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HOW OVERREGULATION CREATES SPRAWL (EVEN IN A CITY WITHOUT ZONING)

MICHAEL LEWYN[†]

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I. INTRODUCTION: SPRAWL, ZONING AND HOUSTON

Numerous commentators have suggested that the spread-out, automobile-dependent urban form (often referred to as “sprawl”¹) that dominates metropolitan America² is at least partially caused by government regulation of land use.³

But at first glance, the fate of Houston, Texas may seem to rebut that theory. Houston is America’s only large city without a formal zoning code.⁴ Yet Houston is as automobile-dependent and sprawling as many cities with zoning.⁵

1. Jeremy R. Meredith, *Note, Sprawl and the New Urbanist Solution*, 89 VA. L. REV. 447, 448 (2003) (“[S]prawl’ evades a precise definition . . .”). See also Thomas Benton Bare, III, *Recharacterizing the Debate: A Critique of Environmental Democracy and an Alternative Approach to the Urban Sprawl Dilemma*, 21 VA. ENVTL. L. J. 455, 457 (2003) (“There are many definitions of sprawl.”). However, many definitions of sprawl suggest that a key characteristic is, inter alia, dependency on automobiles and/or settlement patterns (such as low population density) that tend to lead to such dependency. See, e.g., William W. Buzbee, *Sprawl’s Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509, 510 (2000) (“Sprawling urban forms typically are car dependent . . .”); Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 U. PA. L. REV. 873, 874 (1999-2000) (describing sprawl as “low-density, land-consuming, automobile-dependent” development). See also *infra* notes 54-62 and accompanying text (explaining how low density leads to vehicle dependency). I accordingly define sprawl for purposes of this article as development oriented solely towards automobiles, as opposed to pedestrians, bicyclists and public transit users.

2. See *Miller v. Anckaitis*, 436 F.2d 115, 120 (3d Cir. 1970) (“[U]se of an automobile [is often] the only practical alternative to welfare.”); Michael Lewyn, “*Thou Shalt Not Put a Stumbling Block Before the Blind*”: *The Americans with Disabilities Act and Public Transit for the Disabled*, 52 HASTINGS L.J. 1037, 1041 (2001) [hereinafter *Stumbling Block*] (stating that in most small cities and suburbs “auto ownership is virtually mandatory for a normal life”).

3. See, e.g., Francesca Ortiz, *Biodiversity, The City, and Sprawl*, 82 B.U.L. REV. 145, 179-80 (2002) (arguing that zoning regulations “imposing density restrictions and minimum lot sizes, for example, can contribute to sprawl by forcing larger, more land consumptive developments” and zoning also “encourages sprawl by separating different land uses according to intensity of use” thus forcing developers “to move outward to build if their uses are incompatible with available areas”); *Stumbling Block*, *supra* note 2, at 1055-56 (making similar points).

4. See Bernard H. Siegan, *Smart Growth and Other Infirmitities of Land Use Controls*, 38 SAN DIEGO L. REV. 693, 742 (2001) [hereinafter *Infirmitities*]; Lee Anne Fennel, *Homes Rule*, 112 YALE L.J. 617, 624 n.29 (2002) (book review) (“Houston is the only major American city to eschew zoning.”). One section of Houston’s municipal code allows the city’s planning commission to serve as a zoning commission. See HOUSTON, TEX., CODE OF ORDINANCES, § 33-22(a)(1) (2004), available at <http://www.cityofhouston.gov> (accessed from homepage by selecting City Desk, Code of Ordinances, Chapters 31-35, and Comprehensive Planning and Zoning) (last visited Nov. 30, 2004). This language was adopted “because at the time [it was drafted] it was assumed that one day we [Houston] would have zoning and if we should ever adopt zoning, the Planning Commission could step into that role without a new ordinance.” Private correspondence with Suzy Hartgrove, City of Houston (Dated Dec. 12, 2002) (on file with author). Because Houston never did adopt a comprehensive zoning ordinance, this section is effectively a dead letter. Instead, the planning commission merely “reviews subdivision plats and variances for certain land development regulations such as street width.” *Id.*

5. See *infra* notes 21-31 and accompanying text (describing Houston as sprawling, automobile-dependent city). I note that in 2004, Houston began to operate a light rail system. See

It could therefore be argued that automobile-dependent sprawl is the inevitable result of the free market, based on the following chain of logic:

Assumption 1: Because Houston lacks zoning, Houston has an unregulated, unplanned real estate market. In other words, Houston = the free market at work.

Assumption 2: Houston is an automobile-dependent, sprawling city. In other words, Houston = an example of sprawl.

Conclusion: Therefore, a city, like Houston, which allows the free market to govern land use will (like Houston) typically become an automobile-dependent, sprawling city- and sprawl is thus a product of the free market, rather than of government interference with consumer preferences. In other words, because Houston = the free market at work, and Houston = sprawl, the free market leads to sprawl. The policy consequence of this chain of logic (at least for people who highly value limited government)⁶ is that government should not discourage sprawl, for what the free market has put together, government should not tear asunder.⁷

The purpose of this article is to evaluate this conclusion by addressing one of its underlying assumptions—the assumption that Houston is a free-market role model. Part II of this article describes that assumption (as well as Houston’s sprawling urban form). Part III criticizes that assumption by explaining how municipal regulatory and spending policies have affected Houston’s urban form. Part IV discusses free-market alternatives to those government policies.

II. BACKGROUND: THE CASE FOR HOUSTON AS FREE-MARKET SPRAWL

As noted above, some commentators suggest that Houston is in fact a role model for both free markets and sprawl. These claims will be examined below.

Juan Lozano, *1st Light Rail Line Opens in Houston*, Fort Worth Star-Telegram, Jan. 2, 2004, at 2, 2004 WL 56482365. It is unclear, however, whether the rail line will significantly change Houston’s commuting habits. *Id.* (“Opponents said light rail will do little. . . because it doesn’t reach those who live outside Houston’s inner core.”).

6. The broader philosophical question of the appropriate extent of government regulation is, however, beyond the scope of this article. *Cf.* ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (Basic Books 1974) (making case for minimal government). Rather than addressing this issue, I seek only to suggest that because sprawl in Houston (as in other cities) is at least partially a result of government regulation, a preference for limited government does not automatically justify a preference for pro-sprawl policies.

7. See Michael E. Lewyn, *Suburban Sprawl: Not Just An Environmental Issue*, 84 MARQ. L. REV. 301, 303-04 (2000) [hereinafter *Not Just Environmental*] (quoting numerous conservative and libertarian commentators expressing such sentiments).

A. Houston as Free-Market Role Model

Numerous commentators assert that Houston has adopted a laissez-faire policy of unplanned, unregulated development.⁸ For example, Bernard Siegan sets forth this argument in a set of articles defending Houston's refusal to enact a zoning code.⁹ Siegan asserts that land use regulation in Houston is "extremely modest when compared to what is contained in most zoning ordinances [because] Houston has no ordinance that sets forth specific restrictions on the uses that may be established on any property"¹⁰—that is, no law providing that a given parcel may be used solely for residential use or commercial use.¹¹ Siegan further writes that while other cities force builders to develop large homes on large lots,¹² in Houston "builders and developers determine the size of most building lots, not the planners and politicians."¹³

Siegan therefore concludes that Houston "affords great opportunity for

8. See, e.g., June Carbone, *Dukeminier and Krier as Narrative: The Stories We Tell in the First Year Property Course*, 32 HOUS. L. REV. 723, 741 n.100 (1995-1996) (stating that Houston's "laissez-faire system" is an "alternative to zoning") (citing JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1136-40 (3d ed. 1993)); Byron Shibata, *Land-Use Law in the United States and Japan: A Fundamental Overview and Comparative Analysis*, 10 WASH. U. J.L. & POL'Y 161, 242 (2002) (stating that Houston has a "general laissez-faire approach to land-use regulation"). But see Teddy M. Kapur, *Land Use Regulation in Houston Contradicts the City's Free Market Reputation*, 34 ENVTL. L. REP. 10045 (2004) (suggesting that Houston almost as heavily regulated as cities with zoning). Kapur's article addressed some of the regulations discussed below but, unlike this article, does not focus on the sprawl-producing effects of Houston's regulatory scheme.

9. Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71, 75 (1970) [hereinafter *Non-Zoning*]; *Infirmities*, *supra* note 4, at 695-96, 734-41; Bernard H. Siegan, *Conserving and Developing the Land*, 27 SAN DIEGO L. REV. 279, 295-305 (1990) [hereinafter *Conserving*]; Bernard H. Siegan, *Keynote Address*, 14 ENVTL. L. 645, 646-51 (1984) [hereinafter *Keynote Address*]; see *infra* notes 10-17 and accompanying text. The purpose of Siegan's work is not to discuss sprawl or to critique Houston's existing regulations, but to show that Houston's failure to enact a zoning code has not made Houston worse off than other American cities. See, e.g., *Non-Zoning*, *supra* at 71 (describing Houston as "a functioning, viable and rapidly growing city"); *Id.* at 88 (rejecting the claim that absence of zoning will "destroy values of houses and often lead to blight and slum conditions"); *Infirmities*, *supra* note 4, at 695 (suggesting that absence of zoning has caused Houston to have more affordable housing than other cities). Because this article does not endorse zoning, it is not a rebuttal of Siegan's work. But my emphasis is different from Siegan's. Siegan emphasizes the differences between Houston and cities with zoning. See *infra* notes 14-17 and accompanying text. By contrast, I emphasize the similarities between Houston and other cities—that is, Houston's departures from laissez-faire policies. See Part III *infra*.

10. *Non-Zoning*, *supra* note 9, at 75.

11. *Id.*

12. See, e.g., *Agins v. Tiburon*, 447 U.S. 255 (1980) (upholding ordinance allowing construction of only one house per acre); DANIEL R. MANDELKER, LAND USE LAW, § 5.28 at 5-28 (5th ed. 2003) ("Municipalities often control residential densities and amenities through large-lot zoning and minimum house size restrictions."); JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW, § 6.2 at 232 (2003 ed.) ("Minimum lot sizes of 5,000 square feet, 20,000 square feet, 40,000 square feet, three acres and five acres are common.").

13. *Infirmities*, *supra* note 4, at 734.

builders and developers to satisfy consumer demand”¹⁴ and that “resourcefulness and inventiveness are able to thrive in Houston because of the absence of their enemy, government regulation.”¹⁵ By contrast, in cities with zoning, “these talents are often spent in persuading or outmaneuvering the zoning authorities.”¹⁶ In sum, Siegan views Houston as a libertarian role model, a city where government exercises “minimum control over the uses that will be made of [real] property.”¹⁷

And it is not just zoning opponents who treat Houston as an example of laissez-faire land use policy. Pro-regulation commentators also describe Houston this way—but rather than praising Houston, they claim that Houston’s land use policies have led to sprawl and ugliness. For example, one commentator states: “If you want to see what an unregulated environment looks like, go to Houston. It is one of the ugliest developed cities in the world.”¹⁸ And the President of the Urban Land Institute, a real estate industry research organization,¹⁹ blames Houston’s sprawl on its lack of land use regulation, asserting that Houston is “a textbook example of the sprawl and hopscotch growth that comes with. . . a laissez faire business climate.”²⁰

14. *Conserving*, *supra* note 9, at 304-05.

15. *Id.* at 305. In particular, Siegan praises Houston’s low housing costs, and claims that Houston is more affordable than cities with zoning. *See Infirmities*, *supra* note 4, at 695. I note however, that in this regard Houston may be more similar to other American cities than Siegan suggests. For example, Siegan compares Houston favorably with Dallas, which has zoning. *Id.* at 694-95. But by 2002, housing prices in Houston and Dallas were similar. The median housing price in Houston was \$138,000 (2.3 times the Houston area’s median family income of \$59,600) and the median housing price in Dallas was \$155,000 (also 2.3 times that area’s median family income of \$66,500). *See* National Association of Home Builders, Housing Opportunity Index, available at <http://www.nahb.org> (accessed from homepage by selecting Resources, then Economic and Housing Data, and finally NAHB-Wells Fargo Housing Opportunity Index (HOI)) (last visited Dec. 3, 2003). *Cf.* Kapur, *supra* note 8, at 10062 (questioning link between Houston’s low-cost housing and absence of zoning).

16. *Conserving*, *supra* note 9, at 305.

17. *Infirmities*, *supra* note 4, at 742.

18. Panel Discussion, *Discretionary Limits in Local Land-Use Control*, 15 N. ILL. U. L. REV. 651, 656 (1995). *See also* Stephen Fox, *Houston 2000: Looking Back* (“Houston stands alone among major U.S. cities in refusing to adopt a zoning code. . . [so] the urban landscape of Houston is squalid.”), available at <http://www.livablehouston.com/good/articles/fox.html> (last visited Feb. 8, 2004); Ross Anderson, *Stay Out! A Guide to Controlling Growth*, SEATTLE TIMES, May 8, 1994, at B5, available at 1994 WL 3620423 (stating that, in Houston, “antipathy to zoning leads to untamed ugliness”). *But see Non-Zoning*, *supra* note 9, at 91 (attacking “ugliness” argument on ground that “it would seem impossible to evaluate the aesthetics and physical composition of over 450 square miles of real estate [comprising the city of Houston] and compare such a determination with a similar area elsewhere”).

19. *See* Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and The Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 19 (2003) (stating that the ULI is the “research wing” of the National Association of Real Estate Boards, a trade association for realtors, developers, and mortgage bankers).

20. DAVID CROSSLEY, WHY THE INTERSTATE-10 EXPANSION PLAN NEEDS ANOTHER LOOK, available at www.katycorridor.org/Presentations/Why-Crossley-1Aug02.doc (last visited Feb. 8,

B. Houston Is A Sprawl City

Houston has a reputation as an unusually sprawling, automobile-dependent city. For example, one newspaper article describes Houston as “a city of 581 square miles of unruly urban sprawl. . . [where] no one walks.”²¹ Similarly, an article in Houston’s own newspaper asserts that “Houston’s sprawl is as ugly and pervasive as any city’s in the nation.”²² And Houston’s reputation has ample basis in reality. For example:

*Houston is far less densely populated²³ than most other cities of comparable size.²⁴ The city of Houston has only 3372 people per square mile,²⁵ less than half the density of any of the three cities larger than Houston,²⁶ and fewer than six of the eight American cities with over 1 million people.²⁷

2004) (quoting remarks). See also Editorial, *Houston Race; Brown Victory Shows Changes, Challenges*, DALLAS MORNING NEWS, Dec. 9, 1997, at 22A, available at 1997 WL 16183937 (arguing that Houston’s “no-zoning policies have given rise to considerable sprawl”); Patricia L. Kirk, *City On A Roll*, SHOPPING CENTER WORLD, Oct. 1, 2003, at 50, available at 2003 WL 11006419 (“A city without zoning, Houston has become a poster child for urban sprawl.”).

21. Elisabeth Hickey, *Houston Does Its Best To Give A Warm Howdy*, WASH. TIMES, Aug. 17, 1992, at D1, available at 1992 WL 8136783. See also Mike Snyder, “Smart Growth” Re-Examines Sprawl, HOUSTON CHRON., Mar. 19, 2000, at 1, available at 2000 WL 4286902 (quoting a past president of American Institute of Architects’ Houston chapter that “if you live in the typical [Houston] subdivision, you’ve got to get in your car and drive for 10 minutes just to get a quart of milk”).

22. Bruce Oren, *More of Us Should Live on Main Street, U.S.A.*, HOUSTON CHRON., Jan. 5, 1997, at 19, available at 1997 WL 6533486. See also Blair Kamin, *Houston Becoming a Super City in More Ways Than One*, CHI. TRIB., Jan. 30, 2004, at 1, available at 2004 WL 67381452 (“Houston is sprawling and car-oriented.”).

23. As noted above, one common characteristic of sprawl is low density. See *supra* note 1 (citing numerous definitions); *infra* notes 54-59 and accompanying text (low-density communities typically very dependent on automobiles).

24. Siegan appears to challenge this point, asserting that Houston “has a high population density, greater than Dallas and Phoenix zoned cities, with which it is often compared.” *Infirmities*, *supra* note 4, at 735. As of the 2000 Census, Dallas had slightly more inhabitants per square mile than Houston. See U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002 35-36 (122nd ed. 2002) (hereinafter 2002 ABSTRACT) (indicating that Dallas has 3470 people per square mile while Houston has 3372). Thus, Siegan’s assertion may be technically incorrect. But more importantly, Siegan’s claim is misleading because most large cities are far more dense than Dallas, Phoenix, or Houston. See *infra* notes 26-27 and accompanying text.

25. 2002 ABSTRACT, *supra* note 24, at 33, 37.

26. *Id.* at 36-38 (showing that New York, Los Angeles, and Chicago are the only cities with more inhabitants than Houston). The least dense of these three cities, Los Angeles, has 7877 residents per square mile. *Id.* at 37. The other two (Chicago and New York) have over 10,000 residents per square mile. *Id.* at 36-38.

27. Excluding Houston itself, of course. Chicago, New York, Los Angeles, Philadelphia, Dallas and San Diego are all more densely populated than Houston, while San Antonio and Phoenix are slightly less dense. *Id.* Similarly, Houston’s entire urbanized area has only 1970 people per square mile (fewer than every other urban region which, like Houston and its suburbs,

*Houston is as automobile-dependent as any American city. Only 5.9% of the city of Houston's employed adults commute via public transit²⁸—fewer than in any of the cities larger than Houston.²⁹

*Houstonians drive more than other Americans: The average Houstonian travels 37.6 miles per day by automobile, more than residents of any other large American region.³⁰

*As a result of all that driving, the average Houston household spends \$9566 per year (or 20.1% of its income) on transportation-related expenses, more than its counterparts in all but one of America's large metropolitan areas.³¹

Thus, Houston's reputation as a poster child for sprawl is richly deserved.

III. ZONING WITHOUT ZONING: OR, HOUSTON'S REGULATIONS AND THEIR RESULTS

"Houston has no zoning and it also suffers from urban sprawl."³² It could thus be argued that a causal relationship exists between Houston's sprawl and its

contains over three million people). See TEXAS TRANSPORTATION INSTITUTE, 2003 URBAN MOBILITY STUDY, EXHIBIT A-1, available at <http://mobility.tamu.edu/ums/report> (last visited Jan. 11, 2004) (listing density statistics for various urbanized areas) [hereinafter TTI STUDY]; Greg Lacour & Megan Twohey, *Growth Spreads Out For Rural Charm, City Comfort*, CHARLOTTE OBSERVER, Apr. 20, 2003, at 1V, available at 2003 WL 17750224 (explaining that Census defines "urbanized area" as an area with "a core of at least 1,000 residents per square mile, surrounded by areas with at least 500 people per square mile"); Debra Lynn Bassett, *Ruralism*, 88 IOWA L. REV. 273, 286 (2003) (same).

28. See Lucas Wall, *Bicyclists, Officials Push Pedaling*, HOUSTON CHRON., May 17, 2003, at A31, available at 2003 WL 3259951.

29. See 2002 ABSTRACT, *supra* note 24, at 36-38 (indicating that New York, Chicago and Los Angeles only cities more populous than Houston); Beth Barrett, *Commutes Eat Up More Time in L.A.*, L.A. DAILY NEWS, Nov. 20, 2001, at N1, available at 2001 WL 6073379 (stating that 9% of Los Angeles residents use public transit); Rob Bhatt, *RTC Asks Planners for Rail Rethink*, LAS VEGAS BUSINESS PRESS, Aug. 3, 1998, at 1, 1998 WL 9786736 (stating that 53.4% of New York City residents take public transit to get to work); Jacky Grimshaw, Editorial, *Public Transit Serves More than Just the Poor*, CHI. SUN-TIMES, Sept. 28, 1995, at 32, available at 1995 WL 6673059 (stating that one-third of Chicago residents use public transit).

30. U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., HIGHWAY STATISTICS 2001, TABLE HM-72, available at <http://www.fhwa.dot.gov/ohim/hs01/hm72.htm> (last visited March 3, 2003) [hereinafter HIGHWAY STATISTICS]. The only regions with higher per capita daily vehicle miles traveled are Binghamton, New York; Newburgh, New York; and Sherman-Denison, Texas—all regions much smaller than Houston. *Id.*; see 2002 ABSTRACT, *supra* note 24, at 32-34 (regions not listed as among "Large Metropolitan Areas" with over 250,000 people).

31. SURFACE TRANSPORTATION POLICY PROJECT, TRANSPORTATION COSTS AND THE AMERICAN DREAM—SPENDING TABLE, available at <http://www.transact.org/report.asp?id=225> (last visited Feb. 10, 2004) [hereinafter HOUSEHOLD SPENDING]. Only in Dallas-Fort Worth is transportation spending higher. *Id.*

32. Mukul Verma & Michael Antrobus, *At a Crossroads With a New Urbanist*, GREATER BATON ROUGE BUS. REP., Apr. 29, 1997 at 39, available at 1997 WL 9356512.

lack of zoning,³³ and that Houston's sprawl is solely a result of consumers' preferences. And if land use in Houston was completely deregulated, this argument might be a strong one. But in fact, Houston's city government regulates land use in a wide variety of ways. Houston enacted a subdivision code in 1940,³⁴ when the city was about one-fifth its current size.³⁵ The code's provisions are generally quite similar to regulations enacted in other American cities.³⁶ Houston's regulations and their consequences are discussed below.

A. Minimum Lot Sizes

Until 1998,³⁷ Houston's city code provided that the minimum lot size for detached³⁸ single-family dwellings was 5000 square feet.³⁹ And until 1998,⁴⁰ Houston's government made it virtually impossible for developers to build large numbers of non-detached single-family homes such as townhouses,⁴¹ by requiring townhouses to sit on at least 2250 square feet of land.⁴² As Siegan admits, this law "tend[ed] to preclude the erection of lower cost townhouses"⁴³ and thus effectively meant that townhouses "cannot be built for the lower and lower middle income groups."⁴⁴ Houston's townhouse regulations, unlike its regulations governing detached houses,⁴⁵ were significantly more restrictive than those of other North American cities. For example, town houses may be as small

33. See *supra* note 20 (numerous commentators asserting that absence of zoning causes Houston's sprawl).

34. *Non-Zoning*, *supra* note 9, at 73 (stating that Houston's subdivision code was first adopted in 1940, and three-fourths of city's developed areas subject to code); Kapur, *supra* note 8, at 10052.

35. Houston had 385,000 residents in 1940. See *Non-Zoning*, *supra* note 9, at 72. By contrast, in 2000 Houston had over 1.9 million residents. 2002 ABSTRACT, *supra* note 24, at 36.

36. See *Non-Zoning*, *supra* note 9, at 73 (stating that Houston's regulations "generally common elsewhere in the country"); *Infirmities*, *supra* note 4, at 742 (arguing that Houston's subdivision and traffic regulations "do not seem to vary significantly from those of other cities in its region").

37. See Kapur, *supra* note 8, at 10054; see also *infra* notes 63-68 and accompanying text (discussing 1998 revisions to law).

38. See *infra* notes 41-50 and accompanying text (describing different rules governing townhouses and their practical consequences).

39. See Kapur, *supra* note 8, at 10054.

40. See *infra* note 68 and accompanying text (describing 1998 revisions to law governing townhouses).

41. Townhouses are "units attached side-by-side . . . with no residences above or below." John Handley, *Words to Shop By in Today's Housing Market*, CHI. TRIB., Aug. 22, 1987, at 1, available at 1987 WL 2979597.

42. See *Non-Zoning*, *supra* note 9, at 119.

43. *Id.*

44. *Id.*

45. *Id.* at 102 ("The minimum lot size permitted in new subdivisions is not unusual in a large city.").

as 647 square feet of land in Dallas,⁴⁶ 560 square feet in Phoenix,⁴⁷ and 390 square feet in Toronto, Canada.⁴⁸

Houston's anti-townhouse policy, combined with its minimum lot size requirement for detached houses, effectively meant that almost all single-family development in Houston had to be on a lot of at least 5000 square feet⁴⁹ (which means that single-family areas in Houston could have no more than 8.7 houses per acre).⁵⁰ In fact, Houston has only about 2 households per acre,⁵¹ because portions of Houston are used either for housing on lots larger than the statutory minimum⁵² or for purposes other than housing, such as stores, roads, and industry.⁵³

46. Patricia Long Allbee, *Building Neighborhood from Scratch*, DALLAS MORNING NEWS, Aug. 10, 1998, at 1C, available at 1998 WL 13093722 (describing townhouse development).

47. Cindy Skrzycki, *If You're Looking for a House You Can Afford*, U.S. NEWS & WORLD REPORT, Dec. 5, 1983, at 67 (describing various townhouse developments).

48. See, e.g., *Queensway Project Opens Up*, TORONTO STAR, Nov. 9, 2002, at P12 (Condo Living).

49. See *supra* note 39 and accompanying text.

50. One acre contains 43,560 square feet. See THE WORLD ALMANAC AND BOOK OF FACTS 622 (William A. McGeveran, Jr., ed., 2002 ed.). So if each house in a neighborhood must sit on a 5000 square foot lot, the neighborhood will contain 8.7 such houses per acre (43,560 divided by 5000).

51. I calculate as follows: Houston has 3372 people per square mile. See 2002 ABSTRACT, *supra* note 24, at 37. An acre contains 0.405 hectares and a square mile contains 258.999 hectares. See McGeveran, *supra* note 50, at 623. Because 258.999 divided by 0.405 equals 639.5, a square mile contains 639.5 acres. Thus, Houston has 5.27 people per acre (3372 divided by 639.5). Because the average Houston household contains 2.67 people, Houston has 1.97 households per acre (5.27 divided by 2.67). See U.S. BUREAU OF THE CENSUS, TABLE DP-1: PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000, available at <http://censtats.census.gov/data/TX/1604835000.pdf> (last visited June 12, 2003) (noting size of average Houston household).

52. See John Williams, *Mayoral Campaign Revs Up In Garage*, HOUSTON CHRON., Jan. 13, 2003, at A15, available at 2003 WL 3229966 (reporting that one mayoral candidate announced his candidacy on 3.8 acre house in city's River Oaks section); Jennifer Frey, *Water Over the Dam*, WASH. POST, Apr. 17, 2002, at C1, available at 2002 WL 19154421 (stating that River Oaks is the "city's priciest neighborhood"). The fact that some people prefer lots larger than the statutory minimum does not mean that Houston's minimum lot sizes are irrelevant to the city's overall density. Inevitably, some people will want more land than the statutory minimum and be able to pay for it. However, if Houston had no minimum lot size ordinance, other people might be willing to pay less money for less land.

53. See *Infirmities*, *supra* note 4, at 735 (stating that less land is devoted to residential occupancy in Houston than in some cities with zoning). Moreover, some areas of Houston are now governed by stricter rules. Since 2001, the Houston city code has allowed the city to set up special low-density "minimum lot size areas" in order to preserve the character of existing neighborhoods and to "prevent high-density construction, such as townhouses, on traditional single-family lots." Martin Hajovsky, *Getting the Ball Rolling*, HOUSTON CHRON., Jan. 31, 2002, at 8, available at 2002 WL 3243352; see HOUSTON, TEX., CODE OF ORDINANCES, § 42-213 (2004) (text of ordinance); Kapur, *supra* note 8, at 10055 (describing law). See also CITY OF HOUSTON, CHAPTER 42: HOUSTON'S LAND DEVELOPMENT ORDINANCE, available at <http://www.ci.houston.tx.us/departments/planning/download/chap42.pdf> (last visited Feb. 25, 2004) (describing similar rule allowing neighborhoods to create uniform setbacks from street).

Houston's government-created low density effectively forces Houstonians into their cars, because densities of at least seven to fifteen dwelling units per acre are typically necessary to support significant public transit use.⁵⁴ In areas with lower density, very few people will live within walking distance of a bus or train stop, which in turn means that very few people can conveniently use a bus or train.⁵⁵ Indeed, Houston's own politicians (including two former mayors) have repeatedly argued that Houston's low density makes improved public transit impractical.⁵⁶ By contrast, more compact neighborhoods increase transportation choices because more people in an area means more potential riders within a short walking distance of a bus or train stop.⁵⁷

In addition to reducing transit use, anti-density regulations reduce the overall walkability of a neighborhood. In neighborhoods designed for pedestrians as well as motorized transportation, the majority of the population lives within a short walk of the center of the neighborhood.⁵⁸ If each lot in the neighborhood

[hereinafter Chapter 42]. The city council may establish such a minimum lot size zone if the applicant has demonstrated sufficient neighborhood support and creation of a minimum lot size area will further the goal of preserving prevailing densities. HOUSTON, TEX., CODE OF ORDINANCES, § 42-213(g)(3)-(4) (2004). Thus, the city may freeze neighborhood densities at levels far below 8.7 houses per acre if neighborhood residents support such limits.

54. See, e.g., Robert H. Freilich, *The Land Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 URB. LAW. 547, 552 n.18 (1998) ("Most studies show that residential densities of at least 7-15 dwelling units per acre are needed in order to encourage the utilization of public transit."); Reid Ewing, Richard A. Schieber & Charles V. Zegeer, *Urban Sprawl as a Risk Factor in Motor Vehicle Occupant and Pedestrian Fatalities*, 93 AM. J. PUB. HEALTH 1541, 1542 (9/1/2003) available at 2003 WL 12986698 (stating that 8 housing units per acre is "the lower limit of density needed to support mass transit").

55. See Freilich, *supra* note 54, at 552, 522 n.18 ("[I]n order to effectively encourage transit utilization, a development must be located so that residents are not required to walk a distance of greater than a quarter mile to a transit station" because otherwise "commuters are required to travel too far to transit stations.").

56. See *Houston Divided on Rail Plan*, DALLAS MORNING NEWS, Aug. 30, 1987, at 41A, available at 1987 WL 4622067 (quoting then-mayor Kathy Whitmire that "she opposes building a rail system now because Houston lacks the economic stability and population density to support it"); Bruce Nichols, *Houston Rail Plan Apparently Heading Nowhere*, DALLAS MORNING NEWS, July 26, 1992, at 41A, available at 1992 WL 7130570 (quoting then-mayor Bob Lanier's statement that "Houston is a difficult city in which to make rail work" due to Houston's low density); Eric Hanson, *Voter's Guide: City Council At-Large Races*, HOUSTON CHRON., Oct. 24, 1999, at 3, available at 1999 WL 24260595 (quoting city council candidate's assertion that "Houston's geography and low-density population make [rail service] unfeasible"). Houstonians ultimately rejected these arguments and chose to build a light rail system. See Lozano, *supra* note 5 (noting that system began operation in 2004); *03 Year in Review*, HOUSTON CHRON., Dec. 28, 2003, at 9, available at 2003 WL 68831690 ("[In November 2003], Houston voters approved a \$7.5 billion referendum to extend rail service by 73 additional miles.") [hereinafter *03 Year in Review*].

57. SMART GROWTH NETWORK, GETTING TO SMART GROWTH II: 100 MORE POLICIES FOR IMPLEMENTATION 18 (2003) available at www.smartgrowth.org/library/articles.asp?art=870 (last visited Dec. 19, 2004).

58. Some commentators suggest that the appropriate distance between houses and neighborhood amenities should be about 1/4 mile, or a five-minute walk. See, e.g., Brian W. Ohm

must take up several thousand square feet, this goal cannot easily be met, because if a neighborhood's houses are far apart, fewer houses can be placed within a five-minute walk of shops, jobs or each other.⁵⁹ Thus, minimum lot size requirements reduce the number of people who can walk to errands or jobs.

Minimum lot size requirements and other anti-density regulations also encourage sprawl by encouraging population growth to shift away from Houston's historic core to newer areas (which are typically more thinly populated and automobile-dependent).⁶⁰ When such rules restrict the number of homes that can be built in older, closer-in neighborhoods, builders must go someplace else to house Houston's expanding population⁶¹—and that someplace else is usually rural and suburban areas far from the urban core, because those areas have cheap real estate and few neighbors to object to development.⁶²

In 1998,⁶³ Houston narrowed the scope of its minimum lot size ordinance: the 5000-square-foot minimum now applies only to “suburban” areas,⁶⁴ defined as areas outside Interstate Highway 610,⁶⁵ a highway which encircles, and is about five miles from, downtown Houston.⁶⁶ In “urban areas,” by contrast, the

& Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 URB. LAW. 783, 792 (2003) (arguing that ordinances authorizing pedestrian-friendly “new urbanist” style of development typically require “neighborhood focal points, such as the neighborhood center, [be] within a five-minute walking distance (or one-quarter mile) of the majority of residents”); Andres Duany & Emily Talen, *Making the Good Easy: The Smart Code Alternative*, 29 FORDHAM URB. L.J. 1445, 1447 (2001-2002) (“If urban areas were oriented around the mobility pattern of the pedestrian, the neighborhood unit would be generally organized within a quarter mile radius and would contain. . . structures that meet the essential daily needs of residents, such as parks, schools and stores.”).

59. Cf. Ohm & Sitkowski, *supra* note 58, at 792 (arguing that new urbanist developments “compact”—that is, in such developments lot sizes are “smaller than allowed under conventional zoning”).

60. See Michael B. Gerrard, Trends & Insights, *Environmental Justice and Natural Areas Protection*, 15 NAT. RESOURCES & ENV'T 44, 46 (2000) (stating that where government regulation prevents building in older cities, “new developments are chased from the cities and into the automobile-dependent hinterlands”); Bennett Roth, *Transit Agenda*, HOUSTON CHRON., October 1, 1990, at 9, available at 1990 WL 6620216 (reporting that in Houston's newer areas, mass transit is rare).

61. See TTI STUDY, *supra* note 27, at Exhibit A-1 (indicating the population of Houston's urbanized area grew by 41% between 1982 and 2000).

62. See *Conserving*, *supra* note 9, at 294 (pointing out that overregulation in urban core encourages developers to build in “the places of least resistance, where opposing political pressures are absent or limited...[and] [t]he most likely areas for this to occur will be those of small population, principally the more rural and outlying sections,” thus causing “all of the problems and detriments that come with ‘urban sprawl’”); Allan Turner, *High on Downtown*, HOUSTON CHRON., Oct. 22, 2000, at 1, available at 2000 WL 24520362 (stating that “cheap suburban land” was a cause of Houston's sprawl and of downtown Houston's decline); John Williams, *Downtown: Betting on the Future*, HOUSTON CHRON., Oct. 12, 1997, at 6, available at 1997 WL 13071122 (writing that Houston is a “city that [has] always pushed toward cheap virginland in the suburbs”).

63. See Kapur, *supra* note 8, at 10054.

64. HOUSTON, TEX., CODE OF ORDINANCES § 42-182(1) (2004).

65. HOUSTON, TEX., CODE OF ORDINANCES §§ 42-1, 42-101 (2004).

66. See Lettice Stuart, *Developers Rebuild Area of Downtown Houston Into Living Areas*,

minimum lot size is now typically 3500 square feet.⁶⁷ Houston's government also allowed additional townhouse construction by allowing developers in urban areas to build on lots as small as 1400 square feet, but diluted this concession by requiring builders of such units to provide 600 feet of open space.⁶⁸

But the 1998 ordinance has not yet dramatically increased density, for three reasons. First, only 4,588 of Houston's 329,006 owner-occupied housing units (about 1.4% of city dwellings) were built in 1998 or thereafter.⁶⁹ Second, only 25% of Houston residents live in the "urban" zone affected by the 1998 ordinance (that is, the area inside the I-610 highway, commonly known as the "Loop").⁷⁰ In other words, 75% of Houston homeowners live in homes that still must gobble up at least 5000 square feet of land under city law, and many of the other 25% live in homes that were covered by the 5000-square-foot rule when they were built. Third, the 1400-square foot minimum lot size for townhouses, although less restrictive than prior law, is still more restrictive than laws of other North American cities (some of which allow townhouses as small as 390 square feet).⁷¹ Thus, townhouse developments may not be as compact in Houston as in other North American cities.

So even after the 1998 reforms, Houston's minimum lot size ordinance makes Houston more sprawling by preventing the free market from responding to consumers' possible demand for compact development.

B. Minimum Parking Requirements and Setbacks: Houston's One-Two Punch Against Pedestrians

Virtually every structure built in Houston must, under municipal law, have an ample supply of parking. For example:

THE JOURNAL RECORD, Apr. 18, 1997, at 1997 WL 14390575.

67. HOUSTON, TEX., CODE OF ORDINANCES § 42-183(a) (2004).

68. HOUSTON, TEX., CODE OF ORDINANCES §§ 42-184, 42-185 (2004). *See also* Kapur, *supra* note 8, at 10054 (describing 1998 law). These ordinances are not specifically limited to townhouses. However, Houston's 1998 ordinance, HOUSTON, TEX., CODE OF ORDINANCES sec. 42-1, makes no explicit distinction between townhouses and detached houses, and houses under 2000 square feet are frequently townhouses. *See Non-Zoning, supra* note 9, at 119 (noting that townhouses often take up 1300-1600 square feet of land).

69. *See* U.S. CENSUS BUREAU, AMERICAN FACTFINDER, QUICK TABLES, TABLE QT-H7, HOUSTON, TEXAS, *available at* <http://www.factfinder.census.gov> (accessed from homepage by selecting Housing, entering Houston, TX as the geographic location, and selecting Year Structure Built under Housing Status) (last visited Jan. 21, 2004). In addition, 6.6% of city homes were built before 1940, *id.*, the year Houston enacted its subdivision ordinance. *See Non-Zoning, supra* note 10, at 73.

70. *See* Bennett Roth, *Urban and Suburban Houston: A Tale of Two Cities*, HOUSTON CHRON., July 7, 1991, at 1, *available at* 1991 WL 3928158 (stating that only 408,000 of Houston's then-1.6 million inhabitants lived inside I-610 "Loop"); *supra* notes 64-66 and accompanying text (noting that Loop is boundary between "urban" and "suburban" zones under city law).

71. *See supra* notes 46-48 and accompanying text.

*Apartment buildings must provide 1.25 parking spaces for each efficiency apartment, and 1.33 parking spaces for each 1 bedroom apartment.⁷² So even though 17% of Houston renters do not even own one car,⁷³ landlords must supply more than one parking space for every tenant.

*Single-family homes must be on lots large enough to “[e]nsure that two vehicles per dwelling unit can be parked entirely on the lot.”⁷⁴

*Office buildings must provide 2.5-2.75 parking spaces for every 1000 square feet of floor area.⁷⁵

*Hospitals must provide 2.2 spaces for each bed.⁷⁶

*Supermarkets must provide 5 spaces per 1000 square feet of gross floor area.⁷⁷

*Shopping centers must provide 4-5 spaces (depending on their size) per 1000 square feet of gross floor area.⁷⁸

*Despite the well-known dangers of drunk driving,⁷⁹ Houston bars must accommodate drinking drivers by providing 10 parking spaces per 1000 feet of gross floor area.⁸⁰

Thanks to Houston’s “building line” or “setback” requirements,⁸¹ Houston’s sea of government-mandated parking is usually in front of most buildings.⁸²

72. HOUSTON, TEX., CODE OF ORDINANCES § 42-234(a) (2004).

73. U.S. CENSUS BUREAU, AMERICAN FACTFINDER, TABLE HCT32, HOUSTON, TEXAS, TENURE BY VEHICLES AVAILABLE, *available at* <http://factfinder.census.gov> (accessed from homepage by selecting Data Sets, Census 2000 Summary File 4, Detailed Tables, and Houston city, TX as a “Place”) (last visited Jan. 21, 2004) (indicating also that 66,916 of 389,225 renters have no car).

74. HOUSTON, TEX., CODE OF ORDINANCES § 42-180(4) (2004).

75. HOUSTON, TEX., CODE OF ORDINANCES § 26-21 (2004) (requiring 2.5 parking spaces per 1000 square feet of GFA or 2.75 per 1000 square feet of UFA); HOUSTON, TEX., CODE OF ORDINANCES § 26-2 (2004) (clarifying abbreviations by defining “GFA” as “gross floor area” and “UFA” as “usable floor area”—that is, “the gross floor area of a structure excluding lobbies, hallways, restrooms, elevators, stairwells, mechanical shaft or vertical penetrations, atriums, mechanical rooms and service rooms”).

76. HOUSTON, TEX., CODE OF ORDINANCES § 26-21 (2004).

77. *Id.*

78. *Id.*

79. *See* Michigan Dep’t of State Police v. Sitz, 496 U.S. 444, 451 (1990) (“Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage.”) (citation omitted).

80. HOUSTON, TEX., CODE OF ORDINANCES § 26-21 (2004).

81. *See* HOUSTON, TEX., CODE OF ORDINANCES § 42-1 (2004) (defining “building line requirement” as “minimum required distance from an easement or a property line adjacent to a street or private street in which no improvements requiring a building permit can be constructed on the property”); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (defining “set-back requirement” ordinance as requiring owner to “set his building back from the street line of his lot”).

82. *See* Julie Mason, *Urban Reviewal*, HOUSTON CHRON., Aug. 18, 1997, at 1, *available at* 1997 WL 13057147 (reporting that because Houston law “generally requires a building to be set back at least 25 feet from the street or sidewalk. . . most shopping centers and restaurants are

Houston's city code generally requires that structures abutting major thoroughfares⁸³ be at least⁸⁴ 25 feet from the street.⁸⁵ Because parking lots are a common use for land that cannot be used for buildings,⁸⁶ this ordinance effectively requires that a pedestrian walking into an apartment building, office or store must walk through at least 25 feet of parking first. Houston's combination of mandatory setbacks and mandatory off-street parking makes Houstonians more automobile-dependent, for three reasons. First, Houston's ocean of parking lots discourages walking. Parking lots in front of buildings lengthen pedestrians' commutes by increasing the distance between streets and destinations such as offices and shops,⁸⁷ and may even endanger pedestrians by forcing them to reach buildings by walking through driveways and parking lots which they must share with cars.⁸⁸ Even if Houston's parking lots created no tangible danger or inconvenience for pedestrians, off-street parking would still

designed with parking out front, creating a strip mall effect"); JAMES HOWARD KUNSTLER, *HOME FROM NOWHERE* 138 (Simon & Schuster 1996) (writing that setback laws generally "keep buildings far away from the street in order to create parking lots all around the building"). Cf. Freilich, *supra* note 54, at 554 (where setbacks reduced and buildings closer to street, parking lots typically in rear of buildings). I note that even if no setback rules existed, most Houston parking lots would typically be aboveground because aboveground parking is cheaper than underground parking. See Donald C. Shoup, *The Trouble With Minimum Parking Requirements*, available at <http://vtpi.org/shoup.htm> (last visited June 4, 2003) (arguing that aboveground parking costs builders \$10,000 per space, while underground parking can cost as much as \$25,000 per space).

83. A "major thoroughfare" is a street designated as such in a "major thoroughfare and freeway plan" approved by the Houston city council. HOUSTON, TEX., CODE OF ORDINANCES § 42-1 (2004).

84. HOUSTON, TEX., CODE OF ORDINANCES § 42-150(b) (2004) (explaining that city's setback requirements "are minimum standards").

85. HOUSTON, TEX., CODE OF ORDINANCES § 42-152 (2004). See also HOUSTON, TEX., CODE OF ORDINANCES § 42-157 (2004) (establishing 25 foot setback rule for some houses). The city allows smaller setbacks for buildings in downtown Houston, for commercial buildings not on major thoroughfares, and for commercial buildings on major thoroughfares if they are (1) within the city's urban area, and (2) on a street with less than an 80-foot right of way. HOUSTON, TEX., CODE OF ORDINANCES §§ 42-151(a), 42-151(c), 42-155 (2004). Because sec. 42-112 requires major streets generally to have a 100-foot right of way, the last exemption is quite narrow, and most buildings on major streets must still have a 25-foot setback. Cf. Mike Snyder, *New Concept Promoted for City Planning*, HOUSTON CHRON., Feb. 21, 2003, at 25, available at 2003 WL 3239264 ("[A]ll of Main Street except the downtown segment falls under a city rule requiring buildings be set back 25 feet from the street."). Moreover, the setback amendments do not affect the minimum parking requirements discussed above. See *supra* notes 72-80 and accompanying text.

86. See *supra* note 82 and accompanying text.

87. See Freilich, *supra* note 54, at 557 (arguing that "large expanses of asphalt devoted to parking often discourages pedestrian mobility" and makes public transit inconvenient by impeding walking to and from transit stations); Douglas G. French, *Cities Without Soul: Standards for Architectural Controls with Growth Management Objectives*, 71 U. DET. MERCY L. REV. 267, 280 (1993-1994) ("[P]arking lots are inconvenient and inhospitable to pedestrians.").

88. See Gregory Smith, *Two Buildings Face Wrecking Ball for More Parking Space*, PROVIDENCE JOURNAL, Nov. 4, 2002, at B1, available at 2002 WL 22528319 ("[P]arking lots. . . force pedestrians to dodge vehicles crossing the sidewalk.").

discourage walking by creating landscapes which are visually unappealing for pedestrians. An Environmental Protection Agency report states that where buildings are set back behind yards of parking rather than being “flush with the sidewalk,”⁸⁹ a pedestrian “has less to look at [and] feels more isolated.”⁹⁰ By contrast, “small setbacks and shopfront windows provide more interesting scenery for pedestrians, and create a feeling of connection between the buildings and the public spaces bordering them.”⁹¹

Second, minimum parking requirements and setback laws reduce the density of population (when applied to apartment buildings) and jobs (when applied to businesses)—which in turn makes Houstonians more automobile-dependent, because, as noted above, low-density areas tend to be highly automobile-dependent.⁹² When land is devoted to parking, it is not available for housing, offices, shops or other uses. Thus, a developer cannot build as many apartments, offices or stores in an area with minimum parking requirements and setback laws as he or she could build in the absence of government regulation.⁹³ A case study from Oakland, California, shows how minimum parking requirements can reduce density. In 1961, Oakland enacted an ordinance requiring apartment houses to provide one off-street parking space per dwelling unit for all apartments developed after that date⁹⁴—a requirement less onerous than that of Houston, which requires more than one parking space per apartment even for the smallest

89. REID EWING, PEDESTRIAN- AND TRANSIT-FRIENDLY DESIGN: A PRIMER FOR SMART GROWTH 10, available at http://www.epa.gov/smartgrowth/pdf/ptfd_primer.pdf (last visited June 12, 2003). See also French, *supra* note 87, at 278-79 (noting that one city imposes maximum setback of 5 feet for commercial buildings in order “to promote small-town sociability”).

90. EWING, *supra* note 89, at 10. See also TRANSPORTATION AND GROWTH MANAGEMENT PROGRAM, MAIN STREET . . . WHEN A HIGHWAY RUNS THROUGH IT: A HANDBOOK FOR OREGON COMMUNITIES 68 (1999), available at <http://www.lcd.state.or.us/LCD/TGM/publications.shtml> (last visited Feb. 17, 2004) [hereinafter MAIN STREET] (“Setting buildings back or allowing parking between the building entrance and sidewalk creates . . . a ‘no man’s land’ with little visual interest.”); Amy Sutherland, *Push For “New Urbanism”*, PORTLAND PRESS HERALD, Jan. 1, 1998, at 1A, available at 1998 WL 2479621 (stating that setbacks cause streets to seem “vast” and “unfriendly looking”); Smith, *supra* note 88 (writing that parking lots are “unsightly”).

91. French, *supra* note 87, at 280.

92. See *supra* notes 54-59 and accompanying text.

93. And if minimum parking requirements are calculated on a “per unit” basis (e.g. X parking spaces for each apartment, hotel room or store), developers may be tempted to reduce density still further by building fewer but larger structures in order to install fewer parking spaces. For example, if a developer is forced by municipal law to supply one parking space per apartment, he will be forced to install fewer parking spaces if he builds one hundred 1000 square-foot apartments than if he builds one hundred twenty-five 800 square-foot apartments. See Shoup, *supra* note 82. Houston’s regulations governing parking for apartments are on a “per unit” basis, and thus reduce density in this respect. See *supra* note 72 and accompanying text (describing Houston ordinances that require a set number of parking spaces per apartment).

94. See Donald C. Shoup, *An Opportunity to Reduce Minimum Parking Requirements*, 61 J. AM. PLAN. ASS’N 14, 24 (1995), available at 1995 WL 12344755.

apartments.⁹⁵ As a result of Oakland's parking law, the number of units per acre in new apartment buildings fell by 30%.⁹⁶

Third, Houston's parking and setback laws⁹⁷ encourage developers to provide motorists with free parking, which in turn encourages driving. When builders are forced by a city government to provide more parking than a free market would create, the total supply of parking spots increases, which in turn drives the market price of parking down—often to zero.⁹⁸ In reality, such “free” parking is of course not free, because landowners must spend at least \$10,000 for each parking space (including the loss of rent that landowners could have charged for the land in the absence of minimum parking requirements).⁹⁹ In turn, landowners pass at least some of the cost of parking on to society as a whole through higher prices for goods and services.¹⁰⁰ It follows that minimum parking requirements constitute a government-mandated transfer of wealth from nondrivers to drivers, and thus encourage driving and discourage other forms of commuting.

In sum, Houston's parking and setback laws inconvenience pedestrians to forcing them to walk through parking lots to reach businesses and other destinations, make Houston more sprawling and automobile-dependent by reducing density, and subsidize driving by encouraging landowners to install free parking.

C. Wide Streets

The Houston city code provides, subject to certain exceptions,¹⁰¹ that major thoroughfares¹⁰² must have a 100 feet right-of-way,¹⁰³ and all other streets must

95. See HOUSTON, TEX., CODE OF ORDINANCES § 26-21 (2004).

96. See Shoup, *supra* note 94, at 24-25.

97. I note that the setback law, standing alone, would encourage businesses to create off-street parking in front of buildings even if no minimum parking requirements existed. If no setback law existed, businesses could place buildings, lawns or parking lots in the 25 feet of their property closest to the street. Houston's setback law eliminates the first of these options, thus increasing the chances that a parking lot will be installed.

98. See Richard W. Wilson, *Suburban Parking Requirements: A Tacit Policy for Automobile Use and Sprawl*, 61 J. AM. PLANNING ASS'N 29, 34 (1995), available at 1995 WL 12344761 (explaining effect of minimum parking laws upon parking supply); Shoup, *supra* note 94, at 15 (stating that 93% of Houston-area commuters park for free).

99. See Shoup, *supra* note 82.

100. See Shoup, *supra* note 94, at 24-25 (arguing that “[m]inimum parking requirements can make parking appear free, but the cost does not disappear; rather, it reappears as higher costs for all other goods and services,” as, for example, in Oakland, California where minimum parking requirements raised construction costs by 18% per dwelling).

101. See HOUSTON, TEX., CODE OF ORDINANCES § 42-123 (2004) (listing numerous streets not subject to street width rules, and providing that streets in central business district not subject to such rules).

102. A “major thoroughfare” is a street designated as such in a “major thoroughfare and freeway plan” approved by the city council. HOUSTON, TEX., CODE OF ORDINANCES § 42-1

generally have 50-60 feet rights-of-way.¹⁰⁴ Because Houston sidewalks are typically either 4 feet wide¹⁰⁵ or are nonexistent,¹⁰⁶ the practical result of this ordinance is that some of Houston's major streets are 90 or 100 feet wide,¹⁰⁷ while other streets can be up to 60 feet wide. By contrast, most American streets are 32 to 36 feet wide,¹⁰⁸ and some municipalities allow commercial streets as narrow as 30 feet wide¹⁰⁹ and residential streets as narrow as 18 or 20 feet wide.¹¹⁰

Houston's wide streets are difficult (and perhaps even dangerous)¹¹¹ for

(2004).

103. HOUSTON, TEX., CODE OF ORDINANCES § 42-122 (2004).

104. *Id.* For example, a collector street, defined as a street distributing traffic between major thoroughfares and other streets, must have a 60 feet right-of-way or a 50 feet right-of-way if "both sides of the collector street consist of single-family residential lots that do not have driveway access to the collector street." *Id.* All other streets must be 50 feet right-of-way if "adjacent to exclusively single-family residential lots" and 60 feet right-of-way otherwise. *Id.*

105. See Ralph Bivens, *New Urbanism Walks Away from Automobiles*, HOUSTON CHRON., May 18, 2003, at 8, available at 2003 WL 3260023 (noting that in one new Houston subdivision, "sidewalks are 5 feet wide instead of the typical 4 feet") (emphasis added).

106. See Melanie Markley, *Walking At Their Own Risk*, HOUSTON CHRON., Aug. 23, 2002, at 27, available at 2002 WL 23218224 (reporting that many Houston schoolchildren "have to cross busy four-lane streets and walk along roads that have no sidewalks"); JOHN I. GILDERBLOOM, CREATING THE ACCESSIBLE CITY, available at http://www.louisville.edu/org/sun/housing/cd_v2/Bookarticles/Ch1.htm (last visited Feb. 10, 2004) (stating that 60% of disabled and elderly persons who do live near bus stop do not have sidewalks between residence and bus stop).

107. See Dan Feldstein, *High-Style, Wide and Handsome*, HOUSTON CHRON., June 12, 1998, at 28, available at 1998 WL 3582858 ("Main Street [in downtown Houston] is 90 feet [wide], and Texas Avenue is 100 feet [wide].").

108. See Richard Colby, *How Narrow a Street is Safe, Officials Ask*, PORTLAND OREGONIAN, Aug. 21, 2000, at D2, available at 2000 WL 5425753 ("Since World War II, the customary width for residential streets has been 32 to 36 feet."); Peter Swift, *Residential Street Typology and Injury Accident Frequency*, available at <http://www.sierraclub.org/sprawl/articles/narrow.asp> (visited June 27, 2003); Alan B. Coden, *Narrow Streets Database*, available at <http://www.sonic.net/abcaia/narrow.htm> (last visited June 27, 2003) ("[T]he typical local street has grown to a width of 36'.").

109. See *Creating Quality Places, Case Study of I'On Village*, available at http://qualityplaces.marc.org/4a_studies.cfm?Case=38 (last visited Jan. 28, 2004) [hereinafter *Quality Places*] (describing new development in South Carolina).

110. See TODD LITMAN, *TRAFFIC CALMING BENEFITS, COSTS AND EQUITY IMPACTS 3*, available at <http://www.vtpi.org/calming.pdf> (last visited July 2, 2003) [hereinafter *TRAFFIC CALMING*] (listing various municipalities' street widths, and noting that Portland allows 20-foot streets in lower-density areas). In fact, one new development in Columbia, South Carolina has streets that are only 14 feet wide. See Mike Ramsey, *Neo-Traditional Trend Catches On*, THE STATE, Aug. 19, 2002, at 1, available at 2002 WL 23324909. Cf. Coden, *supra* note 108 (stating that before World War II, most neighborhood streets were 28-30 feet wide).

111. Only six of America's metropolitan areas (Orlando, Tampa, West Palm Beach, Memphis, Jacksonville, and Miami) have higher pedestrian fatality rates than Houston. See SURFACE TRANSPORTATION POLICY PROJECT, *MEAN STREETS 2002* 8, available at <http://transact.org/report.asp?id=202> (last visited Dec. 19, 2004) (listing Houston the seventh highest on the "Pedestrian Danger Index" in the nation; rankings based on average yearly

pedestrians to cross, because “a wider roadway takes longer to cross thus increasing the amount of time the pedestrian is exposed to traffic.”¹¹² Wide streets may also endanger pedestrians by encouraging motorists to drive faster,¹¹³ thus increasing the number and severity of accidents. A motorist driving at high speeds has difficulty noticing the surrounding environment; a motorist driving 30 miles per hour has a field of vision spanning approximately 150 degrees, while a motorist driving 60 miles per hour has a field of vision of only 50 degrees.¹¹⁴ Thus, the faster driver may have difficulty perceiving that a pedestrian is crossing the street, and may be unable to slow down in time to avoid an accident once he or she notices the pedestrian.¹¹⁵ And car crashes are more lethal as cars go faster: the probability of a pedestrian being killed by an automobile is only 3.5% when the auto is traveling at 15 miles per hour, increases to 37% if the auto is traveling 31 miles per hour, and jumps to 83% if the auto is traveling 44 miles per hour.¹¹⁶ And by taking up street space, wide streets reduce the amount of land available for housing and commerce, thus reducing residential and employment density, thus increasing automobile dependence.¹¹⁷ A University of Wisconsin study showed that in one Wisconsin county, each ten feet of required street width reduced the county’s housing supply by three to four percent.¹¹⁸

In sum, Houston’s wide streets, like that city’s setbacks and minimum parking requirements, make Houston less walkable and more auto-oriented—both by making pedestrian journeys more difficult and dangerous, and by reducing density.

pedestrian fatalities per capita, adjusted for frequency of walking as measured by share of workers walking to work).

112. *Donovan v. Jones*, 658 So.2d 755, 765 (La. Ct. App. 1995) (quoting expert testimony). See also Freilich, *supra* note 54, at 557 (stating that narrower streets are easier for pedestrians to cross).

113. See Stephen H. Burrington, *Restoring the Rule of Law and Respect for Communities in Transportation*, 5 N.Y.U. ENVTL. L.J. 691, 701, 725 (1996) (blaming “larger roads” on “solicitude toward fast traffic” and asserting that “narrowed lanes” slow traffic); Thomas Hylton, *Put it in Park*, SUNDAY PATRIOT-NEWS HARRISBURG, Mar. 16, 2003, at D1, available at 2003 WL 3193226 (arguing that “wide streets encourage speeding” and, indeed, goal of adding lanes was to “speed traffic flow”).

114. Burrington, *supra* note 113, at 704 n.50.

115. *Id.* For example, one study of police accident reports showed that 36-foot streets had 1.21 accidents per mile per year, while 24-foot streets had 0.32 accidents per mile-year. Swift, *supra* note 108. See also TRAFFIC CALMING, *supra* note 110, at 7 (“Each 1-mph traffic speed reduction typically reduces vehicle collisions by 5%.”).

116. See Burrington, *supra* note 113, at 704. See also TRAFFIC CALMING, *supra* note 110, at 7; Andy Hamilton, *Driving Pedestrians Into Extinction*, SAN DIEGO UNION-TRIBUNE, June 1, 2001, at B9, available at 2001 WL 6463882 (citing similar statistics).

117. *Cf. supra* notes 92-96 and accompanying text (explaining that regulations requiring use of land for parking and setbacks reduces land available for housing and jobs, thus reducing population and employment density and thereby fostering automobile dependence).

118. See Michele Derus, *Zoning Can Curb Lower-Cost Housing*, MILWAUKEE JOURNAL-SENTINEL, Sept. 21, 1997, at 1, available at 1997 WL 12748753.

D. Long Blocks

The Houston city code provides that “intersections along a major thoroughfare shall be spaced a minimum of 600 feet apart.”¹¹⁹ By contrast, a federal report on pedestrian-friendly design recommends that “[f]or a high degree of walkability, block lengths of 300 feet, more or less, are desirable.”¹²⁰

Houston’s long, intersection-free blocks deter walking in two ways. First, a block with few intersections gives pedestrians few places to safely cross the street.¹²¹ Second, long blocks create less potential than shorter blocks for “direct routing.”¹²² that is, if blocks are long, pedestrians cannot easily travel to parallel streets by taking a quick left or right turn on a side street to their destination, but instead must go out of their way to visit the end of a block, then turn onto the parallel street, then backtrack to reach their destination.

E. Enforcing Separation of Uses

On first glance, Houston’s laws governing separation of land uses appear to be less restrictive than those of other American cities. Many American cities prohibit the creation of businesses or shops in residential zones, and vice versa.¹²³ Such “single use zoning”¹²⁴ often prevents houses and apartments from being within walking distance of employers or shops, thus preventing Americans from walking to jobs or shops,¹²⁵ in turn creating cities in which “[v]ery few people can simply walk to the local grocer Even if you are going to purchase a single item and the store is very close by, it is normally a car trip away.”¹²⁶

119. HOUSTON, TEX., CODE OF ORDINANCES § 42-127(b) (2004).

120. EWING, *supra* note 89, at 4. *See also* MAIN STREET, *supra* note 90, at 35 (suggesting 200-400 foot blocks).

121. MAIN STREET, *supra* note 90, at 35 (“Short blocks are desirable because. . . [p]edestrians have frequent opportunities to cross streets”); EWING, *supra* note 89, at 4 (“[M]ore intersections mean more places where cars must stop and pedestrians can cross.”).

122. EWING, *supra* note 89, at 4. Shorter blocks also benefit motorists by giving them more side streets to travel on, which means that drivers have a wider range of options for driving and on-street parking. *See* MAIN STREET, *supra* note 90, at 35. And if drivers have more chances to park on the street, there is less demand for off-street parking, and government has less reason to enact minimum parking requirements. *See* Part III-B and accompanying text (criticizing such requirements).

123. *See* Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1091 (1996) (referring to “current zoning laws- virtually all of which now mandate the separation of different areas by function”).

124. *See* Terry J. Tondro, *Sprawl and Its Enemies: An Introductory Discussion of Two Cities’ Efforts to Control Sprawl*, 34 CONN. L. REV. 511, 514 (2001) (“single use zoning” is “the designation of separate land areas for different uses”).

125. *See* Lewyn, *supra* note 7, at 331 (“absent a zoning variance, walkable traditional neighborhoods are [often] outlawed . . . because every activity demands a separate zone of its own; people cannot live within walking distance of shopping, and offices cannot be within walking distance of either”).

126. Tondro, *supra* note 124, at 517; *Cf.* Siegan, *supra* note 9, at 90 (pointing out that

By contrast, Houston has no zoning code explicitly prohibiting the mixing of residential and commercial uses,¹²⁷ with the exception of an ordinance prohibiting single-family residences from being located on major thoroughfares.¹²⁸ Instead, Houstonians separate homes from businesses through restrictive covenants that specify the appropriate use for each lot in a subdivision, and enable every lot owner to sue in the event of a violation.¹²⁹ Because such covenants are created by contract rather than by government officials, it could be argued that to the extent residential and commercial uses are segregated in Houston, such segregation is a result of the free market.¹³⁰

But in Houston, restrictive covenants are so heavily facilitated by government involvement that they resemble zoning regulation almost as much as they resemble traditional contracts.¹³¹ Houston's city code, unlike that of most American cities,¹³² allows the city attorney to sue to enforce restrictive covenants.¹³³ The city may seek civil penalties of up to \$1,000.00 per day for violation of a covenant.¹³⁴ Thus, Houston forces its taxpayers to subsidize enforcement of restrictive covenants¹³⁵ even when litigation is too costly for individuals to pursue.¹³⁶ In its covenant litigation, the city focuses on enforcement of use restrictions (that is, covenant provisions requiring separation of uses), as opposed to enforcement of other restrictions such as aesthetic

separation of uses harmful to persons without automobiles, because "for the family that does not own an automobile, the existence of a nearby grocery store . . . may be a great convenience").

127. See Siegan, *supra* note 4, at 734 ("No laws prohibit the erection of buildings containing both residential and commercial uses.")

128. HOUSTON TEX CODE, § 42-189(b) (1999).

129. See Siegan, *supra* note 4, at 742.

130. *Id.*

131. See Kapur, *supra* note 8, at 10049 (discussing city support of covenants). I note, however, that even in other cities, restrictive covenants are widespread because federal officials have encouraged their creation. See Siegan, *supra* note 9, at 80 (noting that the Federal Housing Administration recommends restrictive covenants even in areas with zoning). Cf. Florence Wagman Roisman, *Teaching About Inequality, Race and Property*, 46 ST. LOUIS U. L.J. 665, 678-79 (2002) (pointing out that in the 1930s and 1940s, the Federal Housing Administration encouraged covenants that barred African-Americans from neighborhoods).

132. Kapur, *supra* note 8, at 10049 ("a municipality that is not a party to restrictive covenants generally may not enforce them"); See also Shibata, *supra* note 8, at 232-33.

133. HOUSTON TEX CODE, § 10-443 (1998).

134. HOUSTON TEX CODE, § 10-552(a) (1994) (listing penalties); HOUSTON TEX CODE, § 10-553(b) (1994) (authorizing city attorney to seek such penalties).

135. See Kapur, *supra* note 8, at 10050 (noting that city bears expenses of litigation). Houston also refuses to issue building permits to structures that violate restrictive covenants (HOUSTON TEX CODE, § 10-3(a) (2001)), and encourages covenant creation by allowing covenants to be created by a mere majority vote of subdivision residents. See Kapur, *supra* note 8, at 10050 n.89. But Houston law is not quite unique in the latter respect: in many states, courts hold that if a common scheme of development is embodied in the majority of subdivision residents' deeds, this scheme is enforceable against individual landowners whose deeds do not contain such covenants. See JOHN G. SPRANKLING, *UNDERSTANDING PROPERTY LAW*, § 34.05[B] (2000).

136. See Siegan, *supra* note 4, at 744 (noting that the city enforces covenants because "enforcement of restrictive covenants can be costly for homeowners").

rules.¹³⁷ By subsidizing enforcement of use restrictions, Houston's city government subsidizes segregation of land uses—and in fact, land uses in Houston are only slightly less segregated than in most cities with zoning codes.¹³⁸ As a result, many Houstonians must, in the words of one local architect, “drive for 10 minutes just to get a quart of milk.”¹³⁹

F. A Note On Spending (Or, How Houston's Highways Have Accelerated Sprawl)

In addition to enacting anti-density land use regulations and mandating anti-pedestrian street design, Houston's government also spent its way to sprawl. Houston's city government built, with ample state and federal support,¹⁴⁰ numerous expressways leading to the city's suburbs and newer areas. While most cities have one circular highway (or beltway) surrounding them, Houston has two¹⁴¹ and may soon build a third.¹⁴² Houston has more overall freeway mileage than other American regions of comparable size. For example, the Houston urbanized area is only about 10% more populous than the Boston urbanized area¹⁴³—yet Houston has almost twice as many lane-miles of freeway (2,460 to Boston's 1,310).¹⁴⁴ Similarly, the Houston region is less than half as populous as Chicago and its suburbs¹⁴⁵—yet Houston has almost as many freeway miles

137. Shibata, *supra* note 8, at 234.

138. See Siegan, *supra* note 4, at 742 (noting that a mix of uses not overly common in Houston); Smart Growth America, *The Sprawl Index: Houston, Texas*, available at http://smartgrowthamerica.org/sprawlindex/factsheet_houston.html (last visited Nov. 23, 2004) (noting that Houston has 52nd lowest level of mixed use out of 83 metropolitan areas studied; thus, residences, jobs and services more mixed in 30 other metro areas than in Houston); Reid Ewing, Rolf Pendall & Don Chen, *Measuring Sprawl and Its Impact*, 20-22, available at <http://smartgrowthamerica.org/sprawlindex/MeasuringSprawl.PDF>, (last visited Nov. 23, 2004) (describing methodology in calculating amount of mixed use within metro areas).

139. Snyder, *supra* note 21 (quoting head of Houston chapter of American Institute of Architects).

140. See Laura Johannes, *Funding Hurts Houston Plan for Highways*, WALL ST. J., Sept. 20, 1995 at T1, available at 1995 WL WSJ 9900569 (describing city's lobbying for state highway funds); John Williams, *Influential PAC Considers Disbanding*, HOUS. CHRON., Nov. 17, 1994, at 29, available at 1994 WL 4602953 (describing city's efforts to obtain state and federal support).

141. *Loopy Loop: Say no to a second beltway*, STAR TRIB., Feb. 24, 2003, at 12A, available at 2003 WL 5529459 (discussing the beltway, which is a circular freeway system surrounding a city). See L. Ling-chi Wang, *Political Mobilization or Donations in American Democracy? The Dilemma of Asian-American Political Participation*, 8 ASIAN-PAC. AM. L.J. 100, 106 n.19 (2002).

142. See Mike Snyder, *Buffalo Bayou Master Plan*, HOUS. CHRON., Jul. 4, 2001, at 35, available at 2001 WL 23612340 (noting that a third beltway, known as the “Grand Parkway,” is planned); Rad Salle, *Road's Hazards*, HOUS. CHRON., Aug. 13, 2000, at 37, available at 2000 WL 24504123 (stating that portions of the “Grand Parkway” are already built).

143. TTI Study, *supra* note 27, at Exhibit A-1 (including tables for individual regions that show that the Houston urbanized area has 3.4 million inhabitants to the Boston urbanized area's 3.0 million).

144. *Id.*

145. *Id.* (Showing that Chicago's urbanized area has just over 8 million residents, as opposed

(2,460 to Chicago's 2,655).¹⁴⁶ Yet Houston's roads are more congested than those of Chicago or Boston.¹⁴⁷

More of the same may be coming. The Houston-Galveston Area Council, the region's transportation planning agency, recently proposed to build 10,703 lane miles of roads, at a cost of \$21.1 billion¹⁴⁸ (not counting the costs of purchasing right-of-way from private landowners).¹⁴⁹ Even if Houston-area governments are unable to raise taxes to support this plan, they will be able to spend \$11.5 billion on roads.¹⁵⁰ Houston's road spending includes plans to make its already-wide surface streets even wider. For example, the Texas Department of Transportation and Houston's county government¹⁵¹ are busy turning Westgreen, a residential street in Houston, into a major thoroughfare by adding entrance and exit ramps to a nearby ten-lane freeway, as well as a freeway overpass.¹⁵² The neighborhood's stop signs will be removed to accommodate the additional traffic—a result that, according to one resident, “will create a race track.”¹⁵³ If this prediction is correct, Westgreen (a street now used by neighborhood children walking to school)¹⁵⁴ will become an extremely unpleasant environment for pedestrians.¹⁵⁵

As a general rule, expressways make it easier for people to move from neighborhoods near a city's central business district to newer, more suburb-like areas.¹⁵⁶ The latter areas typically have low population densities¹⁵⁷ and minimal

to Houston's 3.4 million).

146. *Id.*

147. *Id.* at Exhibits A-4, A-8, and A-10 (noting that Houstonians lose more hours, dollars and fuel per person to congestion than residents of Boston and Chicago areas).

148. See Lucas Wall, *Rail Vote Nov. 4*, HOUS. CHRON., Oct. 26, 2003, at 29, available at 2003 WL 57452613. I note that because the Houston area now has 20,181 miles of roadways, this plan would increase the size of the roadway system by over 50%.

149. *Id.*

150. *Id.* (stating that the region's \$11 billion plan requires the creation of 5,644 miles of new roadway); See also Matt Schwartz, *County Considers Major Additions to Area Tollways*, HOUS. CHRON., Jun. 3, 2003 at 1, available at 2003 WL 3264078 (describing numerous new roads being considered by local government).

151. Harris County includes Houston, and most of the county's population lives in the City of Houston. See McGeveran, *supra* note 50. Harris County includes Houston and has just over 3.4 million people. *Id.* at 459. Houston's population is just over 1.9 million. *Id.* at 439.

152. See Dave Schafer, *Westgreen Expansion Concerns Residents*, HOUS. CHRON., Nov. 13, 2001, at 1, available at 2003 WL 68824602.

153. *Id.*

154. *Id.*

155. See *supra* notes 112-17 and accompanying text (describing adverse impact of wide, fast streets upon pedestrians).

156. See Lewyn, *supra* note 2, at 1048-51; OLIVER GILLHAM, *THE LIMITLESS CITY* 36 (2002) (highways “improved access between city and suburb, making it easier to commute to ever more distant outlying areas”).

157. GILLHAM, *supra* note 156, at 5 (noting that each of the United States's ten largest cities, including Houston, are at least five times as densely populated as their entire metropolitan areas).

transit service,¹⁵⁸ and are therefore inaccessible without a car.¹⁵⁹ Thus, highways shift development from relatively dense downtowns to more automobile-dependent areas on the city's fringe.

The same pattern has evolved in Houston. In Houston, as elsewhere, highways have shifted development to areas near or outside Houston's beltways.¹⁶⁰ By contrast, Houston's older neighborhoods lost population for most of the second half of the 20th century.¹⁶¹ In Houston, as in other cities, newer, highway-created areas tend to be more thinly populated¹⁶² and to have less transit service than older neighborhoods closer to downtown.¹⁶³ In fact, Houston's city code now mandates that housing densities be lower in areas outside the city's I-610 Loop than in neighborhoods closer to downtown Houston.¹⁶⁴ By shifting development outside the Loop, Houston's highway spending makes Houston less compact and more automobile-dependent.

G. Does Government Matter?

It could be argued that government's contribution to Houston's sprawl is minimal because Houston's urban form arises out of Houston's "car culture"—that is, from some sort of regional consumer preference for vehicle-dependent lifestyles that may be more important than government regulation or spending.¹⁶⁵ This argument is essentially a faith-based argument: that is, it is impossible to disprove, because there is no way of isolating the impact of one

158. *Id.* at 7.

159. See Lewyn, *supra* note 2, at 1041 (noting that in many small towns and suburbs, "auto ownership is virtually necessary for a normal life"). *Id.* (citing numerous cases pointing out that auto ownership is necessary in suburbs).

160. See Jerome G. Rose, *Regulating the Use of Land Abutting State Highways: New Jersey's State Highway Access Management Act*, 18 REAL EST. L.J. 288, 288 (1990) (noting that in Houston, as elsewhere, there has been "[e]xtensive development along the highways"); Houston Freeways: A Historical and Visual Journey (Jan. 28, 2004) available at http://www.houstonfreeways.com/preview_ch5.aspx (last visited Nov. 23, 2004) (stating that an area near the west edge of the I-610 Loop became a major "edge city" after that portion of Loop was completed in 1968).

161. See David Kaplan, *Houston Homes*, HOUS. CHRON., Apr. 8, 2001 at 1, available at 2001 WL 3011845.

162. See GILLHAM, *supra* note 156 (noting that Houston's suburbs are less dense than its central city).

163. See Roth, *supra* note 60 (noting that Houston suburbs have minimal transit service); Lucas Wall, *Rail Vote Nov. 4*, HOUS. CHRON., Sept. 19, 2003, at 1, available at 2003 WL 57444162 (noting that Houston's light rail system does not serve areas outside I-610 Loop).

164. See *supra* notes 65-68 and accompanying text.

165. See, e.g., David Kaplan, *Walking Against the Crowd*, HOUS. CHRON., Oct. 26, 2003, at 1, available at 2003 WL 57452578 (stating that some residents of Houston's Midtown neighborhood "want a walkable mix of retail and residential . . . but are up against the suburban car culture that dominates Houston"); Lucas Wall, *2003 Voter's Guide: Metro Referendum*, HOUS. CHRON., Oct. 26, 2003, at 3, available at 2003 WL 57452731 (stating that opponents of light rail expansion argue that "few people will ride light rail. . . because Houstonians love their cars").

specific government policy or set of policies upon Houston's sprawl.

However, poll data suggests that a significant number of Houstonians would prefer a *less* vehicle-dependent lifestyle. A May 2003 survey asked a representative¹⁶⁶ sample of Houstonians: "Would you personally prefer to live in a suburban setting with larger lots and houses and a longer drive to work and most other places, or in a more central urban setting with smaller homes on smaller lots, and be able to take transit or walk to work and other places?"¹⁶⁷ Fifty-five percent of survey respondents chose the "Central urban setting" and only 37% chose the "Suburban setting."¹⁶⁸ It therefore appears that if more pedestrian-friendly neighborhoods were available, Houstonians would flock to them.

Other responses to the 2003 survey support this view. When asked whether it was "Very important," "Somewhat important," "Not very important" or "Not important at all" to have schools and other services within walking distance of their homes, 46% of Houstonians stated that it was "Very important" to have more services within walking distance of home, and 25% stated that it was "Somewhat important."¹⁶⁹ Not surprisingly, 87% of Houstonians favored "Making it easier to walk in the city."¹⁷⁰

And when asked to describe various problems as "Very Great" concerns, "Great" concerns, or as "Somewhat" or "Not at all" of a concern, 60% of Houstonians stated that it was a "Very Great" or "Great" concern that "The city needs more and better sidewalks in many areas," and 49% described inadequate public transportation as a "Very Great" or "Great" concern.¹⁷¹

In sum, most Houstonians would actually like to be able to walk or use public transit to reach shops and jobs, rather than being forced into their cars. It logically follows that in Houston, there may be significant unmet demand for pedestrian- and transit-friendly communities—which in turn means that if government regulation and spending did not favor sprawl, a significant number of Houstonians might choose such communities.

166. The 1002 registered voters surveyed were actually less likely to use public transit than the Houston electorate as a whole: 3% of them used public transit to get to work, as opposed to 5.9% of all Houston commuters. See *Summary of Responses, Blueprint Houston Survey of Registered Voters in the City of Houston: May 2003*, available at http://www.blueprintheouston.org/documents/blueprint_survey_results.doc (visited Feb. 8, 2004) (Question 31) [hereinafter *Summary of Responses*]; Wall, *supra* note 28 (noting that 5.9% of Houstonians commute to work via public transit).

167. *Summary of Responses*, *supra* note 166, at Question 10.

168. *Id.* The remaining respondents were undecided.

169. *Id.* at Question 11.

170. *Id.* at Question 8. Poll respondents also favored expanded public transit. 75% favored adding expanded bus service and 68% favored expanded rail transit. *Id.*

171. *Id.* at Question 5.

IV. IS HOUSTON'S SPRAWL A PROBLEM, AND IF SO, WHAT IS TO BE DONE?

Even if Houston's sprawl is caused by government regulation, it could be argued that it is (1) fundamentally harmless or (2) cannot feasibly be mitigated. The discussion below briefly outlines some of the costs of Houston's sprawl and suggests alternative policies.

A. Why Bother to Change (Or, the Costs of Sprawl)?

Houston's sprawl has contributed to the imposition¹⁷² of a variety of costs upon Houstonians, including:¹⁷³

*Financial costs. Because Houston is so sprawling and automobile-dominated, most jobs are not near bus or rail stops,¹⁷⁴ and most Houstonians must own cars¹⁷⁵ and drive many miles¹⁷⁶ to do their daily errands, which means that they must spend thousands of dollars on cars, gasoline and other automobile-related goods and services. The average household in Houston spends \$9,566 per year on transportation,¹⁷⁷ more

172. I concede that all of the problems discussed below would probably exist to some extent if Houston was as compact and transit-friendly as other cities. But the sheer scale of Houston's automobile dependency makes each of these problems worse. For example, if the average Houstonian drove 18.4 miles per day (the mileage traveled by the average resident of metro Philadelphia) instead of 37.6 miles per day, Houston's streets would be at least somewhat less congested and its air would be at least somewhat less polluted. See Highway Statistics, *supra* note 30 (listing mileage statistics for metropolitan areas).

173. The costs listed below are not, of course, the only possible costs of sprawl. See GILLHAM, *supra* note 156, at 88-91 (stating that sprawl may adversely affect farmland and wildlife); 115-18 (stating that sprawl may adversely affect water quality and obesity); 131-32 (stating that sprawl may cause abandonment of cities). But I have chosen to focus on sprawl-related harms that are especially Houston-specific and/or especially easy to describe or statistically verify. Central city deterioration is not as large a problem in Houston as in other cities, because Houston has managed to annex many of its suburban areas and thus gain population. *Id.* at 139-41. And I have found no evidence that environmental and public health problems other than ozone pollution are more significant in Houston than in other cities.

174. See Houston-Galveston Area Council, 2025 RTP Accessibility Summary 7-9, at <http://www.2025plan.org/info/info.html> (Click on "Accessibility" link to find document) (visited Feb. 10, 2004) (noting that less than 30% of jobs transit-accessible) [hereinafter RTP].

175. See L.M. Sixel, "Living Wage" Push Resurrected at \$10, HOUS. CHRON., Aug. 31, 2001, at 1, available at 2001 WL 23625182 (explaining that the proposed local minimum wage for companies doing business with city was "rounded up [by supporters] to reflect the fact that Houstonians need cars"); Kyle W. Fake, HPD Lists Houston's Most Stolen Vehicles, HOUS. CHRON., June 21, 2000, at 12, available at 2000 WL 4310910 ("One thing that is certain about living in Houston is that you need a car or truck"); Clifford Pugh, Ten years after bottoming out in the oil slump, Houston's a changed town from A to Z, HOUS. CHRON., Aug. 24, 1997, at 6, available at 1997 WL 13058274 ("To get around in this sprawling city, you need a car.")

176. See Highway Statistics, *supra* note 30 and accompanying text (noting that Houstonians drive more than residents of other large cities).

177. See Household Spending, *supra* note 31.

than residents of almost every other major metropolitan area,¹⁷⁸ and over \$3000 per year more than residents of metropolitan Boston (the region with the lowest per-household transportation costs).¹⁷⁹

*Traffic congestion. More driving means more cars on the streets, which means more traffic congestion. According to a study by the Texas Transportation Institute, a state research agency affiliated with Texas A & M University,¹⁸⁰ Houstonians lost thirty-seven hours per person in 2001 to traffic congestion, more than commuters in seven of the nine comparably sized (i.e. with over 3 million people) urban areas.¹⁸¹ Another measure of congestion is gallons of fuel wasted per person: Houstonians wasted fifty-nine gallons per person, more than residents of all but three urbanized areas.¹⁸² A third measure of congestion is monetary cost per person: Houstonians lost \$710 per person as a result of traffic congestion, again more than residents of all but two urban areas.¹⁸³ So Houstonians have the worst of both worlds: they often have to drive everywhere,¹⁸⁴ but are stuck in traffic once they get behind the wheel.¹⁸⁵

*Air pollution. Houston's air is more polluted than that of all but a few American cities, at least partially because of heavy automobile use. A 2002 American Lung Association report revealed that Houston had the fifth worst ozone air pollution in the United States.¹⁸⁶ Thirty percent

178. *Id.* (pointing out that only residents of Dallas-Fort Worth spend more).

179. *Id.* It could be argued that Houston's sprawl has contributed to its affordable housing by increasing the supply of buildable land, thus offsetting Houstonians' high transportation costs. See *supra* note 15 (noting debate over whether Houston is significantly less expensive than other cities); Eric Berger, *HUD looks at Houston Housing*, HOUS. CHRON., Apr. 30, 1998, at 33, available at 1998 WL 3574745 (stating that Houston's sprawl "means people earning low wages might be able to find affordable housing"). But the average Houston household spends \$24,157 on housing and transportation combined—more than the average Bostonian, and more than residents of the majority of large metropolitan areas. See *Household Spending*, *supra* note 31 (noting that eleven of twenty-eight metro areas spend more on housing and transportation combined than Houston, while sixteen spend less).

180. Michael Lewyn, *Sprawl, Growth Boundaries, and the Rehnquist Court*, 2002 UTAH L. REV. 1, 43 (2002) [hereinafter *Boundaries*] (describing TTI).

181. See TTI Study, *supra* note 27, at Exhibit A-4 (listing congestion statistics). By this measure, Houston has less traffic congestion than Los Angeles and San Francisco, but more than the other seven regions with over 3 million people. *Id.* at Exhibit A-1 (listing regional populations).

182. *Id.* at Exhibit A-10. By this measure of congestion, the only regions more congested than Houston were Los Angeles, San Francisco, and Dallas.

183. *Id.* at Exhibit A-8. By this measure of congestion, the only regions more congested than Houston were Los Angeles and San Francisco.

184. See *supra* notes 175-77 and accompanying text (describing automobile dependency in Houston).

185. See *supra* notes 182-84 and accompanying text.

186. See Tony Freemantle, *Airing of Grievance*, HOUS. CHRON., May 1, 2002, at 21, available at 2002 WL 3259994. Ozone is "a major respiratory irritant that some studies suggest may cause

of Houston's ozone pollution comes from cars and trucks.¹⁸⁷ So by increasing automobile use, Houston's vehicle-dependent urban form increases pollution.

*The unquantifiable costs of isolating the neediest Houstonians from jobs and civic amenities. As noted above, most Houston-area jobs are not transit-accessible,¹⁸⁸ which means that those Houstonians too poor,¹⁸⁹ too elderly or too disabled¹⁹⁰ to own cars may be frozen out of jobs and other civic opportunities, which in turn may force some of them out of the labor force and onto the welfare rolls.¹⁹¹

*The unquantifiable costs of the "coercion factor"—the practical necessity for the car-owning middle classes to own cars and to use them often.¹⁹² To the extent this "necessity" is created by government regulation, it reduces consumer choice, thus reducing human freedom and impoverishing the lives of its supposed beneficiaries.¹⁹³

Because Houston's sprawl has contributed to several noxious problems, its citizens should prune their city's thicket of regulation in order to make Houston more free and less sprawling.

B. Help Is On The Way

As noted above,¹⁹⁴ Houston public opinion supports policies designed to make Houston less auto-dependent. Similarly, the real estate industry (a bulwark of support for pro-sprawl public policies in most cities and states)¹⁹⁵ has come

asthma."

187. See Andy Summa, *Fort Bend Above the State Average in Passing Vehicle Emissions Tests*, HOUS. CHRON., June 12, 2003, at 1, available at 2003 WL 57420624 (noting that in Houston, cars and trucks produce 30 percent of nitrogen oxide fumes; these fumes in turn "react in sunlight to form ground-level ozone").

188. See RTP, *supra* note 174.

189. See Dan Feldstein & Claudia Kolker, *Carless in Houston*, HOUS. CHRON., June 15, 1997, at 1, available at 1997 WL 6562717 (noting that in Harris County, which includes Houston, average carless household earns \$13,000 per year, less than one-third income of average county household); Patrick Gallagher, *The Environmental, Social, and Cultural Impacts of Sprawl*, 15 NAT. RESOURCES & ENV'T 219, 223 (2001) (noting that generally, sprawl-induced "relocation of jobs outside the urban core made them inaccessible to public transit and further removed from the region's poor and people of color").

190. See Gilderbloom, *supra* note 106 (pointing out that (1) majority of Houston's elderly and disabled do not live near a bus stop, and (2) that 60% of disabled and elderly persons who *do* live near bus stop do not have sidewalks between residence and bus stop).

191. See Lewyn, *supra* note 7, at 364-65 (discussing possible relationship between sprawl and welfare dependency).

192. See Sixel, *supra* note 175 (suggesting that this is the case for many Houstonians); see also *supra* text accompanying note 175.

193. See Lewyn, *supra* note 7, at 347-50 (noting that necessity of car ownership reduces consumer choice).

194. See Part III.G.

195. See Bare, *supra* note 1, at 491 ("The political support for sprawl comes from lobbies for

to support reform of Houston's land use policies. When the city rewrote its subdivision ordinance in the late 1990's, the city's homebuilders urged the city to allow more compact development by reducing lot sizes.¹⁹⁶ And in 1998, the city did exactly that, reducing the minimum lot size within the 610 Loop from 5,000 square feet to 3,500 square feet—and even to 1,400 square feet under certain circumstances¹⁹⁷ (thus facilitating townhouse construction).¹⁹⁸ In addition, Houston modified its setback requirements by allowing setbacks of less than twenty-five feet under certain narrowly defined circumstances.¹⁹⁹

The apparent results of these changes was what the real estate industry and anti-sprawl activists hoped for: townhouses and small houses are popping up throughout Houston's inside-the-Loop neighborhoods,²⁰⁰ population inside the Loop is growing after having decreased between 1960 and the mid-1990s,²⁰¹ and the value of urban land rose by seventy percent in the late 1990s.²⁰² Although Houston's steps so far have been modest,²⁰³ they have not been useless.

C. Further Reforms: A New Vision For Houston

By reducing minimum lot sizes,²⁰⁴ Houstonians have already taken small steps towards making Houston more walkable and less sprawling. But Houston can do far more to cut back on sprawl—and can do so in a way that builds upon,

transportation, real estate, and other business[es]. They push favorable legislation through, using direct and indirect political influence, and are not likely to give up the prosperity of their industries by supporting anti-sprawl initiatives. Each of these industries draw their profits from continued [suburban] development...”).

196. See Matt Schwartz, *Revised Subdivision Ordinance Sent to Panel*, HOUS. CHRON., Sept. 8, 1998, at 13, available at 1998 WL 16769072 (according to city planning director, “there was broad support for [such] revisions among development and residential interests”).

197. See *supra* notes 64-68 and accompanying text.

198. See *supra* notes 41-48 and accompanying text (explaining how pre-1998 law prevented townhouse construction by prohibiting construction of townhouses on less than 2250 square feet). Neighborhoods outside the Loop are still governed by pre-1998 law. See *supra* notes 64-65 and accompanying text.

199. See Chapter 42, *supra* note 53 (noting that twenty-five foot setback rule no longer applies to commercial structures on major thoroughfares where the right of way is narrower than 80 feet); HOUSTON TEX CODE, § 42-155 (1999) (discussing changes in detail, and adding that developer must meet a variety of specified criteria to take advantage of this exception and must build within city's “urban area”).

200. Kaplan, *supra* note 161 (“townhouses have been popping up” in neighborhoods inside the 610 Loop to house “Houstonians [who] are moving back toward the center of town”).

201. *Id.* (noting population rise, and describing it as “noteworthy, considering that it had been losing people from the ‘60s until the mid-‘90s”).

202. *Id.* (“the value of land inside Loop 610 has risen seventy percent, and in some parts it has increased much more.”)

203. See *supra* notes 70-72 and accompanying text (noting limitations of 1998 reforms).

204. See *supra* notes 64-68, 198-99 and accompanying text. I note that Houston's recent creation of a light rail system may also mitigate sprawl by making it easier for Houstonians to get around without a car. See *supra* note 56 (citing numerous articles on light rail in Houston).

rather than reversing, Houston's traditional hostility towards zoning.²⁰⁵ Specifically, Houston can (1) eliminate minimum lot size requirements, (2) scale back setback and minimum parking requirements, (3) stop encouraging separation of land uses, and (4) stop widening roads and building new freeways.

1. Minimum Lot Sizes

Rather than merely reducing the minimum lot size required for new developments (as Houston's 1998 subdivision ordinance did) Houston should completely delete minimum lot size requirements from its municipal code. If builders were allowed to build more compact developments without government interference, they could place more houses and townhouses near public transit, offices and shops, thus giving more Houstonians the chance to live within walking distance of such amenities.²⁰⁶

A common justification²⁰⁷ for minimum lot size requirements and other anti-

205. Of course, Houstonians can also choose to try to reduce sprawl by increasing, rather than reducing, government regulation or spending. Houstonians have chosen to fight sprawl by spending billions of dollars on expanded public transit, *see supra* note 56, while other state and local governments have sought to address sprawl by enacting regulations limiting suburban development and mandating more pedestrian-friendly development. *See, e.g.,* Patricia E. Salkin, *Using Smart Growth to Achieve Sustainable Land Use Policies*, 32 ELR 11385, 11393-96 (1999) (discussing states' attempts to encourage local land use planning and protect farmland from development); Freilich, *supra* note 54, at 552-54, 57 (stating that some cities have experimented with "transit-oriented development" ordinances that "encourage or require minimum densities" in certain areas, "feature maximum setback[s]. . . [to bring] buildings closer to the street," and restrict off-street parking in certain areas); Dwight H. Merriam and Gordon H. Buck, *Smart Growth, Dumb Takings*, 25 ELR 10746, 10774 (1999) (describing various types of "urban growth boundary" schemes designed to limit suburban development). I have chosen not to address the merits of such policies in this paper, for two reasons. First, the merits of using government regulation to control sprawl have been addressed elsewhere in great detail. *See, e.g.,* Clint Bolick, *Subverting the American Dream: Government Dictated "Smart Growth" is Unwise and Unconstitutional*, 148 U. PA. L. REV. 859, 863-64, 868-71 (2000) (raising policy and constitutional objections to anti-sprawl regulations); Siegan, *supra* note 4, at 698-732 (same); Wall, *supra* note 28 (discussing debate over light rail expansion in Houston); Dowling, *supra* note 1, at 880-85 (defending anti-sprawl regulations). Second, because Part III of this article focuses primarily on Houston's departures from laissez-faire principles rather than on its lack of zoning, a discussion of how Houston could deregulate land use flows logically from Part III, while a discussion of the pros and cons of anti-sprawl regulation would not be as closely related to Part III.

206. *See supra* notes 54-59 and accompanying text (describing anti-pedestrian side effects of anti-density regulations).

207. I note in passing that both the Texas and federal Supreme Courts have upheld the constitutionality of minimum lot size requirements. *See Agins v. Tiburon*, 447 U.S. 255 (1980); *Mayhew v. Town of Sunnyvale*, 964 S.W. 2d 922 (1998). *Agins* and *Mayhew* upheld regulations that were designed to protect rural and suburban areas from urbanization. *See Agins*, 447 U.S. at 261 n.8; *Mayhew*, 964 S.W.2d at 935. But other courts have upheld minimum lot size requirements in urban environments as well. *See Neuzil v. Iowa City*, 451 N.W.2d 159, 166 (Iowa 1990) (upholding 8 lot per acre rule); EDWARD H. ZIEGLER, JR., ARDEN H. RATHKOPF, AND DAREN A. RATHKOPF, 3 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 51.11 (4th ed. 2001) (noting that courts have generally upheld "modest lot-size requirements of 5,000 or 6,000 square feet").

density regulations is that such laws prevent the traffic congestion that comes from packing more people (and thus more drivers) into smaller spaces.²⁰⁸ But Houston's own traffic problems suggest otherwise. As noted above, the Houston urbanized area has lower population density than almost every American region of comparable size.²⁰⁹ Yet Houston actually has *more* traffic congestion than the majority of comparable regions. As noted above,²¹⁰ Houstonians lose more hours and dollars per person to congestion than commuters in seven of the nine comparably sized (i.e. with over three million people) urban areas²¹¹—even though all nine are more densely populated than Houston.²¹² Because no strong correlation exists between density and congestion, Houston's anti-density regulations have arguably failed to reduce traffic congestion.

In fact, Houston's anti-density rules may have increased congestion by increasing driving: residents of low-density communities generally must drive more than other Americans,²¹³ and Houstonians in particular drive more miles daily than residents of more densely populated regions.²¹⁴ So, by increasing driving, Houston's minimum lot size requirements may have actually increased congestion.²¹⁵

2. *Parking and Setbacks*

Today, Houston's setback requirements and minimum parking requirements force pedestrians to walk through seas of parking in order to reach apartments, shops, and jobs. Minimum parking requirements force landowners to build

208. See *Schenck v. City of Hudson*, 997 F. Supp. 902, 905 (N.D. Ohio 1998) (upholding city zoning ordinance because city "has the right to limit the density of population to prevent congestion"); *City of Bellevue v. East Bellevue Community Council*, 983 P.2d 602, 608 (Wash. 1999) (stating that municipal government "had authority to conclude that of possible densities, the lowest would be better given existing severe traffic congestion in the area"); *Neuzil*, 451 N.W.2d at 166.

209. See *supra* note 27 and accompanying text.

210. See *supra* notes 182-83 and accompanying text.

211. By these measures, Houston has less traffic congestion than Los Angeles and San Francisco, but more than the other seven regions with over 3 million people. See TTI Study, *supra* note 27, Exhibits A-1 (listing regional populations), A-4 and A-8 (congestion statistics).

212. *Id.* at Exhibit A-1.

213. See *supra* notes 54-60 and accompanying text (showing link between low density and automobile dependency).

214. See *supra* notes 30, 31 and accompanying text.

215. Indeed, it could be argued that by increasing congestion, minimum lot size requirements become irrational and thus unconstitutional. Land use regulations (such as minimum lot size ordinances) are generally facially invalid if they are arbitrary. See *Tri-Corp Mgt. Co. v. Praznik*, No. 00-4326, 2002 WL 486241, at **5 (6th Cir. 2002) (stating that government regulation violates due process if it is "arbitrary and capricious"). Cf. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (indicating that even a rational regulation may violate the Takings Clause of the Fifth Amendment if it creates an unusually harsh impact upon an individual landowner). But to strike down minimum lot sizes as arbitrary, courts would have to overturn generations of precedent. See *supra* notes 207-08 (showing that courts generally defer to anti-density municipal land regulation).

parking lots,²¹⁶ and setback rules encourage businesses to place those parking lots in front of buildings by preventing landowners from placing buildings in the twenty-five feet in front of those buildings.²¹⁷ Such regulations have combined to make Houston more automobile-dependent—by reducing density, subsidizing driving, and making pedestrian travel uncomfortable.²¹⁸

Houston could solve these problems by allowing the free market to decide the amount and placement of off-street parking—that is, by (a) eliminating minimum parking requirements altogether and (b) by amending its setback rules to allow commercial²¹⁹ buildings to sit right next to the sidewalk (i.e. four feet or so from the street).²²⁰

Houston enacted minimum parking requirements in order to prevent “spillover parking”—a problem that occurs when a landowner does not provide enough parking to accommodate all motorists who wish to use his or her land, thus causing the motorists to park on nearby streets, which infuriates the residents of those streets, as they are deprived of their own parking spaces by those motorists.²²¹

However, minimum parking requirements are not the only possible response to the spillover parking problem. Cities could just allow the free market to decide parking users, letting residents compete with nearby businesses and apartment buildings. Or a variety of more intrusive alternatives could alleviate the spillover parking problem without forcing the creation of acres of government-mandated parking. For example, some neighborhoods, both in Houston and in other cities, have instituted “residential parking permit” districts reserving on-street parking for residents and their guests, thus preventing commuter parking from spilling over into residential areas.²²² Or cities could price on-street parking at a level

216. See *supra* notes 73-89 and accompanying text (describing regulations).

217. See *supra* notes 82-87 and accompanying text (describing regulations).

218. See *supra* notes 88-107 and accompanying text (criticizing regulations).

219. I express no opinion as to whether setback requirements for houses should be retained. Although such laws do affect Houston’s overall density, their harm to pedestrians may be less that of commercial setbacks, because a pedestrian walking to a house twenty- five feet from the street need only walk through a small driveway rather than walking through a larger parking lot that he or she must share with numerous cars. Cf. James Robinson, *The Urban Frontier/Variety of Obstacles Challenge Redevelopment Projects*, HOUS. CHRON., May 28, 1995, at 24, available at 1995 WL 5905756 (discussing pros and cons of setback regulations in residential context).

220. See Bivens, *supra* note 105 (asserting that Houston sidewalks are typically four feet wide).

221. See Lori Rodriguez, *Off-Street Parking Requirements to Be Put Before Council*, HOUS. CHRON., May 1, 1989, at 11, available at 1989 WL 2731343 (“Proponents [of the ordinance expanding minimum parking requirements] say the ordinance is intended to alleviate parking problems created by cars that spill over from businesses into neighborhoods.”); Shoup, *supra* note 82 (describing the problem generally).

222. See *County Bd. of Arlington County, Va. v. Richards*, 434 U.S. 5 (1977) (upholding a similar system against equal protection challenge); Deborah Mann Lake, *Parking relief/Permit System May Help Solve Residents’ Woes*, HOUS. CHRON., Mar. 7, 2002, at 1, available at 2002 WL 3248173 (describing introduction of a parking permit system in Houston neighborhood).

adequate to eliminate parking disputes: if prices were high enough, the least motivated users would stop driving, and the most motivated users would be able to find parking spaces.²²³

A common argument for both minimum parking requirements and setback requirements has been that such ordinances prevent the congestion and air pollution that result when drivers move slowly around a city searching for on-street parking spaces²²⁴ or unloading goods from those spaces.²²⁵ But if, as suggested above,²²⁶ minimum parking requirements increase societal automobile dependency, such regulations may be “like fertility drugs for cars”²²⁷—that is, they may actually increase, rather than decrease, the number of cars on Houston streets, thus increasing traffic congestion and air pollution.²²⁸

One original purpose of Houston’s setback requirements was to enable the city to widen roads more easily, because large setbacks enable the city to take a

223. Shoup, *supra* note 94, at 25. It could be argued that, because the overwhelming majority of Houstonians drive to work, parking policy has less effect upon their behavior than would parking policy in a more transit-oriented city. See *supra* note 29 and accompanying text. But numerous case studies, even in auto-oriented cities such as Los Angeles, show otherwise. See Paul Boudreaux, *Vouchers, Buses and Flats: The Persistence of Social Segregation*, 49 VILL. L. REV. 55, 66 (2004) (stating that Los Angeles was “built . . . with the automobile in mind” causing “dependence on automobiles”); Gregory C. Keating, *Pressing Precaution Beyond The Point of Cost-Justification*, 56 VAND. L. REV. 653, 703 (2003) (“Doing without a private automobile in contemporary Los Angeles . . . is a hardship”); Shoup, *supra* note 94, at 16 (citing numerous case studies from Los Angeles, Washington and Ottawa that show an increase in transit and/or carpooling after employers began to charge for parking); Wilson, *supra* note 98, at 35-36 (citing another case study from Los Angeles). I note that even a city that chooses to retain its minimum parking requirements could reduce the demand for parking by encouraging employers to allow employees to “cash out” parking benefits— that is, to choose to forego free parking and take the cash value of a parking space instead. See Lewyn, *supra* note 7, at 333 (describing how one employer’s “cash out” experiment in a Seattle suburb reduced percentage of employees driving alone from 89% to 54%).

224. See *Central Bank & Trust Co. v. City of Miami Beach*, 392 F.2d 549, 550-51 (5th Cir. 1968) (rejecting constitutional challenge to a minimum parking requirement because of a link between “congested traffic [and public] health, safety, and welfare”); *Stroud v. City of Aspen*, 532 P.2d 720, 723 (Colo. 1975) (asserting that parking requirements are necessary to prevent “autoists [from] moving slowly around block after block seeking a place to park . . . clog[ging] the streets, air and ears of our citizens”).

225. *Islip v. F.E. Summers Coal & Lumber Co.*, 177 N.E. 409, 410 (1931) (upholding setback requirements on ground that such laws enable “business to function without congesting the streets” because without such laws, businesses’ customers and delivery vehicles would have to park and unload goods on the street instead of an in-company parking lot).

226. See *supra* notes 54, 92 and accompanying text.

227. Shoup, *supra* note 94, at 20.

228. Thus, it could be argued that minimum parking requirements are irrational and thus unconstitutional. See *supra* note 216 (discussing similar argument in context of minimum lot size requirements). But this argument is likely to fail in most courts because, even if minimum parking requirements increase traffic congestion, courts might hold that concerns over spillover parking are rational enough to justify minimum parking requirements. See *Central Bank & Trust*, 392 F.2d at 550 (holding that land use regulations such as minimum parking requirements are valid if “fairly debatable”).

few feet of parking or yardspace to widen roads instead of a few feet of building.²²⁹ But given the harmful effects of Houston's wide roads upon pedestrians,²³⁰ this rationale may actually support the abolition of Houston's traditional setback requirements. If Houston's setbacks encourage the city to widen roads, and wider roads are inconvenient for Houston's pedestrians, Houston's setback laws should be gutted on that basis alone.

Setback requirements, unlike minimum parking requirements, are sometimes justified on aesthetic grounds—for example, by claims that they are necessary to protect public access to light and air.²³¹ For instance, if one building is closer to the street than the adjacent buildings, the first building may reduce the light available to the second.²³² This argument makes sense in the context of high-rise buildings; for example, a tall building could create shadows affecting the rest of the street.²³³ However, cities can address this problem without mandating setbacks for all shops or houses. For example, New York City has sought to reduce skyscraper-created shadows by “mandating streetwall setbacks increasing as building height increased.”²³⁴ Similarly, Houston could balance concerns over light and air with concerns over pedestrian comfort by requiring longer setbacks for the higher stories of skyscrapers and minimal setbacks for low-rise buildings.²³⁵ More importantly, Houston's setback rules may do more aesthetic harm than good. The ultimate result of setback rules (especially when combined with minimum parking requirements) is to surround buildings with a gray wall of parking.²³⁶ In such situations, “the unfortunate effect is [a building that stands

229. See Robinson, *supra* note 219.

230. See *supra* Part III.C.

231. See *Gorieb v. Fox*, 274 U.S. 603, 609 (1927) (“projection of a building beyond the front line of the adjacent dwellings cuts off light and air from them”); JUERGENSMEYER, *supra* note 12, § 4.13, at 91.

232. See *Gorieb*, 274 U.S. at 609. The *Gorieb* Court also asserted that setbacks promote fire safety by keeping homes on the opposite side of the street far away from each other, but did not explain how a fire could leap from one side of a street to another or why sixty feet of extra distance would reduce the likelihood of such a disaster. The court further suggested that buildings, by interfering with views of street corners, interfere with traffic safety—but did not explain why this was so. *Id.* at 609.

233. See Matthew J. Kiefer, *Privatizing Creation of the Public Realm: The Fruits of New York City's Incentive Zoning Ordinance*, 28 B.C. ENVTL. AFF. L. REV. 637, 639-40 (2001) (describing zoning rules designed to preserve access to light and air in the skyscraper-dominated parts of New York City). The discussion below assumes that such shadows are a problem to be mitigated. But given Houston's intense summer heat, skyscraper-created shadows might be a welcome source of shade. See McGeeveran, *supra* note 50, at 176 (showing that Houston's summer temperatures are typically over 90 degrees and sometimes over 100 degrees).

234. See Kiefer, *supra* note 233, at 639.

235. This exception to my proposed deregulation would not harm the interests of pedestrians so long as the lobby of a high-rise building immediately fronted the street rather than being separated from the street by a parking lot. See *infra* notes 237-38 and accompanying text (describing abyss-like effect which results when a parking lot separates the building and the street).

236. KUNSTLER, *supra* note 82, at 138.

in isolation and its] complete failure to define space: the abyss.”²³⁷ It follows that the alleged aesthetic benefits of setback laws may be offset by the ugliness of a cement jungle of parking lots.

3. *Ending the Covenant with Car Dependency*

As noted above, Houston’s city government encourages separation of land uses by enforcing covenants that bar commercial uses in residential neighborhoods.²³⁸ Thus, Houston has created a kind of de facto “single use zoning” disguised as covenant enforcement, and yielding the same type of automobile-dependent sprawl as other cities’ zoning codes.²³⁹ Instead, Houston should treat such covenants like any other contract: enforceable in court, but not sufficiently desirable that the public fisc should subsidize such lawsuits. If the city stopped subsidizing covenant enforcement, Houstonians would be less likely to enforce covenants that zone neighborhoods for just one possible form of use,²⁴⁰ thus increasing the number of mixed-use neighborhoods in which residents can walk to shops and jobs.²⁴¹

It could be argued that state-supported separation of residences from commerce is justified by the public interest in protecting residential areas from the traffic congestion and noise that businesses attract.²⁴² But government-encouraged separation of uses may actually increase rather than decreasing traffic congestion, for two reasons. First, by forcing people to drive to jobs and shops,²⁴³ separation of uses has increased the number of cars on Houston’s streets and expressways. Second, where all shops are concentrated on a few major streets, by definition, those streets have more traffic and thus more congestion.²⁴⁴ And because Houstonians have to visit those streets to shop and work, they have to put up with congestion aplenty.

It could also be argued that segregation of land uses protects neighborhoods, because any incursion of commerce into neighborhoods makes those neighborhoods less desirable, leading to reduced property values and ultimately

237. *Id.*

238. *See supra* notes 131-39 and accompanying text.

239. *See supra* notes 123-26 and accompanying text (describing effects of single use zoning in other cities); 139 and accompanying text (describing similar reality in Houston).

240. *See supra* note 137 and accompanying text (noting that city especially willing to enforce covenants specifying land uses).

241. *See supra* notes 123-26 and accompanying text (explaining how single use zoning precludes such neighborhoods from coming into existence).

242. *See Euclid v. Ambler Realty*, 272 U.S. 365, 391 (1926).

243. *See supra* notes 123-26 and accompanying text (explaining link between separation of uses and automobile dependency).

244. *Cf. Ortiz, supra* note 3, at 147 n.10 (making similar point in context of residential streets, by pointing out that when cul-de-sac street design forces all outgoing traffic into one or two main streets, those streets become heavily congested).

neighborhood decay.²⁴⁵ As noted above, the majority of Houstonians actually want to be able to walk to shops and offices.²⁴⁶ And some Houstonians are backing up words with deeds: the residential population of Houston's central business district (by definition a mixed-use area) rose by over 60% between 1990 and 2000.²⁴⁷ Thus, it is no longer plausible to assert that "mixed-use" automatically means "declining and decaying."

4. Street Design and Transportation

As noted above, Houston has built a thoroughly automobile-oriented street and highway network. Houston has more sprawl-generating limited-access highways than most other cities,²⁴⁸ and Houston's streets are so wide, have so few intersections, and have such fast traffic that they are not comfortable for pedestrians.²⁴⁹ Houston's street design and transportation policies are more difficult to remedy than the more explicit regulatory policies described above: Houston's streets and highways are already built, and its municipal governments cannot make those streets narrower or shorter simply by repealing an ordinance and allowing the free market to solve the problem.

But at a minimum, Houston's government should amend its right-of-way ordinance by allowing new streets to be as narrow as those in other American cities (typically around twenty to thirty-five feet).²⁵⁰ Moreover, Houston-area governments should stop implementing policies that exacerbate Houston's sprawl. For example, Houstonians could stop building new highways to

245. See *Young v. City of Houston*, 756 S.W.2d 813, 814 (Tex. App. 1988) (upholding Houston's use of public funds to prosecute covenant violations on the ground that deed restrictions "preserve the residential integrity of Houston's neighborhoods" and maintain property values); *Euclid*, 272 U.S. at 391-93 (asserting that businesses bring wide variety of ills into neighborhoods).

246. See *supra* notes 167-70 and accompanying text.

247. GILLHAM, *supra* note 156, at 63. Downtowns in most other big cities are also gaining population. *Id.* at 62-63.

248. See *supra* notes 140-46 and accompanying text.

249. See *supra* Parts III.C. It could be argued that wide streets improve fire safety, by allowing large fire trucks to go through residential blocks more easily. See Colby, *supra* note 108 (noting concern). Most fire rigs are eight to ten feet wide, and thus may have to slow down to get through narrow streets, thus slowing response time. *Id.* But firefighters' needs do not justify streets as wide as Houston's, for two reasons. First, firefighters may need only a twenty foot passage to fit two eight to ten-foot fire rigs on a street at the same time—but many American streets are over thirty feet wide, and Houston's streets may be as wide as 50-100 feet wide (depending on the amount of space reserved for parking and sidewalks). See *id.* (noting that fire marshals typically want twenty feet for two fire trucks), *supra* notes 101-10 and accompanying text (noting difference between Houston streets and typical American streets) Second, the danger of auto accidents outweighs the danger of slower fire response, because large-scale house fires are less common than the daily inconvenience and danger caused by wide streets. See Hamilton, *supra* note 116 ("a neighborhood might experience a house fire only once every couple of decades"); Swift, *supra* note 108 (noting that one city studied suffered from 20,000 traffic accidents and no fire-related injuries over an eight-year period).

250. See *supra* notes 108-10 (describing typical street widths in other cities).

Houston's hinterlands and widening existing surface streets. Houston's policy of building and widening road after road after road has been tried and has apparently failed: in addition to driving sprawl and its noxious results, this policy has failed to reduce congestion—perhaps because when new roads bring development to a suburban area, the development brings cars, which means more traffic congestion.²⁵¹ Between 1982 and 2001, Houston's freeway mileage and arterial mileage have nearly doubled²⁵²—yet its congestion has gotten worse. For example, Houston's annual delay per person nearly doubled (from nineteen hours per person to thirty-seven)²⁵³ and its congestion cost per person tripled (from \$219 to \$711).²⁵⁴ If Houston slowed down its road spending, Houston's sprawl might be slowed as well, and its congestion might not be significantly affected.

If Houston-area governments spent less money on new highways and widening roads, they instead could spend money on "traffic calming"—that is, strategies to improve conditions for pedestrians by slowing down motor vehicle traffic.²⁵⁵ In cities adopting traffic calming, motorist convenience is balanced against pedestrian safety and convenience, reduction of traffic accidents, and other goals.²⁵⁶

For example,²⁵⁷ Houston's traffic engineers could calm traffic and make Houston's streets safer for pedestrians by:

*Expanding sidewalks, thus making streets more comfortable for pedestrians while narrowing roads.²⁵⁸ Wider sidewalks can be used not

251. See Rose, *supra* note 160, at 288 (highway-induced development brings congestion to highways).

252. See TTI Study, *supra* note 27, The Mobility Data for Houston, TX (freeway lane miles increased from 1385 to 2460, while arterial lane miles increased from 1500 to 2840).

253. *Id.*

254. *Id.* It could be argued, of course, that Houston should have built and widened even more roads— but the dismal results of other cities that did so suggests otherwise. See Lewyn, *supra* note 7, at 369-70 (noting that Charlotte increased road mileage by 113%, while annual delay per driver increased by 356%).

255. See Burrington, *supra* note 113, at 723. And of course, Houston could also spend more money on public transit. See 03 Year In Review, *supra* note 56 (describing city's plans to expand rail transit). But major public transit projects, unlike traffic calming, are sometimes enormously expensive. *Id.* (proposed expansion of light rail will cost \$7.5 billion); Institute of Transportation Engineers & Federal Highway Administration, *Traffic Calming: State of the Practice*, 58 (1999) available at www.ite.org/traffic/tcstate.htm (Visited Feb. 18, 2004) [hereinafter ITE] (most traffic calming measures cost \$40,000 or less).

256. See Burrington, *supra* note 113, at 724 (noting numerous other benefits).

257. For a more complete discussion of traffic calming measures, see generally ITE, *supra* note 255.

258. See Freilich, *supra* note 54, at 557 (maximizing sidewalks helps to "make the pedestrian rather than the automobile the primary determinant of urban form."); Main Street, *supra* note 90, at 62 (ideal sidewalk should be 12 feet). A less ambitious remedy is to create curb extensions, which widen a sidewalk only where space is desired for signal poles, street furniture, or some other tangible object. *Id.* at 58. In addition, Houston could also accommodate bicyclists by using one

just for walking, but also for civic amenities such as benches and sidewalk cafes.²⁵⁹

*Installing more medians in the middle of multilane streets, so that pedestrians need only cross one or two lanes of traffic at a time (rather than having to cross an entire street at once).²⁶⁰

*Planting street trees, which may make streets look smaller and thus encourage slower driving.²⁶¹

If these steps are implemented in appropriate situations,²⁶² Houston's streets may become safer and more comfortable for pedestrians.²⁶³

V. CONCLUSION

It could be argued that Houston's sprawling urban form proves that laissez-faire land use policy creates endless suburban sprawl, and that municipal policymakers must therefore choose between more compact urban development and a unfettered real estate market. But this argument rests on a wobbly factual base—the assumption that just because Houston purports to lack zoning, Houstonians in fact live under a true free-market regime.

In fact, Houston regulates land use almost as intricately as cities with zoning by mandating suburban-style low densities, ordering businesses to hide their stores behind an asphalt ocean of parking, encouraging segregation of land uses, and forcing pedestrians to cross wide streets and to trudge through long, intersection-free blocks to go from one place to another. These policies have helped to make Houston as sprawling and automobile-dependent as other American cities (if not more so). By reversing such policies, Houston and other municipalities with similar policies can create an America that is both more deregulated and less sprawling.

lane of traffic for bike lanes, which allow people to use bicycles without coming into conflict with either motorists or pedestrians. *Id.* at 39.

259. Main Street, *supra* note 90, at 62.

260. *Id.* at 43. Medians are not the only means of placing "pedestrian space" in areas otherwise used for motorists. Smaller "refuge islands" can create on-street refuge for pedestrians but may be closer to one end of a street than a median, *id.* at 46.

261. *Id.* at 56 (stating that tree "canopies can create a feeling of a street edge, which helps calm traffic").

262. The increased pedestrian-friendliness resulting from these steps should, of course, be balanced against their cost and effect upon traffic flow. For example, an arterial street with lots of shops or schools that might generate pedestrian traffic is a better candidate for traffic calming than a street in a deserted industrial area.

263. And as a result, affected neighborhoods may become more desirable. See ITE, *supra* note 255, at 175 (noting that after one arterial in Hollywood, FL reduced to two lanes with widened sidewalks and medians, economic decline of area reversed due to creation of "pedestrian-friendly zone").

