Bond Case Briefs

Municipal Finance Law Since 1971

Court Case Could Challenge Houston's Hands-Off Approach.

America’s fourth-largest city has never had a zoning code.

A few weeks ago, business leaders in Houston introduced a new slogan aimed at helping to attract more corporations to town. It’s a simple slogan: “Houston: The City With No Limits.”

Like almost any good civic slogan or motto, this one can be interpreted in many different ways. But to quite a few outsiders, it will signal one overriding idea about the nation’s fourth-largest city: There is no zoning. Houston, they believe, is a place where you can build anything you want next to practically anything you can think of — a greasy garage on a pristine residential street, a convenience store in the midst of expensive single-family houses, a noisy bar next to a nursing home.

That’s only partly true. Houston does, in fact, operate without the benefit of a city zoning code, and in the last 70 years, it has voted against having one three different times. The garage owner who wants to set up shop in between private homes does not have to worry about any comprehensive city code that might forbid it.

That doesn’t mean, however, there are no obstacles to building that garage. In many residential neighborhoods, there are enforceable private deed restrictions that determine what can be built. There are rules governing lot subdivision, building setbacks and parking permits. There are preservation and landscaping laws. All of these contribute to making development in Houston a little more orderly than most people on the outside tend to imagine it.

Even so, the stereotype about Houston being a wide-open development town has some validity to it. If your goal in life is to operate a nightclub in the vicinity of a Baptist church, you’re much better off trying it in Houston than in Boston or San Francisco. The absence of general zoning is in fact a major reason why first-time visitors notice a haphazard or unpredictable quality to Houston’s neighborhoods.

Whatever views one may hold about a city without zoning, it’s hard to deny that Houston has done pretty well for itself over the past generation or so. Its population has grown faster than that of almost any other American city. Its unemployment rate is among the lowest. It continues to attract new businesses no matter what slogan it chooses to adopt for itself. And a growing number of scholars, notably the urbanologist Edward Glaeser, have argued that Houston has done well precisely because it imposes so few restrictions on development.

But will a developmental free-for-all bring Houston the same heady results in the coming decades that it brought in the preceding ones? Or is it, at long last, time to impose a little more order on the unwieldy metropolis? Those are questions that Houston’s development community has spent the past couple of years trying to puzzle out, as it has negotiated the twists and turns of a legal event known to just about everybody as the Ashby case.

The focus of the case is a 1.6-acre lot near Rice University that for decades was home to a nondescript two-story apartment building known as Maryland Manor. This building, set among

single-family homes worth a million dollars and more, didn't do much to enhance the appeal of the surrounding properties, but it didn't especially bother anyone either.

In 2007, however, Buckhead Investment Partners announced that it had acquired Maryland Manor and planned to tear it down and construct a 23-story luxury apartment complex with 228 residential units. No matter how it was designed, this new building would be out of place in an area consisting almost entirely of one- and two-story homes. And scarcely anyone, besides the developers, tried to argue that it fit the neighborhood.

The neighbors set to work to determine what they could do to derail the new project in a town where there were no zoning laws to help them. They beseeched the city, which did not particularly like the project either, to use any available legal means to stop it. Then-Mayor Bill White wrote in a letter to area civic groups that he would use "any appropriate power under law" to alter the development. The city continued to deny building permits during five years of negotiation. Finally, in 2012, city officials decided they were out of options. They concluded the city had no legal grounds for blocking the project and reached a settlement with Buckhead granting it the legal right to build, in exchange for steps to mitigate light and noise from the building and a promise to create a physical buffer between the high-rise and the neighborhood.

That appeared to be the end of the story. But actually, it was only the beginning. The homeowners regrouped and filed suit in the Houston District court, arguing that even at 21 stories, the new proposed height, the Ashby project was a public nuisance and subject to a court injunction preventing its construction. They also asked the court to award damages to the residents living closest to the project, on the grounds that it would decrease their property values, damage their homes and create serious traffic problems. The plaintiffs argued that 10 existing homes near the site could suffer cracked slabs, buckled walls and burst pipes just from the construction process.

This was a novel, if not an unprecedented, employment of the nuisance concept in a civil action. Judges apply the nuisance standard to obnoxious sights, smells or clearly offensive activities that create hardship for the community in which they are located. To declare a building yet unbuilt to be a nuisance mostly on the basis of its planned size was to make an argument that no court anywhere had ever bought. It was, in effect, to impose a nuisance standard on the basis of aesthetics. "This is really breaking new ground," law professor Josh Blackman told a local reporter. "This is the furthest that any residents have tried to challenge something in Houston history." Blackman described the prospect of an injunction against the developers as "backdoor zoning for the wealthy."

Still, it wasn't a crazy challenge. The case was sent to a jury, and there was always the possibility that a jury would feel more sympathy for the homeowners than for the development company. In fact, that was pretty much what happened. In December, the Houston jury awarded 20 homeowners a total of $1.7 million in damages on the grounds that a 21-story tower in their vicinity would indeed constitute a nuisance to the conduct of their everyday lives. The jury returned the case to Judge Randy Wilson to determine whether he should issue a permanent injunction blocking the building from being built at all.

At this point, high-priced legal talent and substantial media attention were focused on the case. And the arguments zeroed in on what the ultimate importance of Ashby was: It stood to determine whether Houston's free-for-all development system would remain intact or would be made subject to an unpredictable judicial review process. "If a permanent injunction is granted," one pro-development organization wrote in a friend-of-the-court brief, "it throws all the rules out the window."

The developers argued that the Ashby opponents were trying to circumvent established city law.

They said the homeowners considered themselves “special” and more sensitive to petty annoyances than other residents of the city.

The homeowners responded that money wasn’t the issue. “It’s about homes; it’s about community,” plaintiffs’ attorney Jean Frizzell insisted. “They want to call these people special; they are fighting for their homes and their community.”

As the case proceeded in Judge Wilson’s court, the city of Houston found itself in a rather unusual position. On the one hand, it agreed with the plaintiffs that the Ashby project was indeed a nuisance. Mayor Annise Parker called it “the wrong project in the wrong place.” But she opposed the idea of an injunction forbidding construction, agreeing with the defendants that it could bring chaos to development citywide.

In the end, that was about where the judge came down. He agreed the project would be a nuisance to its neighbors and granted them $1.2 million in damages. But he refused to prevent the building from being built. “If an injunction is granted,” Wilson wrote, “it will have a chilling effect on other developments in Houston.”

Then he honed in on the big issue. “As Houston becomes more and more urbanized and denser, perhaps Houston should reconsider whether zoning is appropriate for this city.”

That is unlikely to happen. At a minimum, a comprehensive zoning code would dramatically revalue properties all over the city, amounting to a substantial redistribution of private wealth. No elected city leader, not even an outspokenly progressive one like Parker, is going to advocate that.

But neither would it be correct to suggest that free-for-all development will proceed in the future as it did in pre-Ashby times. A precedent for awarding nuisance damages has been set, assuming it is not reversed on appeal. The concessions offered by the Ashby developers over the past seven years seem certain to place pressure on others building where there is significant local opposition. The city government, while backing away from zoning, will be asked to impose new regulations on future projects. One such rule, allowing neighborhood groups to apply for minimum lot size restrictions, has already become law.

But the most interesting question emerging from the case may be whether it will lead to more large infill projects in the central areas of the city. On the one hand, the court and the city government have made it clear that Houston’s build-it-anywhere legal structure will remain more or less intact. On the other hand, the sheer amount of time and effort required of the developers on the Ashby project may send a signal that it remains easier and cheaper to build in the exurbs where they do not have to deal with entrenched community feeling.

Or, still another possibility — developers might draw the lesson that there is plenty of useful work to do in creating urban density, but they have to go about it in a more sensitive and appropriate way than they did on Ashby. That might be the best outcome of all.

GOVERNING.COM
BY ALAN EHRENHALT | AUGUST 2014