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**Cities Don't Enforce Private
Restrictive Covenants, or Do They?:
The City of Houston's Unique Land Use Scheme**

Heather N. Cook

Heather N. Cook
Randle Law Office, Ltd., L.L.P.
820 Gessner, Suite 1570
Memorial City Plaza II
Houston, TX 77024
heather@igradyrandlepc.com
281.657.2000

**Cities Don't Enforce Private Restrictive Covenants, Or Do They?:
Houston's Unique Land Use Scheme
(and How It Might Work for Other Cities)**

I. INTRODUCTION

This paper is intended as a general overview of the City of Houston's deed restriction enforcement authority, its deed restriction enforcement process, and consideration of how a deed restriction enforcement scheme like the City's might be helpful to other municipalities.

II. BACKGROUND

A. History

During the early development of the City of Houston ("City"), it was common for a developer to file a neighborhood plat, and then as lots were later sold to private homeowners, restrictive covenants, otherwise known as deed restrictions, were contained in the first deed out for each property in the platted neighborhood. We didn't see the elaborate "Conditions, Covenants and Restrictions" that we see today complete with the establishment of non-profit Property Owners Associations. Neighborhoods did not have mandatory assessments, management companies, or all the trappings of the modern master-planned community.

The City possessed very limited tools in its toolbox for land use regulation, so it has attempted to adopt zoning three different times in its history. Houston voters soundly defeated attempts to implement the creation of land use districts via zoning in 1947 and again in 1962 (voters later rejected zoning in 1993, yet another time¹). As a result, the City has historically had a rather laissez-faire approach to land use regulation. Today, Houston is the only large municipality in the United States without a city-wide comprehensive zoning ordinance.²

Thus, after the City's second failed attempt to adopt zoning in 1962, the City faced a perceived regulatory crisis.³ The City needed to do something to preserve mechanisms for orderly

¹ <https://www.washingtonpost.com/archive/realestate/1993/11/06/houston-voters-again-reject-zoning/47ad1558-465a-48f2-b330-a4a6fcb01387/>, last visited 2/11/2024.

² Although the City does not have a comprehensive zoning ordinance, it has enacted several ordinances that substitute for zoning which includes a complex development code, the creation of historic districts, regulations in areas around the City's three airports (IAH, HOU, and Ellington Field), TIRZ #1 zoning for St. George Place, and the ability for areas to adopt minimum lot size and minimum building line requirements. *See, e.g.*, Hous. Tex. Code of Ordinances, Chapters 9, 10, 19, 26, 28, 33, 39, 40, and 42.

³ <https://marketurbanism.com/2018/04/11/houstons-deed-restrictions-basically-zoning/>, last visited 2/27/2024 (citing to Bernard Siegan's 1972 book *Land Use Without Zoning* (1972) in which Siegan estimated only 25% of the City was deed restricted and to Teddy Kapur's 2004 *Land Use Law* Article 34 ELR 10046 https://www.pszilaw.com/media/publication/427_Kapur%20-%20ELR%20land%20use%20regulation.pdf in which Kapur estimates the same percentage 30 years later). *See also*, John Mixon, *Neighborhood Zoning in Houston*, 31 S. Tex. L. Rev. 1, 5-6 (1990); Thomas M. Susman, *Municipal Enforcement of Private Restrictive Covenants: An Innovation in Land-Use Control*, 44 Tex. L. Rev. 741, 743 (1965-1966).

development and to prevent businesses like car repair shops, liquor stores, and strip clubs from becoming next door neighbors to single family residences.

B. Authority and caselaw

As a result, in 1965 the Texas legislature enacted Texas Local Government Code Chapter 230 which allowed the City to enforce deed restrictions.⁴ In 2001 Chapter 230 was renumbered to Chapter 212, Subchapter F entitled Enforcement of Land Use Restrictions Contained in Plats and Other Instruments.⁵

i. Current limits on cities that can use this authority

Initially, Texas Local Government Code Section 212.151 was bracketed to the City because it only applied to a municipality without zoning or to a municipality with a population of 1.5 million or more. Of course, the City qualified to utilize the statute under both prongs. Additionally, the statute required the City to pass an ordinance requiring uniform application and enforcement for all property and residents in its jurisdiction.⁶ The requirement for uniform enforcement is still effective today for municipalities that qualify to enforce deed restrictions under this statute.

In 2021 Section 212.151 was amended to also apply to a municipality with a population of less than 4,000 (now 4,500)⁷ that is located in two counties, one of which has a population greater than 45,000, and that borders on Lake Lyndon B. Johnson.⁸ This legislation was intended to make it easier for an entity to be certified as a new Dark Sky Community without impacting its ability to enforce deed restrictions, to counteract the unintended consequences of other recent legislation.⁹

ii. Limits on types of restrictions that can be enforced by statute

Section 212.151 authorizes the City to enforce certain types of deed restrictions “contained or incorporated by reference in a properly recorded plan, plat, or other instrument that affects a subdivision located inside the boundaries of the municipality”¹⁰ pertaining to:

- the use of real property;
- setbacks;
- lot size or the size, type, and number of structures that can be built on a lot,
- the orientation of structures; and,
- fences¹¹

⁴ Mixon at 6; Susman at 743.

⁵ TEX. LOC. GOV'T CODE §§ 212.151-.157, attached as Appendix A.

⁶ TEX. LOC. GOV'T CODE § 212.151(1), (3).

⁷ This was changed to 4,500 in 2023. Acts 2023, 88th Leg., R.S., Ch. 644 (H.B. 4559), Sec. 141, eff. September 1, 2023.

⁸ TEX. LOC. GOV'T CODE § 212.151(2).

⁹ Bus. & Comm., Bill Analysis, Tex. S.B. 1090, 87th Leg., R.S (2021) (enrolled version).

¹⁰ TEX. LOC. GOV'T CODE § 212.153.

¹¹ TEX. LOC. GOV'T CODE § 212.152.

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