

How Overregulation Creates Sprawl (Even In A City Without Zoning)

by Michael Lewyn¹

I. Introduction: Sprawl, Zoning and Houston

Numerous commentators have suggested that the spread-out, automobile-dependent urban form (often referred to as “sprawl”)² that dominates metropolitan America³ is at least partially caused by government regulation of land use.⁴

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²The concept of sprawl “evades a precise definition”. Jeremy R. Meredith, *Sprawl and the New Urbanist Solution*, 89 Va. L. Rev. 447, 448 (2003). 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”). But many definitions of sprawl suggest that key characteristics of sprawl include, inter alia, dependency on automobiles and/or settlement patterns (such as low population density) that tend to lead to such dependency. See, e.g., Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 U. Pa. L. Rev. 873, 874 (2000) (describing sprawl as “low-density, land-consuming, automobile-dependent” development); 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”). See also infra notes 55-63 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.

³See *Miller v. Anckaitis*, 436 F.2d 115, 120 (3d Cir. 1970) (“use 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) (“Stumbling Block”) (in most small cities and suburbs, “auto ownership is virtually mandatory for a normal life”).

⁴See, e.g., Francesca Ortiz, *Biodiversity, The City and Sprawl*, 82 B.U. L. Rev. 145, 179-80 (2002) (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 3, at 1055-56

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.⁵ Yet Houston is as automobile-dependent and sprawling as many cities with zoning.⁶

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 which (like Houston) allows the free market to govern land use will (like Houston) typically become an automobile-dependent,

(making similar points).

⁵See Lee Anne Fennel, *Homes Rule*, 112 *Yale L.J.* 617, 624 n. 29 (2002) ("Houston is the only major American city to eschew zoning"); Bernard H. Siegan, *Smart Growth and Other Infirmities of Land Use Controls*, 38 *San Diego L. Rev.* 693, 742 (2001) ("Infirmities"). One section of Houston's municipal code allows the city's planning commission to serve as a zoning commission. See *Houston: Code of Ordinances*, Sec. 33-22(a)(1), <http://livepublish.municode.com/LivePublish/newonlinecodes.asp?infobase=10123> (visited Mar. 6, 2003) ("Houston Code"). 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 (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.*

⁶See *infra* notes 22-32 and accompanying text (describing Houston as sprawling, automobile-dependent city). I note that in 2004, Houston began to operate a light rail system. See Juan Lozano, *1st light rail line opens in Houston*, *Houston Chronicle*, 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").

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)⁷ is that government should not discourage sprawl, because what the free market has put together, government should not tear asunder.⁸

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 the 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.

A. Houston as Free-Market Role Model

Numerous commentators assert that Houston has adopted a laissez-faire policy of

⁷The 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* (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.

⁸See Michael E. Lewyn, *Suburban Sprawl: Not Just An Environmental Issue*, 84 Marq. L. Rev. 301, 303-04 (2000) ("Not Just Environmental") (quoting numerous conservative and libertarian commentators expressing such sentiments).

unplanned, unregulated development.⁹ For example, Bernard Siegan so argues in a set of articles defending Houston’s refusal to enact a zoning code.¹⁰ 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”¹¹ - that is, no law providing that a given parcel may be used solely for residential use or commercial use.¹² Siegan further writes that while other cities force builders to develop large homes on large

⁹See, e.g., Byron Shibata, *Land Use Law in the United States and Japan: A Fundamental Overview and Comparative Analysis*, 10 Wash. U. J. L. & Policy 161, 242 (2002) (Houston has a “general laissez-faire approach to land-use regulation”); June Carbone, Dukeminier and Krier as Narrative: The Stories We Tell In The First Year Property Course, 32 Hous. L. Rev. 723, 741 (1995) (Houston’s “laissez-faire system” is an “alternative to zoning”). But see contra 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 discussed some of the regulations discussed below but, unlike this article, does not focus on the sprawl-producing effects of Houston’s regulatory scheme.

¹⁰Bernard H. Siegan, *Non-Zoning in Houston*, 13 *Journal of Law & Econ.* 71, 75 (1970) (“Non-Zoning”); *Infirmities*, supra note 5, at 695-96, 734-41; Bernard H. Siegan, *Conserving and Developing the Land*, 27 *San Diego L. Rev.* 279, 295-305 (1990) (“Conserving”); Bernard H. Siegan, *Keynote Address*, 14 *Envtl. L.* 645, 646-51 (1984) (“Keynote Address”); infra notes 11-18 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 (Houston “a functioning, viable and rapidly growing city”); 88 (rejecting claim that absence of zoning will “destroy values of houses and often lead to blight and slum conditions”); *Infirmities*, supra note 5, 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.

¹¹*Non-Zoning*, supra note 10, at 75.

¹²*Id.*

lots,¹³ in Houston “builders and developers determine the size of most building lots, not the planners and politicians.”¹⁴

Siegan therefore concludes that Houston “affords great opportunity for builders and developers to satisfy consumer demand”¹⁵ and that “resourcefulness and inventiveness are able to thrive in Houston because of the absence of their enemy, government regulation.”¹⁶ By contrast, in cities with zoning, “these talents are often spent in persuading or outmaneuvering the zoning authorities.”¹⁷ 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.”¹⁸

And it is not just zoning opponents who treat Houston as an example of laissez-

¹³See, 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*, sec. 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 and Thomas E. Roberts, *Land Use Planning and Development Regulation Law*, sec. 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”).

¹⁴*Infirmities*, supra note 5, at 734.

¹⁵*Conserving*, supra note 10, at 304-05.

¹⁶*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 5, 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.* 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*, http://www.nahb.org/reference_list.aspx?sectionID=135 (Visited Dec. 3, 2003). Cf. Kapur, supra note 9, at 10062 (questioning link between Houston’s low-cost housing and absence of zoning)

¹⁷*Id.*

¹⁸*Infirmities*, supra note 5, at 742.

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."¹⁹ And the President of the Urban Land Institute (a real estate industry research organization)²⁰ 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."²¹

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

¹⁹Panel Discussion, Discretionary Limits to Local Land-Use Control, 15 N.I.U. L. Rev. 651, 656 (1995). See also Stephen Fox, Houston 2000: Looking Back, <http://www.livablehouston.com/good/articles/fox.html> (Because Houston "stands alone among major U.S. cities in refusing to adopt a zoning code . . . the urban landscape of Houston is squalid") (visited Feb. 8, 2004); Ross Anderson, Stay Out! A Guide to Controlling Growth, Seattle Times, May 8, 1994, at B5, 1994 WL 3620423 (in Houston, "antipathy to zoning leads to untamed ugliness"). But see No Zoning, supra note 10, at 91 (attacks "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.").

²⁰See Wendell E. Pritchett, The "Public Menace" of Blight: Urban Renewal and The Private Uses of Eminent Domain, 21 Yale Law & Policy Rev. 1, 19 (2003) (ULI the "research wing" of the National Association of Real Estate Boards, a trade association for realtors, developers, and mortgage bankers).

²¹ David Crossley, Why The Interstate-10 Expansion Plan Needs Another Look, at www.katycorridor.org/Presentations/Why-Crossley-1Aug02.doc (Visited Feb. 8, 2004) (quoting remarks). See also Editorial, Dallas Morning News, Houston Race: Brown's Victory Shows Changes, Challenges, Dec. 9, 1997, at 22A, at 1999 WL 16183937 (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, 2003 WL 11006419 ("A city without zoning, Houston has become a poster child for urban sprawl").

square miles of unruly urban sprawl . . . no one walks in Houston”.²² 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.”²³ And Houston’s reputation has ample basis in reality. For example:

*Houston is far less densely populated²⁴ than most other cities of comparable size.²⁵ The city of Houston has only 3372 people per square mile,²⁶ less than half the density of any of the three cities larger than Houston,²⁷ and fewer than six of the eight

²² Elisabeth Hickey, *Houston Does Its Best To Give A Warm Howdy*, *Washington Times*, August 17, 1992, at D1, at 1992 WL 8136783. See also Mike Snyder, “Smart Growth” re-examines sprawl, *Houston Chronicle*, March 19, 2000 at 1, 2000 WL 4286902 (According to past president of American Institute of Architects’ Houston chapter, “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”).

²³ Bruce Oren, *More Of Us Should Live on Main Street, U.S.A.*, *Houston Chronicle*, Jan. 5, 1997 at 19, at 1997 WL 6533486. See also Blair Kamin, *Houston becoming a super city in more ways than one*, *Chicago Tribune*, Jan. 30, 2004, at 1, 2004 WL 67381452 (“Houston is sprawling and car-oriented”).

²⁴As noted above, one common characteristic of sprawl is low density. See note 2 *supra* (citing numerous definitions); *infra* notes 55-60 and accompanying text (low-density communities typically very dependent on automobiles).

²⁵Siegan 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 5, 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* at 35-36 (122nd ed. 2002) (“2002 ABSTRACT”) (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 27-28 and accompanying text.

²⁶ 2002 ABSTRACT, *supra* note 25, at 33, 37.

²⁷ *Id.* at 36-38 (New York, Los Angeles, and Chicago 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 square mile. *Id.* at 36-38.

American cities with over 1 million people.²⁸

*Houston is as automobile-dependent as any American city. Only 5.9% of the city of Houston's employed adults commute via public transit²⁹ - fewer than in any of the cities larger than Houston.³⁰

*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.³¹

²⁸Excluding 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, contains over 3 million people). See Texas Transportation Institute, 2003 Urban Mobility Study, Exhibit A-1, http://mobility.tamu.edu/ums/appendix_a/ (visited Jan. 11, 2004) ("TTI Study") (listing density statistics for various urbanized areas); Greg Lacour and Megan Twohey, Growth Spreads Out For Rural Charm, City Comfort, *Charlotte Observer*, April 20, 2003, at 1V, 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).

²⁹ See Lucas Wall, *Bicyclists, officials press pedaling*, *Houston Chronicle*, May 17, 2003, at 31, 2003 WL 3259951.

³⁰See *supra* note 27 (New York, Chicago and Los Angeles only cities more populous than Houston); Beth Barrett, *Commuters Eat Up More Time in L.A.*, *L.A. Daily News*, November 20, 2001, at N1, 2001 WL 6073379 (9% of Los Angeles residents use public transit); Rob Bhatt, *RTC asks planners for rail rethink*, *Las Vegas Business Press*, August 3, 1998, at 1, 1998 WL 9786736 (53.4% of New York City residents take public transit to get to work); Jacky Grimshaw, *Public Transit Serves More Than Just the Poor*, *Chicago Sun-Times*, Sept. 29, 1995, at 32, 1995 WL 6673059 (one-third of Chicago residents use public transit).

³¹ U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., *HIGHWAY STATISTICS 2001*, Table HM-72, <http://www.fhwa.dot.gov/ohim/hs01/hm72.htm> (visited March 3, 2003) ("Highway Statistics"). The only regions with higher per capita daily vehicle miles traveled are Binghamton, New York, Newburgh, New York, and Sherman-Denison, Texas, *id.*, - all regions much smaller than Houston. See 2002 ABSTRACT, *supra* note 25, at 32-34 (regions not listed as among "Large Metropolitan Areas" with over 250,000 people).

*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.³²

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."³³ It could thus be argued that a causal relationship exists between Houston's sprawl and its lack of zoning,³⁴ 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 1940,³⁵ when that city was about one-fifth its current size.³⁶ The code's provisions are generally quite similar to regulations enacted in other American cities.³⁷ Houston's regulations and their

³² Surface Transportation Policy Project, Transportation Costs and the American Dream-Spending Table, <http://www.transact.org/report.asp?id=225> (visited Feb. 10, 2004) (Household Spending"). Only in Dallas-Fort Worth is transportation spending higher. Id.

³³ Mukul Verma & Michael Antrobus, At a Crossroads With a New Urbanist, Greater Baton Rouge Bus. Rep., April 29, 1997 at 39, at 1997 WL 9356512.

³⁴ See supra note 21 (numerous commentators assert that absence of zoning causes Houston's sprawl)

³⁵ Non-Zoning, supra note 10, at 73 (Houston's subdivision code first adopted in 1940, and 3/4 of city's developed areas subject to code); Kapur, supra note 9, at 10052.

³⁶ Houston had 385,000 residents in 1940. See Non-Zoning, supra note 10, at 72. By contrast, in 2000 Houston had over 1.9 million residents. 2002 ABSTRACT, supra note 25, at 36.

³⁷ See Non-Zoning, supra note 10, at 73 (Houston's regulations "generally common elsewhere in the country"); Infirmities, supra note 5, at 742 (Houston's subdivision and traffic regulations "do not seem to vary significantly from those of other cities in its region").

consequences are discussed below.

A. Minimum Lot Sizes

Until 1998,³⁸ Houston's city code provided that the minimum lot size for detached³⁹ single-family dwellings was 5000 square feet.⁴⁰ And until 1998,⁴¹ Houston's government made it virtually impossible for developers to build large numbers of non-detached single-family homes such as townhouses,⁴² by requiring townhouses to sit on at least 2250 square feet of land.⁴³ As Siegan admits, this law "tend[ed] to preclude the erection of lower cost townhouses"⁴⁴ and thus effectively meant that townhouses "cannot be built for the lower and lower middle income groups."⁴⁵ Houston's townhouse regulations, unlike its regulations governing detached houses,⁴⁶ were significantly more restrictive than those of other North American cities. For example, town houses may be as small as 647 square feet in Dallas,⁴⁷ 560 square feet in Phoenix⁴⁸

³⁸See Kapur, *supra* note 9, at 10054. See *infra* notes 64-69 and accompanying text (discussing 1998 revisions to law).

³⁹See *infra* notes 42-51 and accompanying text (describing different rules governing townhouses and their practical consequences).

⁴⁰See Kapur, *supra* note 9, at 10054.

⁴¹See *infra* note 69 and accompanying text (describing 1998 revisions to law governing townhouses).

⁴² Townhouses are "units attached side-by-side . . . with no residences above or below." John Handley, *Words To Shop By In Today's Housing Market*, *Chicago Tribune*, August 22, 1987, at 1, at 1987 WL 2979597.

⁴³See *Non-Zoning*, *supra* note 10, at 119.

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*Id.* at 102 ("The minimum lot size permitted in new subdivisions is not unusual in a large city.").

⁴⁷Patricia Long Albee, *Building neighborhood from scratch*, *Dallas Morning News*, August 10, 1998, at 1C, 1998 WL 13093722 (describing townhouse development).

⁴⁸Cindy Skrzyzcki, *If you're looking for a home you can afford*, *U.S. News & World Report*, Dec. 5, 1983, at 67 (describing various townhouse developments).

and 390 square feet in Toronto, Canada.⁴⁹

Houston's anti-townhouse policy, combined with its minimum lot size requirement for detached houses, meant that almost all single-family development in Houston had to be on a lot of at least 5000 square feet⁵⁰ (which means that single-family areas in Houston could have no more than 8.7 houses per acre).⁵¹ In fact, Houston has only about 2 households per acre,⁵² because portions of Houston are used either for housing on lots larger than the statutory minimum⁵³ or for purposes other than housing, such as stores, roads, and industry.⁵⁴

⁴⁹Condo Living, *The Toronto Star*, Nov. 9, 2002, 2002 WL 101967229.

⁵⁰See *supra* note 40 and accompanying text.

⁵¹ One acre contains 43,560 square feet. See William A. McGeeveran, Jr., ed. *THE WORLD ALMANAC AND BOOK OF FACTS* 622 (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 500).

⁵² I calculate as follows: Houston has 3372 people per square mile. See 2002 ABSTRACT, *supra* note 25, at 37. An acre contains 0.405 hectares and a square mile contains 258.999 hectares. See McGeeveran, *supra* note 51, 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, <http://censtats.census.gov/data/TX/1604835000.pdf> (visited June 12, 2003) (noting size of average Houston household).

⁵³ See John Williams, Mayoral campaign revs up in garage, *Houston Chronicle*, Jan. 13, 2003, at 15, at 2003 WL 3229966 (one mayoral candidate announced his candidacy on 3.8 acre house in city's River Oaks section); Jennifer Frey, Water Over the Dam, *Washington Post*, April 17, 2002, at C1, at 2002 WL 19154421 (River Oaks is "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- but if Houston had no minimum lot size ordinance, other people might be willing to pay **less** money for **less** land.

⁵⁴ See *Infirmities*, *supra* note 5, at 735 (less land 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

Houston's government-created low density effectively forces Houstonians into their cars, because densities of at least 7-15 dwelling units per acre are typically necessary to support significant public transit use.⁵⁵ 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.⁵⁶ Indeed, Houston's own politicians (including two former mayors) have repeatedly argued that Houston's low density makes improved public transit impractical.⁵⁷ By contrast, more compact

existing neighborhoods and to "prevent high-density construction, such as townhouses, on traditional single-family lots." Martin Hajovsky, *Home in the Heights*, *Houston Chronicle*, January 31, 2002 at 8, 2002 WL 3243352. See also Houston Code, sec. 42-213 (text of ordinance); Kapur, *supra* note 9, at 10055 (describing law); See City of Houston, Chapter 42: Houston's Land Development Ordinance, at <http://www.ci.houston.tx.us/department/planning/download/chap42.pdf> (visited Feb. 25, 2004) (describing similar rule allowing neighborhoods to create uniform setbacks from street) ("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. *Id.*, secs. 42-213(g)(3) and (g)(4). Thus, the city may freeze neighborhood densities at levels far below 8.7 houses per acre if neighborhood residents support such limits.

⁵⁵See, 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, 2003 WL 12986698 (2003) (8 housing units per acre is "the lower limit of density needed to support mass transit").

⁵⁶See Freilich, *supra* note 55, at 552 and n. 18 ("in 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").

⁵⁷See Eric Hanson, *Voter's Guide: City Council At-Large Races*, *Houston Chronicle*, October 24, 1999, at 3, at 1999 WL 24260595 (quoting city council candidate's assertion that "Houston's geography and low-density population make [rail service] unfeasible") Bruce Nichols, *Houston rail plan apparently heading nowhere*, *Dallas Morning News*, July 26, 1992, at 41A, 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

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.⁵⁸

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.⁵⁹ If each house in the neighborhood 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.⁶⁰ Thus, minimum lot size requirements reduce the

density); Houston Divided on Rail Plan, Dallas Morning News, August 30, 1987, at 41A, at 1987 WL 4622067 (then-mayor Kathy Whitmire stated that “she opposes building a rail system now because Houston lacks the economic stability and population density to support it”). Houstonians ultimately rejected these arguments and chose to build a light rail system. See Lozano, *supra* note 6 (system began operation in 2004); 03 Year in Review, Houston Chronicle, Dec. 28, 2003, at 9, 2003 WL 68831690 (In November 2003, “Houston voters approved a \$7.5 billion referendum to extend rail service by 73 additional miles”) (“03 Year in Review”).

⁵⁸Smart Growth Network: Getting to Smart Growth II: 100 More Policies For Implementation 12 (2003) (available online at www.smartgrowth.org/library/articles.asp?art=870)

⁵⁹Some 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 & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 *Urb. Law.* 783, 784 (2003) (ordinances authorizing pedestrian-friendly “new urbanist” style of development typically provide that “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, 1448 (2002) (“If urban areas were oriented around the mobility pattern of the pedestrian, the neighborhood unit would be organized within a quarter mile radius and would contain . . . structures that meet the essential daily needs of residents, such as parks, schools and stores”).

⁶⁰*Cf.* Ohm & Sitkowski, *supra* note 59, at 792 (new urbanist developments “compact” - that is, in such developments lot sizes are “smaller than allowed under conventional zoning”).

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).⁶¹

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 population⁶² – 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.⁶³

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

⁶¹ See Michael B. Gerard, Trends & Insights, 15 *Natural Resources & Environment* 44, 46 (2000) (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 Chronicle*, October 1, 1990, at 9, 1990 WL 6620216 (in Houston's newer areas, mass transit rare).

⁶² See TTI Study, *supra* note 28, Exhibit A-1 (population of Houston's urbanized area grew by 41% between 1982 and 2000).

⁶³ See *Conserving*, *supra* note 10, at 294 (pointing out that overregulation in urban core encourages developers to build in “the place of least resistance, where opposing political pressures are absent or limited. The most likely areas for this to occur . . . will be those of small population, principally the more rural and outlying sections”, thus causing “all the problems and detriments that come with ‘urban sprawl’”); Allan Turner, High on Downtown, *Houston Chronicle*, October 27, 2000, at 1, 2000 WL 24520362 (“cheap suburban land” a cause of Houston's sprawl and of downtown Houston's decline); John Williams, Downtown: Betting on the Future, *Houston Chronicle*, October 12, 1997, at 6, 1997 WL 13071122 (Houston is a “city that has always pushed toward cheap virgin land in the suburbs”).

⁶⁴ See Kapur, *supra* note 9, at 10054.

⁶⁵ Houston Code, sec. 42-182(1).

⁶⁶ *Id.*, secs. 42-1 and 42-101.

downtown Houston.⁶⁷ In “urban areas”, by contrast, the minimum lot size is now typically 3500 square feet.⁶⁸ 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.⁶⁹

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.⁷⁰ 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”).⁷¹ 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-

⁶⁷ See Lettice Stuart, Developments Rebuild Area of Downtown Houston Into Living Areas, *The Journal Record*, April 18, 1997, at 1997 WL 14390575.

⁶⁸ Houston Code, sec. 42-183(a).

⁶⁹ *Id.*, secs. 42-184 and 42-185. See also Kapur, *supra* note 9, at 10054 (describing 1998 law). These ordinances are not specifically limited to townhouses. However, Houston’s 1998 ordinance makes no explicit distinction between townhouses and detached houses, Houston Code, sec. 42-1, and houses under 2000 square feet are frequently townhouses. See Non-Zoning, *supra* note 10, at 119 (noting that townhouses often take up 1300-1600 square feet of land).

⁷⁰ See U.S. Census Bureau, AmericanFactFinder, Quick Tables, Table QT-H7, Houston, Texas, http://www.factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=16000US4835000&-qr_name=DEC_2000_SF3_U_QTH7&-ds_name=DEC_2000_SF3_U&-lang=en&-red_oLog=false&-sse=on (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.

⁷¹ See Bennett Roth, Urban and Suburban Houston, *Houston Chronicle*, July 7, 1991, at 1, at 1991 WL 3928158 (only 408,000 of Houston’s then-1.6 million inhabitants lived inside I-610 “Loop”); *supra* notes 65-66 and accompanying text (noting that Loop is boundary between “urban” and “suburban” zones under city law).

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).⁷² 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:

*Apartment buildings must provide 1.25 parking spaces for each efficiency apartment, and 1.33 parking spaces for each 1 bedroom apartment.⁷³ So even though 17% of Houston renters do not even own one car,⁷⁴ 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

⁷²See supra notes 47-49 and accompanying text.

⁷³ Id., 42-234(a).

⁷⁴ U.S. Census Bureau, American FactFinder, Table HCT32, Houston, Texas, Tenure By Vehicles Available (http://factfinder.census.gov/servlet/DTTable?_bm=y&-context=dt&-reg=DEC_2000_SF4_U_HCT032:001&-ds_name=DEC_2000_SF4_U&-CONTEXT=dt&-mt_name=DEC_2000_SF4_U_HCT032&-tree_id=404&-all_geo_types=N&-geo_id=01000US&-geo_id=16000US4835000&-search_results=16000US4835000&-format=&-_lang=en) (visited Jan. 21, 2004) (66,916 of 389,225 renters have no car).

per dwelling unit can be parked entirely on the lot.”⁷⁵

*Office buildings must provide 2.5-2.75 parking spaces for every 1000 square feet of floor area.⁷⁶

*Hospitals must provide 2.2 spaces for each bed.⁷⁷

*Supermarkets must provide 5 spaces per 1000 square feet of gross floor area.⁷⁸

*Shopping centers must provide 4-5 spaces (depending on their size) per 1000 square feet of gross floor area.⁷⁹

*Despite the well-known dangers of drunk driving,⁸⁰ Houston bars must accommodate drinking drivers by providing 10 parking spaces per every 1000 feet of gross floor area.⁸¹

Thanks to Houston’s “building line” or “setback” requirements,⁸² Houston’s sea

⁷⁵ Houston Code, sec. 42-180(4).

⁷⁶ Houston Code, secs. 26-21 (requiring 2.5 parking spaces per 1000 square feet of GFA or 2.75 per 1000 square feet of UFA); 26-2 (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.”)

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ 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)).

⁸¹ Houston Code, sec. 26-21.

⁸² See Houston Code, sec. 42-1 (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. 608, 609 (1927) (“set-back requirement” was ordinance requiring landowner to “set his building back from the street line of his lot”).

of government-mandated parking is usually in front of most buildings.⁸³ Houston's city code generally requires that structures abutting major thoroughfares⁸⁴ be at least⁸⁵ 25 feet from the street.⁸⁶ Because parking lots are a common use for land that cannot be used for buildings,⁸⁷ 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

⁸³ See Julie Mason, *Urban Reviewal*, *Houston Chronicle*, August 18, 1997, 1997 WL 13057147 (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 designed with parking out front, creating a strip mall effect"); James Howard Kunstler, *Home from Nowhere* 138 (1996) (setback laws generally "keep buildings far away from the street in order to create parking lots all around the building"). Cf. Freilich, *supra* note 55, 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*, at <http://vtpi.org/shoup.htm> (visited June 4, 2003) (aboveground parking costs builders \$10,000 per space, while underground parking can cost as much as \$25,000 per space).

⁸⁴A "major thoroughfare" is a street designated as such in a "major thoroughfare and freeway plan" approved by the Houston city council. *Id.*, sec. 42-1.

⁸⁵ Houston Code, sec. 42-150(b) (explaining that city's setback requirements "are minimum standards").

⁸⁶ Houston Code, sec. 42-152. See also *id.*, sec. 42-157 (25 foot setback rule applies to some houses). The city allows smaller setbacks for buildings in downtown Houston, *id.*, sec. 42-151(a), for commercial buildings not on major thoroughfares, Houston Code, sec. 42-151(c) 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. *Id.*, sec. 42-155. Because major streets generally have a 100-foot right of way, *id.*, sec. 42-122, the latter 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 Chronicle*, February 21, 2003, at 25, at 2003 WL 3239264 ("all 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 73-81 and accompanying text.

⁸⁷See *supra* note 83 and accompanying text.

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,⁸⁸ and may even endanger pedestrians by forcing them to reach buildings by walking through driveways and parking lots which they must share with cars.⁸⁹ Even if Houston's parking lots created no tangible danger or inconvenience for pedestrians, off-street parking would still 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,"⁹⁰ a pedestrian "has less to look at [and] feels more isolated."⁹¹ 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

⁸⁸ See Freilich, *supra* note 55, at 557 ("large expanses of asphalt devoted to parking often discourage pedestrian mobility" and make 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 (1994) ("Parking lots are inconvenient and inhospitable to pedestrians").

⁸⁹See Gregory Smith, *Two buildings face wrecking ball for more parking space*, Providence Journal, November 4, 2002, at B1, 2002 WL 22528319 (parking lots "force pedestrians to dodge vehicles crossing the sidewalk").

⁹⁰Reid Ewing, *Pedestrian- and Transit-Friendly Design, A Primer for Smart Growth* 10, http://www.epa.gov/smartgrowth/pdf/ptfd_primer.pdf (visited June 12, 2003) (emphases added). See also French, *supra* note 88, at 278 (noting that one city imposes maximum setback of 5 feet for commercial buildings in order "to promote small-town sociability").

⁹¹ Ewing, *supra* note 90, at 10. See also Transportation and Growth Management Program, *Main Street . . . when a highway runs through it: A Handbook for Oregon Communities* 68 (1999) www.lcd.state.or.us/tgm/publications.htm (Visited Feb. 17, 2004) ("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, 1998 WL 2479621 (setbacks cause streets to seem "vast" and "unfriendly looking"); Smith, *supra* note 89 (parking lots "unsightly").

them.”⁹²

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.⁹³ 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.⁹⁴ 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 date⁹⁵ – a requirement less onerous than that of Houston, which requires more than one parking space per apartment even for the smallest apartments.⁹⁶ As a result of Oakland’s parking law, the number of units per acre in new

⁹² French, *supra* note 88, at 280.

⁹³ See *supra* notes 55-60 and accompanying text.

⁹⁴ 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 100 1000 square-foot apartments than if he builds 125 800 square-foot apartments. See Shoup, *supra* note 83. Houston’s regulations governing parking for apartments are on a “per unit” basis, and thus reduce density in this respect. See *supra* note 73 and accompanying text (describing Houston ordinances that require a set number of parking spaces per apartment).

⁹⁵ See Donald C. Shoup, An opportunity to reduce minimum parking requirements, 61 J. Am. Plan. Ass’n 14, 24 at 1995 WL 12344755 (1995).

⁹⁶ See Houston Code, sec. 26-21.

apartment buildings fell by 30%.⁹⁷

Third, Houston's parking and setback laws⁹⁸ 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.⁹⁹ 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).¹⁰⁰ 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.¹⁰¹ 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

⁹⁷ See Shoup, *supra* note 95, at 24-25.

⁹⁸ 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.

⁹⁹ See Richard W. Wilson, *Suburban parking requirements: a tacit policy for automobile use and sprawl*, 61 *J. Am. Planning Ass'n* 29, 34 (1995) at 1995 WL 12344761 (explaining effect of minimum parking laws upon parking supply); Shoup, *supra* note 95, at 15 (93% of Houston-area commuters park for free).

¹⁰⁰ See Shoup, *supra* note 83.

¹⁰¹ See Shoup, *supra* note 95, at 24-25 (“Minimum 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”; for example, when Oakland, California instituted minimum parking requirements, construction costs rose by 18% per dwelling).

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,¹⁰² that major thoroughfares¹⁰³ must have a 100 feet right-of-way,¹⁰⁴ and all other streets must generally have 50-60 feet rights-of-way.¹⁰⁵ Because Houston sidewalks are typically either 4 feet wide¹⁰⁶ or are nonexistent,¹⁰⁷ the practical result of this ordinance is that some of Houston's major streets are 90 or 100 feet wide,¹⁰⁸ while other streets can be up to 60 feet

¹⁰² See Houston Code, sec. 42-123 (listing numerous streets not subject to street width rules, and providing that streets in central business district not subject to such rules).

¹⁰³A "major thoroughfare" is a street designated as such in a "major thoroughfare and freeway plan" approved by the city council. *Id.*, sec. 42-1.

¹⁰⁴ *Id.*, sec. 42-122.

¹⁰⁵ *Id.* (collector street, defined as streets distributing traffic between major thoroughfares and other streets, must have 60 feet right-of-way or 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"; 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).

¹⁰⁶ See Ralph Bivens, *New Urbanism walks away from automobiles*, *Houston Chronicle*, May 18, 2003, at 8, at 2003 WL 3260023 (in one new Houston subdivision, "sidewalks are 5 feet wide instead of the **typical** 4 feet") (emphasis added).

¹⁰⁷ See Melanie Markley, *Walking at their own risk*, *Houston Chronicle*, August 23, 2002, at 27, at 2002 WL 2321824 (Many Houston schoolchildren "have to cross busy four-lane streets and walk along roads that have no sidewalks"); See John I. Gilderbloom, *Creating the Accessible City*, at http://www.louisville.edu/org/sun/housing/cd_2/Bookarticles/Ch1.htm (visited Feb. 10, 2004) (60% of disabled and elderly persons who do live near bus stop do not have sidewalks between residence and bus stop).

¹⁰⁸ See Dan Feldstein, *High-style, wide and handsome*, *Houston Chronicle*, June 12, 1998, at 28, at 1998 WL 3582858 (Main Street in downtown Houston is 90 feet wide, and Texas Avenue is 100 feet wide).

wide. By contrast, most American streets are 32 to 36 feet wide,¹⁰⁹ and some municipalities allow commercial streets as narrow as 30 feet wide¹¹⁰ and residential streets as narrow as 18 or 20 feet wide.¹¹¹

Houston's wide streets are difficult (and perhaps even dangerous)¹¹² for pedestrians to cross, because "a wider roadway takes longer to cross thus increasing the amount of time the pedestrian is exposed to traffic."¹¹³ Wide streets may also endanger pedestrians by encouraging motorists to drive faster,¹¹⁴ thus increasing the number and

¹⁰⁹ See Richard Colby, How Narrow A Street is Safe, Officials Ask, *Portland Oregonian*, August 21, 2000, at D2, 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, at <http://www.sierraclub.org/sprawl/articles/narrow.asp> (visited June 27, 2003); Alan B. Coden, Narrow Streets Database, at <http://www.sonic.net/abcaia/narrow.htm> (visited June 27, 2003) ("the typical local street has grown to a width of 36").

¹¹⁰ See Creating Quality Places, Case Study of I'On Village, at http://qualityplaces.marc.org/4a_studies.cfm?Case=38 (Visited Jan. 28, 2004) (describing new development in South Carolina) ("Quality Places").

¹¹¹ See Victoria Transport Policy Institute, Traffic Calming Benefits, Costs and Equity Impacts 3, at www.vtpi.org/calming.pdf (visited July 2, 2003) ("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*, August 19, 2002, at 1, at 2002 WL 23324909. Cf. Coden, *supra* note 109 (before World War II, most neighborhood streets 28-30 feet wide).

¹¹² 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 at 8 (<http://transact.org/report.asp?id=202>) (Houston has seventh highest "Pedestrian Danger Index" in nation; rankings based on average yearly pedestrian fatalities per capita, adjusted for frequency of walking as measured by share of workers walking to work).

¹¹³ *Donovan v. Jones*, 658 So.2d 755, 765 (La. Ct. App. 1995) (quoting expert testimony). See also Freilich, *supra* note 59, at 557 (narrower streets easier for pedestrians to cross).

¹¹⁴ See Stephen H. Burrington, Restoring the Rule of Law and Respect for Communities in Transportation, 5 N.Y.U. Env. L.J. 691, 701, 725 (1996) (blaming "larger roads" on "solicitude for fast traffic" and asserting that "narrowed lanes" slow traffic); Thomas Hylton, Put it in park, *Sunday Patriot-News*, March 16, 2003, at D1, at 2003 WL 3193226 ("wide streets encourage speeding" and indeed goal of adding lanes was to

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.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷

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.¹¹⁸ A University of Wisconsin study showed that in one Wisconsin county, each 10 feet of required street width reduced the county's housing supply by 3 to 4 percent.¹¹⁹

“speed traffic flow”).

¹¹⁵ Burrington, *supra* note 114, at 704 n. 50.

¹¹⁶ *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 109. See also Traffic Calming, *supra* note 111, at 7 (“Each 1-mph traffic speed reduction typically reduces vehicle collisions by 5%”).

¹¹⁷ See Burrington, *supra* note 114, at 704. See also Traffic Calming, *supra* note 111, at 7; Andy Hamilton, Driving pedestrians into extinction, San Diego Union-Tribune, June 1, 2001, at B9, 2001 WL 6463882 (citing similar statistics).

¹¹⁸ Cf. *supra* notes 93-97 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).

¹¹⁹ See Michelle Derus, Zoning can curb lower-cost housing, Milwaukee Journal-Sentinel, Sept. 21, 1997, at 1, 1997 WL 12748753.

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.

D. Long Blocks

The Houston city code provides that “intersections along a major thoroughfare shall be spaced a minimum of 600 feet apart.”¹²⁰ 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.”¹²¹

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.¹²² Second, long blocks create less potential than shorter blocks for “direct routing”:¹²³ 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.

¹²⁰ Houston Code, sec. 42-127(b).

¹²¹ Ewing, *supra* note 90, at 4. (NOTE to editor: Street Map Table on page 4 may look good in article). See also Main Street, *supra* note 91, at 35 (suggesting 200-400 foot blocks).

¹²² *Id.* (“Short blocks are desirable because . . . pedestrians have frequent opportunities to cross streets”); Ewing, *supra* note 90, at 4 (“more intersections mean more places where cars must stop and pedestrians can cross”).

¹²³ *Id.* 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 91, 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).

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.¹²⁴ Such "single use zoning"¹²⁵ often prevents houses and apartments from being within walking distance of employers or shops, thus preventing Americans from walking to jobs or shops,¹²⁶ 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."¹²⁷

By contrast, Houston has no zoning code explicitly prohibiting the mixing of residential and commercial uses,¹²⁸ with the exception of an ordinance prohibiting single-family residences from being located on major thoroughfares.¹²⁹ 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

¹²⁴ See Jerry Frug, *The Geography of Community*, 48 *Stan. L. Rev.* 1047, 1091 (1996) ("virtually all" current zoning laws "mandate the separation of different areas by function").

¹²⁵ 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").

¹²⁶ See *Not Just Environmental*, *supra* note 8, 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") (citation omitted).

¹²⁷ Tondro, *supra* note 125, at 517. Cf. *Non-Zoning*, *supra* note 10, at 90 (pointing out that 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.").

¹²⁸ See *Infirmities*, *supra* note 5, at 735 ("No laws prohibit the erection of buildings containing both residential and commercial uses.")

¹²⁹ Houston Code, sec. 42-189(b).

violation.¹³⁰ 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.¹³¹

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.¹³² Houston's city code, unlike that of most American cities,¹³³ allows the city attorney to sue to enforce restrictive covenants.¹³⁴ The city may seek civil penalties of up to \$1000 per day for violation of a covenant.¹³⁵ Thus, Houston forces its taxpayers to subsidize enforcement of restrictive covenants¹³⁶ even when litigation is too

¹³⁰See *Infirmities*, supra note 5, at 742.

¹³¹*Id.*

¹³²See Kapur, supra note 9, 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 *Non-Zoning*, supra note 10, at 80 (Federal Housing Administration recommends restrictive covenants even in areas with zoning). Cf. Florence Wagman Roisman, *Teaching About Inequality, Race and Property*, 46 *St. L. U. L.J.* 665, 678-79 (2002) (in 1930s and 1940s, Federal Housing Administration encouraged covenants that barred African-Americans from neighborhoods)

¹³³*Id.* (“a municipality that is not a party to restrictive covenants generally may not enforce them”). See also Shibata, supra note 9, at 232-33.

¹³⁴ Houston Code, sec. 10-443.

¹³⁵ Houston Code, sec. 10-552(a) (listing penalties) and 553(b) (authorizing city attorney to seek such penalties).

¹³⁶See Kapur, supra note 9, at 10050 (noting that city bears expenses of litigation). Houston also refuses to issue building permits to structures that violate restrictive covenants, Houston Code, sec. 10-3(a), and encourages covenant creation by allowing covenants to be created by a mere majority vote of subdivision residents. See Kapur, supra note 9, 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*, sec. 34.05[B] (2000).

costly for individuals to pursue.¹³⁷ In its covenant litigation, the city has focused on enforcement of use restrictions (that is, covenant provisions requiring separation of uses), as opposed to enforcement of other restrictions such as aesthetic rules.¹³⁸ 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.¹³⁹ As a result, many Houstonians must, in the words of one local architect, "drive for 10 minutes just to get a quart of milk."¹⁴⁰

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 has also spent its way to sprawl. Houston's city government has, with ample state and federal support,¹⁴¹ built numerous expressways leading to the city's suburbs and newer areas. While most cities have one

¹³⁷ See *Infirmities*, supra note 5, at 744 (city enforces covenants because "enforcement of restrictive covenants can be costly for homeowners").

¹³⁸ Shibata, supra note 9, at 234.

¹³⁹ See *Infirmities*, supra note 5, at 742 (mix of uses not overly common in Houston); Smart Growth America, *The Sprawl Index: Houston, Texas*, http://smartgrowthamerica.org/sprawlindex/factsheet_houston.html (visited June 12, 2003) (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, <http://smartgrowthamerica.org/sprawlindex/MeasuringSprawl.PDF>, (visited June 12, 2003) (describing methodology in calculating amount of mixed use within metro areas).

¹⁴⁰ Snyder, supra note 22 (quoting head of Houston chapter of American Institute of Architects).

¹⁴¹ See Laura Johannes, *Funding Hurts Houston Plan for Highways*, Wall Street Journal, Sept. 20, 1995 at T1, 1995 WL-WSJ 9900569 (describing city's lobbying for state highway funds); John Williams, *Influential PAC Considers Disbanding*, Houston Chronicle, November 17, 1994, at 29, 1994 WL 4602953 (describing city's efforts to obtain state and federal support).

circular highway (or beltway) surrounding them, Houston has two¹⁴² and may soon build a third.¹⁴³ And 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 area¹⁴⁴ - yet Houston has almost twice as many lane-miles of freeway (2460 to Boston's 1310).¹⁴⁵ Similarly, the Houston region is less than half as populous as Chicago and its suburbs¹⁴⁶ - yet Houston has almost as many freeway miles (2460 to Chicago's 2655).¹⁴⁷ Yet Houston's roads are more congested than those of Chicago or Boston.¹⁴⁸

And 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 billion¹⁴⁹ (not counting the costs of purchasing right-of-way from

¹⁴²Loopy Loop: Say no to a second beltway, *Star Tribune*, February 24, 2003, at 12A, 2003 WL 5529459. A beltway 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).

¹⁴³See Mike Snyder, *Buffalo Bayou Master Plan*, *Houston Chronicle*, July 4, 2001, at 35, 2001 WL 23612340 (third beltway, known as "Grand Parkway", planned); Rad Sallee, *Road's Hazards*, *Houston Chronicle*, August 13, 2000, at 37, 2000 WL 24504123 (portions of Grand Parkway already built).

¹⁴⁴TTI Study, *supra* note 28, Exhibit A-1 (tables for individual regions show that Houston urbanized area has 3.4 million inhabitants to Boston urbanized area's 3.0 million).

¹⁴⁵*Id.*

¹⁴⁶*Id.* (Chicago urbanized area has just over 8 million residents, as opposed to Houston's 3.4 million).

¹⁴⁷*Id.*

¹⁴⁸*Id.*, Exhibits A-4, A-8, and A-10 (Houstonians lose more hours, dollars and fuel per person to congestion than residents of Boston and Chicago areas).

¹⁴⁹See Lucas Wall, *Rail Vote* Nov. 4, *Houston Chronicle*, October 26, 2003, at 29, 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%. *Id.*

private landowners).¹⁵⁰ 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.¹⁵¹ And 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 government¹⁵² are busy turning Wintergreen, 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.¹⁵³ 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."¹⁵⁴ If this prediction is correct, Westgreen (a street now used by neighborhood children walking to school)¹⁵⁵ will become an extremely unpleasant environment for pedestrians.¹⁵⁶

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.¹⁵⁷

¹⁵⁰Id.

¹⁵¹Id. The region's \$11 billion plan requires the creation of 5,644 miles of new roadway. Id. See also Matt Schwartz, County considers major additions to area tollways, *Houston Chronicle*, June 3, 2003 at 1, 2003 WL 3264078 (describing numerous new roads being considered by local government).

¹⁵²Harris County includes Houston, and most of the county's population lives in the city of Houston. See McGeeveran, *supra* note 51, at 459 (Harris County includes Houston and has just over 3.4 million people), 439 (Houston's population is just over 1.9 million).

¹⁵³See Dave Schafer, Westgreen expansion concerns residents, *Houston Chronicle*, Nov. 13, 2001, at 1, 2003 WL 68824602.

¹⁵⁴Id.

¹⁵⁵Id.

¹⁵⁶See *supra* notes 112-17 and accompanying text (describing adverse impact of wide, fast streets upon pedestrians).

¹⁵⁷See *Stumbling Block*, *supra* note 3, 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.")

The latter areas typically have low population densities¹⁵⁸ and minimal transit service,¹⁵⁹ and are therefore inaccessible without a car.¹⁶⁰ 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.¹⁶¹ By contrast, Houston's older neighborhoods lost population for most of the second half of the 20th century.¹⁶² And in Houston, as in other cities, newer, highway-created areas tend to be more thinly populated¹⁶³ and to have less transit service than older neighborhoods closer to downtown.¹⁶⁴ 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.¹⁶⁵ So by shifting development outside the Loop, Houston's highway spending makes Houston less compact and more automobile-dependent.

¹⁵⁸Id. at 5 (each of the United States's ten largest cities, including Houston, are at least five times as densely populated as their entire metropolitan areas).

¹⁵⁹Id. at 7.

¹⁶⁰See *Stumbling Block*, supra note 3, at 1041 (noting that in many small towns and suburbs, "auto ownership is virtually necessary for a normal life") and n. 24 (citing numerous cases pointing out that auto ownership necessity in suburbs).

¹⁶¹See Jerome G. Rose, *Regulating the Use of Land Abutting State Highways: New Jersey's State Highway Access Management Act*, 18 R.E.L.J. 288, 288 (1990) (in Houston, as elsewhere, there has been "[e]xtensive development along the highways"); *Houston Freeways: A Historical and Visual Journey*, http://www.houstonfreeways.com/preview_ch5.aspx (Jan. 28, 2004) (area near west edge of I-610 Loop became major "edge city" after that portion of Loop completed in 1968).

¹⁶²See David Kaplan, *Houston Homes*, *Houston Chronicle*, April 8, 2001 at 1, 2001 WL 3011845.

¹⁶³See Gillham, supra note 157, at 5 (Houston's suburbs less dense than central city).

¹⁶⁴See Roth, supra note 61 (Houston suburbs have minimal transit service); Lucas Wall, *Rail Vote* Nov. 4, *Houston Chronicle*, September 19, 2003, at 1, 2003 WL 5744162 (Houston's light rail system does not serve areas outside I-610 Loop).

¹⁶⁵See supra notes 65-68 and accompanying text.

H. 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.¹⁶⁶ 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 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 representative¹⁶⁷ 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 to work or walk to work and other places?"¹⁶⁸ 55% of survey respondents chose the "Central urban setting" and only 37% chose the "Suburban setting."¹⁶⁹ It therefore appears that if more

¹⁶⁶See, e.g., David Kaplan, *Walking Against the Crowd*, Houston Chronicle, Oct. 26, 2003, at 1, 2003 WL 57452578 (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*, Houston Chronicle, October 26, 2003, at 3, 2003 WL 57452731 (opponents of light rail expansion argue that "few people will ride light rail . . . because Houstonians love their cars").

¹⁶⁷The 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*, at http://www.blueprintheouston.org/documents/blueprint_survey_results.doc (visited Feb. 8, 2004) (Question 31) ("Summary of Responses"); Wall, *supra* note 29 (5.9% of Houstonians commute to work via public transit).

¹⁶⁸Summary of Responses, *supra* note 167 (Question 10).

¹⁶⁹*Id.* The remaining respondents were undecided.

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.”¹⁷⁰ Not surprisingly, 87% of Houstonians favored “Making it easier to walk in the city”.¹⁷¹

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.¹⁷²

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.

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

¹⁷⁰Id. (Question 11).

¹⁷¹Id. (Question 8). Poll respondents also favored expanded public transit. 75% favored adding expanded bus service and 68% favored expanded rail transit. Id.

¹⁷²Id. (Question 5).

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 imposition¹⁷³ of a variety of costs upon Houstonians, including:¹⁷⁴

*Financial costs. Because Houston is so sprawling and automobile-dominated, most jobs are not near bus or rail stops,¹⁷⁵ and most Houstonians must own cars¹⁷⁶ and

¹⁷³I 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 31 (listing mileage statistics for metropolitan areas).

¹⁷⁴The costs listed below are not, of course, the only possible costs of sprawl. See Gillham, *supra* note 12, at 88-91 (sprawl may adversely affect farmland and wildlife), 115-18 (sprawl may adversely affect water quality and obesity); 131-32 (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.

¹⁷⁵See Houston-Galveston Area Council, 2025 RTP Accessibility Summary 8-9, at <http://www.2025plan.org/info/info.html> (Click on "Accessibility" link to find document) (visited Feb. 10, 2004) (less than 30% of jobs transit-accessible) ("RTP")

¹⁷⁶See L.M. Sixel, "Living Wage" Push Resurrected at \$10, *Houston Chronicle*, August 31, 2001, at 1, 2001 WL 23625182 (proposed local minimum wage for companies doing business with city "rounded up [by supporters] to reflect the fact that Houstonians need cars"); Kyle W. Fake, HPD lists Houston's most stolen vehicles, *Houston Chronicle*, June 21, 2000, at 12, 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, *Houston Chronicle*, August 24, 1997, at 6, 1997 WL 13058274 ("To get around in this sprawling city, you need a car.")

drive many miles¹⁷⁷ 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,¹⁷⁸ more than residents of almost every other major metropolitan area,¹⁷⁹ and over \$3000 per year more than residents of metropolitan Boston (the region with the lowest per-household transportation costs).¹⁸⁰

*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,¹⁸¹ Houstonians lost 37 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.¹⁸² Another measure of congestion is gallons of fuel wasted per person: Houstonians wasted 59 gallons per

¹⁷⁷See Highway Statistics, *supra* note 31 and accompanying text (Houstonians drive more than residents of other large cities).

¹⁷⁸See Household Spending, *supra* note 32.

¹⁷⁹*Id.* (only residents of Dallas-Fort Worth spend more).

¹⁸⁰*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 16 (noting debate over whether Houston significantly less expensive than other cities); Eric Berger, HUD looks at Houston housing, *Houston Chronicle*, April 30, 1998, at 33, 1998 WL 3574745 (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 32 (11 of 28 metro areas spend more on housing and transportation combined than Houston, while 16 spend less).

¹⁸¹Michael Lewyn, *Sprawl, Growth Boundaries, and the Rehnquist Court*, 2002 *Utah L. Rev.* 1, 43 (2002) ("Boundaries") (describing TTI).

¹⁸²See TTI Study, *supra* note 28, at Exhibit A-4 (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.*, Exhibit A-1 (listing regional populations).

person, more than residents of all but three urbanized areas.¹⁸³ 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.¹⁸⁴ So Houstonians have the worst of both worlds: they often have to drive everywhere,¹⁸⁵ but are stuck in traffic once they get behind the wheel.¹⁸⁶

*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.¹⁸⁷ 30% of Houston's ozone pollution comes from cars and trucks.¹⁸⁸ 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,¹⁸⁹ which means that those Houstonians too poor,¹⁹⁰ too elderly or too disabled¹⁹¹ to own cars

¹⁸³ Id., Exhibit A-10. By this measure of congestion, the only regions more congested than Houston were Los Angeles, San Francisco, and Dallas.

¹⁸⁴ Id., Exhibit A-8. By this measure of congestion, the only regions more congested than Houston were Los Angeles and San Francisco.

¹⁸⁵ See supra notes 175-77 and accompanying text (describing automobile dependency in Houston).

¹⁸⁶ See supra notes 182-84 and accompanying text.

¹⁸⁷ See Tony Freemantle, Airing of Grievance, *Houston Chronicle*, May 1, 2002, at 21, 2002 WL 3259994. Ozone is "a major respiratory irritant that some studies suggest may cause asthma." Id.

¹⁸⁸ See Andy Summa, Fort Bend above the state average in passing vehicle emissions tests, *Houston Chronicle*, June 12, 2003, at 1, 2003 WL 57420624 (in Houston, cars and trucks produce 30 percent of nitrogen oxide fumes; these fumes in turn "react in sunlight to form ground-level ozone").

¹⁸⁹ See RTP, supra note 175.

¹⁹⁰ See Dan Feldstein & Claudia Kolker, Carless in Houston, *Houston Chronicle*, June 15, 1997, at 1, 1997 WL 6562717 (in Harris County, which includes Houston, average carless household earns \$13,000 per year, less than one-third income of average county

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.¹⁹²

*The unquantifiable costs of the “coercion factor” - the practical necessity for the car-owning middle classes to own cars and to use them often.¹⁹³ 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.¹⁹⁴

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,¹⁹⁵ 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)¹⁹⁶ has come to support reform of

household); Patrick Gallagher, *The Environmental, Social and Cultural Impacts of Sprawl*, 15 *Natural Resources and Environment* 219, 223 (2001) (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”).

¹⁹¹See Gilderbloom, *supra* note 107 (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).

¹⁹²See Not Just Environmental, *supra* note 8, at 364-65 (discussing possible relationship between sprawl and welfare dependency).

¹⁹³See *supra* note 176 (suggesting that this is the case for many Houstonians).

¹⁹⁴See Not Just Environmental, *supra* note 8, at 347-50 (necessity of car ownership reduces consumer choice).

¹⁹⁵See Part III-H *supra*.

¹⁹⁶ See Bare, *supra* note 2, at 491 (“The political support for sprawl comes from lobbies for 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”).

Houston's land use policies. When the city rewrote its subdivision ordinance in the late 1990s, the city's homebuilders urged the city to allow more compact development by reducing lot sizes.¹⁹⁷ 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 circumstances¹⁹⁸ (thus facilitating townhouse construction).¹⁹⁹ In addition, Houston modified its setback requirements by allowing setbacks of less than 25 feet under certain narrowly defined circumstances.²⁰⁰

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,²⁰¹ population inside the Loop is growing after having decreased between 1960 and the mid-1990s,²⁰² and the value of urban land rose by 70 percent in the late 1990s.²⁰³ Although Houston's steps so far have been modest,²⁰⁴ they

¹⁹⁷ See Matt Schwartz, Revised subdivision ordinance sent to panel, *Houston Chronicle*, Sept. 8, 1998, at 13, 1998 WL 16769072 (according to city planning director, "there was broad support for [such] revisions among development and residential interests").

¹⁹⁸ See supra notes 65-68 and accompanying text.

¹⁹⁹ See supra notes 42-49 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 65-66 and accompanying text.

²⁰⁰ See Chapter 42, supra note 54 (noting that 25 foot setback rule no longer applies to commercial structures on major thoroughfares where the right of way is narrower than 80 feet); Houston Code, sec. 42-155 (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").

²⁰¹ Kaplan, supra note 162 ("townhouses have been popping up" in neighborhoods inside the 610 Loop to house "Houstonians [who] are moving back toward the center of town").

²⁰² Id. (noting population rise, and describing it as "noteworthy, considering that it had been losing people from the '60s until the mid-'90s").

²⁰³ Id. ("the value of land inside Loop 610 has risen 70 percent, and in some parts it has increased much more.")

²⁰⁴ See supra notes 70-72 and accompanying text (noting limitations of 1998 reforms).

have not been useless.

C. Further Reforms: A New Vision For Houston

By reducing minimum lot sizes,²⁰⁵ 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, rather than reversing, Houston's traditional hostility towards zoning.²⁰⁶ Specifically, Houston can (1) eliminate minimum lot size requirements, (2) scale back setback and minimum parking

²⁰⁵See supra notes 65-68, 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 57 (citing numerous articles on light rail in Houston).

²⁰⁶Of 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 on expanded public transit, see supra note 57, 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 55, at 552-54, 57 (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); *Infirmities*, supra note 5, at 698-732 (same); Wall, supra note 166 (discussing debate over light rail expansion in Houston); Dowling, supra note 2, 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.

requirements, (3) stop encouraging separation of land uses, (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 did Houston's 1998 subdivision ordinance) 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.²⁰⁷

A common justification²⁰⁸ for minimum lot size requirements and other anti-density regulations is that such laws prevent the traffic congestion that comes from packing more people (and thus more drivers) into smaller spaces.²⁰⁹ But Houston's own traffic problems suggest otherwise. As noted above, the Houston urbanized area has lower

²⁰⁷See supra notes 55-60 and accompanying text (describing anti-pedestrian side effects of anti-density regulations).

²⁰⁸I 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), cert. denied, 526 U.S. 1144 (1999). *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* sec. 51.11 (4th ed. 2001) (courts have generally upheld "modest lot-size requirements of 5,000 or 6,000 square feet").

²⁰⁹See *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) (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.

population density than almost every American region of comparable size.²¹⁰ Yet Houston actually has **more** traffic congestion than the majority of comparable regions: as noted above,²¹¹ Houstonians lose more hours and dollars per person to congestion than commuters in seven of the nine comparably sized (i.e. with over 3 million people) urban areas²¹² - even though all nine are more densely populated than Houston.²¹³ 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,²¹⁴ and Houstonians in particular drive more miles daily than residents of more densely populated regions.²¹⁵ So by increasing driving, Houston's minimum lot size requirements may have actually increased congestion.²¹⁶

²¹⁰ See supra note 28 and accompanying text.

²¹¹ See supra notes 182-84 and accompanying text.

²¹² 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 28, Exhibits A-1 (listing regional populations), A-4 and A-8 (congestion statistics).

²¹³ Id., Exhibit A-1.

²¹⁴ See supra notes 55-60 and accompanying text (showing link between low density and automobile dependency).

²¹⁵ See supra notes 24-28, 31 and accompanying text

²¹⁶ Indeed, it could be argued that by increasing congestion, minimum lot size requirements are irrational and thus unconstitutional. Land use regulations (such as minimum lot size ordinances) are generally facially invalid only if they are arbitrary. See *Tri-Corp Management Co. v. Praznik*, 33 Fed. Appx. 742, 747 (6th Cir. 2002) (government regulation violates due process if it is "arbitrary and capricious"). Cf. ; *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (even a rational regulation may violate Takings Clause of Fifth Amendment if it creates unusually harsh impact upon individual landowner). But to strike down minimum lot sizes as arbitrary, courts would have to overturn generations of precedent. See supra notes 207-08 (courts generally defer to anti-density municipal land regulation).

2. Parking and Setbacks

Today, Houston's setback requirements and minimum parking requirements combine to force pedestrians to walk through seas of parking to reach apartments, shops and jobs. Minimum parking requirements force landowners to build parking lots,²¹⁷ and setback rules encourage businesses to place those parking lots in front of buildings by preventing landowners from placing buildings in the 25 feet in front of those buildings.²¹⁸ Such regulations have combined to make Houston more automobile-dependent, by reducing density, subsidizing driving, and making pedestrian travel uncomfortable.²¹⁹

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 commercial²²⁰ buildings to sit right next to the sidewalk (i.e. 4 feet or so from the street).²²¹

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, thus infuriating the residents of those streets (who are deprived of

²¹⁷See supra notes 73-89 and accompanying text (describing regulations).

²¹⁸See supra notes 82-87 and accompanying text (describing regulations).

²¹⁹See supra notes 88-107 and accompanying text (criticizing regulations).

²²⁰I express no opinion as to whether setback requirements for houses should be retained. Although such laws do affect Houston's overall density, they may harm pedestrians less than commercial setbacks, because a pedestrian walking to a house 25 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*, *Houston Chronicle*, May 28, 1995, at 24, 1995 WL 5905256 (discussing pros and cons of setback regulations in residential context).

²²¹See *Bivens*, supra note 106 (Houston sidewalks typically 4 feet wide).

their own parking spaces by those motorists).²²²

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.²²³ Or cities could price on-street parking at a level 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.²²⁴

²²²See Lori Rodriguez, Off-street parking requirements to be put before council, *Houston Chronicle*, May 1, 1989, at 11, at 1989 WL 2731343 (“Proponents of the ordinance [expanding minimum parking requirements] say the ordinance is intended to alleviate parking problems caused by cars that spill over from businesses into neighborhoods”); Shoup, *supra* note 83 (describing problem generally).

²²³ See *County Bd. of Arlington County, Va. v. Richards*, 434 U.S. 5 (1977) (upholding similar system against equal protection challenge); Deborah Mann Lake, Parking relief, *Houston Chronicle*, March 7, 2002, at 1, 2002 WL 3248173 (describing introduction of parking permit system in Houston neighborhood).

²²⁴ Shoup, *supra* note 95, at 25. It could be argued that, because the overwhelming majority of Houstonians drive to work, see *supra* note 29 and accompanying text, parking policy has less affect upon their behavior than would parking policy in a more transit-oriented city. But numerous case studies, even in auto-oriented cities such as Los Angeles, show otherwise. See Shoup, *supra* note 95, at 16 (citing numerous case studies from Los Angeles, Washington and Ottawa showing that transit and/or carpooling increased after employers began to charge for parking); Wilson, *supra* note 99, at 35-36 (citing another case study from Los Angeles); Paul Boudreaux, Vouchers, Buses and Flats: The Persistence of Social Segregation, 49 *Villanova L. Rev.* 55, 66 (2004) (Los Angeles “built . . . with the automobile in mind” causing “dependence on automobiles”); Gregory C. Keating, Pressing Precaution Beyond The Point of Cost-Justification, 56 *Vanderbilt L. Rev.* 653, 703 (2003) (“Doing without a private automobile in

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 spaces²²⁵ or unloading goods from those spaces.²²⁶ But if, as suggested above,²²⁷ minimum parking requirements increase societal automobile dependency, such regulations may be “like fertility drugs for cars”²²⁸ - that is, they may actually increase, rather than decreasing, the number of cars on Houston streets, thus increasing traffic congestion and air pollution.²²⁹

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 few feet of

contemporary Los Angeles . . . is a hardship”). 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 *Not Just Environmental*, supra note 8, at 333 (one employer’s “cash out” experiment in Seattle suburb reduced percentage of employees driving alone from 89% to 54%).

²²⁵ See *Central Bank & Trust Co. v. City of Miami Beach*, 392 F.2d 549, 550-51 (5th Cir. 1968) (rejecting constitutional challenge to minimum parking requirement because of 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 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”).

²²⁶ *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 in company parking lot).

²²⁷ See supra notes 88-101 and accompanying text.

²²⁸ *Shoup*, supra note 95, at 20.

²²⁹ 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 (land use regulations such as minimum parking requirements valid if “fairly debatable”).

parking or yardspace to widen roads instead of a few feet of buildings.²³⁰ But given the harmful effects of Houston’s wide roads upon pedestrians,²³¹ this rationale may actually support 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.²³² For example, if one building is closer to the street than adjacent buildings, the first building may reduce the light available to the second.²³³ 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.²³⁴ However, cities can address this problem without mandating setbacks for all shops or houses. For example, New York

²³⁰See Robinson, *supra* note 220.

²³¹See *supra* Part III-C.

²³²See *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 & Roberts, *supra* note 13, sec. 4.13 at 91.

²³³ 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, *id.*, but did not explain how a fire could leap from one side of a street to another or why 60 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.*

²³⁴ See Matthew J. Kiefer, *Privatizing Creation of the Public Realm: The Fruits of New York City’s Incentive Zoning Ordinance*, 28 B.C. Env’tl. Aff. L. Rev. 637, 639-40 (2001) (describing zoning rules designed to preserve access to light and air in 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 McGeveran, *supra* note 51, at 176 (Houston’s summer temperatures typically over 90 degrees and sometimes over 100 degrees).

City has sought to reduce skyscraper-created shadows by “mandating streetwall setbacks increasing as building height increased.”²³⁵ 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.²³⁶

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.²³⁷ In such situations, “the unfortunate effect is [buildings’] complete failure to define space: the abyss.”²³⁸ 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.²³⁹ 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.²⁴⁰ Instead, Houston should treat such covenants like any other contracts:

²³⁵ See Kiefer, *supra* note 234, at 639.

²³⁶ 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 parking lot separates building and street).

²³⁷ Kunstler, *supra* note 83, at 138.

²³⁸ *Id.*

²³⁹ See *supra* notes 132-40 and accompanying text.

²⁴⁰ See *supra* notes 124-27 and accompanying text (describing effects of single use zoning in other cities); 140 and accompanying text (describing similar reality in Houston).

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,²⁴¹ thus increasing the number of mixed-use neighborhoods in which residents can walk to shops and jobs.²⁴²

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.²⁴³ 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,²⁴⁴ 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 those streets, by definition, have more traffic and thus more congestion.²⁴⁵ 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

²⁴¹See supra note 138 and accompanying text (noting that city especially willing to enforce covenants specifying land uses).

²⁴²See supra notes 124-27 and accompanying text (explaining how single use zoning precludes such neighborhoods from coming into existence).

²⁴³ See *Euclid v. Ambler Realty*, 272 U.S. 365, 391 (1926).

²⁴⁴See supra notes 124-27 and accompanying text (explaining link between separation of uses and automobile dependency).

²⁴⁵Cf. *Ortiz*, supra note 4, at 147 n. 10 (2002) (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).

desirable, leading to reduced property values and ultimately neighborhood decay.²⁴⁶ As noted above, the majority of Houstonians actually want to be able to walk to shops and offices.²⁴⁷ 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 2000.²⁴⁸ 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,²⁴⁹ and Houston’s streets are so wide, have so few intersections, and have such fast traffic that they are not comfortable for pedestrians.²⁵⁰ Houston’s street design

²⁴⁶See *Young v. City of Houston*, 756 S.W. 2d 813, 813 (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 392-93 (asserting that businesses bring wide variety of ills into neighborhoods).

²⁴⁷See *supra* notes 168-70 and accompanying text.

²⁴⁸*Gillham*, *supra* note 157, at 63. Downtowns in most other big cities are also gaining population. *Id.* at 62-63.

²⁴⁹See *supra* notes 141-47 and accompanying text.

²⁵⁰See *supra* Parts III-C and III-D. 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 109 (noting concern). Most fire rigs are 8-10 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 20 foot passage to fit two 8- to 10-foot fire rigs on a street at the same time - but many American streets are over 30 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 20 feet for two fire trucks), *supra* notes 102-111 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*,

and transportation policies are more difficult to remedy than the more explicitly 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 20-35 feet).²⁵¹ Moreover, Houston-area governments should stop implementing policies that exacerbate Houston's sprawl. For example, Houstonians could stop building new highways to 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.²⁵² Between 1982 and 2001, Houston's freeway mileage and arterial mileage have nearly doubled²⁵³ - yet its congestion has gotten worse. For example, Houston's annual delay per person nearly doubled (from 19 hours per person to 37)²⁵⁴ and its

supra note 117 ("a neighborhood might experience a house fire only once every couple of decades"); Swift, supra note 109 (one city studied suffered from 20,000 traffic accidents and no fire-related injuries over an eight-year period).

²⁵¹See supra notes 109-11 (describing typical street widths in other cities).

²⁵²See Rose, supra note 161, at 288 (highway-induced development brings congestion to highways).

²⁵³See TTI Study, supra note 28, The Mobility Data for Houston, TX (freeway lane miles increased from 1385 to 2460, while arterial lane miles increased from 1500 to 2840).

²⁵⁴Id.

congestion cost per person tripled (from \$219 to \$711).²⁵⁵ 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 could instead spend money on "traffic calming" - that is, strategies to improve conditions for pedestrians by slowing down motor vehicle traffic.²⁵⁶ In cities adopting traffic calming, motorist convenience is balanced against pedestrian safety and convenience, reduction of traffic accidents, and other goals.²⁵⁷

For example,²⁵⁸ 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.²⁵⁹ Wider sidewalks can be used not just for walking, but also for civic

²⁵⁵Id. 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 Not Just Environmental, *supra* note 8, at 69-70 (Charlotte increased road mileage by 113%, while annual delay per driver increased by 356%).

²⁵⁶See Burrington, *supra* note 114, at 723. And of course, Houston could also spend more money on public transit. See 03 Year In Review, *supra* note 57 (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) at www.ite.org/traffic/tcstate.htm (Visited Feb. 18, 2004) ("ITE") (most traffic calming measures cost \$40,000 or less).

²⁵⁷See Burrington, *supra* note 114, at 724 (noting numerous other benefits).

²⁵⁸For a more complete discussion of traffic calming measures, see generally ITE, *supra* note 256.)

²⁵⁹See Freilich, *supra* note 55, at 557 (maximizing sidewalks helps to "make the pedestrian rather than the automobile the primary determinant of urban form."); Main Street, *supra* note 91, 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 lane of traffic for bike lanes,

amenities such as benches and sidewalk cafes.²⁶⁰

*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).²⁶¹

*Planting street trees, which may make streets look smaller and thus encourage slower driving.²⁶²

If these steps are implemented in appropriate situations,²⁶³ Houston's streets may become safer and more comfortable for pedestrians.²⁶⁴

IV. 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 an 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

which allow people to use bicycles without coming into conflict with either motorists or pedestrians. *Id.* at 39.

²⁶⁰*Id.* at 62.

²⁶¹*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.

²⁶²*Id.* at 56 (tree “canopies can create a feeling of a street edge, which helps calm traffic”).

²⁶³The 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.

²⁶⁴And as a result, affected neighborhoods may become more desirable. See ITE, *supra* note 256, at 175 (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”).

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.

