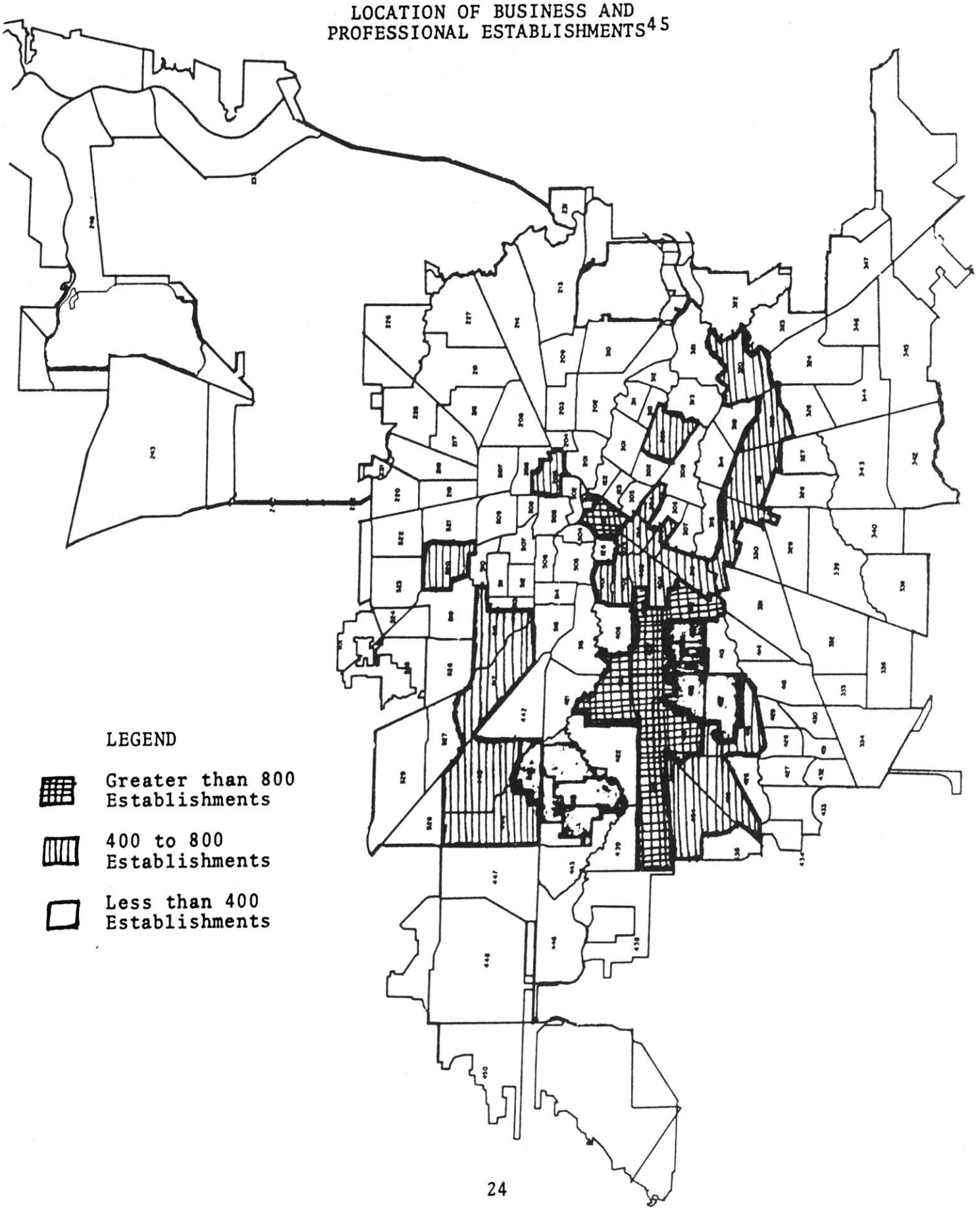
Table 7: HARRIS COUNTY EMPLOYMENT BY INDUSTRY DIVISIONS[40]

	1950	1960	1970	1980	1990
Agriculture	6,083	6,995	9,000	7,600	7,100
Mining	13,446	19,938	20,439	17,554	15,989
Contract Construction	31,613	46,856	62,798	68,193	90,580
Manufacturing	69,465	95,919	122,194	144,409	177,654
Transportation, Communications, %Public Utilities	39,511	53,100	63,119	75,561	95,802
Wholesale & Retail Trade	78,335	130,129	196,655	272,959	364,591
Finance, Insurance & Real Estate	14,783	28,184	43,928	64,615	82,523
Services	68,712	87,838	151,528	231,795	308,608
Government	11,098	39,178	73,708	111,863	149,009

Table 8: EMPLOYMENT AND UNEMPLOYMENT[41]

	1965	1971	1972	1973	1974	1975
Total Employment (thousands) (December of @ yr)	691.5	882.6	912.9	966.7	1013.1	1047.0
Unemployed (as % of total work force)						
July	3.9%	5.6%	5.9%	5.2%	4.2%	5.2%
December	2.4	3.9	3.5	3.5	4.0	4.6

FIGURE 5:
LOCATION OF BUSINESS AND
PROFESSIONAL ESTABLISHMENTS[45]



for the fifth year in a row. The National Association of Home Builders estimated that the 12- month total for the Houston area will be 42,000 as compared to a second place total of 35,000 for Chicago.[44]

5. Conclusion

The City of Houston has undergone substantial growth in recent years. Land area, population, employment opportunity and business activity have all felt the impact of a favorable physical and economic environment. Yet this favorable climate has not worked to the equal advantage of all segments of the population. Confronted by rapid expansion the City has sought to maximize the economic return from this growth with little concern for the allocation of the resulting benefits. Nor has the City been unduly concerned with more subtle results of this growth:

> The image of Houston rests on its commercial success and its 'spaghetti bowls'-vast networks of superhighway interchanges which speed the traffic but destroy both the fabric and scale of the urban environment.[46]

And as we shall see, the City's response to the increased pressure on the land market has been sadly inadequate.

Chapter III

THE LEGAL VALIDITY OF THE HOUSTON MECHANISMS: SUBDIVISION REGULATION

Like other large U.S. municipatities, the City of Houston utilizes a wide variety of specific land use control regulations.[1] While such commonplace formal mechanisms play a significant role in land regulation, the more substantial control powers are excerised by virtue of informal practices and less widely-recognized procedures.[2]

Neither the Land Platting Policy Manual adminstered by the City Planning Commission nor the permit restriction program pursued by the Department of Public works has been officially adopted or endorsed by City Council.[3] Together these two practices exercise greater influence upon land development than any of the formal procedures.

At the same time, the final major control techinque- municipal enforcement of deed restrictions - even though formally adopted by City Council, raises questions regarding the ability of local government to engage in such activity. Past municipal efforts in this area have never been pursued through such an officially articulated program.

Since these three mechanisms are of greatest significance, the analysis in this and the following chapters will focus on the legal questions arising from the utilization of these three techniques. In addition, much of the current land use control

controversy revolves around programs based upon similar concepts. It would seem particularly appropriate then, to inquire into the legal viability of these practices.

1. Subdivision Regulation: The General Power

Subdivision regulation, derived from the power to control land registration, is intended to control the preliminary stages of new land development for private use.[4] Subdivision regulation does not attempt to influence the decision whether certain land should or should not be used for residential or other purposes. Rather, it assumes that if the decision is made to subdivide land, then the developer must meet certain specific standards before he can sell these subdivided lots.

Article 974a, enacted in 1927, allows cities in Texas to regulate subdivision development within their jurisdiction.[5] The policy behind such regulations seems to be that any necessary improvements should be provided by the developer rather than at public expense. So it is not surprising that in most large cities, where there is very little vacant land remaining, there seems to be little interest in such regulations.[6]

The situation is very different in Houston. It is estimated that three-fourths of the built-up areas of Houston have been built under subdivision control.[7] If properly adopted and fully implemented, these regulations are not only applicable within the roughly 510 square miles of incorporated area; they also apply to the extra-territorial jurisdiction of Houston - a total control area of over 2,000 square miles.

2. Statutory Requirements

Since land registration is a privilege that the appropriate regulatory body, pursuant to state authorization, has the power to grant or withhold, certain conditions may be exacted from developers as a requisite to plat approval.[8] In addition, subdivision regulation has long been acknowledged to constitute an important aspect of the exercise fo the police power, further allowing requirements designed to protect the public health, safety and general welfare.[9]

Presently the specific requirements for land subdivision in Houston are contained in the Land Platting Policy Manual administered by the City Planning Commission.[10] The regulations applied by the Planning Commission extend to street layout and design and minimum lot size and other matters traditionally covered by subdivision regulation under Act 974a.

The plat must conform to the City's plan for major thoroughfares and provide adequate secondary streets with the subdivision. Streets must meet design standards established for paving, curves, width, block length, and intersections. Requirements for private streets, building setbacks and off-street parking are also included in the subdivision design standards.[11]

While the Planning Commission administers these regulations, their ability to require compliance is questionable. The Houston City Council has not adopted by ordinance, resolution or motion the present Land Platting Policy Manual.[12] Although the

City Council has been considering a proposed subdivision ordinance, there seems to be little initiative towards adoption.[13]

The planning commission has asked council to adopt an ordinance establishing subdivision standards, but council has consistently refused to do so.[14] The position of council seems to be that the enabling act gives the planning commission the power to establish regulations and to apply them without an implementing ordinance. While this might be true as to matters specifically covered by the enabling legislation, e.g., street layout, it is questionable whether requirements such as minimum lot size can be legally enforced in the absence of an ordinance which relates minimum lot size to the general health, safety, and welfare of the community.

Section 4 of Article 974a consists of two parts.[15] The first part of the section is a self-executing clause which gives the Planning Commission the power, without City Council action, to require compliance with the very general requirements that the streets be laid out in accordance with the general plan of the city and that space be provided for the laying of utility lines. This first part of the section does not provide for the Planning Commission authority to designate lot sizes, provide for building setback lines, or establish any standards as to street improvements.[16]

It is the second part of the section which gives a much broader power of regulation, allowing the enforcement of rules and regulation designed to promote the public health, safety,

morals or general welfare. This power, however, may only be exercised by virtue of an ordinance adopted by the City Council following a public hearing held in connection therewith. The Houston City Council has never done so.[17]

It would be a simple matter for the City Council to adopt a subdivision ordinance. Failing to do so complicates an already messy system of land use control.[18] The Houston subdivision regulation scheme is further complicated by the Texas Municipal Annexation Act which allows cities to extend their subdivision regulations into the area of their extra-territorial jurisdition (ETJ).[19]

In 1965, the attorney general was called upon to clarify that procedure. In an opinion based upon construction of the language of the statute (the word "may"), the attorney general concluded:

> It is therefore our opinion that under Sec.4 of Article 970a. it is not mandatory that the governing body of a city extend by ordinance to the area under its extraterritorial jurisdiction the application of <u>such city's ordinance</u> establishing rules and regulations governing plats and the subdivisions of land before the planning commission or governing body of such city has authority to approve or disapprove a plat of subdivision lying within the area of its extraterritorial jurisdiction. (emphasis added)[20]

The opinion is of no consolation to the City of Houston, however, since the city council has passed no ordinance establishing rules and regulations governing plats and subdi-

visions of land within the city limits. This failure to adopt a subdivision ordinance raises serious doubts about the legality of Houston's plat approval system as to subdivisions inside and outside city limits (but within the ETJ).[21]

The extensive regulations which Houston applies to subdivisions within the five mile ring of extraterritorial jurisdiction, then, are unauthorized by law and consequently unenforceable. Since much of the current land subdivision is occurring in the ETJ, outside the city limits, this ineffectiveness could have profound consequences, particularly in light of the importance of subdivision control in Houston.

3. Judicial Interpretation

The courts have consistently held that once a subdivider meet the requirements of the subdivision regulations, plat approval cannot be withheld because of additional factors, even the fact that the subdivision will accentuate existing inability to provide services.[22] The Texas enabling legislation specifically requires plat approval once the subdivider meets the adopted rules and regulations.[23]

In Beach v. Planning and Zoning Commission of Town of Milford,[24] the Supreme Court of Errors of Connecticut in interpreting similar legislation,[25] explained the situation as follows:

> The significant feature of this statute is that, by its terms, the adoption of regulations is made a condition precedent to the exercise by a planning commission of any control over the

> planning of a subdivision. A planning commission may neither approve nor disapprove subdivision plans until after it has adopted regulations to guide it in its approval or disapproval. The necessary implication of the statute is, therefore, that in passing upon such plans the commission is to be controlled by regulations which it has adopted. Any subdivision plan such as the one proposed by the plaintiff in the present case, which complies with those regulations must be approved by the commission.[26]

It would seem then that the only substantive requirement that the City may enforce is the filing of a map which shows the location of streets in compliance with the City's general plan and the proper provision for public utilities.[27] Any other requirements are subject to such a non-adoption attack. A developer could probably challenge any other requirement and force the City to approve his plat. Such a challenge, however, has yet to occur.

Developers must deal with the City on a continuing basis and are not likely to jeopardize their good will by bringing a law suit. In addition, the cost of bringing suit would be quite substantial. The actual control system then, is based not so much on legal authority as on practical bargaining ability. Given the city's weak legal position, however the planning commission may not be as demanding, particularly where the possibility of a legal challenge exists.[28] This can lead to uneven enforcement of subdivision regulations. If such a practice were codified, i.e. a subdivision ordinance was adopted which applied differing standards among developers, a

violation of the due process and equal protection clauses of The Constitution would be apparent. The present practice is just as violative of the Constitution, even though it is less apparent and less likely to be challenged.

Chapter IV

THE LEGAL VALIDITY OF THE HOUSTON MECHANISMS: RESTRICTION OF BUILDING PERMITS

In response to the overloaded capacity of a number of the city's sewage treatment plants, the Department of Public Works in Houston has been restricting the issuance of building permits.[1] This program was motivated to a large extent by numerous orders from the Texas Water Quality Board relating to operation of the city sewage system.[2]

At first glance, this would seem to place Houston amid the burgeoning list of "growth control" municipalities.[3] Several distinct factors, however, serve to place Houston in a quite different situation from such municipalities.

First, as might be expected after gaining a familiarity with the Houston scene, the avowed purpose of the Houston restriction program, in marked contrast to that of most growth control proponents, is to facilitate contined growth by the City:

> In an attempt to encourage the continuing growth of the City of Houston, every effort has been made to provide municipal services where requested.[4]

Houston, then is unlike Ramapo, New York where the avowed purpose was to preserve its rural, semi-rural and suburban character[5] or Petaluma, California wher the avowed purpose was to protect its small town character.[6] In contrast,

Houston wants to grow.[7]

A second important distinction flows from this difference in orientation. Houston should be considered a practitioner of the "pure" moratorium and not a growth restriction adherent. When the issue is growth control the central question is to what extent a community can prohibit or severly limit population growth.[8] It has been noted that the moratorium issue, however, comes down to a question of whether a municipality may temporarily delay construction, and if so, for how long.[9]

1. Validity of a Temporary Moratorium

In Westwood Forest Estates v. Village of South Nyack[10] the court invalidated an amendment to the zoning ordinance of the village which barred the construction of multiple dwellings throughout the village. Although recognizing that a municipality has the power "to take appropriate steps to deal with sanitation problems, including those created by inadequate biological treatment of sewage",[11] the court found the particular zoning amendment to be an improper means towards adressing that problem. Among the factors the court found determinative were the lack of a comprehensive plan and the fact that the burden of a city-wide problem fell inequitably upon certain indviduals.[12] The court was careful to point out, however, that:

> This is not to say that the village may not, pursuant to its other and general police powers, impose other restrictions or conditions on the granting of a building permit to plaintiff such

> as a general assessment for reconstruction of the sewage system, granting of building permits for the planned garden apartment complex in stages, or perhaps even a moratorium on the issuance of any building permits, reasonably limited as to time.[13]

Since the Westwood Forest decision the use of building and/or sewer moratoria has become increasingly more popular.[14] Often these programs have been no more than efforts at growth control with purported public health or safety justifications.[15] Where there has been a legitimate public welfare concern, however, the courts have sustained the municipal action.

In Cappture Realty Corporation v. Board of Adjustment of the Borough of Elmwood Park[16] the borough, through an interim zoning ordinance, declared a moratorium on construction in certain flood prone and flood plain areas until proposed flood control projects were completed. After first examining the rationale behind zoning and interim ordinances to allow preparation of comprehensive zoning ordinances, the court found similar merit in a temporary moratorium:

> There is no rational basis for holding that a municipality may not provide sufficient breathing space in order to complete construction of such flood control projects where the health, safety and welfare (as well as property values) of the people of the municipality are involved.[17]

The court went on to stress the temporary nature of the restriction allowed and that failure to complete construction within the allowable time period (two years from the date of

decision) would lead to invalidation of the ordinance.[18]

Similarly, in Roy v. Water Supply and Pollution Control Commission[19] the denial of an application to extend a sewer line by the defendant commission was upheld since the commission had properly found that the extension would endanger public health..

This increased reliance on temporary restriction programs, however, has met with judicial disapproval when the municipality has disregarded the lessons of Westwood Forest.

In Belle Harbor Realty Corporation v. Kerr[20] the city refused to issue a building permit to plaintiff on the ground that sewer facilities in the area were grossly inadequate. In ordering issuance of the permit, the court noted that since all the requirements for issuance of the permit had been met, to refuse the permit in such circumstances would be a deprivation of property without due process.[21] Relying on Westwood Forest, and distinguishing Ramapo, the court noted that:

> The lack of facilities here had no relation to any community plan; nor does it appear that there are any comprehensive plans for the improvement of the sewer system in the area to accommodate the structures for which it is zoned.[22]

Perhaps the most extensively analyzed use of the sewer moratorium involves the program in operation in Metropolitan Washington, D.C., including Prince George's and Montgomery Counties, Maryland.[23] In Smoke Rise, Inc. v. Washington Suburban Sanitary Commission[24] the program was upheld in an extensive opinion by U.S. District Judge Northrop.

The initial moratoria orders were issued by the Maryland Department of Health and Mental Hygiene on May 20, 1970. In addition to amendments and revisions of these orders the Washington Suburban Sanitary Commission and the Montgomery County Council also implemented sewer moratoria.[25] The court noted that all of the orders were based on a determination that there were:

> discharges of raw and inadequately treated sewage into the waters of the State, which waters are being, or are likely to become polluted in a way dangerous to health, therby constituting a menace and nuisance prejudicial to the health, safety, and comfort of the public.[26]

Additionally, the court disagreed with plaintiff's allegation that the moratoria orders were not coupled with a positive remedial program.[27]

The court then proceeded to examine the reasonableness of the moratoria orders on two seperate grounds - whether the various orders were reasonable as to purpose and reasonable as to duration.[28]

While recognizing that the state must act to prevent the pollution of its waters and potentially unsanitary sewer condition, the court also emphasized the necessity of examining whether the sewer moratoria orders had been implemented for the primary purpose of achieving other objectives which are not permissible. Relying on the Ramapo and Belle Harbor decisions, Northrop concluded:

> [I]t is equally well established that development demand may properly be impeded where growth restrictions are imposed pursuant to well-reasoned, comprehensive plans for the improvement of the physical infrastructure of the region.[29]

Since the various sewer moratoria orders were accompanied by extensive and detailed plans for improvement of the waste water treatment capacity in Prince George's and Montgomery Counties, the court found no deprivation of property without due process with regard to the purpose of the moratorium.

The court was equally concerned with the duration of such a restriction on growth. Since a local government can impose a reasonable moratorium on construction in the area until the sewers can be expanded to accommodate the area's needs, the reasonableness of the duration of the moratorium has to be measured by the scope of the problem which is being addressed.[30] The court was particularly aware of the interjurisdictional complexity of the problem and the delay resulting from utilization of federal funds under the Federal Water Pollution Control Act Amendments of 1972.[31] Taking such facts into consideration the court held that:

> [T]he five-year duration of the Secretary's sewer moratoria orders is reasonable in view of the scope of the sewer problem confronting metropolitan Washington.[32]

The courts, then, in deciding upon the validity of a moratoria based upon problems with municipal sewage system which restricts the issuance of building permits seem to re-

quire the following four characteristics be met:

1. The restriction program must be based upon substantial threat to the public welfare, particularly concerns of public health;
2. The restriction program must be based upon a comprehensive plan for remedying the sewage system inadequacies;
3. The entire restriction program must be reasonably limited in time;
4. The restriction program must be applicable to all proposed construction. (Depending upon the severity of the problem, however, certain construction may be allowed.).

2. The Houston Restriction Program

Perhaps the most noticeable difference between the Houston restriction program and that of the many other municipalities employing similar programs is the absence of a specific ordinance in Houston which officially establishes such a practice. Most temporary control municipalities have taken official action (often amendment of the zoning ordinance) to validate the restriction program.[33] In Houston, however, the practice is pursued as an internal matter of the Department of Public Works.

(1) The Problem

The existing problems associated with the sewer system in Houston can, in large part, be traced to the dynamic growth and development of the recent past. An inadequate response, and even complete inaction, on the part of the City government, however, has further complicated the situation. There

are three distinct, yet interrelated, types of areas which have led to the existing inadequacies in the sewer system.

First, there are areas of the City which are presently unsewered and where it is necessary to improve and expand the system to provide service.[34] Certain of these area are commonly referred to as "red flag" subdivisions. Most of these areas were divided into larger than usual lots and sold by metes and bounds in the 1909 to 1928 period without public water or sewer service being provided.[35] Increased development has left the private water wells and septic tanks incapable of handling the increased demand.

Second, there are areas where the capability of the collection system was originally designed to handle areas of single-family residences which are now being converted to commercial and multi-family complexes of relatively high density.[36] If the City (or the subdivider) installs subdivision-sized utilities to serve an area which unpredictably develops office center or similar increased requirements, then it must replace the existing system with facilities appropriate for the new use in order to handle the increased demand.

Finally, there are areas where growth and development have left the existing system outdated and/or inadequate. Here an attempt must be made to upgrade the operating efficiency of the present system.[37]

The common thread linking all these areas is unregu-

lated growth; the result:

> The rapid growth of the City in area and population and the increase in density of population have placed a burden on the City of greater magnitude than had been realized, or that the City has been able to cope with physically of financially during recent years. Consequently, the sewers in some sections of the City are loaded beyond capacity, and a number of sewage treatment plants are being operated almost continously at or beyond their peak design capacity and capability, with the composite result that some of the major plants are not operating to effect the desired levels of treatment, and conditions of bypass are experienced.[38]

The figures supporting the statement highlight the severity of the problem. In February 1975 twenty-seven of the thirty-nine sewage treatment plants operated by the city, including the two largest plants - Northside and Sims Bayou - were subject to load growth restrictions.[39] These plants cover roughly seventy-five percent of the City. Included within the service area for the Northside plant is the entire Central Business District.

(2) The City's Response

In an attempt to eliminate the overloaded conditions which are now present in the sanitary sewer system the City of Houston has embarked upon an ambitious capital improvements program. It is a huge and complex undertaking, involving, as it does, massive expenditures; the interplay of the Title II grant program with the uncertainties associated with it such

as environmental impact requirements and congressional funding levels; the phasing in of interim improvements; and on and on. The program is designed to eliminate present overflaws, solve treatment performance problems and provide for normal growth in the system.[40]

The extent of the projected program is imposing. The present book value of the Houston sanitary sewer system is $185 million. The eight-year capital improvement program (1974 through 1981) designed to bring the system into conformance with Texas Water Quality Board guidelines is estimated to cost almost $295 million dollars with $234 million of construction projects initiated in the first five years.[41]

Upon completion of the five-year program, the system's total treatment capacity will increase from its present 180 million gallons per day to 305.8 million gallons per day.[42] A substantial part of this increased capacity will be constructed with the use of federal funds. A total of almost $118 million in EPA grants is anticipated.[43]

The Capital Improvement Program is not the only action taken by the City in response to the existence of overloaded facilities. In an attempt to monitor and control load growth to its wastewater treatment facilities, the Director of Public Works in February of 1973 established a service request procedure.[44] This procedure involves six distinct operations:

> First. All informal inquiries have been discouraged, and the subject property owner has been required to submit a letter of inquiry or request to the Di-

rector of Public Works.[45]

Second. The Director of Public Works has required the Water and Sewer Divisions to reply to the request for service by endorsement.

Third. Each division has made an assessment as to the City's capability for commitment of services for the proposed development of the particular property, and a written response has been prepared for the Director's signature and forwarded to the land owner.

Fourth. A copy of the Director's letter has been forwarded to the Record Section of the Sewer Division to indicate the approval or denial of a proposed project on the record map and the letter filed.

Fifth. If a commitment of service was granted and the property owner proceeded with development, a building permit was issued by the Department of Public Works.

Sixth. If the property owner secured a building permit and had proceeded with construction, a plumbing permit was issued for the project allowing the connection to the sanitary sewer system. When the project was completed, an occupancy permit was issued finalizing the cycle of development.[46]

It is within this framework that the city restriction program is actually implemented. The Chief Engineer of the Sanitary Sewer System, after conducting an evaluation of the receiving treament plant's capacity to handle additional flows and of the capacity of the major collectors within the area to convey the additional flow, sends his reply to the Director of Public Works.[47] While the City has attempted to fill all

requests, there have been two types of areas where the City has been forced to vary from this objective.

These two exceptions have included areas where no building permits are allowed and those areas where building permits have been restricted to certain densities.[48] In such instances, the property owner is informed that his request cannot be honored at that time and that he should resubmit his request within a certain time period based on the proposed construction shedule.[49]

3. Legal Implications of the Program

The entire procedure seems to proceed in an orderly, rational manner. An examination of actual practice, however, reveals a quite different pattern.

To assist potential developers, the Waste Water Division of the Department of Public Works has established "General Criteria for Maximum Development of Areas Restricted by Wastewater Systems Overload".[50] In restricted areas, development is limited to five single family residential units, or seven apartment units, or six townhouse units, or 15,000 square feet of office space, or 43,560 square feet of official warehouse space.[51]

These restrictions are equivalent to requirements of 8712 square feet per single family residence, 6223 square feet per apartment unit and 7260 square feet per townhouse unit. This contrasts with a minimum lot size of 5,000 square feet for single family residential dwelling units and 1400 square feet for townhouse units in the subdivision ordinance currently under consideration and presently contained in the City Planning

Commission Land Platting Policy Manual.[52]

This could lead to the not improbable situation where one developer satisfies the Planning Commission requirements yet is still refused a building permit, while another developer is granted a building permit. The difference in result would hinge on the proposed location of the development.

To justify such differential treatment, the City of Houston would need to meet the four criteria for a moratorium program outlined above.[53] Since the City is already subject to Texas Water Quality Board orders regarding operation of the City Sewage System, the focus of the inquiry is on the operation of the program, not the justification for the restrictions.

While the load growth control methodology utilized by the city has been developed and will be implemented in conjunction with the capital improvements program, the City is in no way bound by the schedule of improvements. This can be contrasted with the situation in Ramapo where the capital improvement budget and capital program were adopted by the Town Board and tied to the zoning amendments.[54]

Additionally, the current program is not specifically limited in time:

> [U]ntil such time as the City of Houston can attain a posture of sufficient adequate treatment capacity, load growth control must become a necessary reality in certain treatment plant contributory areas.[55]

When you consider that the City has engaged in building re-

striction practices for over eight years already, with at least an additional five years envisioned, the temporary nature of the program begins to approach that undefinable outer limit.[56] And when you add the fact that the City is making no attempts to confront the basic problem which led to the present situation--intensfication of land use-- the liklihood of continued restriction is substantial.[57] The fifteen-year time delay in Ramapo was upheld since the time period at issue was viewed as the maximum period for which development of any parcel of land would be restricted.

Finally, it is unclear to exactly what types of development the restriction policy is applicable. Although the Houston policy is not subject to an attack alleging an exclusionary or selective growth policy,[58] it is subject to an equally fundamental attack-denial of due process:

> Building permits are authorized by the Permit Section only when the building permit application is approved by specified Sections or Departments of the City, including the Sewer Division. The Sewer Division's approval of the building permit application has been based on the copy of the Director's letter of availability to the property owner. If a building permit was submitted for a small project, such as an office-warehouse, strip center, gas station, church, or remodeling, without a letter of availability, judgement of the personnel at the Record Counter was utilized to approved [sic]or deny the project. (emphasis added)[59]

While a statement that "Requests for each type of develop-

ment will be considered on an individual basis"[60] may be evidence of a desire to consider each request on its merits (in keeping with the move towards flexibility in planning), the present Houston system allows too high a variation in basic requirements and standards.[61] When approval of a proposed development activity may depend on who's minding the record counter, the continued viability of the system is doubtful.

The City could avoid these problems by pursuing any of several alternatives. The City could include the more restrictive density requirements in the proposed subdivision ordinance, as well as providing guidelines for when and how long such restrictions are applicable.

Alternatively, the City could enact a permit restriction ordinance. The City of San Antonio subdivision regulations provide that:

> In no event shall the City be obligated to proceed under the terms of this article if sufficient funds are not available in the sewer extension fund, or, if in the opinion of the Director of Public Works, the extension is not in the public interest.[62]

If the public interest were further defined to include any danger to the public health, a restriction ordinance could provide that any demand upon the city sewer system in excess of Texas Water Quality Board standards would present a health hazard because of the inability to properly treat the excess effluent. In such a situation the City could restrict further development in the interest of public health.

Regardless of the action the City might elect to take, the program needs to be specifically limited in time with relevant standards and criteria established. In addition, the program should be officially linked to an officially enacted capital improvement program. These actions would remove the present inadequacies and allow the City to legally pursue the present moratorium program.

4. The Underlying Problem

If the City of Houston were to officially adopt a properly formulated moratorium program the City would not be subject to the above-discussed objections. This would not solve the problem entirely, however, since:

> The sewer moratorium is an example of a regrettable characteristic within the American governmental process - ad hoc, piecemeal efforts to solve a complex problem rapidly by simplistic means.[63]

The city of Houston recognizes that restrictive growth controls should only be envisioned as interim measures and that the initiation of remedial construction is the preferable alternative.[64] Due to the severity of the problem, however, the City intends to continue its policy of restricting development within the service areas of those treatment facilities for which expansion cannot be effected timely, and where overloads are anticipated.[65]

These restrictions have been necessitated in part because of the inadequacy of collection systems which were originally

designed to handle areas of single-family residences which now are being converted to relatively higher density uses. Yet the City is not moving towards solving this conversion problem. It is likely, then, that the City will continue to find itself in a situation where it is forced to initiate temporary growth restrictions in various parts of the City. The City's failure to attack this more basic problem will lead to continued reliance on a less than desirable restriction policy.

It could be argued that failure by the City to address these basic problems shows a lack of a comprehensive planning effort to solve the inadequacies of the sewage system. If the courts were to adopt this more expansive view of dealing with the present sewage problem, the moratorium program would be susceptible to invalidation unless the City of Houston acts to exercise greater control over the broader aspects of land utilization.

Such a massive construction program as is occuring in Houston is rare; indeed, growth such as that which has occurred in Houston is rare. That does not mean, however, that the City should make no attempt to insure against reoccurrence. Yet the City is taking no action to control the unregulated development which was at the root of the present problem. The City seems content to sit back and continue to rely on a system which has shown it is incapable of addressing the basic causes of the existing problems. The actual performance of the

Houston approach to land use regulation fails to establish a record of providing certain essential services which either warrants or encourages adherence to the principles underlying the approach taken.

Chapter V

THE LEGAL VALIDITY OF THE HOUSTON MECHANISMS: MUNICIPAL ENFORCEMENT OF PRIVATE DEED RESTRICTIONS

The primary land use control mechanism employed by the City of Houston is municipal enforcement of private deed restrictions. Pursuant to state legislation, the City of Houston is authorized to bring suit against a private individual to enjoin a breach of a private restrictive covenant,[1] and to condition the issuance of a commercial building permit upon conformance with existing restrictions.[2] The City quickly passed the necessary ordinances.[3] Despite the novelty of such a procedure, there has been slight analysis of the legal validity of these provisions.[4] Among the many endorsements of municipal enforcement, there has been only one attempt to examine the legal aspects of the procedure.[5]

1. Purpose and Use of Deed Restrictions

An essential element of the market system is bargaining among the parties involved. This bargaining can be reflected in various ways; in the urban land market one such example is the restrictive covenant.[6] These covenants usually come into existence when the original tract is subdivided and similar restrictions are placed in the deeds of all the subdivided plots.[7] This is currently the most prevalent type of private agreement between neighboring landowners.[8] As such, these

deed restrictions can serve as an alternate mechanism to public regulation over land use.

Wile the use of restrictive covenants is a well-developed and widely-utilized practice,[9] there has recently been an upsurge in interest in use of this private mechanism as an important tool in the general land regulation scheme.[10] As might be expected, this has led to various comparisons between deed restrictions and zoning, the most common public mechanism.[11]

(1) Private vs. Public Land Control

Perhaps the most important distinction between deed restrictions and public land use controls is the explicit public interest justification required for the latter. Deed restrictions, since they are private consensual agreements, do not require such a justification.[12] Since these covenants are designed primarily to protect a property investment from depreciation caused by the infiltration of undesirable businesses, industries or similar uses in the area, they reflect little concern for general social policy.[13]

Public regulation is also designed to allow property owners in an area to secure desirable surrounding and preserve the value and character of their immediate neighborhood. The focus, however, is slightly different. Public control attempts to improve the municipality as a whole while preserving individual property values. Inevitably, the two goals conflict. The resolution usually occurs in the public

arena, a much criticized characteristic of public regulation.[14]

If it was merely a situation of public regulation being less efficient because of the political trade-offs, the strength of the market argument would be less substantial. The additional claim is made, however, that compounding the inefficiency is the fact that public regulation such as zoning does not achieve the goal of equity either.[15] Such a claim is usually made after referring to specific instances of mal-administration, yet it has been observed:

> Where reasonable controls have been adopted and are well administered, they do undoubtedly result not only in sound standard of development and an absense of conflicting uses but also in stability of neighborhood character and maintenance of property values.[16]

Public regulation, then, can succeed in protecting the interests of the general public and the individual landowner.

(2) Inadequacies of Deed Restrictions

At the same time, deed restrictions are acknowledged to have substantial shortcomings. The first problem is that the market will not always induce a developer to originally draft covenants since "covenants will enhance the developers profit only if they increase his land values by more that the cost of imposing them".[17] Since profits will already be less on low or moderate income housing, the motivation to draft covenants will similarly be less.

Assuming the covenants are originally drafted there are

still two major limitations on their enforcement: the changed conditions doctrine and the related notions of waiver and abandonment.[18]

It has been noted than even valid covenants may become unenforceable unless they are diligently enforced:

> Determined commercial users can eventually overcome the will of law and moderate income residents to fight for their restrictions. In Houston's South Park subdivisions, commercial users have probably rendered several sets of residential restrictions invalid because residents were uninformed about their restrictions, and lacked the wealth to bring suit.[19]

In City of Houston v. Emmanuel United Pencostal Church, Inc.[20] the plaintiff church succeeded in modifying the restrictions to allow construction of a church building. The court stressed the fact that four years prior, Southmont Baptist Church was built in the subdivision in violation of the restrictions and had been in continuous operation since that date.[21] Since there had apparently been complete acquiescence in the prior violation, plaintiff was also allowed to construct a church building.[22]

Finally, even if the restrictions are vigorously enforced, the covenants may not provide for the extension of the restrictions.[23] While this is more a problem of draftsmanship, it points to the susceptibility to non-enforcement of restrictive covenants. All of these problems has led one commentator to admit that "although covenants are an attractive de-

vice, they are not feasible in many neighborhoods".[24]

2. Previous Municipal Enforcement Efforts

Although there has never been a state statute conferring upon municipalities the power to enforce private restrictions or bring suit against a private individual for breach of a restrictive covenant, Houston will not be the first city attempting land use regulation by withholding building permits where the contemplated use and structure would be contrary to private restrictions.

In analysis of past efforts by municipalities to enforce compliance with restrictive covenants, Baddour v. City of Long Beach[25] has been cited as a sucessful attempt.[26] A close reading of Baddour, however, reveals that contrary to such a claim, the ordinance in question was the permanent zoning ordinance which carried forward the "substance" of the original covenants in the designation of districts and the attendant restrictions.[27]

The true issue before the New York Court of Appeals was the meaning under the ordinance of a "one-family detached house for one housekeeping unit only".[28] It was because of a disagreement as to the meaning of that term that Judge Lougran dissented, with Chief Judge Crane and Judge Lehman, from the majority opinion.[29] The majority opinion reference to the enforceability of covenants comes as historical background and the existence of these prior covenants apparently operated to influence the interpretation of the relevant zoning restriction.

The City was operating pursuant to the zoning ordinace and the action sought to have the zoning ordinance declared inapplicable to plaintiff's property.[30] Baddour, then, can hardly be considered an endorsement, of the Houston practice.

In those cases where the issue has been directly raised, the courts have universally struck down municipal actions based upon private deed restrictions...And the language has left little room for equivocation.[31]

In State ex. rel. Folkers v. Welsch[32] a building permit was refused because the contemplated construction was in violation of a restrictive covenant running against the land. The Building Commissioner admitted that the applicant had:

> complied with the requirements of the Building Code of the City of St. Louis, which governs the issuance and refusal of permits; and that the only reason for refusal of the issuance of the permit was the objection of third parties based not upon the zoning ordinance but upon the private restriction of record...[33]

In holding objections, based on the restrictive covenant of record, of lot owners of the subdivision to the proposed use of the property would not justify the refusal of the permit to an applicant who had complied with all ordinance requirements for the permit, the court stated:

> The admission by realtor that such restrictions do exist is far from an admission of their validity, and it is obvious that the Building Commissioner has no authority or power to determine

> whether or not such restrictions are valid or invalid. Only a court of competent jurisdiction has authority to pass upon that matter. The office of Building Commissioner is clearly not the proper tribunal to pass upon such a judicial question...[34]

The Supreme Court of Missouri approved this language in State ex rel. Sims v. Eckhardt,[35] also involving denial of a building permit for construction of a dwelling in violation of a recorded restrictive covenant. The court found that the ordinance relied on, which purported to delegate to individuals the legislative power to create restrictions on the use of land to be enforced by the city through the exercise of its police power to control the issuance of building permits, was an invalid delegation of legislative authority.[36]

The court concluded that "the Board of Adjustment had no legal authority to revoke appellant's building permit on the basis it authorized the construction of a building in violation of the restrictive covenant".[37] The court, however, was careful to point out that the ruling "has no effect on the right of interested individuals by a proper action to obtain a determination of all questions as to the validity of the covenant."[38]

Perhaps the most lengthy and litigation-filled battle over municipal efforts to preserve residential character in the face of business infiltration occurred in Dallas, Texas during the 1920's. The first episode in this, at times amusing,

saga was Spann v. City of Dallas.[39] Spann involved an ordinance of the City of Dallas which required the consent of three-fourths of the property owners within three hundred feet of a proposed business location if the location was within a residence district of the city.

The court noted that the ordinance "takes no heed of the character of the business to be conducted" and "disregards utterly the fact that the business may be legitimate, altogether lawful, in no way harmful and even serve the convenience of the neighborhood."[40] Since the business had not been shown to be a nuisance, the municipality could not by mere declaration make a particular use of property a nuisance which is not so. And three-fourths consent would not make it less a nuisance:

> This feature of the ordinance, in our opinion, reveals its true purpose. It reveals with reasonable clearness that its object is not to protect the public health, safety or welfare from any threatening injury from a store, but to satisfy a sentiment against the mere presence of a store in a residence part of the City.[41]

The City of Dallas responded to Spann with Ordinance No. 742 which provided a hearing at which all persons residing within three hundred feet of the proposed building were allowed to appear and testify and also provided for a board of appeals. In all other respects the ordinance corresponded with the ordinance invalidated in Spann. This revised ordinance was

similarly invalidated in City of Dallas v. Mitchell,[42] and again in City of Dallas v. Burns.[43]

The new ordinance did not remedy the legal inadequacies addressed in Spann since city officials were:

> directed by said ordinance to deny any application made for a building permit in the residence districts of the city, when they deem that the granting of same will injure the property or be hurtful to the residents of said district.[44]

In City of Dallas v. Urbish[45] the court explained the problems associated with the city's approach:

> The ordinance does not set up any standard which the city is required to follow in determining whether or not the building may or may not be erected in a residence section of the city...[T]he ordinance virtually leaves to the caprice and whim of the board of appeals or review, or to the desires of those who own nearby property, whether or not the property in any given locality may be used for the purpose which the city in this instance has denied. There is no rule of uniformity anywhere disclosed by which the right to construct such buildings in residence sections is determined.[46]

The court refused to condone the assertation of such a purely arbitrary power to consent to or prohibit the use of property in a particular locality merely at the behest of other property owners.

The final chapter in the Dallas story was Gulf Refining Co. v. City of Dallas,[47] where the court invalidated various ordinances conditioning permit issuance on compliance with

private deed restrictions. Ordinance No. 742 was found to be invalid since it failed to define the "degree of hurt, injury or inconvenience" which would make a structure undesirable.[48]

The court also invalidated Ordinance No. 1080 of the City of Dallas which required compliance with private deed restrictions:[49]

> This ordinance, if valid, confers on the building inspector alone the right, after discovery by him of certain facts, to revoke the permit theretofore issued. This provision is certainly not valid. It assumes to provide that the city may make the restrictions contained in a deed the subject-matter of an ordinance to make the violation of certain restrictions a penal offense and confers on the building inspector full authority to determine and adjudicate the meaning and effect of such restriction and revoke permits if in his judgement same should violate such restrictions. The portion of the ordinance in regard to the granting, refusing, and the revocation of permits, based upon restrictions contained in a deed, is invalid, because it is too indefinite and uncertain, as an ordinance attempting to limit the right of use of private property must be definite, specific, and certain. The ordinance is further invalid, in that it vests the city authorities with unlimited and arbitrary power to revoke a permit when in their judgement it violates the restrictions contained in a deed. ...
>
> Said ordinance contains the further vice, it attempts to vest the building inspector with judicial powers, in that he is empowered to revoke the permits if he determines that a permit violates the re-

> striction contained in deeds, which renders it invalid, that being in contravention of our State Constitution.[50]

The court concluded that "such restrictions and coventants in a deed are not properly within the province of the police power of the city, being strictly private matters between private individuals, and their probable violation is a matter of no concern to the city, unless such violation is an infraction of the police power of the city."[51] In order to sustain the practice, the court noted that it would be necessary to amend the Texas Constitution.

3. Validity of the Houston Approach

Invalidation of previous efforts to premise municipal action upon private deed restrictions were based upon two general objections: failure to maintain separate and distinct branches of the government as mandated by the Federal and state Constitutions and improper delegation of legislative power. In addition to these objections, the Houston procedures are also subject to three other attacks: the denial of equal protection, the expenditure of public funds for a private purpose and the failure to adopt uniform land-use measures.

(1) Separation of Powers

The Texas Constitution creates three coordinate branches of government - the executive, legislative and judicial - and vests each with separate powers which shall not be encroached upon by another branch.[52] Articles 974a-1 and 974a-2

manage to make a shamble of such a system of government.

Under the common law, when an attack is made against the enforceability of residential restrictions, the relief generally available is the court's refusal to enforce the restrictions at all.[53] In Cooper v. Kovan[54] the lower court had allowed construction of a shopping center otherwise prohibited by an enforceable restrictive agreement, requiring instead a greenbelt buffer. In disallowing the modification and upholding the original restrictions the Michigan Supreme Court observed:

> [D]esirable as such a plan may be in general city planning terms, we must answer the question here as to whether the circuit judge sitting in equity had power to effect such a compromise in the face of and at the expense of existing and valid residential restrictions, or whether such planning must be left to planning boards and private developers.
>
> We are unable to find that this power lies in judicial hands.[55]

Since Section 7 of art. 974a-2 allows the courts to modify existing deed restrictions,[56] it has been suggested that this is an unlawful delegation of legislative authority to the courts.[57] A judicial tribunal does not have the prerogative to perform in any respect the duties that rest under the Constitution alone with the legislative branch of government.[58] For the court to alter restrictions to better conform with present conditions is to engage in activity en-

compassed by zoning, a legislative function.[59]

Both articles also create the reverse situation-they delegate judicial power to administrative officials. Article 974a-2, Section 3(b) is subject to the same objections as those made against ordinance No. 1080 in Gulf Refining since a discretionary determiniation by the public works department is necessary.[60] Article 974a-1 and the ordinance passed pursuant thereto similarly allow the city attorney to determine the validity of existing restrictions:[61]

> The lawyer in charge of enforcement must interpret the restrictions, and determine whether a violation has occurred. He may also measure the intensity of objections to the violation. He may consider the effect of changed conditions on the enforceability of the restrictions.[62]

Such a determination is properly a judicial function, and not the duty of an executive officer of the city.

(2)Delegation of Legislative Power

Closely related to the problems regarding delegation of power among the different branches of government is the problem of improper delegation of legislative power. Delegation of power to an administrative agency is valid if there are adequate standards provided so as not to vest too much authority with the administrative body.[63]

Under art. 974a-1 it is impossible to determine whether actions are reasonable and within the scope of the statute or ordinance passed pursuant thereto because neither contains

rules or limitations prescribing standards for action for the city attorney's office.[64] The only limitation on the actions of the city attorney is that the authority granted by art.974a-1 must be "exercised uniformly."[65] This requirement was added after the Texas Legislature amended art. 974a-1 in 1971 to include all cities within the state that do not have zoning ordinances provided that the city pass an ordinance which applies to all property and citizens within the city. That proviso seems to have been added to avoid attacks based upon a claim of denial of equal protection since the original statute was subject to such a claim.[66] This requirement appears to be an impossibility, however, since not all property may be restricted by private covenants.[67]

Texas courts will not uphold such a statute which does not prescribe at least some standard to guide official action.[68] In City of Houston v. Freedman[69] the City of Houston was chastized for its regulations governing the location of abattoirswhich were similarly nonspecific:

> As we have also seen, where, as here, there is no valid ordinance providing a rule of action for the government and restraint of discretion to preserve it from whimsy and caprice, there is no legally supportable discretion vested in the Council.[70]

In addition to the improper delegation of power to an administrative entity, both statutes are subject to the objection raised in State v. Eckhardt[71] and similar decisions. Under these statutes the City of Houston has no part in formulating the restrictions, nor does it determine whether the restrictions are maintained as an enforceable con-

trol - both aspects are determined by the action or inaction of individuals in the subdivision. This situation has led one commentator to observe:

> The conclusion thus becomes astounding: the city can neither formulate the restrictions which it will enforce under its police power to control land use, nor has it any control over the circumstances that may render those restrictions unenforceable. In effect, the city merely pays for litigation and furnishes counsel...[72]

The notion of freedom of contract allows covenants to cover an almost infinite range of subjects and variations and arise from economic necessity or pure caprice. This complete lack of any guarantee against arbitrary restrictions may be more than unfortunate; in many circumstances it is bound to be unreasonable. More significantly, it has uniformly been held illegal.

In Eubank v. City of Richmond[73] the city ordinance required the committee on streets to establish a building line whenever owners of two-thirds of the property abutting any street should so request. The Court noted that this allowed part of the property owners fronting a block to determine the extent of use, as well as the kind of use, which another set of owners might make of their property. More importantly:

> The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be

> exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously.[74]

Since the ordinance bore no relation to the public health, safety, comfort, convenience or general welfare, there was an illegal exercise of the police power.

Similarly, in State ex rel. Seattle Title Trust Co. v. Roberge[75] the Court invalidated an amendment to the Zoning Ordinance of Seattle which required the written consent of owners of two-thirds of the property within 400 feet of any proposed philanthropic home for old people. The Court observed that the superintendent of buildings was bound by the decision or inaction of such owners, yet:

> They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice.[76]

The Court found such an attempted delegation of power repugnant to the due process clause of the Fourteenth Amendment.

More recently, in Williams v. Witten[77] the court in dealing with an ordinance which required the consent of all property owners within 200 feet of a proposed trailer park, stated that "The ordinance in question is invalid because it attempts to delegate the police power to the adjoining property owners."[78]

The Legal Department of the City of Houston has reached

this same conclusion:

> City Council cannot delegate the authority and responsibilities of zoning to developers, subdividers or other private individuals. The exercise of the police powers of zoning have been vested by the State Legislature exclusively in City Council, and they are nondelegable.[79]

(3) Public vs. Private Purpose

In order to sustain the expenditure of public funds to enforce private deed restrictions such expenditures must be for a public purpose as distinguished from a private purpose.[80] In determining what is public purpose, the modern trend is to expand and liberally construe the term to take into account rapidly-changing economic, social and political conditions.[81] Since this determination is primarily a legislative function, such a finding will not be overruled by the courts except where it is arbitrary or incorrect.[82]

In analyzing a legislative determination the courts will look beyond the individual purpose of an expenditure to the total situation in order to determine whether it is in the interests of the public or for the benefit of the individual.[83] It is necessary to examine the entire activity to determine whether the public purpose will be effectuated.[84]

It is undoubtedly in the public interest to preserve the integrity of residential neighborhoods. The issue, however, is whether municipal enforcement of deed restrictions achieves such a goal; "the question is not one of power but rather one

of the manner in which the exercise of power is attempted."[85] The City of Houston may regulate the use of private property only pursuant to its police power, that is, to promote the public welfare. It has been observed, however, that:

> Private deed restrictions do not, in themselves, bear sufficient relationship to the purposes for which the police power may be exercised for the City to legally enforce them.[86]

In addition, since the statutes only apply to residential neighborhoods with valid restrictions, the ability of the city to intervene is most limited in those areas most in need of protection, and where the public interest is greatest.[87]

It appears that the dominant benefit from the statutes, particularly art. 974a-1, is the relief to a neighborhood civic association or a private individual from paying for litigation to restrain breaches of covenants:

> Because deed restrictions arise out of private contract, they are enforced by private lawsuits. Any owner of a subdivision lot may sue any other resident of the same section to enjoin a violation of restrictions. However, the lawsuit is privately financed and lawyers' fees and court costs must be paid. Cities ordinarily are not involved in the enforcement of private restrictions.[88]

While the desire to maintain the residential character of a neighborhood might well be a matter within the public welfare, the City of Houston may not lawfully perform legal services for private individuals by attempting to enforce their

private contractual rights.

> It would be a misuse and gift of public monies, prohibited by the State Constitution, for the City to use the labor, time facilities and supplies of its Legal Department in the attempted enforcement of such restrictions through injunction suits in the name of persons claiming the violation thereof.[89]

For the City to spend public funds on what is essentially a private lawsuit is an unauthorized expenditure for a private purpose.[90]

(4) Denial of Equal Protection

There are two groups of citizens who could make equal protection arguments against the current Houston scheme. The first group is composed of all those individuals residing in "unprotected" residential neighborhoods.[91] This would include those persons living in an unrecorded subdivision, a subdivision where the restrictions have lapsed or are no longer enforceable.

The lack of enforceable deed restrictions hardly establishes that the area is not in need of, and worthy of, municipal assistance to the same extent as similar neighborhoods with valid restrictions:

> In older residential areas, deed restrictions may have terminated by passage of time or change of conditions. Even so, older neighborhoods may retain their general desirability for residential purposes.[92]

If the objective of the present practice is to protect residential neighborhoods from incompatible uses, the classi-

fication utilized does not seem to bear a substantial relation to that objective.[93] It would benefit a limited number of property owners whose deeds contained restrictions, but would not benefit others who were similarly situated except for the fact that their deeds did not contain restrictions.

The second group which could claim a denial of equal protection is composed of those individuals who would attempt to either invalidate existing residential restrictions or enforce non-residential restrictions. The City will intervene on behalf of individuals seeking to enforce residential restrictions yet will not intervene to invalidate such restrictions.

Here, however, there seems to be a more substantial relation between the desired objective of maintaining the residential character of the neighborhood and the municipal action. On the other hand, if municipal enforcement of deed restrictions is viewed more broadly and considered as a general land use control, the practice is less justifiable.

(5) Lack of Uniformity

Neither art. 974a-1 nor art.974a-2 requires coordination of enforcement of private covenants with a general plan. Zoning and subdivision control traditionally carry such a requirement; failure to satisfy this requirement would invalidate the municipal action.[94] Deed restrictions, on the other hand, are not drafted as part of a comprehensive plan, but rather in response to individual preferences.[95]

While there are undeniably basic differences between pub-

lic controls and private deed restrictions,[96] when municipal enforcement is utilized as a land control technique it should be subject to similar requirements as other public controls.

Art. 974a-1 allows the City to enforce covenants in residential subdivisions. Such covenants, however, may vary widely. Enforcement of such divergent requirements has been compared to spot zoning, a practice that has been generally declared invalid:

> Any effort to enforce deed restrictions would violate such requirements of the zoning statute that zoning be "in accordance with a comprehensive plan" (Art. 1011d) and it be uniform for each class or kind of building throughout each district" (Art. 1101b) -it would in other words, be "piecemeal" or "spot" zoning, which is generally condemned by the courts of Texas and other states.[97]

In addition, there is no assurance that the restrictions will contribute to the general development of the city. Since the Houston approach is based upon the police power of the City, it must promote the health, safety and welfare of the community.[98] Yet, when the City makes no effort to determine the need for particular restrictions, nor to insure that necessary protection is provided, the general welfare is given scant consideration.

To fail to properly plan for the needs of the entire community is to fail to promote the public welfare. This is the situation in Houston, where "[w]ith the Texas legislature's help, Houston found a way to respond to middle income home-

owner's interests without offending real estate interests."[99]

Municipal enforcement of private restrictive covenants without planning can be no better than haphazard and us unjustifiable in terms of community land use planning.[100] When this inadequacy is combined with the various other legal infirmities of municipal enforcement, the argument in favor of reliance upon restrictive covenants as a tool of public land use regulation loses much of its appeal. While lack of control may have its advantages, there are also certain disadvantages:

> The City of Houston is without a zoning ordinance, consequently no control is exercised over the specific use of land, its maximum density, yard requirements, maximum height of buildings, or minimum off street parking requirements. This allows teh developer complete freedom of choice in using his land for residential development based on new land planning concepts and innovations. The disadvantage, however, is that there is no assurance that properties once developed will continue to be used for the purpose they were originally intended.[101]

Chapter VI

CONCLUSION

The City of Houston continues to hurtle forward into the future. For some, Houston is the future.[1] Yet that movement seems to occur oblivious to the record and lessons of the past. Impending demand seems to receive only slight consideration. The people of the City of Houston have no desire to plan their growth. In Houston, to succeed is to grow and to grow is to succeed.[2] This is true even though past record and future demand both show that Houston must come to grips with the growth and development which has characterized the City to date.

Examination of the major land use controls exercised by the City shows that this growth has not been without problems and inequities. But then, that can be said of virtually every city. What is rarely seen, however, is the almost total lack of attention and effort towards confronting and resolving the underlying problems. With a jurisdictional area of some 2,000 square miles, sanitation and traffic become major problems and, in order to preserve any sort of efficiency, the City Planning Department has had a necessary pre-occupation with sewers and roads.[3] Without doubt, these are serious problems, but far more serious is the combined effect of rapid expansion, total laissez-faire planning and a political system which favours a fragmented power structure.[4]

The operation of the land market in Houston is particularly reflective of this orientation. The City has responded to the resulting growth and development with minimal control or regulation. The invisible forces of the market have been given room to wander.

When public regulation has been attempted, the actions have been ineffective and of questionable legality. This is so because rather than asking what can or should be done the question asked in Houston seems to be - what do we want to do.[5] Once that answer is determined, no other questions are usually asked. At least not if you have the money to pursue your goal.[6]

Not surprisingly, there are many who do not have that money. Houston contains substantial minority and low-income populations. The responsiveness to the needs and concerns of these groups has been less immediate than to the interests of the gratification through growth proponents.

The situation, though, is not irreversible. Although the growth to date has been astounding, the future holds promise of even greater activity. It is still possible for Houston to take control of its destiny and strive to realize the full potential of such growth.

There is no need to propose that Houston stop growing, nor even that it slow down. But there is a need to step back and analyze what has happened to date and look at what the future holds in store. Then an effort can be made to maxi-

mize that future development for all.

The public interest in land development must be recognized. Better community development cannot be achieved if land usage and development is allowed to continue unchecked. The market approach towards land usage has produced stunning testimonials to the power of the dollar.

From the Astrodome to the Woodlands, from the Galleria to the Ship Channel, Houston is dotted by massive development projects. And they continue to spring up, often from the decay amidst such opulence. The areas of neglect, however, also continue to increase. The two trends must he harmonized.

The crucial element is commitment. There has been no motivation to date. The recent influx of Community Development Block Grant funds might help generate a greater amount of foresight and planning.[7] Among the long-term objectives for the City under this program are to:

> Provide a more efficient and orderly arrangement of residential, commercial and industrial activity centers within the City, facilitating effective planning, resource allocation, provision and utilization of public facilities and services.
>
> Coordinate the planned provision of community facilities and services with the intensity of residential, commercial and industrial development.[8]

It is hoped that this infusion of federal funds will help the City accomplish these goals and therefore achieve the primary objective of the program - to develop viable urban com-

munities by providing decent housing and a suitable living environment and expanding economic opportunity to all persons, principally those with low and moderate incomes.[9]

Achievement of such a goal, however, will require a fundamental reorientation toward public control over land use decisions. The present system of non-regulation has not in fact produced the shining example of market success that others have presented. Rather, examination of the record of reflexive action reveals a performance which has failed to deal with the pressing problems of a growing community.

Fierce individualism is often offered as explanation for Houston's resistance to zoning and land use regulation. Perhaps nothing is more inhibiting to present day acceptance of planning than the spirit of the early Texas pioneers, their feeling of pride in individual ownership and personal rights. The historical background of the state has become a living mythology which has a profound effect on the attitudes of the people of Texas toward growth controls which may be imposed on the individual in the name of the community.[10]

Yet Houstonians have not hesitated to turn to governmental aid when necessary to advance particular aims:

> The Chamber of Commerce still pressed for real ocean going status for the Port of Houston and in an unprecendented bid for Federal aid they pledged that local commercial interests would supply half of $2.5 million needed to deepen the channel to 25 feet. Congress accepted this offer and in 1909 the citizens of Houston approved a $1.25 million bond issue.

> Their action has two fold significance. Firstly, it established the system of matching funds in Federal assistance and secondly the people living in Houston in 1909 showed a wisdom in their attitude toward the Federal government almost totally lacking today. That Federal funds can be used for roads and ship channels is still acceptable, but Houston is one of the few major cities in the country which is refusing Federal assistance for rapid transit studies by not making a General Plan for the city, a requirement before funds for such a study can be released. Houston is aware of its deficieneies.in rapid transit matters, having been involved in year long litigation with the operators throughout 1965, but both planning and the Federal organization are regarded as the early signs of a socialist control totally foreign to the Houstonian.[11]

Ralph S. Ellifrit, former Director of City Planning in Houston, however, feels that Houston's present growth pattern, with the blight pattern typical of annular expansion, will demand Federal support to prevent the total physical collapse of the city since private funds cannot (or will not) support all public goods.[12]

Ultimately, the nature of land and property is at the root of the current controversy around public regulation. Neither the private market nor public regulation alone, however, can solve the problem. The present system of public land regulation has not succeeded any more than has the market approach in achieving the goal of a better community. Zoning, subdivision regulation, facility planning, code en-

forcement and restrictive covenants have all been utilized and shown lacking in some respect. Urban life is far too complex to allow simplistic solutions.

At the same time, certain factors must be recognized. The use of the police power to achieve the general welfare must be wedded to the interest of the general community. The public welfare can no longer be viewed in single-issue, limited-reach terms. It should be recognized as a package of interests which must be served by the particular action taken.

When the general welfare conflicts with personal benefit, the public interest must be accorded the strong consideration it merits. This will often necessitate expanding the scope of concerns. In the instance of Houston, "one wishes that it had a larger conceptual reach, that social and cultural and human patterns were as well understood as dollar dynamism".[13]

It seems curious that a city the size of Houston, which is thriving on the tools and technologies of outer space exploration, should be satisfied to non-plan, secure in the knowledge that they are bound to make some expensive mistakes rather than accept the tools and technologies of contemporary thinking. Instead, the City utilizes ineffective and illegal techniques in a feeble attempt to keep pace with rapid development throughout the City. Only when the City attempts to integrate land development with community development and strives to comprehensively address these diverse issues with the tools available will Houston truly merit the title of city of the future.

FOOTNOTES

CHAPTER I

1. See NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 346 - 354 (1968) [hereinafter cited as BUILDING THE AMERICAN CITY].

2. Id. at 376-383.

3. J. DELAFONS, LAND USE CONTROLS IN THE UNITED STATES 12 (2d ed. 1969) [hereinafter cited as DELAFONS].

4. BUILDING THE AMERICAN CITY, supra, note 1, at 203; DELAFONS, supra note 3, at 8-11. See also Bosselman, "Can The Town of Ramapo Pass a Law to Bind the Rights of the Whole World?", 1 FLA. ST. U. L. REV. 234, 235 (1973) [hereinafter cited as Bosselman].

5. In contrast, Los Angeles and New York are considered originators of the modern zoning ordinance. See BUILDING THE AMERICAN CITY, supra note 1, at 200; MAKIELSKI, THE POLITICS OF ZONING 1-4 (1966).

6. And it has been observed of Texans:

> Texans believe in the efficacy of the private market. Most land resource management decisions can best be made through a system that optimizes reliance on the productive benefits of the free enterprise system and minimizes governmental interference.

Donald Williams and James Blackburn, Jr. "Managing Growth: Texas Style", in Urban Land Institute, Environmental Comment (July 1976).

7. See, e.g., Siegan, "Land Use Planning in America" 5 ENV. LAW 385, 465 n. 107 (1975) [hereinafter cited as Siegan, "Land Use Planning"]. See generally BABCOCK, THE ZONING GAME 25-28 (1966); DELAFONS, supra note 3, at 91-93.

8. The initial article was Siegan, "Non-Zoning in Houston", 13 J. LAW & ECON 71 (1970) [hereinafter cited as Siegan, "Non-Zoning"]. This article was subsequently expanded into: B. SIEGAN, LAND USE WITHOUT ZONING (1972) [hereinafter cited as SIEGAN]. Drawing upon this research effort have been: Ellickson, "Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls", 40 U. CHI. L.REV. 681 (1973); Siegan, "Land Use Planning in America", 5 ENV. LAW 385 (1975); Note, "The Municipal Enforcement of

Deed Restrictions: An Alternative to Zoning", 9 HOUS. L. REV. 816 (1972); Note, "Land Use Control in Metropolitan Areas: The Failure of Zoning And a Proposed Alternative", 45 S. CAL. L. REV. 335 (1972).

9. SIEGAN, supra note 7, at XV.
That this is the focus of Siegan's argument can be seen in the concluding remarks to his latest article:

> The experience of Houston shows that the nation can in good conscience curtail and ultimately eliminate most government involvement in the places where it now exists and prevent imposition where it still remains absent.

Siegan, "Land Use Planning", supra note 6, at 474.

10. Musgrave, "Social Goods and Social Bads". in OLDMAN AND SCHOETTLE, STATE AND LOCAL TAXES AND FINANCE 841-842 (1974).

11. The Heights has been designated as Community Development Planning Area 1 and is one of eight such areas in Houston to receive first-year funds under the Housing and Community Development Act of 1974, 42 U.S.C. §5301 et seq. (1974). Only census tracts with median family incomes below 80 percent of the City median ($9,874 in 1970) and/or with housing in a deteriorating condition are included in the target area. The City of Houston, Housing and Community Development Program and Application of the City of Houston 3 (March, 1975).

A neighborhood survey to establish "Neighborhood Priorities for Community Development" identified living environment as the most important need according to the area residents. Living Environment relates to traditional city services, land use and environmental health. Id. at 10-14.

12. See SIEGAN, supra note 7.

13. See generally sources cited note 7 supra.

CHAPTER II

1. U.S. BUREAU OF THE CENSUS, FINAL REPORT PHC(1)-89, CENSUS OF POPULATION AND HOUSING: 1970 CENSUS TRACTS (1972).

2. In 1970, the leading city in land area was Oklahoma City, Oklahoma with 635.7 square miles. Los Angeles, California was second with 463.7 square miles. Houston followed with 433.9 square miles. Since that time both Los Angeles and Houston have annexed additional land, surpassing 500 square miles. See U.S. BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK 1972 (1973).

3. HOUSTON CITY PLANNING DEPARTMENT, COMPREHENSIVE PLAN REPORT 58 (1973) [hereinafter cited as COMPREHENSIVE PLAN REPORT].

4. See M. SIBLEY, THE PORT OF HOUSTON: A HISTORY (1968). Sibley observed that:

> [T]he full impact of the Port on the area, state, and nation defied measurement. The channel's most spectacular development had occured in the half century since the achievement of deep water, but for more than 130 years the waterway to the sea had been a vital factor in the settlement and development of the Texas Gulf Coast.

Id. at 11.
See also E. FISCHER, JR., HOUPOLIS: THE HOUSTON METROPOLITAN AREA 35-38 (1964) [hereinafter cited as FISCHER].

5. The Houston Chamber of Commerce boasts:

> Houston is an international energy capital, with 24 of the 25 largest U.S. oil companies having management activities here, along with some 400 other oil companies. Nearly one fourth of the nation's oil and gas transmission companies are in the Houston area, making it a major supplier in energy exploration, production, and distribution around the world. Additionally, the Houston area provides at least 50% of the petrochemicals produced in the United States.

Houston Chamber of Commerce, Houston Data Sketch (Feb. 1977). Fischer estimated the Houston area included 10% of the U.S. refining capacity in 1964. FISCHER, supra note 4, at 42.

6. FISCHER, supra note 4, at 26, quoting GENERAL COMMERCIAL ENGINEERING DEPARTMENT, SOUTHWESTERN BELL TELEPHONE COMPANY. ECONOMIC SURVEY OF TEXAS 248-249 (1928).

7. See, e.g. Siegan, "Non-Zoning in Houston", J. LAW & ECON. 71, 108, 121 (1970) [hereinafter cited as Siegan, "Non-Zoning"].

8. Id. at 121, 143.
This situation no longer seems to be true:

> Most local buyers of new and used housing are now paying prices and interest rates above the national average...
>
> Newly built homes sold here last month for an average of $55,200 as compared with a national average of $52,300...
>
> Previously occupied homes sold here on the conventional market in February cost an average of $49,000 as compared with a national average of $44,200...

The Houston Post, March 27, 1977, at 19C summarizing a survey made for the Urban Report.

9. See, e.g., D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 350 (2d ed. 1971). HOUSTON CHAMBER OF COMMERCE, CITY PLANNING IN HOUSTON (1971) [hereinafter cited as CITY PLANNING IN HOUSTON], contains an Appendix detailing the growth of Houston through annexation from 1836 to 1971. Since that date the city has annexed almost 60 square miles of additional land area, the most substantial single annexation being the Barker and Addicks Reservoir areas in 1972.

10. See D. WOODCOCK, SOME INFLUENCES ON THE GROWTH OF TWO TEXAS CITIES 66-68 (1966):

> Houston's annexation programme, whilst always consistent, has run riot since 1956 when the city annexed a huge ring round its existing territory and doubled in area overnight.

Id. at 66.

11. HOUSTON CITY PLANNING DEPARTMENT, HARRIS COUNTY POPULATION STUDY 33 (1975) [hereinafter cited as HARRIS COUNTY POPULATION STUDY].

12. See K.E. GRAY, A REPORT ON THE POLITICS OF HOUSTON Section VI at 12-19 (1960); FISCHER supra note 4, at 1-5.

13. CITY PLANNING IN HOUSTON, supra note 9, at 49.

14. See F. SENGSTOCK, EXTRATERRITORIAL POWERS IN THE METROPOLITAN AREA (1962).

15. See WOODCOCK, supra note 10, at 67:

> Houston's appetite for land has had the remarkable effect that, notwithstanding substantial population increases, the population density within the city is in fact reducing, creating a non-urban environment with endless sub-urban communities ringing the central urban area. (Emphasis added).

16. TEX. REV. CIV. STAT. ANN. art. 970a (1963).

17. TEX. REV. CIV. STAT. ANN. art. 970a §7(B-1) (1975) requires that the width of any annexed area must be at least 500 feet at its narrowest point. Prior to that requirement, the City of Houston had annexed finger strips giving it extraterritorial jurisdiction over all of unincorporated Harris County. Under art. 970a, the extra territorial jurisdiction of the City of Houston is five miles. Id. §3(A).

18. Id. Sections 7(B), 7(C). Due to its existing area, however, this means the City of Houston could currently annex over 50 square miles a year.

19. Brown, "Municipal Finances and Annexation: A Case Study of Post-War Houston", 48 SOUTHWESTERN SOC. SCI. Q. 339, 351 (1967). Although less forceful, Cho, "Fiscal Implications of Annexation: The Case of Metropolitan Central Cities in Texas", 45 LAND ECON. 368, 372 (1969) supports the general conclusion.

20. The Houston Chronicle, September 3, 1976, Section 1 at 6. Castillo estimates that the proposed annexation would net the City an additional two million dollars in taxes. This would end the preferential tax treatment given to channel industries when the city created the Ship Channel Industrial District in 1967.

21. Siegan, "Non-Zoning", supra note 7, at 71-72.

22. COMPREHENSIVE PLAN REPORT, supra note 3, at 30.

23. HARRIS COUNTY POPULATION STUDY, supra note 11, at 45-49.

24. Id. at 13.

25. J. DELAFONS, LAND USE CONTROLS IN THE UNITED STATES 71 (2d ed. 1969) [hereinafter cited as DELAFONS].

26. A. MANVEL, THREE LAND RESEARCH STUDIES (1968). The comparable figure for cities of over 100,000 population was 22.3%. The majority of the data relates to the 1964-1966 time period.

27. Id. The pre-1949 city boundaries can be considered as encompassing the central city of Houston. See HARRIS COUNTY POPULATION STUDY, supra note 11. Siegan states that only 4% of Washington D.C. was undeveloped in 1955. He also gives a figure of 31% undeveloped land for Los Angeles while Manvel lists the amount as 10.0%. See SIEGAN, LAND USE WITHOUT ZONING 151 (1972).

28. See DELAFONS, supra note 25, at 2.

29. Houston Chamber of Commerce, Houston Data Sketch (Feb. 1977).

30. Sales and Marketing Management, 1976 Survey of Buying Power (1976) also ranks Houston as the nation's fifth largest city.

31. Sales and Marketing Management, Survey of Buying Power (July 21, 1975 and July 10, 1971).

32. Bureau of Labor Statistics, Autumn 1975 Urban Family Budgets.

33. Tables 3 through 6 are derived from C. Luna, "The Mexican American Population of Houston, Texas: An Historical Perspective and Demographic Analysis" (Unpublished manuscript in possession of the author) [hereinafter cited as Luna].

34. According to 1970 Census figures median school years completed for Anglos, Blacks and Chicanos are 13.1, 10.4 and 8.9, respectively. While 60% of Anglos are high school graduates, only 35% of Blacks and 33% of Chicanos are high school graduates. Luna, supra note 33, at 31.

35. See U.S. DEPARTMENT OF LABOR, NEGRO EMPLOYMENT IN THE SOUTH, VOLUME I: THE HOUSTON LABOR MARKET (1971).

36. See Luna, supra note 33, at 36.

37. HOUSTON CITY PLANNING DEPARTMENT, HOUSING REPORT 22-23 (1973).

38. While Houston's minorities receive slight benefit, the very existence of Houston is traceable to the efforts of these groups, as this description of the clearing of the site of Houston shows:

> One could hardly picture the jungle and swampy sweetgum woods that a good portion of the city is built upon. These swampy grounds had to be cleared and drained...The labor of clearing the great space was done by negro slaves and Mexicans, as no white man could have endured the insect bites and malaria, snake bites, impure water, and other hardships.

WRITER'S PROGRAM: A HISTORY AND GUIDE 38 (1942). One can only wonder if Houston would have ever been built had there not been such a hardy stock of Mexicans and Negroes.

39. U.S. BUREAU OF THE CENSUS, SUPPLEMENTARY REPORT PC (SI) -78, LOW-INCOME NEIGHBORHOODS IN LARGE CITIES: 1970 (1974)

40. HARRIS COUNTY POPULATION STUDY, supra note 11, at E-5.

41. City of Houston, Texas, Public Improvement Bonds Official Statement 42 (July 28, 1976).

42. Sales and Marketing Management, Survey of Buying Power (July 21, 1975 and July 10, 1971).

43. Houston Chamber of Commerce, Houston Data Sketch (Feb. 1977).

44. The Houston Post, March 29, 1977, at 11A. See also The Houston Post, June 29, 1976, at 5D.

45. HARRIS COUNTY POPULATION STUDY, supra note 11, at 58-59.

46. WOODCOCK, supra note 10, at 75.

CHAPTER III

1. SIEGAN, LAND USE WITHOUT ZONING 27, 30-31 (1972) [hereinafter cited as SIEGAN] contains a brief summary of the land use control regulations in effect in the City of Houston as of that date. See also HOUSTON CITY PLANNING DEPARTMENT, COMPREHENSIVE PLAN REPORT 156-163 (1973) [hereinafter cited as COMPREHENSIVE PLAN REPORT].

2. The distinction between formal and informal control mechanisms utilized here is whether or not there has been official action by the City Council through enactment of an ordinance relating to the particular procedure. See note 13, infra.

3. The Houston City Planning Commission adopted a Land Platting Policy Manual on June 2, 1976 to supersede the Rules For Land Subdivision previously administered by the Planning Commision. See note 10, infra.

4. R. FREILICH AND P. LEVI, MODEL SUBDIVISION REGULATIONS 1-2 (1975) [hereinafter cited as FREILICH AND LEVI].

5. TEX. REV. CIV. STAT. ANN. art. 974a (1963). Art. 974a, §1 allows this control over all land within the corporate limits or within five miles of the corporate limits. However, in 1944 the Texas Supreme Court in Trawalter v. Schaefer, 142 Tex. 521, 179 S.W. 2d 765 (1944) held that a 1931 amendment to art. 6626 (providing counties with limited plat approval powers) repealed the extra-territorial jurisdiction (ETJ) provided cities under art. 974a. Enactment of the Texas Municipal Annexation Act, TEX. REV. CIV. STAT. ANN. art. 970a (1963), allowed cities to extend their subdivision regulations into the area of their ETJ. For the City of Houston, art. 974a applies as originally written since the City's ETJ extends five miles. See Art. 970a, §3(A). RESEARCH AND PLANNING CONSULTANTS, TEXAS LAND USE: A COMPREHENSIVE LAND RESOURCE MANAGEMENT STUDY, REPORT NUMBER TWO: EXISTING MECHANISMS 124-128 (1974) [hereinafter cited as TEXAS LAND USE] outlines the complicated devolution of land subdivision regulatory powers for cities and counties in Texas. See also M. Pohl, "Establishing and Altering the Character of Texas Subdivisions", 27 BAYLOR L. REV. 639, 640-641 (1975) [hereinafter cited as Pohl].

6. J. DELAFONS, LAND USE CONTROLS IN THE UNITED STATES 70-71 (2d ed. 1969) [hereinafter cited as DELAFONS].

7. COMPREHENSIVE PLAN REPORT, supra note 1, at 162. See also, Siegan, "Non-Zoning in Houston", J. LAW & ECON. 71, 73 (970) [hereinafter cited as Siegan, "Non-Zoning"]. Subd. ision control in Houston extends to major apartment and commercial developments through the Private Street Ordinance. COMPREHENSIVE PLAN REPORT, supra note 1, at 160. See HOUSTON, TEXAS, CODE OF ORDINANCES §42-19 (1968). For the period 1972-1976 the City Planning Commission approved 1,045 plats covering 37,894.71 acres and containing 132,927 residential lots and dwelling units. HOUSTON CITY PLANNING DEPARTMENT, 1975 ANNUAL REPORT 18-19 (1976) supplemented by information from the Houston City Planning Commission on Land Platting activity in 1976.

8. See Pohl, supra note 5, at 642.

9. FREILICH AND LEVI, supra note 4, at 9. See also TEXAS LAND USE, supra note 5, at 203-205.

10. Houston City Planning Commission, Land Platting Policy Manual (June 2, 1976) superseding Houston City Planning Commission, Rules For Land Subdivision, Adopted January 30, 1957; Revised through Sept mber 14, 1971. These rules had been supplemented b Regulations for "Townhouse Subdivision", Adopted May 21, 1963; Regulations For Plats Containing Private Streets, Adopted October 24, 1973; and Regulations For Plats Containing Private Streets in the Unincorporated Areas of Harris County, Adopted October 23, 1974. All of these rules and regulations have been compiled in the Land Platting Policy Manual, serving as subdivision regulations for the City of Houston.

11. The Houston City Council first passed a "Private Street Ordinance" on June 9, 1948. Ordinance No. 2639, amended by Ordinance No. 58-1357, January 7, 1959 and Ordinance No. 68-610, April 23, 1968. HOUSTON, TEX., CODE OF ORDINANCES ch. 42, art. II (1968). The private street ordinance attempts to reach those "development of large apartment projects and industrial subdivisions in such a manner as to apparently not be subject to the City Planning Commission Law..." Houston, Tex., Legal Dep't Opinion, Private Street Development (To Mayor Holcombe, April 7, 1948)(L.D. File No. 10,463). The City Legal

Department has limited its interpretation of this ordinance to street layout since

> "[I]t is not the function of the Planning Commission to determine whether the project as a whole conforms to accepted or desirable standards applicable to the development of land for multi-family occupancy."

Houston, Texas, Legal Dep't Opinion, Apartment Development (To Mr. Ralph Ellifrit, Director, City Planning, April 3, 1959)(L.D. File No. 21,795). The Legal Department also commented unfavorably on building setback restrictions. See Houston, Tex., Legal Dep't Opinion, Validity of Minimum Set Back Lines Without Resorting to State Zoning Law (To Mayor Lewis Cutrer, May 2, 1958)(L.D. File No. 20,760). The off-street parking requirement, HOUSTON, TEX., BUILDING CODE §9023 (1968), was seen as an ordinance which "would not stand if contested" and "would be struck down by our courts." Houston, Tex., Legal Dep't Opinion, Off Street Parking for Developers of Apartments (To Mayor Oscar Holcombe, Sept. 26, 1956)(L.D. File No. 19,433).

12. In addition to the requirement of the state enabling legislation the City Charter provides:

> The council shall act only by ordinance, resolution or motion...

HOUSTON, TEXAS, CHARTER Art. VII, §3 (1968). See City of Houston v. Hruska, 155 Tex. 139, 283 S.W. 2d. 739 (1955) for an interpretation of this provision.

With respect to the platting of property the Charter provides:

> the platting of any property laid off into blocks and lots as herein provided shall be platted in accordance with the regulations prescribed by the city council... and the city council shall be authorized to pass all necessary ordinances, penal or otherwise, with reference to the platting of property so as to carry into effect the purposes of this provision...

HOUSTON, TEXAS, CHARTER Art. I, §3 (1968).

13. The current Proposed Land Subdivision and Platting Ordinance bears a January 15, 1975 preparation date. The ordinance has yet to come before council for a first reading. There have been previous proposed ordinances which council failed to enact. See Houston, Tex., Legal Dep't Opinion, Proposed Subdivision Ordinance (To Mr. Ralph Ellifrit, Director, City Planning Department, June 9, 1961).

14. See HOUSTON CITY PLANNING DEPARTMENT, 1975 ANNUAL REPORT (1976)

15. Art. 974a, §4 provides:

> If such a plan or plat, or replat shall conform to the general plan of said city and its streets, alleys, parks. playgrounds and public utility facilities, including those which have been or may be laid out, and to the general plan for the extension of such city and of its roads, streets and public highways within said city and within five miles of the corporate limits therof, regard being had for access to and extension of sewer and water mains and the instrumentalities of public utilities, and if same shall conform to such general rules and regulations, if any, governing plats and subdivisions of land falling within its jurisdiction as the governing body of such city may adopt and promulgate to promote the health, safety, morals or general welfare of the community, and the safe, orderly and healthful development of said community, which general rules and regulations for said purposes such cities are hereby authorized to adopt and promulgate after public hearing held thereon , then it shall be the duty of said City Planning Commision or of the governing body of such city, as the case may be, to endorse approval upon the plan, plat or replat submitted to it. (emphasis added).

16. Houston, Tex., Legal Dep't Opinion, Drainage Easement; Right of City Planning Commission to Require Incident to Subdivision Plat Approval (To Mr. Ralph S. Ellifrit, Director of City Planning, May 8, 1951)(L.D. File No 11,687) [hereinafter cited as Drainage Easement Opinion].

17. The fault, however, does not lie entirely with City Council:

> [S]ince the Houston City Planning Commission had consistently refused to comply with the provisions of Article 974a and have its rules and regulations adopted by an ordinance of City Council after a public hearing, the rules and regulations of the City Planning Commission are presently unenforceable.

Houston, Tex., Legal Dep't Opinion, Annexation of Area around Lake Houston (To Mr. Noah E. Hull. Administrator, Surface Water Department, Feb. 28, 1964)(L.D. File No. 23.549).

18. TEXAS LAND USE, supra note 5, at 124 refers to Texas subdivision regulation as "a confusing patchwork of statutes and court decisions."

19. TEX. REV. CIV. STAT. ANN. art 970a, §4:

> The governing body of any city may extend by ordinance to all of the area under its extraterritorial jurisdiction the application of such city's ordinance establishing rules and regulations governing plats and the subdivision of land... (emphasis added).

20. TEX. ATTY' GEN OP. NO. C-459, at 2191 (1965).

21. See Houston, Tex., Legal Dep't Opinion, Errors and Misrepresentations in Subdivision Plats (To Mr. Ralph S. Ellifrit, Director of City Planning, Sept. 7, 1953)(L.D. File No. 11,687):

> [T]his Department will not undertake that such rules or orders adopted only by your Commission and not by the City Council would be sustained in court in the face of an attack. Such attack might probably take the form of a suit by some subdivider seeking a mandatory order to require the Commission to approve a plat notwithstanding the subdivider's failure to comply with rules which the Commision had adopted, but which had not been adopted or approved by the City Council.

22. See, e.g., Beach v. Planning and Zoning Commission of Town of Milford, 141 Conn. 79, 103 A. 2d 814 (1954); Daley Construction Co. v. Planning Board of Randolph, 163 N.E. 2d 27 (Sup. Jud. Ct. Mass. 1959); Snyder v. Zoning Board of the Town of Westerly, 200 A. 2d 222 (R.I. 1964).

23. TEX. REV. CIV. STAT. ANN. art. 974a, §4 (1963).

24. 141 Conn. 79, 103 A. 2d 814 (1954).

25. The Connecticut legislation allowed the defendant commission to adopt regulations, 103 A. 2d at 816 while the Texas legislation requires council action. Reference to adoption by the commission, then, should be interpreted accordingly.

26. 103 A. 2d at 817.

27. Drainage Easement Opinion, supra note 16, at 4.

28. See, e.g., Houston, Tex., Legal Dep't Opinion, Partition in Ownership of Subdivided Tract 2(To Mr. I.M. Singer, City Attorney, Corpus Christi, Texas, Sept. 6, 1956)(L.D. File No 11,687):

> I feel much as Mr. Ellifrit does that we are much better off to rock along as we have been doing and making no requirements which can reasonably be questioned as to their fairness rather than run the risk of having a definite court ruling which might leave us worse off than we are now.

CHAPTER IV

1. It is unclear precisely when this practice began:
   > Although the concept of load growth control has only recently received general public attention, load growth control measures and building restrictions have been utilized within the City for a considerable period of time by the Sanitary Sewer Division.

   TURNER, COLLIE & BRADEN, INC., REPORT NO. 4, CITY OF HOUSTON WASTEWATER MANAGEMENT PLAN - WASTE LOAD PROJECTION/CONTROL METHODOLOGY 41-42 (1974) [hereinafter cited as WASTEWATER MANAGEMENT PLAN].
   Siegan relates a Houston Post article of April 20, 1969 which reported that permits for some 8,000 to 10,000 apartments were being temporarily withheld due to inadequate sewer facilities. See Siegen, "Non-Zoning in Houston", J. LAW & ECON. 71, 139 (1970) [hereinafter cited as Siegan, "Non-Zoning"].
   For the authority of the Department of Public Works relating to the sewer system, See HOUSTON, TEXAS, CODE §§2-172 to -176, Appendix C §§3-4 (1968).
   The requiring of building permits for construction or repair of structures is a governmental function of the city and falls within the purview of the police power. Kirschke v. City of Houston, 330 S.W. 2d 629 (Tex. Civ. App. -Houston 1959, writ ref'd n.r.e.), appeal dismissed, 364 U.S. 474 (1960).

2. See TURNER, COLLIE & BRADEN, INC., REPORT NO. 1, FIVE YEAR CAPITAL IMPROVEMENT PROGRAM AND FISCAL STUDY, PART I: CONSTRUCTION PROGRAM 11-13 (1974) [hereinafter cited as CONSTRUCTION PROGRAM]. The principal order affecting the City of Houston is Texas Water Quality Board Order No. 74-0122-1 (Jan. 22,1974) which required the city to prepare a Waste Load Projection Methodology, and in the case of pending overloads, to "promptly initiate and diligently pursue appropriate measures to stop or retard load growth at such points in time as are necessary to avoid the pending overload."

3. Growth restriction programs have been referred to by a wide variety of names- "no growth", "slow growth", "phased growth" - but the essence of each technique is that they all restrict the community's "natural" expansion rates. Kellner, "Judicial Responses to Comprehensively Planned No-Growth Provisions: Ramapo, Petaluma, and Beyond", 4 ENV. AFF. 759, n. 1 (1975) [hereinafter cited as Kellner]. See also FRANKLIN, CONTROLLING URBAN

GROWTH- BUT FOR WHOM 4 and sources cited n. 1 (1973) [hereinafter cited as FRANKLIN].

4. WASTEWATER MANAGEMENT PLAN, supra note 1, at 54.

5. Bosselman, "Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?", 1 FLA. ST. U. L. REV. 234. 239 (1973) [hereinafter cited as Bosselman].

6. Construction Industry Association of Sonoma County v. City of Petaluma, 375 F. Supp. 574, 576 (N. D. Cal. 1974), rev'd, 522 F. 2d. 897 (9th Cir. 1975).

7. See D. WOODCOCK, SOME INFLUENCES ON THE GROWTH OF TWO TEXAS CITIES 147 (1966):

> William P. Hobby, Jr., President and Executive Editor of The Houston Post [and now Lieutenant Governor of the State] claimed recently that there were "many instances in which zoning and urban renewal projects have not had the effect intended and have prohibited a city's growth instead of stimulating it."

8. Kellner, supra note 3, at 768. See R. TABORS, M. SHAPIRO, AND P. ROGERS, LAND USE AND THE PIPE 113 (1976) [hereinafter cited as TABORS]:

> Restrictive policies attempt to control development by denying, in one manner or another, access to treatment service. The no-growth objectives which have recently become popular in many communities require restrictive policies for implementation.

9. Cappture Realty Corporation v. Board of Adjustment of the Borough of Elmwood Park, 126 N.J. Super. 200, 313 A. 2d 624, 630 (Law Div. 1973).

10. 23 N.Y. 2d 424, 244 N.E. 2d 700 (1969).

11. 244 N.E. 2d at 702.

12. Id.

13. Id. at 702-703.

14. TABORS, supra note 8, at 114-117 claims over 200 instances of actual or proposed sewer moratoria concentrated

primarily in New Jersey, Florida, California and Ohio. See Rivkin, "Growth Control Via Sewer Moratoria", 33 URBAN LAND 10 (1974) [hereinafter cited as Rivkin]. See, e.g., Metropolitan Dade County v. Rosell Construction Corporation, 297 So. 2d 46 (Dist. Ct. App. Fla. 1974); Bayshore Sewerage Co. v. Department of Environmental Protection, 122 N.J. Super. 184, 299 A. 2d 751 (Ch. Div. 1973); Torsoe Brothers Construction Corporation v. Board of Trustees of the Incorporated Village of Monroe, 81 Misc. 2d 702, 366 N.Y.S. 2d 810 (Sup. Ct. 1975); Commonwealth ex rel. State Water Control Board v. Board of Supervisors of Fairfax County, 1 E.R. 1482 (Cir. Ct. Va. 1970). See generally TASK FORCE ON LAND USE AND URBAN GROWTH, THE USE OF LAND 36-59 (1973).

15. See TABORS, supra note 8, at 117:

> Unfortunately, some communities wishing to adopt a no-growth strategy have viewed sewer moratoria as another tool in their arsenal against development. Sewer moratoria employed in this manner are no more legitimate than exclusionary zoning policies if they impose burdens on adjacent communities or violate the individual's right to freedom of movement.

See, e.g., Construction Industry Association of Sonoma County v. City of Petaluma, 375 F. Supp. 574, 577-578 (N.D. Cal. 1974), rev'd 522 F. 2d 897 (9th Cir. 1975). In Golden v. Planning Board of Town of Ramapo, 30 N.Y. 2d 359, 285 N.E. 2d 291 (1972) the adequacy of present facilities to service increased demand was not contested, 285 N.E. 2d at 294, n. 1.

16. 126 N.J. Super. 200, 313 A. 2d 624 (Law Div. 1973).

17. 313 A. 2d at 631. For an analysis of the use of interim development controls while preparing a system of comprehensive controls, see Freilich, "Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning", 49 J. URBAN L. 65 (1971) [hereinafter cited as Freilich]. While a building moratorium might be considered a temporary development control, the underlying rationale is different. Here the focus is not on preserving the integrity of the planning process (although that would hopefully result), but on preserving the public healt' in the face of an imminent danger.

18. 313 A. 2d at 632. The two-year grace period is a common time limit. See TABORS, supra note 8, at 114; Freilich, supra note 17, at 106.

19. 289 A. 2d 650 (N.H. 1972).

20. 43 A.D. 2d 727, 350 N.Y.S. 2d 698 (1973), rev'd 35 N.Y. 2d 507, 364 N.Y.S. 2d 160 (1974).

21. 350 N.Y.S. 2d at 700.

22. Id. The court went on to point out that, as in Westwood Forest, the city is not without remedies:

> the city may impose a reasonable moratorium on the construction in the area until the sewers can be expanded to accommodate the area's needs.

350N.Y.S. 2d at 701.
Although the court of appeals reversed the appellate division, the court of appeals required the municipality to establish:

> that it has acted in response to a dire necessity, that its action is reasonably calculated to alleviate or prevent the crisis condition, and that it is presently taking steps to rectify the problem.

Belle Harbor Realty Corporation v. Kerr, 35 N.Y. 2d 507, 354 N.Y.S. 2d 160, 163 (1974). Such requirements are similar to those that would have been required under the lower court decision.

23. See, e.g., TABORS, supra note 14, at 133-145; Robert Einsweiler, et al., "Comparative Description of Selected Municipal Growth Guidance Ststems: A Preliminary Report" in 2 URBAN LAND INSTITUTE, MANAGEMENT AND CONTROL OF GROWTH 306-307, 312-313 (R. Scott ed. 1975) [hereinafter cited as Einsweiler].

24. 400 F. Supp. 1369 (D. Md. 1975)

25. 400 F. Supp. at 1373-1376.

26. Id. at 1375.

27. Id. at 1373.

28. Id. at 1383:

> While the polic power of the state establishes in elected officials an extremely broad authority to promote the health, safety, morals and general welfare of the public, the means used to achieve these objectives must be reasonable.

29. Id. at 1384.

30. Id. at 1386.

31. Id. at 1387-1390. See 33 U.S.C. §1288 (Supp. 1973).

32. Id. at 1386.

33. See Einsweiler, supra note 23.

34. CONSTRUCTION PROGRAM, supra note 2, at 3. See generally The Houston Chronicle, September 20, 1975, §6, at 1 for the lead article in a series on "The Forgotten People" - over 40,000 residents of at least 27 areas in the city (mostly outlying areas) who are without city water and/or sewer service.

35. See CONSTRUCTION PROGRAM, supra note 2, at 3-4. For an expanded discussion of "red flag" subdivisions, see RESEARCH AND PLANNING CONSULTANTS, TEXAS LAND USE: A COMPREHENSIVE LAND RESOURCE MANAGEMENT STUDY, REPORT NUMBER TWO: EXISTING MECHANISMS 200-202 (1974) [hereinafter cited as TEXAS LAND USE].
Red flag subdivisions are another example of the ineffectual regulatory scheme in Houston. Although TEX. REV. CIV. STAT. ANN. art. 974a (1963) provides that a landowner who divides his property into two or more parts for the purpose of laying out a subdivision shall cause a plat to be made thereof, no penalty is provided for failure to do so. The City of Houston attempts to encourage platting by withholding city improvements and building permits until the platting procedure is completed. HOUSTON, TEXAS, CODE OF ORDINANCES §§42-5; 42-7 (1968).
The City of Longview, Texas has taken a more aggressive stance on this issue:

> No transfer of land in the nature of a subdivision as defined herein shall be exempt from the provision of this ordinance even though the instrument or document or transfer may describe land so subdivided by metes and bounds.

LONGVIEW, TEXAS, ORDINANCE NO. 257, at 2 (1955).

36. CONSTRUCTION PROGRAM, supra note 2, at 3. See TEXAS LAND USE, supra note 35, at 240:

> Absent zoning, there is no way to carry aging neighborhoods gracefully into townhouse and apartment development. Sewage facilities and other utility systems may be overloaded in the

process.

In discussing the problem Siegan noted:

> Had zoning limited the area to single-family lots, most of the sewers would have been adequate and there would have been no such problem. Confronted with this situation, the city began to install at substantial cost the necessary sewer facilities.

B. SIEGAN, LAND USE WITHOUT ZONING 131[illegible] (1972).

37. TURNER, COLLIE & BRADEN, INC., REPORT NO. 8, RESPONSE REPORT TO TEXAS WATER QUALITY BOARD ORDER NO. 74-0122-1, at 3 (1975) [hereinafter cited as RESPONSE REPORT].

38. CONSTRUCTION PROGRAM, supra note 2, at 3-4.

39. See RESPONSE REPORT, supra note 37, at 220. The Northside plant is operating at almost double its capacity. HOUSTON CITY PLANNING DEPARTMENT, SEWER PLANT CAPACITY/POPULATION STUDY (1975).

40. RESPONSE REPORT, supra note 37, at 3.

41. Id. at 4-7.

42. CONSTRUCTION PROGRAM, supra note 2, at 13.

43. RESPONSE REPORT, supra note 37, at 8. The EPA grants are administered under §208 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1288 (Supp. 1973).

It is uncertain what impact the June 6, 1975 policy statement issued by Russell Train, Administrator of the EPA, will have on future funding for the Houston capital improvements program. See 6 ENV. REP. 381 (1975). The policy statement was "aimed at assuring that secondary effects of a project are analyzed and taken into account during the grants process in comparable manner throughout the ten regions." Secondary effects of a project are:

> (1) indirect or induced changes in population and economic growth and land-use, and
> (2) other environmental effects resulting from these changes in land-use, population, and economic growth.

If these secondary effects seem likely to contravene federal, state and/or local environmental laws and regulations, and plans and standards required by environmental laws or regulations, the grant must be withheld

until the applicant initiates steps to mitigate the adverse effects. Among the variety of actions which may be used to mitigate these adverse secondary effects are improved land-use planning, better coordination of planning among affected communities and improved land-management controls.

44. WASTEWATER MANAGEMENT PLAN, supra note 1, at 50.

45. HOUSTON, TEXAS, CODE OF ORDINANCES, Appendix C, §4(A) (1968) specifies the information which must be included in the petition for extension of city service.

46. WASTEWATER MANAGEMENT PLAN, supra note 1, at 51.

47. Id. at 53-54. The methodology utilized in making this determination is somewhat complicated by the fact that wastewater flows in the City of Houston are affected by stormwater infiltration in excess of ninety percent of the time. Id. at 4.

48. Id. at 54. Certain exceptions, however, have been allowed even in areas of "absolute" bans. These exceptions have been to honor prior commitments or to allow minimal or non-contributory construction or construction of necessary public facilities.

49. Id. at 57. An eight-year capital improvement program (1974 through 1981) designed to bring the City of Houston sewage treatment system into conformance with Texas Water Quality Board guidelines (at an estimated $295 million) is outlined in RESPONSE REPORT, supra note 37. The City has no current published version of all capital improvements since "[n]either custom, the charter nor ordinance requires an annual capital improvement budget or a published annual report." HOUSTON CITY PLANNING DEPARTMENT, COMREHENSIVE PLAN REPORT 155 (1973)..

50. Mimeo available from the Wastewater Division of the Department of Public Works.

51. The restrictions are based on a 1575 gallon per day limit per acre. Each individual is allocated 90 gallons per day, with 3.5 persons per single family residence used as average occupancy. For apartments and townhouses the average occupancy figures are 2.5 and 3.0, respectively. Limits are also established for hotels, restaurants, coin-operated washing machines and self-service car washes.

52. Houston City Planning Commission, Land Platting Policy Manual 35-36 (June 2, 1976).

53. See text accompanying notes 10-32, supra. In general, the manner of regulation of a sanitary sewer system is within the discretion of the governing body of the city. Crownhill Homes, Inc. v. City of San Antonio, 433 S.W. 2d 448 (Tex. Civ. App. - Corpus Christi 1968, writ ref'd, n.r.e.). However, such regulation must not be arbitrary. Kimbrough v. Walling, 371 S.W. 2d 691 (Tex. Sup. 1963).

54. See Golden v. Planning Board of Town of Ramapo, 30 N.Y. 2d 359, 285 N.E. 2d 291, 294-295 (1972). See also text accompanying notes 22-27, supra.

55. WASTEWATER MANAGEMENT PLAN, supra note 1, at 41.

56. Deal Gardens, Inc. v. Board of Trustees, Loch Arbour, 48 N.J. 492, 226 A. 2d 607,611 (1967):

> Plainly there must be some terminal point. It is impossible to establish an inflexible rule applicable to every case. Each situation must be assayed in its own particular factual setting to ascertain whether the elapsed time during which the ordinance has been in effect is reasonable.

In Charles v. Diamond, 47 App. Div. 2d 426, 366 N.Y.S. 2d 921 (1975), the court found unreasonable a nine-year delay without any action being taken.

57. TABORS, supra note 8, at 117 notes that problems:

> have forced some communities to extend the moratoria far longer than originally intended, so that what was regarded as a temporary hardship becomes a longer term influence on development patterns.

58. See FRANKLIN, supra note 3, at 35:

> A locality that permits commercial and industrial development to proceed without phasing, so that it can reap the tax benefits while deferring residential development, is following a selective growth policy rather than a controlled growth policy. A selective growth policy is inherently suspect.

59. WASTEWATER MANAGEMENT PLAN, supra note 1, at 58.

60. RESPONSE REPORT, supra note 37, at 220, n. 1.

61. The need for a core of basic standards, especially in times of increased flexibility and greater delegation of powers is generally recognized. See, e.g., Freilich, supra note 17, at 107-108.
The general test in Texas is whether the standards formulated are capable of reasonable application. See Nichols v. City of Dallas, 347 S.W. 2d 326, 333 (Tex. Civ. App. - Dallas 1961, writ ref'd n.r.e.).

62. SAN ANTONIO, TEXAS, CODE §36-39 (1975).

63. Rivkin, supra note 14, at 15. See also FRANKLIN, supra note 3, at 5.

64. WASTEWATER MANAGEMENT PLAN, supra note 1, at 55.

65. Id.

1. TEX. REV. CIV. STAT. ANN. art. 974a-1 (Supp. 1971).

2. TEX. REV. CIV. STAT. ANN. art. 974a-2 (Supp. 1971).

3. Ordinance No. 65-1567, as amended, Ord. No. 71-2151, implementing art. 974a-1, provides in part:

> The legal department of the city is hereby authorized to file suit or become party to a suit on behalf of the city in any court of competent jurisdiction for the purpose of enjoining or abating the violation of a restriction contained or incorporated by reference in any plan, plat, replat or other instrument affecting a restriction that protects or tends to protect the residential character of the neighborhood where the subject property is situated; provided, however, that after a careful investigation of the facts and of the law, or either, if in the opinion of the city attorney no legal cause of action could be alleged and proved, then in such event, the city shall not file or become a party to a suit; provided further, that all authority granted to the legal department of the city under this section shall be exercised uniformly on behalf of and against all citizens and property in the City of Houston.

HOUSTON, TEXAS, CODE OF ORDINANCES §42-8(a) (1968).
Ordinance No. 71-2253, §1, implementing art. 974a-2, provides:

> No building permit shall be issued until an affidavit has been submitted to the building official stating that the construction, alteration or repair for which the building permit is sought, and the use to which the improvement is to be put will not violate any deed restrictions or restrictive covenants running with the land to which the property may be subject. Such affidavit shall be properly subscribed and sworn to before a notary public and shall be in the following language:
>
> > "I hereby verify that the proposed construction, alteration or repair described in this application and the use to which this improvement will be put will not violate any deed restriction or restrictive covenant running with the land, which restriction concerns the health, safety or general welfare of the citizens of the City of Houston, including, but not limited to, restrictions which involve considerations of additional traffic upon and over existing city streets, additional fire safety

hazards, increases in the density of population, additional use of garbage collection facilities provided in whole or in part by the city, or minimum square footage for residential structures. I further verify and agree that should such construction or such use be violation of any deed restriction or restrictive covenant running with the land to which the property is subject, that this building permit shall automatically become void and have no affect, without the necessity of any action on the part of the City of Houston, Texas, or any property owner in any subdivision in which such land is located.

HOUSTON, TEXAS, CODE OF ORDINANCES §10-3 (1968).

4. Two commentators have analyzed the validity of arts. 974a-1 and 974a-2 and come to negative evaluations of the practice. See Comment, "Houston's Invention of Necessity - An Unconstitutional Substitute for Zoning", 21 BAYLOR L. REV. 307 (1969) [hereinafter cited as "Unconstitutional Substitute"]; Comment, "Municipal Enforcement of Private Restrictive Covenants: An Innovation in Land-Use Control", 44 TEXAS L. REV. 741 (1966) [hereinafter cited as "Innovation in Land-Use Control".] But see Note, "The Municipal Enforcement of Deed Restrictions: An Alternative to Zoning", 9 HOUSTON L. REV. 816 (1972) [hereinafter cited as "Municipal Enforcement"].

5. See "Municipal Enforcement", supra note 4.

6. The concept expressed by the term restrictive covenant goes under a variety of names. These private restrictions on the use of land are also referred to as equitable servitudes and deed restrictions. See, e.g., Note, "An Evaluation of the Applicability of Zoning Principles to The Law of Private Land Use Restrictions", 21 U.C.L.A. L. REV. 1655 (1974) [hereinafter cited as "Evaluation of Private Restrictions"]. Thus, these various terms will be used interchangeably.

7. Id. at 1657-1658.

8. Ellickson, "Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls", 40 U. CHI. L. REV. 681, 713 (1973) [hereinafter cited as Ellickson].

9. The law of mutual servitudes had its genesis in the English case of Tulk v. Moxhay, 41 Eng Rep. 631 (Ch. 1848). For a full discussion of the law of equitable servitudes see 2 AMERICAN LAW OF PROPERTY §9.24-.40 (A.J. Casner ed. 1952). On the use of private restrictions for land use control, see generally MOCHOW, THE USE OF DEED RESTRICTIONS IN SUBDIVISION DEVELOPMENT (Studies in Land Economics Research

Monograph No.1, 1928).

10. The renewed interest can be traced to the passage in 1965 by the Texas Legislature of two bills relating to the enforcement of deed restrictions, Tex. Rev. Civ. Stat. Ann. arts 974a-1 and 974a-2 (Supp. 1971). See "Innovation in Land-Use Control", supra note 4.

11. See, e.g. "Evaluation of PrivateRestrictions", supra note 6, at n. 3.

12. Id. at 1676.

13. Id. at 1665.

14. See, e.g., Siegan, "Non-Zoning in Houston" 13 J. LAW AND ECON. 71, 142-143 (1970) [hereinafter cited as Siegan, "Non-Zoning"]. Siegan feels that:

> Governmental land use regulations at any level mean that politics and political power will continue making decisions for reasons that have minimum or no relationship to the best and most efficient use of the land, and that precious resource will continue to be wasted.

SIEGAN, LAND USE WITHOUT ZONING 247 (1972) [hereinafter cited as SIEGAN].

15. See, e.g., Ellickson, supra note 8, at 699-705.

16. J. DELAFONS, LAND USE CONTROLS IN THE UNITED STATES 93 (2d ed. 1969).

17. Ellickson, supra note 8, at 713.

18. See "Evaluation of Private Restrictions", supra note 6. at 1659-1660. This of course assumes that the covenants have been properly drafted, something which has caused problems in the past, see, e.g. Siegan, "Non-Zoning", supra note 14, at 142.

19. RESEARCH AND PLANNING CONSULTANTS, TEXAS LAND USE: A COMPREHENSIVE LAND RESOURCE MANAGEMENT STUDY; REPORT NUMBER TWO: EXISTING MECHANISMS 245 (1974) [hereinafter cited as TEXAS LAND USE]. See also Siegan. "Non-Zoning", supra note 14, at 79.

20. 429 S.W. 2d 679 (Tex. Civ. App. - Houston [14th Dist.] 1968) error refused, 433 S.W. 2d 680 (Tex. Sup. 1968). The relevant restriction provided that "All tracts shall be used for residence purposes only". 429 S.W. 2d at 680.

21. 429 S.W. 2d at 680-681.

22. Id. at 682. The trial court, however, limited the structure to no more than 3,390 square feet. Id.

23. See "Innovation in Land-Use Control", supra note 4, at 762. It appears, however, that most declarations of restrictions in more recent subdivisions contain a clause providing for automatic renewal. Id. at n. 125.

24. Ellickson, supra note 8, at 719.

25. 279 N.Y. 167, 18 N.E. 2d 18 (1938), appeal dismissed, 308 U.S. 503 (1939).

26. See "Innovation in Land Use Control", supra note 4, at 747.

27. 18 N.E. 2d at 20-21.

28. Id. at 21. No reliance was placed on the restriction which provided that the owner would not carry on, or permit to be carried on "any trade or business whatsoever,or any boarding house" although plaintiff was seeking to use the premeises as a boarding house.

29. Baddour v. City of Long Beach, 279 N.Y. 167, 18 N.E. 2d 18,23 (1938) (Loughran, J., dissenting) appeal dismissed, 308 U.S. 503 (1939).

30. 18 N.E. 2d at 19.

31. See, e.g. Pumo v. Mayor and Council of Ft. Lee, 4 N.J. Misc. 663, 134 A. 122 (Sup. Ct. 1926):

> Whether the erection of this building would be a violation of neighborhood restrictions is a matter of no concern to the municpality.

See also In re Appeal of Michener, 382 Pa. 401, 115 A. 2d 367, 369-370 (1955).

32. 235 Mo. App. 15, 124 S.W. 2d 636 (1939).

33. 124 S.W. 2d at 639.

34. Id. at 640.

35. 322 S.W. 2d 903 (Mo. 1959).

36. 322 S.W. 2d at 909.
The Board of Adjustment relied on Chapter 19, §31 of the city's comprehensive zoning ordinance which provided:

> No permit for the erection, alteration or enlargement of any building or structure, or the use thereof, shall be issued by the director of public works, board of adjustment, or any other official, employee, commission or board authorized to grant or modify building permits under the ordinances of the City, if the erection, alteration or enlargement of such building or

structure, or the use thereof, be in violation of any recorded covenant, condition or restriction, then in effect, which restricts the type and kind of building or structure, or the value or use therof, to be erected upon the lot which such building or structure is to, or does, occupy.

Id. at 908.

37. Id.

38. Id. at 909-910.

39. 111 Tex. 359, 235 S.W. 513 (1921). See also Hill v. Storrie, 236 S.W. 234 (Tex. Civ. App. - Dallas 1921), invalidating the same ordinanceon authority of Spann.

40. 235 S.W. at 514.

41. Id. at 516.

42. 245 S.W. 944 (Tex. Civ. App. - Dallas 1923, writ ref'd).

43. 250 S.W. 717 (Tex. Civ. App. - Dallas 1923, writ ref'd).

44. 250 S.W. at 718.

45. 252 S.W. 258 (Tex. Civ. App. - Dallas 1923, writ dism'd w.o.j.). Urbish involved the construction of a building for use as a moving icture show which Ordinance No. 742 specifically applied to under Section 5 of the ordinance.

46. 252 S.W. at 260.

47. 10 S.W. 2d 151 (Tex. Civ. App. - Dallas 1928, writ dism'd).

48. 10 S.W. 2d at 157.

49. Ordinance No. 1080, §5 read, in part, as follows:

That whenever any property is restricted by deed or any covenant, or under the terms of any ordinance to any particular use in the residence portions of the city, it shall be unlawful for any person to thereafter put or attempt to put the said property to any other use than the use or uses to which the same has been so restricted. Any person violating the terms of the Ordinance shall be subject to the penalty herein provided for. And the building inspector shall refuse to grant any permit to any person to build or construct any structure to be used for any purpose other than the purposes provided by the said restrictions and in case any permit may be granted and it is discovered by the building

inspector that the same is in violation of any restriction so made, the said building inspector shall revoke the said permit.

10 S.W. 2d at 162.

50. 10 S.W. 2d at 162.

51. Id.

52. The Texas Constitution provides that:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEXAS CONST. art. II, §1.

53. City of Houston v. Emmanuel United Pentecostal Church, Inc., 429 S.W. 2d 679, 682 (Tex. Civ. App. - Houston [14th Dist.] 1968), writ ref'd 433 S.W. 2d 680 (Tex. Sup. 1968). See Cowling v. Colligan, 158 Tex. 458, 312 S.W. 2d 943, 945 (1958).

54. 349 Mich. 520, 84 N.W. 2d 859 (1957).

55. 84 N.W. 2d at 864; accord, Mullally v. Ojai Hotel Co., 266 Cal. App. 2d 9, 71 Cal. Rptr. 882 (2d Dist. 1968).

56. TEX. REV. CIV. STAT. ANN. art. 974a-2, §7 (Supp. 1971) provides:

> An administrative refusal to issue a commercial permit on the grounds of violation of restrictions contained in a deed or other instrument shall be reviewable by a court of appropriate jurisdiction provided notice of filing of such suit is given the city department responsible for issuing commercial building permits within ninety (90) days. In the event of changed conditions within a subdivision or any other legally sufficient reason that restrictions should be modified a person refused a commercial building permit can petition a court of appropriate jurisdiction to alter the restrictions to better conform with present conditions.

57. "Unconstitutional Substitute", supra note 4, at 309-310. Contra, "Municipal Enforcement", supra note 4, at 826-828. See also TEXAS LAND USE, supra note 19, at 248.

58. Gulf Refining Co. v. City of Dallas, 10 S.W. 2d 151, 159 (Tex. Civ. App. - Dallas 1928, writ dism'd).

59. See Board of Adjustment of San Antonio v. Levinson, 244 S.W. 2d 281, 284 (Tex. Civ. App. - San Antonio 1951, no writ); Harrington v. Board of Adjustment of City of Alamo Heights, 124 S.W. 2d 401, 406 (Tex. Civ. App. - Amarillo 1939, writ ref'd.)

60 See text accompanying notes 32-51 supra. TEX. REV. CIV. STAT. ANN. art. 974a-2, § 3(b) (Supp. 1971) provides:

> When an applicant has complied with the Act and local ordinances relating to commercial building permits, the department shall issue a permit for construction or repair which conforms with all restrictions relating to the use of the property described in the application.

Although this provision might seem to indicate that any conflict with existing restrictions requires denial of the permit and therefore there is no discretionary action involved, see "Municipal Enforcement", supra note 4, at 826, it is the intent of the statute that the permit should be issued only for construction conforming with all valid restrictions, thus requiring a non-judicial determination of this validity. See "Innovation in Land Use Control", supra note 4, at 765.

61. See note 3 supra.

62. TEXAS LAND USE, supra note 19, at 247.

63. "Unconstitutional Substitute", supra note 4, at 310.

64. "Innovation in Land-Use Control", supra note 4, at 766.

65. HOUSTON, TEXAS CODE OF ORDINANCES §42-8(a) (1968).

66. See "Innovation in Land-Use Control", supra note 4, at 766.

67. Houston Galveston Area Council, "Survey of Zoning " 11 (1971).

68. Ray, "Delegation of Power to State Administrative Agencies in Texas", 16 TEXAS L. REV. 20, 30 (1937). See Fairbanks v. Hidalgo County Water Improvement Dist. No. 2, 261 S.W. 542 (Tex. Civ. App. - Austin 1923, writ dism'd).

69. 293 S.W. 515 (Tex. Civ. App. - Galveston 1956, writ ref'd n.r.e.).

70. 293 S.W. at 520.

71. See text accompanying notes 35-38 supra.

72. "Innovation in Land-Use Control", supra note 4, at 759-760.

73. 226 U.S. 137, 33 S.Ct. 76 (1912).

74. 33 S. Ct. at 77.

75. 278 U.S. 116, 49 S. Ct. 50 (1928).

76. 278 U.S. at 122.

77. 451 S.W. 2d 535 (Tex. Civ. App. - Tyler 1970, no writ.)

78. 451 S.W. 2d at 538.

79. Houston, Tex., Legal Dep't Opinion, Enforcement of Deed Restrictions 2 (To Mayor Lewis Cutrer, Nov. 26, 1962) (L.D. File No. 20, 759).
Internal correspondence within the Legal Department regarding State v. Eckhardt had previously noted that:

> City Council notwithstanding, they cannot delegate their legislative authority under the police power to private groups or to majorities of private groups nor can they make the lawfulness or unlawfulness of any particular act depend upon the willingness of affected persons to consent to it.

Houston, Tex., Legal Dep't Opinion, Building Restrictions (To Mr. R. H. Burks, City Attorney, May 25, 1959).

80. Relevant provisions of the Texas Constitution include:

> Taxes shall be levied and collected by general laws and for public purposes only.

TEX. CONST. art. VIII, §3.

> The Legislature shall have no power to make any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever...

TEX.CONST. art. III, § 51.

> The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever...

TEX. CONST. art III § 52.
See generally Willatt, "Constitutional Restrictions on Use of Public Money and Public Credit", 38 TEXAS BAR J. 413 (1975) [hereinafter cited as Willatt].

81. Bland v. City of Taylor, 37 S.W. 2d 291, 293 (Tex. Civ. App. - Austin 1931), aff'd sub nom. Davis v. City of Taylor, 123 Tex. 39, 67 S.W. 2d 1033 (1934).

82. 37 S.W. 2d at 293.

83. Wheeler v. City of Brownsville, 148 Tex. 61, 220 S.W. 2d 457, 463 (1949).

84. Willatt, supra note 80, at 422.

85. City of Dallas v. Urbish, 252 S.W. 258, 261 (Texa Civ. App.- Dallas 1923, writ dism'd w.o.j.).

86. Houston, Tex., Legal Dept. Opinion, City Enforcement of Deed Restrictions 8-9 (To Mayor Lewis Cutrer, April 4, 1962) (L.D. File No. 20, 759).

87. Houston, Tex., Inter-office Correspondence, Community Development (From Rick Gerlach, Policy Planning Division to T.H. Cody, Sr. Asst. City Attorney, Dec. 17, 1974):

> The City is undertaking a $50 million Three Year Program designed, among other things, to preserve housing stock and upgrade lower income neighborhoods. In the majority of these neighborhoods deed restrictions have lapsed, leaving the residential areas open to nuisance or incompatible uses and rendering them in many cases undesirable places to live... If the City expends a great deal of effort and revenue in these areas, in order to improve these older residential neighborhoods, what legal remedies are available to protect the public investment? The argument of deed restrictions is moot when considering inner-city neighborhoods...

88. TEXAS LAND USE, supra note 19, at 245. See SIEGAN, supra note 14, at 32; "Innovation in Land-Use Control", supra note 4, at n. 29.

89. Houston, TEx., Legal Dept Opinion, Building Restrictions (To Mayor Lewis Cutrer, Feb. 14, 1958) (L.D. File No. 20, 759). See also Houston, Tex., Legal Dep't Opinion, Ordinance Enforcing Deed Restrictions 4-5 (To Mayor Lewis Cutrer, March 2], 1958); Houston, Tex., Legal Dep't Opinion, City Enforcement of Deed Restrictions 9 (To Mayor Lewis Cutrer, April 4, 1962) (L.D. File No. 20, 759). Both of these opinions also note that such a practice would violate Art. II, §I of the City Charter of Houston which prohibits the City granting a purely personal gratuity. When the Legal Department was again requested an opinion regarding municipal enforcement of deed restrictions, the City Attorney responded with no small amount of exasperation:

> Since there have been no amendments to the State Constitution repealing those provisions thereof which prohibit the City from furnishing legal services to private individuals to assist them in the enforcement of their private contracts by Court action, and no amendment to the Constitution has granted the City this power, we are constrained to abide by former opinions and hold that the City has no such authority.
>
> We therefore respectfully submit, for the fourth time, that it is the opinion of this department, based upon the Constitution of the State of Texas, the laws of the State of Texas, the Charter of the City of Houston

and court decisions, both from this state and from other states, that the City of Houston does not have the authority to pass an ordinance providing for the enforcement of deed restrictions on private property by providing the services of City Attorneys to prosecute or defend law suits involving such matters, by withholding permits to construct buildings in violation of such restrictions, or by any other means. Houston, Tex., Legal Dep't Opinion, Enforcement of Deed Restrictions 1-2 (To Mayor Lewis Cutrer, Nov. 26, 1962) (L.D. File No. 20, 759).

90. See TEXAS LAND USE, supra note 19, at 248; "Innovation in Land-Use Control.", supra note 4, at 758.

91. See "Innovation in Land-Use Control", supra note 4, at 758.

92. TEXAS LAND USE, supra note 19, at 240.

93. See Gunther, "The Supreme Court, 1971 Term - Foreward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection", 86 HARV. L. REV. 1, 20 (1972); Tussman & ten Brock, "The Equal Protection of the Laws", 37 CALIF. L. REV. 341 (1949).

94. See TEX. REV. CIV. STAT. ANN. arts. 974a, 1011b, 1011c (1963)

95. See Note, "An Evaluation of the Applicability of Zoning Principles to the Law of Private Land Use Restrictions", 21 U.C.L.A. L. REV. 1655, 1664-66 (1974).

96. See text in Chapter V accompanying notes 12-24, supra.

97. Houston, Tex., Legal Dep't Opinion, City Enforcement of Deed Restrictions 9 (To Mayor Lewis Cutrer, April 4, 1962) (L.D. File No. 20, 759). See also City of Texarkana v. Mabry, 94 S.W. 2d 871 (Tex. Civ. App. - Texarkana 1936 writ dism'd); TEXAS LAND USE, supra note 4, at 764; Houston, Tex., Legal Dep't Opinion, Enforcement of Deed Restrictions 2 (To Mayor Lewis Cutrer, Nov. 26, 1962) (L.D. File No. 20, 759); Houston, Tex., Legal Deptt. Opinion, Ordinance Enforcing Deed Restrictions (To Mayor Lewis Cutrer, March 21, 1958).

98. See "Municipal Enforcement", supra note 4, at 818-822.

99. TEXAS LAND USE, supra note 19, at 245.

100. See "Innovation in Land-Use Control", supra note 4, at 763-764

101. D. WOODCOCK, SOME INFLUENCES ON THE GROWTH OF TWO TEXAS CITIES 72 (1966).

CHAPTER VI

1. See Huxtable, "Space City Odyssey", TEXAS MONTHLY, May 1976 [hereinafter cited as Huxtable].

2. D. WOODCOCK, SOME INFLUENCES ON THE GROWTH OF TWO TEXAS CITIES 75 (1966) [hereinafter cited as WOODCOCK].

3. See WOODCOCK, supra note 2, at 70:

> In the words of Houston's Director of City Planning ...
>
> > If we didn't plan for the people, we did a magnificent job in planning for automobiles.
>
> He went on to outline Houston's biggest problems as "dealing with flooding, sewage, and drainage."

In the words of a popular Houston columnist:

> Zoning is a dirty word. Community planning means widening the freeways.

Ashby, "Golden Buckle", The Houston Post, June 9, 1976, at 1B [hereinafter cited as Ashby].

4. Although Houston operates under a strong mayor set-up:

> The two year term, with the necessity for vigorous political campaigning, leaves about six months for effective work which, if too radical, may insure that more conservative control will be returned at the next election. The system is therefore opposed to change and open to abuse and, thanks to the influence of the business interests headed by the Chamber of Commerce, almost any move can be defeated by the suggestion that [it] will be commercially restricting or even downright unprofitable. In such an atmosphere it is not too surprising to discover that the present Director of City Planning, faced with no political support and inadequate resources to plan a city which has approximately the same area as Greater London, has reverted to a position in which the very concept of land use control as a desirable aim is being questioned.

WOODCOCK, supra note 2, at 71.

5. WOODCOCK, supra note 2, at 37-38:

> In 1841 the Mayor and Aldermen of the City established the Port of Houston, an interesting move, for it was not until the following year that the

Texas legislature gave permission for public works and clearance to be carried out on the Bayou. The technique of "goals first and methods later" recurs in the history of Houston.

6. See Ashby, supra note 3:

> If tomorrow our civic leaders decided Houston was going to have parks rivaling the Versailles gardens, I guarantee you we would.

7. The Housing and Community Development Act of 1974, 42 U.S.C. §5301 et seq. (Supp. 1975). From 1975 through 1980, the City of Houston is eligible for funds totalling $119,356,000.

The Community Development program has apparently already helped generate proposals to better control land use decisions in the program areas:

> [T]he City will need to show some evidence that it is acting in good faith and has implemented adequate controls to insure that block grant funds will be used for the purposes intended and not channeled primarily into the hands of private business interests, as has happened in some of the previous HUD programs. It can be expected that a community development plan without adequate land use controls will be disapproved by HUD and, for this reason, it is recommended:
>
> a. That suitable controls be established to restrict land allocation and use within designated CD (Community Development) impact areas, essentially as follows:
>
> (1) Designation of specific areas for specific types of dwellings and numbers of families per dwelling unit.
>
> (2) Designation of specific areas to be set aside for CD related commercial activities, service centers, health centers, parks and recreation facilities, open space, and other CD supporting facilities.
>
> (3) Identification of pre-existing industrial or commercial enterprises within the designated impact area which are not in direct support of the CD effort, and recognition of their right to continued existence but prohibiting further expansion within the impact area.
>
> b. That adequate covenants governing the allocation and use of land within CD impact areas

be included in the City's Title I- Community Development document.

Houston, Tex., Inter-office Correspondence, Land Use Objectives for Community Development (From W.R. Doraxis to Rick Gerlach, Policy Planning Division, Oct. 31, 1974).

8. City of Houston, Texas, 1976 Community Development Program Application 15,17 (1976). The particular objectives were designed to support the following statement of need in the application:

> Promote the rational utilization of land and other natural resources through planned orderly community development for without the above otherwise stable residential communities may decline due to the intrusion of nuisance or non-conforming uses.

Id. at 14.

Interestingly, the 1976 Application excluded several other community development needs which had been included in the 1975 application, including:

> [L]ack of management controls has allowed inappropriate uses to intrude upon otherwise stable residential communities, generating excessive traffic on residential streets and generally upsetting residential life-styles.
>
> Difficulty in planning and provision of basic City services (streets, sanitary sewers, parks, etc.) due to uncertain or rapidly changing land use patterns.

City of Houston, Housing and Community Development Program and Application of the City of Houston, Statement of Needs A-3 and A-4 (March 1975).

9. 42 U.S.C. §5301(c) (Supp. 1975).

10. WOODCOCK, supra note 2, at 3.

11. Id. at 52.

The City of Houston has also encountered problems in the past with Model Cities and related programs because of the city's inability to obtain Workable Program certification. When certification was finally obtained in October 1971, Houston became the final large city to have an approved workable program. See NATIONAL COMMISSION ON URBAN PROBLEMS, 3 HEARINGS BEFORE THE NATIONAL COMMISSION ON URBAN PROBLEMS 134-135 (1967); Note, "The Municipal Enforcement of Deed Restrictions: An Alternative to Zoning", 9 HOUSTON L. REV. 816, 830-831 (1972).

More recently, on July 30, 1975, the Houston City Council defeated an ordinance to apply for $100,500 in federal funds under §701 of the Housing Act of 1954, 40 U.S.C. §461 (1969) because it was felt that the land-use element required by HUD (which did not have to be met until August 22, 1977) was a forerunner to zoning. See The Houston Post, July 31, 1975, at 4A, col. 2. Interestingly, this action was taken even after a stipulation that "none of the funds shall be used to study or recommend zoning" had been added to the ordinance upon Council's insistence.

12. WOODCOCK, supra note 2, at 140.

13. Huxtable, supra note 1, at 40.