

GROWTH AND CONSERVATION IN TEXAS

A PRIMER ON COUNTY TOOLS
AND PATHS FORWARD

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The Hill Country Alliance, Cibolo Center for Conservation, Comal County Conservation Alliance, Environmental Defense Fund, Greater Edwards Aquifer Alliance, League of Women Voters of the Comal Area, and the National Wildlife Federation commissioned this white paper. It was completed in the spring of 2023, with amendments following the close of the 2023 legislative session.

This is a guide to existing powers and practices of Texas counties, with consideration of additional governance tools that might be considered by future county officials and legislators.

It was prepared by Gap Strategies.



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Executive Summary

Texas Counties are a strange animal. “They were designed by the legislature not to work,” former county judge Eddy Etheredge used to say when he was leading the Hays County Commissioners Court. “And they did a damn good job at it.”

Etheredge was speaking to the decentralized nature of county government, and the restrictions on authority that make it difficult for growing counties to manage new development effectively. The underlying truth behind his humor — that Texas counties have limited authority, especially compared to Texas cities — historically caused many counties to shy away from trying to do much beyond the basics: routine road maintenance, budgeting, and oversight of the criminal justice system.

But the deeper truth is this: despite the obstacles and limitations, for county leaders willing to innovate, there are powerful ways to address growth, protect water and natural resources, and shape the future. That’s not to say better tools aren’t needed. They are.

Crafting such tools, learning to use them effectively, and winning new legislative options from the Texas Legislature will demand patience and persistence. But there are recent examples of progress from which we can learn – examples that light the way for creative county leaders to use imperfect tools with effect.

This report, commissioned by the Hill Country Alliance, the Cibolo Center for Conservation, Comal County Conservation Alliance, Environmental Defense Fund, Greater Edwards Aquifer Alliance, League of Women Voters of the Comal Area, and the National Wildlife Federation, and prepared by Gap Strategies, addresses how counties came to be structured as they are, with the limitations they have, because that history helps explain where we are today and what changes might be needed – or at least possible – in the future. This report goes on to explore how some counties have pushed against traditional frontiers, seeking to be more proactive and more effective at population management and the accompanying natural resource challenges that have come their way. It addresses subtle shifts in state law that have opened new doors, and ways that counties may step outside traditional boundary lines to better manage new development challenges — directly and indirectly. Finally, it looks at what additional tools counties might ask for in future legislative sessions.

This is not intended as a comprehensive catalog of county powers or best practices in each jurisdiction. This paper is focused on growth management, land use, and natural resources. It is intended to present a historical perspective and a current snapshot of policies pursued by a handful of counties that may be among the state’s innovators. No doubt there are others.

The tools we have in Texas are far from perfect; yet, they can be effective – and there are innovative ideas already available for local leaders to adapt and apply.

Introduction

From its rural and mythically self-reliant roots, Texas has grown to become the nation's second most populous state, with many counties among the fastest growing in the country. The press of people, and the challenges of changing times have summoned many Texans to wonder whether the state needs new visions, and new regulatory tools, to deal with the demands of development and modern, interconnected living.

Across this once wide-open state, there have sprouted hundreds of unincorporated places that resemble urban suburbs, or even towns. It will require modern tools – and innovative use of existing authority – if county leaders are to meet the challenges of growth and climate that are apparent in the Hill Country and in urban ring counties throughout Texas.

Counties and cities developed along different paths in Texas, as they did in many parts of the country. Here, because of the state's unique history, that divergence was especially stark. In short, the Texas legislature has sharply limited what counties may do to address land management and new development. Whereas Texas cities (at least those with a population of more than 5,001) are empowered to create home rule charters, essentially granting the right to enact any ordinance not expressly forbidden by state or federal law, Texas counties are the reverse. Considered an arm of the state, Texas counties may enact only those orders and regulations that are expressly authorized by state law. And the legislature has been notoriously reluctant to grant much planning or land use authority to counties.

Even so, there is a considerable amount of gray in the equation. With dedication and creativity, Texas counties may access some useful, even surprising powers.

There was a time when the state experimented with providing counties clearer and more direct authority to address growth in unincorporated areas. In the 1930s, the state granted counties much more robust authority, then retreated from that. But beginning about four decades ago, as more and more growth spilled into previously rural places, counties began once again to assert more interest in managing development, buttressed by piecemeal state mandates and grants of authority.

Then, just as counties – especially those adjacent to the state's big metro areas, or in freshly desirable places, such as the Hill Country – began to grapple in earnest with how to manage a record influx of development, the few reliable regulatory tools county officials thought they could rely on came into question. This earth-shaking question came in the form of a court case, *Elgin Bank v. Travis County*, which would remake the regulatory landscape – and plant seeds of legislative change that are still ripening today.

The initial result of the *Elgin Bank* case undermined the authority of counties to perform the most basic regulation of land development in certain situations, encouraged *colonia*-style sprawl, and jeopardized even indirect efforts to address environmental stewardship, such as water quality protection. In the long term, the case led to

important overhauls in state law and new tools for counties, some of which are still misunderstood and underutilized to this day. Among the most significant examples was the passage of SB 873, now Subchapter E of Chapter 232 of the Texas Local Government Code, which clarified and expanded counties' powers to regulate subdivision development. (For more about how Texas counties evolved and the context of county regulatory authority, see Appendix A.)

Elgin Bank and the Importance of Subchapter E

To grasp the importance of the Elgin Bank case, it's important to understand the context. During the late 1980s and early 1990s, both Texas counties and state government made efforts to address substandard development. The state granted – and in some cases mandated – new responsibility for counties to tackle the kinds of substandard housing projects that had grown rapidly as the state population mushroomed. These problem subdivisions were especially prevalent in the unincorporated areas along the Texas-Mexico border but were also evident throughout the state.

By the election of 1994, however, there was a strong backlash nationally and in Texas against government regulation, especially environmental initiatives from Washington and the Ann Richards administration in Austin. The group Take Back Texas campaigned for a more expansive view of private property rights.

In this atmosphere, a lending company sued Travis County, arguing that they should be exempt from subdivision platting requirements on land they had come to own.

The case, Elgin Bank v. Travis County, became a landmark.

Elgin Bank owned 150 acres in Travis County with access to existing public roads. The bank argued it was exempt from subdivision platting regulations based on a 1989 state attorney general's opinion by Jim Mattox (JM-1100). The Attorney General's opinion interpreted state law to indicate that platting was not triggered unless the developer was dividing land *and* laying out streets or other public areas such as parks. Despite the Attorney General opinion, many counties continued to require routine platting for subdivision developments.

When Travis County tried to make Elgin Bank subdivide according to its regulations, the bank sued in 1994. Travis County District Judge F. Scott McCowan ruled in favor of Travis County, writing in essence that while poor grammar may have made the state's platting statute mildly confusing, the original legislative intent was clear. He noted that the county subdivision statutes were modeled on city statutes and court rulings dating back to the 1920s, with authority and intent that seemed clear. Several counties, including Hays, supported Travis County with friend-of-the-court briefs arguing that the Elgin Bank interpretation made no sense in the practical world and would lead to gross abuse.

Though Travis County won at the district court level, the 3rd Court of Appeals reversed McCowan and sided with Elgin Bank. In 1996, the state supreme court declined to review the case.

The result was a race to the bottom among low-end developers, sparking an explosion in “flag lots” across the state. These flag lots were designed to have narrow “flag poles” that would touch an existing county or state road, thus exempting them from platting requirements and effectively removing the subdivision from any preemptive regulation.

Sometimes these “flag poles” would be only a few feet wide, and stacked many flag lots deep, so that from the road, an ambulance or school bus driver might see only a series of unmarked, makeshift driveways stretching as far as could be discerned – with no proper road, no addressing, and sometimes not even enough width to provide access for a large vehicle, sometimes nothing but rutted mud tracks running through scattered concentrations of mobile homes. This made tracking 9-1-1 addressing, emergency services, septic tank inspection and enforcement, utility hookups – even accurate appraisal records – all but impossible.

The damage from the Elgin Bank era, and from earlier epochs when there was no development regulation outside cities, linger to this day. Many a county official can testify to the ongoing misery dealt to families, taxpayers, and natural resources by grandfathered, substandard subdivisions.

But for all its problems, the Elgin Bank case of the 1990s helped galvanize county officials and crystalize public opinion around the need to regulate development in unincorporated areas. Hays County organized bus tours for legislative aides of “Elgin Bank subdivisions” and emergent *colonias* in the shadow of the state capital. (About the same time, Hays County had passed what were arguably the state’s most far-reaching set of county subdivision and development regulations, incentivizing cluster development and rainwater harvesting, and establishing variable lot sizes based on geology and the source of water and wastewater. The Texas Association of Counties featured the rules as a model, but the Elgin Bank ruling threatened to undermine the very idea of county authority and offered large loopholes to circumvent the rules.) Counties from West Texas to the Coastal Bend reported problems and reached out to state representatives.

In 1999, with the Conference of Urban Counties, the Texas Association of Counties, and the County Judges and Commissioners Association working together, and after widespread press reports about Elgin Bank abuses, both in Texas papers and in national publications such as the *Washington Post* and the *Wall Street Journal*, the legislature passed bills to clarify the authority of counties to require platting in most new subdivisions, and to allow counties to impose basic infrastructure standards on manufactured home rental communities. These new authorities went a long way toward limiting future damage from the Elgin Bank case, though there were exceptions to the regulations, including for subdivisions with all lots larger than 10 acres.

Building on the momentum from the 1999 session, county interests succeeded in passing more sweeping legislation in the next regular legislative session, in 2001. State Senator Jon Lindsay, a Republican and former Harris County judge, authored SB 873, which today, as noted above, is today codified as **Subchapter E of Chapter 232 of the Texas Local Government Code, the county subdivision statute**. At first, this legislation applied only to large urban counties, and the counties immediately adjacent. During the 80th legislative session, in 2007, that restriction was lifted, allowing all Texas counties to take advantage of Subchapter E.

The specific language introducing the powers of Subchapter E is important because its breadth was almost revolutionary for legislation addressing Texas counties and land use. The language closely follows wording that has been used historically in the United States, and in Texas, to justify and enable more expansive land use management, such as zoning laws. While the Texas code expressly prohibits most traditional zoning, Subchapter E states that “the commissioners court may adopt rules governing plats and subdivisions of land within the unincorporated area of the county to promote the health, safety, morals, or general welfare of the county and the **safe, orderly, and healthful** development of the unincorporated area of the county.”

This language opened the door to “police powers” for Texas counties, broad – and in relationship to Texas counties, relatively untested authority to regulate private affairs – even if, as noted, the legislature expressly forbade counties to engage in general zoning except for a few special cases, such as sexually-oriented businesses, junkyards, airports, and, where expressly legislated, zoning around special features such as a handful of lakes and coastal beaches (more on that later).

SB 873 – Subchapter E – changed the game for counties, reinforcing and clarifying some tools, expanding others, and creating new frontiers for growth management. Yet, two decades later it is often overlooked and misunderstood.

For a list of expanded authorities linked to Subchapter E, see Appendix D. Its implications will be discussed further in later sections of the main report.

In addition to Subchapter E, in the aftermath of Elgin Bank, the legislature adopted several other notable laws that expanded or clarified county land use authority:

- HB 1445 (2001), to coordinate regulation in the ETJs between cities and counties. Despite follow-up legislation and some success, that issue remains problematic, with ETJ regulation often confusing or contradictory, and poorly coordinated between cities and counties.
- HB 467 (2005), under which every county became eligible for the Texas Water Development Board’s Economically Distressed Area Program so long as the affected community adopted TWDB’s Model Subdivision Rules.
- SB 712 (1999), gave counties the authority to set minimum road and infrastructure standards for manufactured home rental communities.

- SB 1323 (1999), added a section to Subchapter A of Chapter 232 to allow commissioners courts to require evidence of sufficient groundwater to support the requested subdivision if that source was groundwater from the subdivided land.

Medina County, in the Hill Country southwest of San Antonio, was among the first – possibly *the* first – to adopt new, comprehensive regulations based on Subchapter E. Following the early pattern set by Hays County, Medina adopted rules that set variable lot sizes based on water and wastewater issues, addressed infrastructure in manufactured home rental communities, and established modern standards for road sizing based on the size of developments.

Shifting, Growing Population Highlights Need For Change

Texas' Population Since 1990

If Texas were still the rural state it once was, the Elgin Bank ruling might not have landed with such force, and there would be little need for Subchapter E and other growth management tools.

Despite its vast geographic size, as late as World War II, the state's population was less than 6.5 million. Not a single Texas city was in the nation's top 20. Harris County was the only county in the state with more than 350,000 people.

Today there are five Texas cities in the top 20 (four in the top 11), all with populations near or over one million; there are a dozen Texas cities in the nation's top 100, and four metro areas with more than 2 million people each. Texas has boomed to more than 30 million people and continues to grow. Between 2000 and 2020 it grew faster than any other state and added three million *more* residents than second place Florida.

Texas and United States Population Growth by Decade

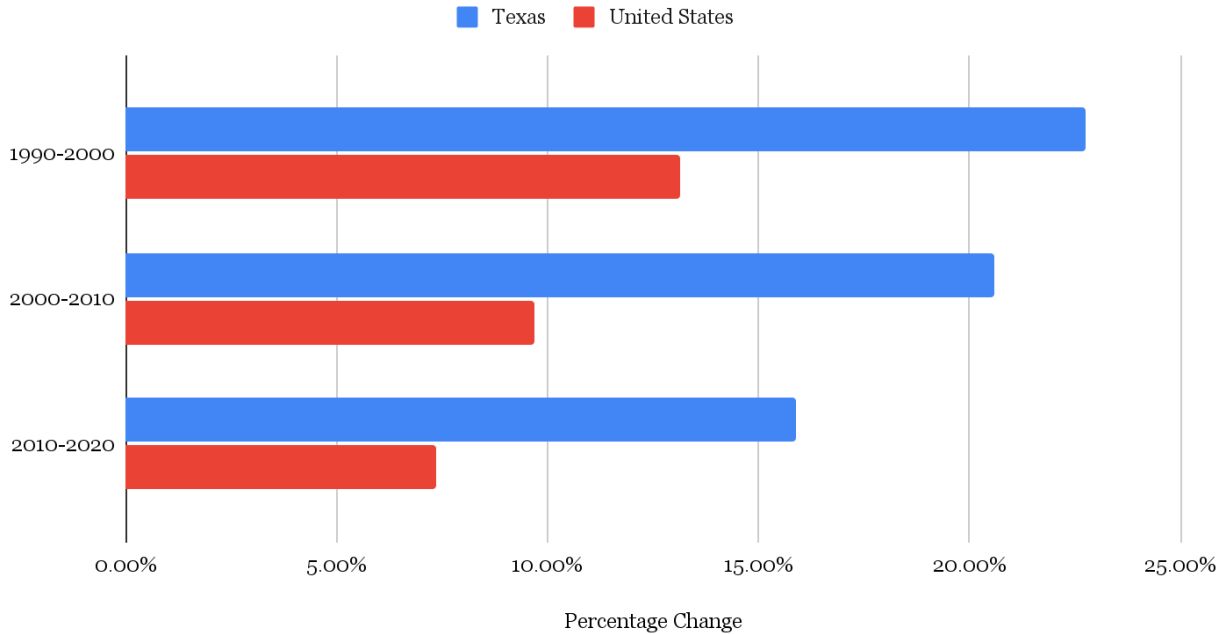
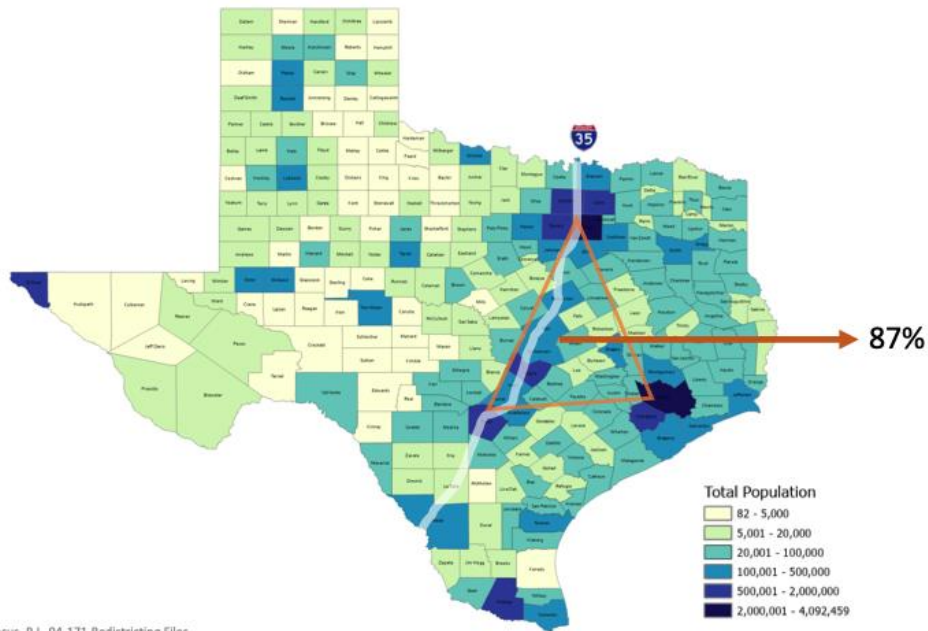


Figure 1.1 Texas and United States Population Growth by Decade

That growth has spilled out to suburban and exurban communities, even to counties that were, until recent decades, predominantly rural, stressing lean local governments, road capacity, and water resources.

During these past two decades, a number of Texas counties have ranked among the very fastest growing places on the continent. The spearhead of much of that growth has been along the I-35 corridor at the gateway to the Texas Hill Country. The Austin and San Antonio metropolitan areas have virtually combined into one, with a total population of approximately 5 million, projected by the Austin San Antonio Corridor Council to reach 6-7 million by 2030, which would make the region larger in population than all but 15-20 states.



10 Census, P.L. 94-171 Redistricting Files

Figure 1.2 Texas Population (2020 Census, Texas Demographic Center)

Though percentage growth has slowed slightly in recent years in Texas, percentage growth in the United States as a whole also has slowed, so that the state continues to far outpace the nation. In fact, according to analyses drawn from the U.S. Census Bureau by the Private Enterprise Research Center at Texas A&M, and from united-states.reaprojectorg, the gap appears to be widening since 2010.

And from 2010-2021, the fastest growing counties in the fastest growing state in the country were Hays and Comal, two counties along sensitive water and environmental boundaries, with large numbers of people living in unincorporated communities that stretch into the Hill Country. Two other regional counties, Williamson and Kendall, ranked fourth and 10th in percentage growth among the state's 254 counties.

Of course, many counties in deep East Texas or the Texas Panhandle are not growing at the same kind of rate. Some are even losing population. But in areas of concentrated growth, such as the I-35 corridor and much of the Hill Country, development continues to outpace state and national rates, with suburban “ring counties” typically growing faster – in percentage terms – than the major urban centers. (See Figures 1.1 and 1.2 below)

This growth is reshaping the physical landscape, the future of water recharge zones, and the character of historic small towns and crossroads. It’s also reshaping communities themselves.

It’s been much discussed, for example, that the Latino population in Texas is growing faster than the White-not-Latino population. But there are other, more subtle trends with far-reaching implications for planning and community life. Data compiled by researchers at Texas A&M reveal that the over-65 age cohort is growing faster in Texas than in the nation at large. That’s true and then some in the Hill Country, where the 65+ cohort is growing even faster than the Texas average in Bandera, Blanco, Comal, Hays, Kendall, Kerr, and Travis.

These changes – the sheer scale of growth, the demands of planning for new populations and new population mixes – are unprecedented.

POPULATION GROWTH IN UNINCORPORATED AREAS, 1990 - 2020

0 20 mi.

The Hill Country population in unincorporated areas has grown by **103%** since 1990. **Darker shades** indicate faster growth rates by county.

Unincorporated population growth in Kimble County has grown while Junction, the county seat, has dropped by **8%**.

Edwards is **one of 2** Hill Country counties losing population. County seat, Rocksprings, the county seat, is shrinking at a similar rate.

96% of Bandera County's rapidly growing population lives in unincorporated areas.

Even with 19 municipalities in Hays and Comal Counties, **more than 40%** of their population lives in unincorporated areas.

White spaces indicate incorporated areas.

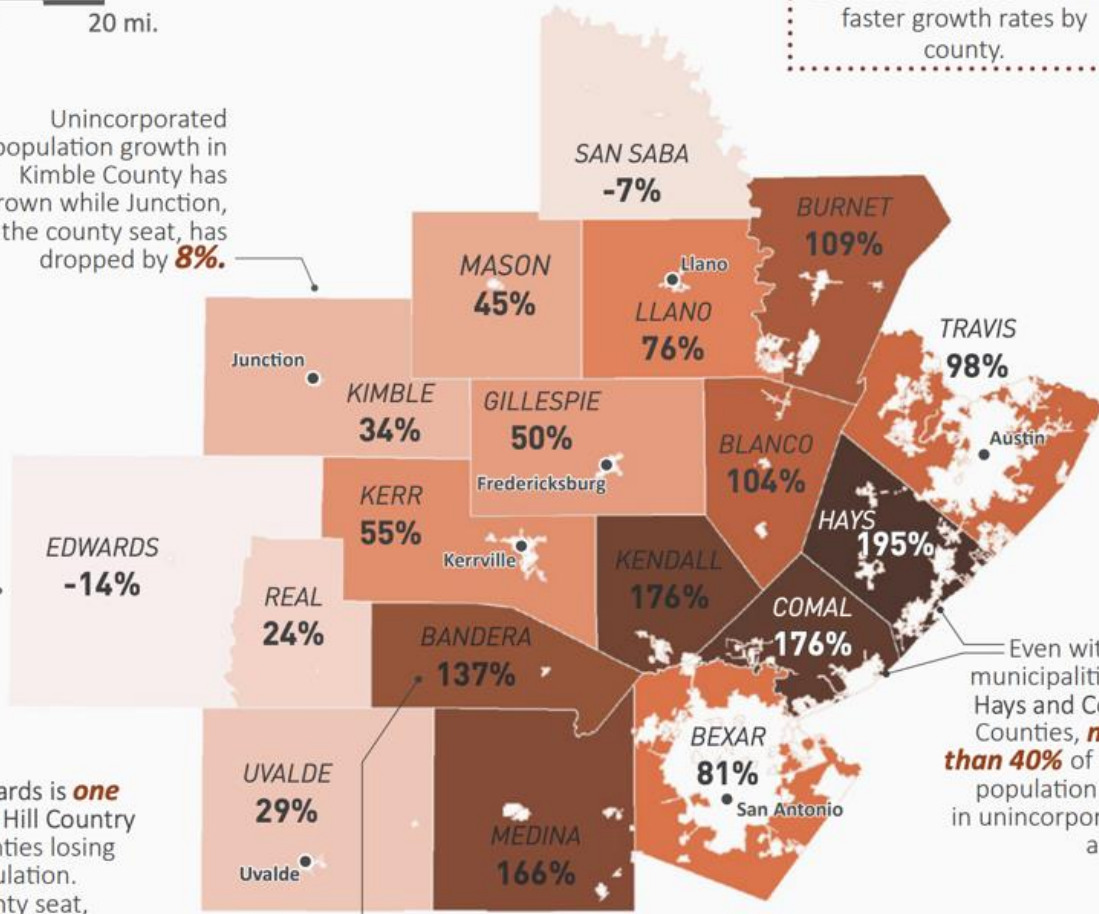


Figure 1.3 Population Growth in Unincorporated Areas, 1990-2020, prepared by Siglo Group for the Hill Country Conservation Network, State of the Hill Country Report, February 2022.

Although population growth has its advantages, it can also put stress on natural resources, particularly when the growth takes place beyond city boundaries. According to the 2022 State of the Hill Country report, when former open spaces and ranchlands are converted to subdivisions, the region experiences:

- **More pressure on aquifers** as a result of greater residential water consumption
- **More wastewater** from newly established Municipal Utility Districts and Water Control and Improvement Districts, which often discharge treated wastewater into Hill Country creeks, causing harmful algal blooms
- A significant **increase in impervious surface cover**, leading to **heightened flooding, and reduced land capacity to recharge** the aquifer
- The **loss of land** that might have been considered ideal for a regional park or wildlife area, at the same time that the region is seeing increased demand for outdoor recreational activities and more pressures on endangered species like the Golden-cheeked Warbler
- **Net losses for county budgets**, as residential subdivisions tend to require more local government dollars to service and maintain than they generate in tax revenue, whereas open space and agricultural land is net positive for local budgets

In many Hill Country counties, the impacts of growth on water quality and quantity is of particular concern – especially given the compounding impacts of more intense drought and flood events. The 2022 drought was one of the worst single-year droughts on record, with inflows to the Highland Lakes experiencing historic lows and Jacob's Well going dry for the longest period on record. The region is also prone to intense flooding that can threaten lives and property, as was seen in the Blanco, Hays and Travis Counties Memorial Day Floods of 2015, as well as many others.

From shifting demographics to flood control, drinking water protection, transportation, affordable housing, farm and ranch preservation, criminal justice, air pollution, and subdivision management, the dizzying, cumulative pace of growth is posing serious new challenges to local communities and the county governments that serve them. Yet too often the tools available – and, especially, the tools that leaders are *familiar with and using* – are tools rooted in a rural past and a slower time that is quickly disappearing in this part of the state. (See ***County Toolkit and Source of Authority*** and Appendix A for more information.)

In the next sections of this report, we discuss regulatory tools that already exist but are underutilized, and address what the future might hold for Texas counties in general, and Hill Country counties in particular, as they plan for more growth.

County Tools for Managing Growth and Conservation

Background on SB 873

In 2001, State Senator Jon Lindsay, a Republican and former Harris County judge, authored SB 873, which today is codified as **Subchapter E of Chapter 232 of the Texas Local Government Code, the county subdivision statute**. At first, this legislation applied only to large urban counties, and the counties immediately adjacent. During the 80th legislative session, in 2007, that restriction was lifted, allowing all Texas counties to take advantage of Subchapter E.

SB 873 — codified as Subchapter E of Chapter 232 of the Texas Local Government Code — closely tracks the general authority given to cities through the platting statute in Chapter 12 of the Local Government Code. Thus, SB 873 can be construed to give *counties* a similar authority to that exercised by *cities* within their ETJ. But what the language of Subchapter E, the “promot[ion] of the health, safety, morals, or general welfare of the county and the safe, orderly, and healthful development of the unincorporated area of the county,” explicitly means in practice is not wholly clear. The issue has not been substantially litigated in Texas courts, and the statutory language is broad and general rather than precise. For example, 873 gives counties more freedom to enact and enforce regulation that protects natural resources, including water. In parts of Texas, including much of the Hill Country, this can work effectively in concert with other special authorities, such as those granted to counties in priority groundwater management areas (PGMAs). Still, there are some clear limitations counties should be aware of.

In fact, SB 873 specifically prohibits counties from regulating:

1. the use of any building or property for business, industrial, residential, or other purposes;
2. the bulk, height, or number of buildings constructed on a particular tract of land;
3. the size of buildings on a tract;
4. the number of residential units per acre.

In other words, counties may not employ general zoning, at least as it is typically understood.

While SB 873 expressly prohibited general zoning, it also expressly enabled some county actions that had been ambiguous before. Under SB 873 (again, now codified as Subchapter E of TLGC Chapter 232) counties may:

1. Adopt a major thoroughfare plan, and then require broader rights of way than

the county could otherwise require under state law - up to 120 feet on its own; greater than 120 feet if the requirement is consistent with a plan adopted by the metropolitan planning organization of the region;

2. Adopt reasonable standards for minimum lot frontages;
3. Establish reasonable building setback lines, without expiration. (All counties may require setbacks from roads under Section 233.004 of the Local Government Code, but that section includes time limits after which the setbacks expire);
4. Enter into limited partnership contracts with developers in order to construct public improvements;
5. Require utility providers to withhold service until after a plat, and a water/wastewater plan is approved.

County Toolkit and Source of Authority

Because there are no broad or comprehensive authorities at the county level, counties must weave together a patchwork of small authorities to creatively address various issues. The following are sources of smaller or roundabout authorities that counties used before, and can now use in conjunction with, SB 873 expanded county tools. These authorities remain relevant because they are still applicable avenues for counties to achieve their goals, albeit through a patchwork approach.

Traditional Source (Local Government Code § 232)

1. Arterial right-of-way (ROW) width (limited)
2. Other ROW width (limited)
3. Roadway width
4. Construction specifications
5. Drainage specifications (roads)
6. Water availability statement
7. Construction bonds
8. Stormwater drainage in subdivisions
9. Monumentation

Special Bracketed Authority (LGC § 232, Subchapter B - Border Counties)

1. Stricter plat regulations spelled out
2. Broader water quality and availability standards
3. Utility requirements

Other Sources of Authority (non-exhaustive)

1. **Local Government Code Chapters 241, 234, and 243**
 - a. Special zoning: airports, junkyards and sexually-oriented businesses
2. **Texas Health and Safety Code**
 - a. Ch. 121 (public health),
 - b. Ch. 366 (On-Site Sewage)
3. **Texas Transportation Code (TTC)**
 - a. Classify and name roads and misc. authorities
 - b. Regulate sight distance and driveways

4. **Highway Beautification Act / TTC**
 - a. Ch. 391 (certain signage regulation - outdoor signage, junkyards)
5. **Texas Property Code**
 - a. Ch 12. (plat filing)
6. **Texas Utilities Code**
 - a. Ch. 181 (utility site approval)
7. **Texas Water Code**
 - a. Ch 16 (water and flood planning)
8. **Federal Floodplain Program**
 - a. Floodplain regulation and management
9. **Priority Groundwater Management Area (PGMA)**
 - a. Water protections - quality and availability

SB 873 Expanded County Tools

There are clearly expanded authorities that SB 873 enabled. The bill also opened up opportunities that counties could consider to take the patchwork approach even further. These opportunities refer to tools, or powers, that are implied by Subchapter E – particularly in concert with other laws – but are not explicitly authorized. In other words, areas where county leaders might innovate, so long as they recognize the risks: there are few clear precedents and courts could strike down regulations that push too far.

Clarified powers:

- **Healthful, Orderly, and Moral Development**
 - Special zoning: SOBs, airports, junkyards
 - Developer participation contracts
- **Subdivision Plan Review**
 - Utility connections
 - Establish minimum lot frontages
- **Stormwater Management**
 - Broad stormwater (drainage) planning
 - Erosion & sedimentation control
- **Transportation Planning**
 - ROW widths up to 120 ft.
 - ROW over 120 ft. (per MPO plan)
 - Setbacks for future ROW without time limits
 - Major thoroughfare plan

Implied powers:

- **Healthful, Orderly, and Moral Development**
 - Water quality: filtration and sedimentation
 - Impervious cover
 - Tree protection
 - Parkland dedication or fee in lieu

- Sign Control
- Landscaping
- Critical environmental setbacks
- Fire Code
- Lighting: hazardous roadway glare
- **Subdivision Plan Review**
 - Site development permit
- **Stormwater Management**
 - Stormwater detention
 - Review of subdivision/site grading plan

How Counties Are Utilizing Their Toolkits

In the mid-2000s, Jeff Barton, AICP, (the project manager for this current study), along with Doucet & Associates, compiled a study of what counties were doing in the post-SB 873 landscape. The original surveys and tables are in the Appendices, along with new survey data (Appendix B).

For this report, Jeff Barton and Gap Strategies refreshed those surveys and collected information from select counties, focused heavily on the Hill Country. The goal of the survey was to understand how those counties are using their authorities 15 years after the Subchapter E bracket was expanded statewide.

This table on page 17 represents responses from the counties that completed the survey. Green indicates that the county has rules in place to regulate the listed item. Brown denotes items which cannot be regulated at the county level.

Water and Flooding: Additional County Tools

The Hill Country is a water-limited region that faces challenges in planning for both long term water supply as well as catastrophic flooding events. Climate models indicate that rainfall patterns in the region will come in more concentrated bursts in the future, meaning that communities will have the compounding challenges of increased demands for limited water resources in a shifting hydrologic norm.

Priority Groundwater Management Area

- **Priority Groundwater Management Areas (PGMAs)** - Established in Chapter 35 of the Texas Water Code, a commissioners court within a PGMA-designated county may adopt water availability requirements for new subdivisions. The county may require the subdivider to demonstrate an adequate supply of water “of sufficient quantity and quality is available to supply the number of lots proposed for the platted area,” and require lot buyers to be notified if an adequate supply does not exist. The PGMA designation is also a vehicle for the state and/or local communities to seek the establishment of a groundwater conservation district to help study and protect groundwater supplies.
- PGMA are delineated by the Texas Commission on Environmental Quality (TCEQ) and the Texas Water Development Board, and defined as areas “experiencing, or expected to experience, critical groundwater problems within the next 50 years.” There are a handful of PGMAs across the state, with more under study. What the state defines as the Hill Country PGMA includes all of Bandera, Kendall, Kerr, and Gillespie counties, plus parts of Bexar, Comal, Hays, and Travis.
- PGMAs were created by the legislature in 1995 as part of a major overhaul of water law, and amended in 1997 and 2001. Formal recognition of the Hill Country as an area of concern for water resources dates back at least to a 1990 designation by the Texas Water Commission.
- When first created, PGMA authority was the primary basis for several Hill Country counties to require water availability certifications, and the PGMA designation itself was used as part of the rationale for creating minimum lot sizes for lots relying on wells and septic tanks when those lot sizes exceeded state-mandated minimums. For example, Hays referenced this provision in the 1990s. Subsequently, the legislature **added Section 232.0032 to Subchapter A, Chapter 232 of the Texas Local Government Code, allowing all counties, not just those within PGMAs, to require water availability certifications** when land is subdivided. Many counties (such as Kerr, 2006) have since adopted related provisions. Several counties across the region work in concert with groundwater conservation districts (GCDs) to review water

availability as part of the development process. Two examples are Cow Creek GCD and Kendall County, and the Clearwater Underground Water Conservation District's work with Bell County. In Comal County, subdivision developers are required to demonstrate that the proposed water provider for the subdivision has adequate supply for 20 years.

Floodplain management

- **Floodplain considerations** – Floodplain management is an important way for counties to protect both life and safety, and natural resources. While flood management goes beyond the scope of this report, there are a few flood and drainage related items worth noting in relation to county authority and land development.
- As local floodplain administrators for the National Flood Insurance Program, cities and counties play a major role in mitigating flood damage. Protecting flood plains from unregulated development not only helps minimize flooding but can help preserve water quality and protect habitat for plants and animals. Establishing floodplain development regulations, hiring qualified administrators, addressing variances with caution, coordinating with regional flood studies and new weather and climate data – these are all ways for county government to address floodplain management.
- Other, less obvious relationships between floodplain management and growth management exist. Some larger counties, such as Travis and Bexar, have adopted technical drainage manuals that detail highly specific engineering standards for drainage culverts, grade calculations, and construction design in flood-prone areas. Interpreting these rules, and keeping them up to date, can be expensive for both applicants and the local government. Some smaller communities adopt urban standards by reference. Many small counties still apply a one size fits all standard to road construction. But others tailor certain standards to a simplified calculation of risk. For instance, less traveled roads or bridges into smaller subdivisions might be allowed to design to a storm likely to occur every 10 years, while a major road or a primary bridge leading to a major subdivision might be required to design to a 25-year or a 100-year standard. Finding a balance between protection and reasonable cost for people trying to subdivide their land is a decision that is part technical engineering, part an expression of local policy and philosophy, and part a reflection of budget sensitivities. State law prohibits counties from enacting road standards for developers that are stricter than the county would use for its own roads.
- There are outside-the-box ways to think about floodplain as well. In Kendall County, lawyers have advised the county that they might consider floodplain regulations to address activity and roads within quarries, which may sometimes be below flood elevations or otherwise subject to flooding. Hays County has adopted a conservation development ordinance, discussed elsewhere in this paper, that (for developers who voluntarily opt in) gives incentives to set back from creeks and protect floodplains. Travis, Hays, and Kendall are among

counties actively acquiring parkland – an effort that can work in concert with floodplain protection.

Highland Lakes Watershed Ordinance

- The **Highland Lake Watershed Ordinance**, enabled by the Lower Colorado River Authority Enabling Act, directly applies to development and quarry/mining activities “occurring above the Regulated Pool Elevation of the Highland Lakes” to manage runoff. This area includes the Lake Travis watershed, appropriate areas in Burnet and Llano Counties and otherwise identified areas in the [ordinance map](#). Nearby municipalities in identified areas, for example Lago Vista, have entered into interlocal agreements which allow communities to adopt the Highland Lake Watershed Ordinance directly into their codes to reinforce water standards.

Edwards Aquifer Protection Program

- The **Edwards Aquifer Protection Program** regulates several distinct zones, including the recharge, transition, contributing and contributing within the transition zones, and is enabled by Texas Administrative Code Chapter 213. The current map, found here, outlines the areas directly governed by the TCEQ rules. In addition, the Barton Springs Edwards Aquifer Conservation District (covering the northern part of the Edwards Aquifer) and the Edwards Aquifer Authority (governing the southern part of the Edwards Aquifer) are authorized to regulate wells, pumpage, and technical requirements under certain conditions. The Barton Springs Edwards Aquifer Conservation District, established in 1987, and the Edwards Aquifer Authority, established in 1993, were both formed in part to address concerns over the impact to endangered species. These overlapping rules work in concert to weave together 30 TAC 213 & 216, District Enabling Legislation, SDLLC 8802, and Texas Water Code Chapter 36 to protect and to preserve hydrologically significant and contributory sources of water for Texans in Central-South Texas and the Hill Country. Counties are charged with regulating certain minimum lot sizes and wastewater regulations under the Edwards Rules (TCEQ).

Changes in County Tools Over Time

Since the adoption of SB 873 and its codification as Subchapter E, many local leaders and nonprofits have argued for additional steps – to more explicitly address dwindling water resources, or limited zoning to address noxious industrial uses and quarry mining, for instance. The legislature has rebuffed these efforts for big-scale change, but there have been a number of bills that added new patches to the quilt work of county authority (or, in some cases, removed a few threads). Briefly, the following amendments have been made to Chapters 212 and 232 of the Local Government Code since 2009. While many of these amendments allow only small and highly specified powers, these changes demonstrate the precedence and necessity of expanding county authority.

81st Session (2009)

- SB 1676: amended 232 with regard to fees for utility certificates
- SB 2253: amended 232 and 212 with regard to certain counties regulating platting near the international border
- HB 1473: amended 212 with regard to subdivision golf courses
- HB 2278: amended 212 with regard to wireless communication facilities without preempting local ordinances

82nd Session (2011)

- HB 3096: amended 232 with regard to Commissioner's Court's right to deny a subdivision cancellation if it interfere with infrastructure
- SB 1789: amended 212 with regard to platting requirements and affected subdivision golf courses in certain areas
- HB 2702: amended 212 with regard to “application of statutes that classify political subdivisions according to population”
- HB 1643: amended 212 with regard to duration of development agreements in extraterritorial jurisdictions of certain municipalities

83rd Session (2013)

- SB 194: amended 232 with regard to the Commissioner's Court's right to implement requirements for ingress and egress for safety in developments
- SB 552: amended 232 with regard to the Commissioner's Court's process for subdivision revision and associated fees
- SB 1599: amended 232 with regard to county and municipal land development with acreage brackets on subdivision plat requirements
- HB 1553: amended 212 with regard a reduction in population bracket for replatting a subdivision without vacating the preceding plat in certain municipalities

84th Session (2015)

- HB 2033: amended 232 with regard to interactive digital map submissions with plat applications

85th Session (2017)

- HB 7: amended 212 with regard to tree removal in municipalities, excluding a range of area around military facilities

86th Session (2019)

- HB 3167: amended 232 and 212 with regard to transparency between application recipient (county or municipality) and developer
- SB 1510: amended 232, Subchapter E with regard to infrastructure developer will bear the responsibility of a reasonable amount related to its development
- SB 1402: amended 232 with regard to infrastructure requirements for undeveloped land over 25 years old and on an international border
- HB 3314: amended 212 with regard to requirements to replat certain municipal subdivision plats

87th Session (2021)

- HB 1564: amended 232 with regard to adoption of Subchapter F, a bracketed bill related to “abandoned, unoccupied, and undeveloped platted lots in certain counties”
- SB 1090: amended 212 with regard to “certain regulations adopted by governmental entities regarding land use and restrictions”
- SB 1338: amended 212 with regard to transparency and municipal annexation
- HB 1929: amended 212 with regard to breach of development agreement contracts governing land in the extraterritorial jurisdiction of certain municipalities

The expansion of county tools has been a decades-long endeavor in the face of stiff resistance from property rights advocates, some business groups, and a legislature with a historic bias toward rural interests and in favor of minimalist government. A number of past legislative leaders, and a succession of governors, have highlighted perceived regulatory overreach by various cities, including Austin; more recently, state leaders such as the lieutenant governor have been explicit about limiting the regulatory and taxing power of cities. In some cases, even county leaders have made it clear they would not relish the task of more intensive land use management. In this context, sweeping change has proven difficult – and remains so.

Numerous bills to address new challenges related to population growth, climate, and water have been submitted and stalled out on the Capitol floor – from density to infrastructure recovery fees to open space minimums. Even so, given the adoption of

Subchapter E and other recent measures, and the broad, even subtle implications of these tools – many of which have yet to be fully explored by most counties – there remains an intriguing opportunity to innovate. **Until political will catches up to the public’s need for better-planned land use and a new ethos of conservation design, creativity, and innovation using existing powers – coupled with efforts at bracketed or incremental change in the legislature – seems the most effective path forward.**

Examples of Innovation

In the space between codified and implied authority lies innovation. There are counties pushing the envelope and creatively finding solutions to the challenges they face. This list is by no means exhaustive. Texans across the state are working on bettering their communities, some in their nascent stages, others in the procurement process, asking for help to get it done, and still others are successfully educating their citizens on the impact of local action. This list provides a menu of approaches for counties looking to do more, to be bolder, and to push for future opportunities.

What are counties doing?

In the charts shown previously in this document, you see examples of what counties are doing. Below, you'll find some examples of innovation and what can or might be done.

Organized thematically, a number of counties are already engaging in one or more of the following endeavors:

1. Long-Range and Strategic Planning
2. Variable Lot-Sizing (And Zoning)
3. Exceptions to Zoning Prohibition
4. Roads and Transportation
5. Protecting Water and Natural Resources

Keep in mind that in many ways these overlap. Strategic planning at the county level often involves transportation. Transportation affects land use and channels growth. Lot sizing and growth affect natural resources and the future of water – and vice versa.

Long-range and Strategic Planning

Long-range land planning is the traditional purview of cities in Texas. But a few Texas counties have begun experimenting with strategic and integrated master plans.

This kind of planning offers counties the opportunity to deploy indirect authority with considerable effect. For example, while counties may not have the direct authority to regulate most land uses, a general strategic plan or a long-range transportation plan that incorporates natural resource protection and economic development can take advantage of the strong link between transportation and land use, directing county infrastructure investment to parts of the county that are most appropriate and/or most manageable.

- **Strategic Planning for Mid-Sized Counties – Guadalupe County** (County Seat: Seguin) completed a Strategic Plan in 2019 with help from Gap Strategies. The plan is something like what a city might produce for a comprehensive plan. It includes natural resource protection, sections on water and flood control, recommendations for improving the subdivision development

process, and calls for a long-range transportation plan, now underway. The Strategic Plan also examines economic and demographic trends and potential economic initiatives. It includes recommendations on what the county considers cluster development and adopts “context-sensitive design” standards for major county road projects. (Context-sensitive design is addressed later in more detail).

- **Integrated Land, Water Planning For Urban Counties – Travis County** (Austin). Travis County’s Land, Water, and Transportation Plan (LWTP) is a framework for future development in Travis County. Approved by the Commissioners Court in 2014, the plan has set the tone for land and water resource management, and the expansion of transportation systems, and services in unincorporated portions of the county. The plan followed a similar process to city-level comprehensive planning. Recognizing that growth begets growth and resources are finite, the Travis County Transportation and Natural Resources (TNR) opted to plan from a long-range perspective.

The LWTP was built around the CAMPO 2035 Regional Transportation Plan as well as the City of Austin’s Imagine Austin comprehensive plan. The objective was to plan and create more interconnected, dense development in certain areas, away from environmentally sensitive zones, to reduce both environmental impacts and infrastructure costs. The plan addresses development in the eastern and western parts of the county – the prairie and the Hill Country. It is intended to guide elected officials, department heads, and budgeting.

- **Rural County Master Planning –Waller County** (Hempstead) near Houston has implemented a Long-Term Comprehensive Strategic Plan with the understanding that the greater than 100 percent growth anticipated by 2050 required a guiding hand. It is unique in its approach — offering a framework that aspires for all cities in the county to work in tandem with the county government to achieve the plan’s stated goals. The comprehensive plan covers public involvement, land use, economic development, transportation infrastructure, and extra-territorial jurisdictions to establish clear goals and influence planning county-wide for a 10-15 years horizon. There are obvious implications here (coordination with groundwater conservation district on rules, enforcement, research and funding; using transportation plans and strategic partnerships with cities to steer development toward established water-wastewater infrastructure which would reduce new wells and septic tanks; and tailoring county rules and procedures to custom fit water and geologic conditions in subsections of the county.) for water in counties located in the state’s more arid zones. The city of Prairie View, in Waller County, selected consultants in late 2022 for a new city comprehensive plan, with explicit instructions to the planning team that the city plan coordinates with the county’s.
- **Upcoming Plans:** Walker County (Huntsville) is currently considering whether to initiate a long-range master plan.

- Leveraging County Land For Green Planning — Nueces County** (Corpus Christi) initiated the Harbor Gateway Plan in 2021, a particularly innovative application of county planning. There, TXDOT is constructing a new bridge across the harbor bay. The bridge will tie to a rerouted highway system, meaning parts of the old highway through Corpus could be abandoned. Adjacent to a section of Interstate 37 and State Highway 181 that is scheduled for eventual abandonment is the historic Nueces County Courthouse, now vacant and in poor repair. Working with an ad-hoc group of local government known as the Nueces County Right-of-Way Coalition, the county hired Gap Strategies to plan how abandoned road right-of-way might be incorporated into the county's existing land parcel to create green space, trails, and mixed-use redevelopment next to the old courthouse, near the heart of downtown.

The design was initially well-received by stakeholders and governments, but subsequent delays in the state bridge project and political tensions with the City of Corpus delayed the project, which suffered another setback when County Judge Barbara Canales, the project's champion, was defeated for reelection in November 2022, and the Commissioners Court cooled toward the initiative. The city and the Port Authority of Corpus Christi moved forward in 2022-23 with a federal grant application to pursue the project.

Though the county now appears to be taking a backseat, the project is an example of how innovative counties might use land holdings in or out of corporate limits to influence development and conservation (and complementary economic development).

Variable Lot Sizing (and Zoning)

The Texas Commission on Environmental Quality (TCEQ) sets minimum lot sizes for On-Site Sewage Facilities (OSSFs, which are essentially septic tanks in most cases). These are typically one-half acre or one acre over the Edwards Aquifer Recharge Zone. These rules do not address lots connected to an organized sewer system. Most Texas counties have either established no formal minimum lot size of their own and default to the state OSSF minimums or use the state OSSF minimums as the basis for minimum sizing.

A relatively small number of counties have taken a different approach, especially in the Hill Country, using a combination of OSSF regulations, PGMA rules, well-spacing requirements, culvert-spacing, and other patchwork authority to assert much larger minimum lot sizes, making lot sizing a stand-in for water protection (quantity and quality) and *de facto* density controls. OSSF Authorized Agents (counties and sometimes cities and River Authorities/Water Districts) can put in place more stringent rules than State regulations as long as they have TCEQ approval. These more stringent regulations are county-specific and can be found on the [TCEQ website](#) under Section 10

of a specific county's documents. More stringent OSSF regulation, with or without other patchworked authorities, allows counties to begin to protect their water resources.

Hays County established aggressive minimum lot sizes in the mid-1990s, based on a broad interpretation of the implied aggregate authority of several disparate statutes, both in the subdivision code and elsewhere: road and lot standards in Chapter 232, Priority Groundwater Management Authority (PGMA), TCEQ on-site septic regulations, the tax code, transportation code, and others. This approach was in response to growth pressure and substandard development that in the eastern part of the county sometimes rivaled border *colonias*. The approach gained significant attention statewide and even nationwide, including presentations by the Texas Association of Counties and CAPCOG as a model for innovation. A big part of the new approach was to tie lot sizing to both the availability of sustainable water supplies and to alternative means of sewage disposal. The rules also created incentives for certain conservation measures, such as "rural by design" lots and rainwater harvesting. The rules were considered subject to challenge until the legislature clarified and bolstered some county authority by creating Subchapter E in the subdivision statutes (SB 873). Since then, Hays County has further expanded.

Few counties followed suit immediately, but with the advent of Subchapter E, a number of counties adopted lot sizes much larger than state minimums, and some of them adopted something similar to Hays County's patchwork of development rules. In the Hill Country, this included Medina, Travis, Kerr, Comal, and Bandera, among others. Atascosa just south of Bexar County did the same, and Bastrop County considered it. Caldwell County and a few others in the region later followed.

Each of these counties had its own flavor for what lot sizing meant to them – some counties attached environmental and conservation requirements while others prioritized water quality and availability concerns. Variable minimum lot sizes from 1/2 acre (or smaller, with collective sewer in place) up to six acres or more allowed these counties to tailor regulations to different geologic, environmental, and economic conditions. By taking a more individualized approach to developments, more efficient use of space, and better integration with the existing transportation network.

Using OSSF regulations, and – where available – PGMA authority, well-spacing, and the like to go beyond state-mandated minimums for lot sizing is a crude but effective way for counties to address population density in unincorporated areas. Lot sizing can be a critical tool to implement policy and county vision, but it is a complex issue where science, policy, and property rights meet. County leaders assessing this option should consider a myriad of factors: water availability, soil conditions, new technologies, economic interests, and affordability. It is important to note, too, that there are loopholes to this approach. Developments that incorporate collective sewer systems – connecting to existing systems or building package treatment plants, and/or that have no need for wells – may be able to escape minimum lot sizing (based on OSSFs, for instance). The regulatory approach here needs to be particularly well crafted, based on

clear findings of interest, and careful not to overreach in ways that incentivize developers to use loopholes.

Exceptions to Zoning Prohibition

As noted, counties in Texas are generally prohibited from zoning or controlling the *use* of land (as opposed to regulating platting procedures and infrastructure). But there are exceptions. For instance, state law allows counties to regulate land use, design, and impose what are essentially limited zoning restrictions for a few things, such as auto salvage yards and sexually oriented businesses.

A handful of counties have additional zoning-type authority, found in Chapter 231, of the Texas Local Government Code. These counties are “bracketed” — the special authority is granted only to specific counties that meet a narrow definition, or bracket, and are typically established through “local” bills in the legislature. These brackets for county land use are set up around the protection of a few surface lakes, military bases, and observatories (that need dark sky protection); and often they apply only to small parts of a county, within a certain distance of the protected lake, for instance. In the 80th Texas Legislature (2023), Kendall County explored ways to address land management by tying floodplain and watershed management to protecting the military base at Camp Bullis.

For more about bracketed zoning cases and how new brackets might be used to address other issues, including aquifer protection, see the section on Ideas For the Future, below.

Roads and Transportation

Subchapter E also provides more leeway to regulate road and lane widths. Because transportation, land use, and water act as compounding drivers for growth and resource management, road and transportation tolls can have an immense impact. Similar to variable lot sizing, variable road widths depending upon the project's size, scope, and character allow a county to prioritize conservation-based development, and to meet more urban challenges. Additionally, a system of roadway requirements dependent upon size and use would allow counties to plan according to traffic needs and population density. Prioritizing lane and pavement width would also allow a greater degree of specificity related to what is good for the community in the long run without putting an unbearable onus on the developer. Thousand-lot communities don't have the same needs as smaller communities, and the drainage systems, roads, and maintenance required should reflect those differences while integrating seamlessly into the larger transportation network.

Denton County (Denton) – Denton County is currently moving forward with plans to catalog current development and project future growth corridors in coordination with

infrastructure planning, allowing the county to focus resources and incorporate park and trail planning into transportation planning and design. The project is in the early stages and it's not clear whether it will evolve into the kind of big-picture planning tool the county judge has spoken of or will become primarily an engineer-driven road planning tool.

Williamson County (Georgetown) - Williamson County has adopted context-sensitive design criteria in certain circumstances and a handful of other counties have adopted or are considering similar initiatives. Context-sensitive design (CSD), sometimes referred to as “context-sensitive solutions,” refers to the idea that transportation design should serve more than an isolated transportation engineering function. It calls for more public involvement up front, and a multidisciplinary approach to roadway design. For instance, this might include incorporating pedestrian concerns, sense of place, history, and social, aesthetic, and environmental considerations into road planning.

A context-sensitive design policy might include landscaping, sidewalks, public art, tree planting, dark sky provisions, and careful consideration of lane and right-of-way widths. It starts with asking affected community members what they need, and want, from a road. While it could be directed at roads built by developers, its most direct application would be to county road departments, or to plans that address state projects in individual counties. CSD/CSS adds a small premium to road projects but pays big dividends.

Special Districts – This is listed here under Roads and Transportation because special districts such as a Public Improvement District (PID) or a Tax Increment Finance Zones (TIRZ) – are most often used to finance infrastructure. But they can be important tools for policy, providing financial assistance to developers who are meeting county goals. For instance, Hays County last year completed a detailed analysis of how to encourage more conservation development. Among the conclusions: offer incentives through special districts, including financial assistance with public infrastructure and open space that developers would otherwise have to pay themselves, provided developers meet certain specific county goals. (More on the conservation planning is in the next section.) There are a number of different special district options. A PID involves a special taxing district whereby a landowner/ developer may impose an additional assessment on his or her land, to be collected but not guaranteed by local government, thus creating a guaranteed future income stream against which the developer may borrow to build public improvements, such as roads or parks. A TIRZ essentially dedicates a portion of future taxes created by development to reimburse a developer, or to pay down debt the developer accrues, for public improvements. These and other special districts, including Municipal Utility Districts, have their pros and cons but can be effective tools when used appropriately.

Protecting Water & Natural Resources

In areas such as the Hill Country and fast-growth corridors around the state, more residents and local governments are awakening to the need to protect natural resources and preserve historic character. Significant population growth and pressure on existing water sources, including the Edwards and Trinity aquifers, have only intensified in recent decades. This subset of planning overlaps with long-range strategic planning, but natural resource preservation exists independently across the state in the form of park plans and green space plans. Specific subsets of natural resource preservation include water, Priority Groundwater Management Areas (PGMAs), environmental and flood setback lines, critical environmental feature setbacks, and slope regulations. Each county has an opportunity, thanks to Subchapter E, and various sections of the water code, to customize resource preservation – albeit within the limits of county authority.

Stormwater and Impervious Cover Limits

Water regulation in Texas is notoriously tricky. Despite dedicated organizations and committees to the study of water in Texas, additional measures are needed to match the pace of Texas' growth. Subchapter E provides a few avenues through which counties can move toward water policy goals despite a lack of explicit county-level authority for water regulation. Among local and county governments, a few examples of environmental regulation stand out since the late 2000s. Austin, Buda, Georgetown, San Marcos, New Braunfels, and San Antonio are among the leaders in stormwater and impervious cover regulation at the city level. Site drainage, setbacks, and water quality ponds also fall under local government control. A broader adoption of environmental regulation on a county level would allow the lessons learned from the local communities, especially on topics related to water and development, to be broadly applied across all acres of the county.

However, it is important to note that state law does not explicitly give counties the power to regulate impervious cover, and most authority for county stormwater regulation is tied to road construction, or to the regulation of floodplains. Lot sizing is one tool that can affect impervious cover, indirectly. Theoretically, a county government can make the case that impervious cover is part of an overall drainage system – and that a drainage system is an inherent part of a good infrastructure network, thus tying impervious cover back to Subchapter E authority. But it is a far reach, as are other county pathways to direct impervious cover regulation. The tables in the section above, titled Current Landscape: Regulatory Landscape for Counties, are an indication of how lonely that position might be. Only two counties, Hays and Travis, indicate any impervious cover regulation.

Both Hays and Travis are influenced by local aquifer issues and water quality concerns at iconic landmarks such as Barton Springs, as well as by the Barton Springs Regional Water Quality Protection Plan produced in 2005, which outlines the case for impervious

cover management. While both Travis County and Hays County report addressing impervious cover, this is easier in Travis where the City of Austin covers so much of the county and has interlocal agreements with the county; and, in Hays, impervious cover regulation is primarily indirect – through development agreements, opt-in conservation planning, and indirect site planning.

There are other ways for counties to address stormwater runoff and the effects of impervious cover. Here’s a rundown of some tools and existing authorities:

- **Voluntary opt-in agreements with developers** – Counties may establish incentives or alternative development guidelines, giving developers a choice between standard, conservative state-law-conforming subdivision procedures and a voluntary, incentivized alternative. This might be a voluntary conservation design program (Hays County’s efforts are discussed below) or a Developer Agreement that incorporates other county goals. *Refer to Context-Sensitive Design for specific stipulations.*
- **Road design standards that incorporate Low Impact Design features**, such as rain gardens, or that allow for narrower roadways (meaning less impervious cover) under certain circumstances, such as large-lot subdivisions.
- **Lot sizing**, as discussed above in its own subsection.
- **Allowing for “cluster development”** (grouping houses on smaller lots with large amounts of permanent open space owned in common). Randall Arendt, in his seminal book, *Rural By Design*, gives many examples. Cluster development can be a feature of conservation design but can stand alone. In Texas, cluster development is complicated by the reluctance of the Texas Commission on Environmental Quality to approve county on-site sewage regulations that promote cluster development, because of concerns that long-term maintenance issues of common open space, or, especially, common septic systems will prove contentious and infeasible. There are ways to address the issue. Counties must also be willing to be flexible with road standards to make many cluster developments work.
- **Direct preservation of open space in strategic areas**, limiting impervious cover in certain watersheds or environmentally sensitive areas. Hays County, the city of Austin, environmental groups, and a federal program combined to preserve the strategically placed Dahlstrom Ranch near Buda.

A few counties, including Hays County and Kendall County, have taken steps to address the issue more holistically by passing voter-approved conservation bonds. In Hays County, for instance, the county created the Parks and Open Space Advisory Commission (POSAC), which, beginning in the spring of 2020 made recommendations for parks and open space projects around the county. These recommendations were consolidated into a list of 15 projects to be funded

by Hays County Proposition A, a \$75 million bond passed in November of 2020.

In 2022, Kendall County passed a bond for \$20 million to be used to acquire additional open space and conservation land, with a stated goal of ensuring available land to “protect wildlife habitat and the water quality of creeks, rivers, and springs.” This bond is the second of its kind in Kendall County. The first, voted on in 2015, resulted in dedicated open space and parks. The 2022 Bond takes Kendall County’s conservation work a step further, giving the county flexibility to acquire land or assets that would be invaluable to the protection of resources. The bond’s executing structure reflects that of Hays County’s POSAC and will kick off in March 2023.

Water Availability Management

- **Priority Groundwater Management Areas (PGMAs)** - Refer to section ***Water and Flooding: Additional County Tools***. Begun in 1995 and amended in 1997 and 2001, PGMAs offered an indirect pathway to water regulation. Effectively, counties gain the right to require water availability studies, additional platting checks, and require responsible management of water systems created in subdivisions to mitigate a drain on existing water resources.
- **Cooperation with groundwater districts.** Several counties are working cooperatively with local groundwater districts – providing county funding, relying on groundwater reviews for water availability, or otherwise coordinating efforts. Broader conservation planning efforts between counties and water districts are an avenue ripe for further exploration.

Managing Open Space and Ecosystems

- **Land banks and habitat preservation** – Travis County and others are good examples of counties using habitat and wildlife preservation, as well as land banks to address conservation of natural resources and habitat preservation. The Balcones Canyonlands Conservation Plan (BCCP) provides a streamlined way for landowners in Travis County to comply with the Endangered Species Act while protecting high-quality habitat in the Balcones Canyonlands Preserve (BCP). The process to apply for a permit from the U.S. Fish & Wildlife Service (USFWS) can be lengthy, but landowners in much of western Travis County can obtain permits from Travis County to mitigate the removal of habitat in a few weeks for a one-time fee. This fee goes towards buying and managing land in the Balcones Canyonlands Preserve.
- **Additional ways to acquire open space may be possible in the future** – HJR 138 of the 2023 legislative session proposed “a constitutional amendment providing for the creation of the land and water conservation fund, dedicating certain money in that fund to the conservation of, restoration of, or public access to land, water, or natural resources in this state, and providing for the transfer of certain general revenues to the economic stabilization fund, the land and water

conservation fund, and the state highway fund.” This resolution would have effectively created an endowment for the state to do what Kendall County is doing with its 2022 conservation bond package. While the bill did not pass, something like this could be considered in the future.

- **Conservation Development Planning** – The Hays County Commissioner’s Court issued a Request for Proposals (RFP) in late 2019 to push the envelope on conservation – this time to explore how to get more developers to employ conservation planning and design.

The county already had an existing conservation section in its development regulations that allowed landowners to voluntarily opt out of the routine subdivision process and enter a conservation development process that allowed the county to govern design in ways the basic rules – founded in state law requirements – does not. The problem? As with a similar program in Travis County, no one was using the opt-in program, which made development more complex and expensive, without much direct financial upside for developers.

The new plan, crafted by an interdisciplinary team led by Gap Strategies and presented to Commissioners Court in early 2022, is still a voluntary, opt-in program, but now includes a menu of conservation goals matched by incentives for developers if they can demonstrate how their plan protects water resources, open space, and other conservation goals.

In developing the plan, the team demonstrated through design charrettes on actual properties, how regulatory, financial, and market desires can be met (Appendix C includes select exhibits from the Michaelis Tract Case Study). The result of the design workshops demonstrated the potential under the proposed rules to pay respect to the area’s beauty and heritage while accepting the growth of its population. Understanding that components of conservation design are largely dependent on water availability, quality, and management, a key takeaway was how necessary water-conscious planning is, benefiting broad swaths of the population to protect and regulate uses in floodplains, buffer zones, and aquifer recharge areas. Dubbed the Conservation Development Guidelines: A Sustainable Future, the plan and the detailed study received public support from all five members of the Court and is being used as the basis for development agreements in the county. However, it has yet to be formally codified into the county’s regulations. Another key feature of the Hays County plan worth noting is cluster development – allowing developers to group clusters of homesites on relatively small lots, offset by large set-asides for community greens and open space. Hays and a handful of counties allow lot size averaging on most lots, whether part of a conservation development or not. Clustering can help reduce impervious cover, reduce infrastructure costs, and protect native environments by leaving more natural areas untouched, focusing development on just a part of a land tract.

Do All Counties Need Full Toolkits?

Admittedly, there are counties in Texas that do not seek additional tools right now. Population growth is concentrated in a minority of Texas counties. Many counties in West Texas and the Panhandle, for example, do not face the same development pressures as the Hill Country or urban ring counties. Many counties are understanding and seeking routes to best plan for their communities within the existing powers, but those approaches will be patchwork at best. Even bracketed expansion of power in favor of county purview could better prepare the state of Texas for responsible development. These ideas are not an exhaustive list of the full potential action for Texas communities or counties – it is important to look for inspiration across state lines as well.

Inspiration from Other States

The American Planning Association recognizes projects in planning and planning leadership each year. Texas is a uniquely large state, but the awards provide a snapshot of what other states are successfully achieving in the realms of water management, comprehensive planning, and land-use planning.

Recent projects from which counties could learn include:

1. **Comprehensive Plan for Small Jurisdiction (2022)**
Ellis County, KS
Comprehensive planning out of Ellis County, Kansas takes a holistic approach to natural resources, land-use, and growth planning
2. **One Water Chapter (2021)**
Hillsborough, FL
Hillsboro, Florida elevated the role of water, redefining how that area conceptualized conservation and executed stewardship plan
3. **Emporia-Lyon County Joint Comprehensive Plan (2017)**
Lyon County, KS
The joint comprehensive plan in Lyon County, Kansas incorporates perspectives from all community types within the county to jointly create a roadmap for future expansion

Counties can take action toward these types of plans right now. Separately, these initiatives are meritorious. Taken together to inform other communities' development, these plans can form a sort of aspirational roadmap for what kind of moral, orderly, helpful development is possible.

Ideas for the future

Legislative sessions present opportunities to expand the toolkit available to counties to meet their local needs. Presented by the level of immediate feasibility, we recommend the following legislative changes:

1. **Incremental Improvements To Chapter 232** – As discussed elsewhere in this paper, Chapter 232 of the Texas Local Government Code, is the foundation for subdivision management for counties. It has evolved almost continually since its inception and is a much stronger basis for county management today than it was 30 years ago. It can still be confusing and provides for the somewhat arbitrary division of counties into different subchapters. In places, it continues to be unduly restrictive on counties – and for that matter on developers – since the state micro-manages road and drainage standards, for instance, without consideration for the wide variety of circumstances across a state as large and diverse as Texas, and without regard to the latest planning best management practices. The Chapter is probably due for a full rewrite, but that seems hard to imagine on the near horizon, with both advocates and critics of county authority concerned about the unknown consequences of a full reimagining of the statute.

There are other things that might be addressed with revisions and additions to Chapter 232:

- a. Expanding, clarifying, and simplifying the opportunities for counties to create planning commissions;
- b. Opening the special authorities granted to border counties in Subchapter B to all counties (though this is not as critical since the passage of SB 873 and the incorporation of Subchapter E).
- c. Explicitly detailing the right of counties to engage in conservation design planning for subdivision – or, possibly, to require conservation design in certain circumstances (this might also be addressed through bracketed legislation in Chapter 231, see Bracketed Zoning, below).
- d. Subchapter E might be amended to explicitly include landscaping or landmark trees – or other natural resources – as part of a county’s “economic infrastructure,” enabling counties (or counties within certain brackets of population growth and density) to address tree preservation, or require low impact design features. This is an admittedly hard sell in the current political environment.

2. **Empowerment and Funding from TWDB And Other Grant Programs** – The Texas Water Development Board has become a larger player in water planning. Funding widespread grants to counties – or

regional alliances of counties – for water and environmental planning would help make regional water plans more connected and effective while providing a way for county governments to “level up.” Counties do not have the same revenue-producing opportunities that cities have, but have significant constitutional responsibilities (indigent care, the courts, and records systems) that are often more politically pressing – in the eyes of organized constituent interests – than land and resource management. A state or regional source of good funding could help change this. There are also examples of other regional entities stepping up to provide certain types of planning – the Capital Area Council of Governments, the Capital Area Metropolitan Planning Organization (CAMPO), and the North Central Texas Council of Governments. One of the most interesting is the Houston-Galveston Area Council’s consistent funding of “Livable Centers” grants, which fund planning initiatives for smaller jurisdictions. TWDB already funds some planning as well as water and wastewater improvements. This program could be expanded dramatically on a state-wide or bracketed basis, similar to the EDAP program but for “environmentally distressed” instead of “economically distressed” areas.

3. **Federal Programs: Stormwater Runoff, Clean Water Act, Wetlands and Watershed Management** – The National Association of Counties has called for more federal funding to help local jurisdictions meet clean water mandates, and for a number of changes to the Clean Water Act. Some of NaCO’s points are clearly from counties with special interests (counties with significant logging roads, for instance, seeking exemptions) but there are several points worth consideration. While aimed at the federal level, some of the arguments and/or funding would be appropriate at the state level as well.
 - a. Flexibility for local governments to consider the site-specific nature of stormwater, including geographically-specific information, and determining the most cost-effective technologically feasible means of reducing pollutants
 - b. Consolidation of the separate programs for jurisdictions of under and over 100,000 to simplify a more effective set of rules
 - c. Federal funding of a comprehensive stormwater research program to determine the impact of stormwater on overall water quality, with a comprehensive cost-benefit analysis of stormwater problems and solutions.

4. **Technology, Carbon Footprints, and Climate Change** – In the current environment, broad state programs to address climate change are not likely. Though State Rep. Erin Zweiner did submit a bill in the 80th Legislature (2023) to require the state to engage in planning for climate change, this bill did not pass.

In the absence of cohesive state policy, counties or groups of counties could pool resources to create meaningful data sets and policies. This could also give counties more say in working with state agencies. There are very rough models for this in regional working groups for agencies like the Texas Water Development Board. But the application for counties might range from watershed-wide water studies (or regional “model” development regulations) to less public and more nuanced challenges: how to manage both people and materials in routine county functions, such as road paving during increasingly harsh summer and winter seasons.

While some state agencies are developing plans that take changing climate into consideration, and federal agencies are doing so more aggressively, most counties have yet to address how new climate realities will affect the mission of counties in the coming years. A related issue is a technological change, related to both climate and the changing nature of core functions: jail technology and reform, and transportation. For instance, only a few counties are currently planning in detail for a future that includes more ride-sharing and more autonomous trucks and passenger vehicles. Many of these technological changes will roll out over decades, as the existing stock of vehicles is replaced. But counties should be considering changes to road surfacing, lighting, shoulders, traffic lights, lane widths, speed limits, and internal vehicle fleets that might be necessitated by new technologies, such as electric vehicles and autonomous vehicles. In addition, few counties have done comprehensive facility studies to evaluate life-cycle cost-benefits of installing green-friendly technology and materials.

5. **Further resolution of ETJ Rules and Regional Alliances for Small Cities** - Small counties should consider regional planning alliances, including agreements to share high-level professional planning staff with neighboring counties or cities. Groups of counties with limited budgets could also develop regional growth plans and/or regional subdivision standards. Ideally, this work might be done in conjunction between the county and cities or water districts (something leaders in some counties, such as Kendall, have at least explored).

Within extraterritorial jurisdictions (ETJs), state law requires regulatory coordination, but this frequently breaks down in practice. Counties should update “1445 agreements” to clarify who leads regulation in ETJs, the county, or the relevant city government. To be stuck between the conflicting city and county regulations in an ETJ, with no clear path forward, can be a frustrating experience for a landowner, and contributes to mistrust of government and frustration with otherwise well-meaning regulations. Cooperative ETJ management can both help cities and reinforce county authority. But there is talk at the state level of revisiting

the concept of ETJs because of these conflicts, as well as what many see as the undemocratic nature of ETJ regulation – people in unincorporated areas partially regulated by a city government in which they have no vote.

6. **Funding and Impact Fees** – Cities in Texas have the power to impose direct impact fees, such as road impact fees. In most cases, counties do not. Allowing counties to collect impact fees – for instance, to charge a reasonable road impact fee on new subdivisions created from access to county roads would give counties an important funding tool to upgrade infrastructure and to implement innovative programs for water quality protection and context-sensitive design. Any such program should be tied to a reasonable nexus between the fee and the impact of the development; some cities have overreached with impact fees.

While true impact fees might require new state legislation, counties should also review subdivision development fees, which are typically considered allowable under existing law – and which not all counties charge (or charge adequate amounts to cover the staff costs of serious development review.

Finally, a useful change in state law might allow counties to impose direct local fees or more forceful limits on overweight trucking. Such trucks often wreak havoc on roads in counties with heavy industrial and extraction industries. Though there are obvious state concerns in protecting logistics and efficient critical transport, counties deserve better tools here.

7. **Industrial Zoning for Quarries And Other Heavy Industry** – In general, counties do not have zoning authority and have very limited jurisdiction over land use. Texas law specifically prohibits counties from regulating the height, density, and use of most properties. There are exceptions. Under Chapter 234 of the Texas Local Government Code, counties may establish aesthetic standards in the unincorporated areas for a very limited set of land uses, including automotive wrecking and salvage yards, junkyards, recycling and flea markets, and demolition businesses.

Section 396 of the Transportation Code further regulates county management of junkyards and auto-wrecking yards. In general, counties may require certain screening, depending on population brackets, and this could be a solid fence at least eight feet high. Counties may also require a license for the operation of some of these businesses. On this precedent, counties might seek an expansion of the existing legislation to include other types of industry or separate legislation to govern specific industries such as quarries. Efforts to provide greater county authority over quarries have failed in the past. Legislators have been concerned that county governments could not stand up to angry constituents and would rarely allow quarries, which are needed for the state's economy, so any proposed

regulation needs to be tightly drawn and focused on ensuring that quarries would be viable in some areas, and/or that regulation is focused on mitigation of sites rather than outright prohibition.

This might also be tacked onto Chapter 381 of the Local Government Code, which allows a county judge to appoint an industrial commission of not less than seven persons to “investigate and undertake ways of promoting the prosperous development of business, industry, and commerce in the county. The commission shall promote the location and development of new business....” While this does not address regulation, it is a potential vehicle that is amended to address certain types of broad regulation for industry such as quarries, establishing setbacks, and/or landscape buffers from existing neighborhoods as part of promoting (or, with amendments, regulating) location.

8. **Bracketed Zoning** – While counties are expressly prohibited from zoning land in general, there is bracketed legislation that allows a small number of counties to plan and zone around notable features – certain surface lakes, parts of Padre Island, near missions, and near military bases in Bexar County. Much of this authority is captured in Chapter 231 of the Texas Local Government Code, provocatively titled County Zoning Authority.

This chapter is testimony to the legislature’s unwillingness to grant general zoning authority – *and* to its willingness to grant more authority to individual locations and counties for specific, local purposes, something which might be creatively applied to various regions of the state, including the Hill Country.

For instance, there are separate subsections related to zoning for “zoning near Amistad Recreational Area”; within 5,000 feet of a lake with more than one million acre-feet of storage; to “Hood County because the whole county is located within the watershed that drains into Lake Grandberry and the Brazos River,”; to the area within 25,000 feet of Lake Falcon; to the areas within 5,000 feet of Lake Somerville in Burleson, Milam, Lee, or Washington counties.

Much of this “lake legislation” and other specially crafted brackets are based on the findings in the statute that the area tourism value to the state as a whole requires orderly and healthful development to benefit the public, and therefore is granted special authority.

The way brackets have been used opens a potential path through precedent to the idea that certain additional counties might claim zoning or special land use authority. Possibilities might include counties with underground “lakes” – aquifers – or PGMA counties, or Hill Country

counties with scenic views. Such counties might make a case for a local bill or bracketed bill to grant additional authority in all or parts of the county, either for broad zoning authority or for some limited form of land use control (i.e., water management, quarry regulation, dark skies).

9. **Right-sizing Roads, Road Diets, and Context-Sensitive Design.**

Counties need more flexibility from the state to address lane widths and right-of-way standards. SB 873 gave counties more room to maneuver, but the state still micromanages how counties address road standards, limiting road right-of-way (ROW), for instance, on both the upper and lower spectrum. This limits innovation, and the ability of counties to incentivize (or sometimes even allow) truly narrow roads and ROWs in rural settings, for instance; or to adequately address certain urban environments. The state has been concerned about curbing abuse and poor basic transportation management. But the result stifles county road building and creates subdivision design by developers, occasionally causing needless costs and impervious cover.

Still, there is much counties can do now, with existing authority. Until recently, most rural and suburban Texas counties still had a single road county road standard – no matter the urban or rural setting, the anticipated traffic count, and the environmental circumstances. In the past 25 years, several Hill Country counties have adopted more tailored specifications for drainage, materials, turn lanes, lane widths, and ROWs. But many have not, and there is more to do.

Counties can tailor road standards as much as possible, given state limits (itemized in LGC 232, Subchapter E). They can use smart road specs as an incentive for things like more conservation-minded development, or large lots that maintain rural character (or, depending on the circumstances, for clustered development). Counties can adopt right-of-way standards that address native vegetation to control erosion and limit the clear-cutting of trees. County engineers and public works officials are often reluctant to encourage skinnier roads or to allow trees to remain in right-of-ways, fearing safety problems, liability, and more difficult maintenance.

But there are now many careful studies that indicate “road diets” – properly employed and tailored to appropriate circumstances – can slow traffic and increase safety without sacrificing mobility. They can also reduce impervious cover, with attendant benefits to water quality and erosion control. There is a place for wider roads and ROWs, and good county stewards need to scrutinize the need for safe-harbor turning lanes and added lanes on critical arteries as well.

One way to make meaningful change in the future – without requiring major new legislation or authority – is for counties to adopt the use of

context-sensitive design criteria (CSD) for both new developments and their own county road departments. (“Context-Sensitive Design” is also discussed under the section, What Counties Are Doing, earlier in this report.) The CSD concept calls for adapting streets to people’s needs and to the existing social and geographic landscape, rather than the other way around. For instance, a county could make it a matter of policy to spend a small fraction of dollars for each major road construction project on early public outreach, to see what matters to the people who will be using the road. Counties could push TXDOT to do the same within their county. A county might consider various enhancements, depending on the demands of the local sense of place and neighborhood desires – more graceful bridge design; public art; low impact environmental features, such as rain gardens; bike and pedestrian ways; traffic circles; landscaping, and native grass plantings.

10. **Scenic Texas Program** – Enacted in 2021, state law allows this specialty designation for certain roadways, towns, and soon, counties. The program’s mission is to preserve the “visual environment” of Texas and currently does so using eight metrics for assessing eligible cities. The Scenic Texas program is exploring the potential for a Scenic County program and how that may be implemented. Because the program requires the locations to align with Federal Highway Administration codes to be eligible for federal funds, these sites must fill one of the following: 1) archeological, 2) cultural, 3) historic, 4) natural, 5) recreational, or 6) scenic qualities. Counties that are already home to many scenic cities and roadways should explore the Scenic County program.
11. **Light Pollution / Dark Skies** – State law authorizes counties to regulate lighting to protect dark skies only around the McDonald Observatory in the Davis Mountains. This bracket might be expanded through careful criteria to include counties with recognized scenic vistas or where a certain percentage of tourism could be ascribed to natural and scenic beauty; or, perhaps, to counties containing other types of research facilities and /or astronomy departments. Broader application through Chapter 232 of the Texas Local Government Code or through an expansion of the bracket is an option.
12. **Explore using Chapter 382 of the Texas Local Government Code** – special county districts – to advance conservation as part of an economic development initiative for the county. The chapter allows counties to establish public improvement districts (PIDs) in “economic development projects”; or Chapter 387 county assistance districts. Counties might push for more creative uses of (PIDs), Tax Increment Reinvestment Zones (TIRZs), or with possible tweaks from the legislature, the creation of other redevelopment zones, such as a Tourism or an Environmental Zone that

could help wineries or scenic areas and agricultural districts retain their character and natural beauty.

13. **Transfer Development Rights (TDRs)** are outside the box for Texas counties but have been used effectively elsewhere, on the West Coast, and in places such as Maryland, Florida, and Pennsylvania, among others. WeConservePA cites a number of successful uses of TDRs in Pennsylvania.

The Hays County Commissioners Court tried to initiate a variation on TDRs in 1994, based on the market-driven Habitat Transaction Method used in Kern County California. The plan would have established habitat credits that landowners could buy and sell on a free market, with a goal of channeling development away from environmentally sensitive areas and into less sensitive areas where infrastructure was already in place, such as along Interstate 35. But it was attacked by property rights activists who misrepresented the basics of the plan while also arguing that the county had no legal authority to engage in or facilitate any type of transfer development rights. The effort eventually died.

Conclusion

Texas will continue to grow, at least for the foreseeable future. And with it, the Hill Country. The Hill Country Conservation Network's 2022 report on the state of the region projects the area's population will increase *a third* by 2040.

That means more stress on water, land, and communities. While population growth will bring exciting opportunities, including the potential for economic prosperity, the challenges will be immense. As the Hill Country follows the state to grow beyond rural roots, local leaders will face more urban challenges as they seek to preserve the very quality of life that attracts new residents and holds old ones.

Much of that growth and some of the most dramatic change will occur in the unincorporated areas of counties, beyond the control of cities and their more robust menu of regulatory options, including zoning. Yet few Texas counties are prepared. Outdated regulatory tools and a tradition of passive growth management leave many counties at the mercy of demographic trends, in a cycle of reaction to land development rather than postured to channel and guide growth. It's time for counties in Texas to choose their own futures, their own destiny.

That won't be easy.

Managing growth in ways that honor the existing character of communities while truly stewarding limited natural resources – and doing so while respecting property rights and the freedom to move and to live in the place of one's choice – will require a balancing act rarely achieved, and seldom even attempted in Texas, with its ethos of individualism and self-reliance. Success will require sustained effort, beyond the constraints of a single election cycle. It will require adaptation, resilience, persistence, and collaboration.

This would be challenging enough in any environment. Now we find ourselves in an age where many state government leaders are openly hostile to local governments and local control of land use decisions, and when at the same time extreme weather and changing climate patterns are posing unprecedented challenges to city and county leadership.

Yet the fight to preserve the Hill Country – and special places across Texas – is far from hopeless. There are tools that exist, a few models for action, and a path forward, clear if perhaps uncertain.

As this report seeks to illustrate, there are tools currently available for counties to pick up and use. There are innovative ideas already on the table for local leaders to adapt and apply.

Moreover, a few counties around the state, and more across the nation, have blazed trails toward a future that *could* be.

One key will be deep, broad public engagement. “Rural” Texans, so often skeptical of government agents “here to help” are historically acclimated to be resistant to local government action and new-fangled remedies. County leaders and their allies will need to both listen to constituents and educate them about county powers, regulatory alternatives, and the high price of doing nothing.

Developers, builders, realtors, landowners need to be recruited – and treated – as partners and potential allies, knowledgeable resources with a vested interest in the future of land and the quality of life. That doesn’t mean “selling out,” nor giving in to short-term economic exploitation at the expense of long-term wellbeing for the broader community. It means balancing interests, and leading with data and, where possible win-win proposals rather than emotion and blame.

Incentives and opt-in agreements are potent tools in Texas, where the public sector is suspect and legislative opportunities are limited. Though sweeping overhaul remains unlikely at the statewide level, at least in the near future, careful, incremental change, “bracketed” legislation for specific areas, and local creativity offer meaningful avenues to address the population explosion in the Hill Country and across Texas. Leaders in these efforts will need to be mindful of public perception and the disastrous consequences of overreach, especially in the present political environment.

The most recent legislative session offers a lesson in this regard. Conservative legislators such as Senator Paul Bettencourt, R-Harris County, introduced a raft of legislation aimed at what they consider local government overreach. Much of this effort was sparked by regulation in a handful of cities and counties.

Though many of the most restrictive bills did not ultimately pass, they showed noticeable strength. One, Senate Bill 2037 would have stripped counties of much of their most useful authority to govern subdivisions and development, striking the heart of the language that animates Subchapter E of Chapter 232, the county subdivision chapter. As this report notes, the original adoption of that language earlier this century was a landmark for county authority.

Newly passed legislation will be analyzed for some time, including reviews at the Texas Association of Counties Legislative Conference August 30, 2023. Meanwhile, it’s clear there were some victories for proponents of natural resource protection, such as SB 1648 and SJR 74, which will allow Texans to vote for a state constitutional amendment that would establish the Centennial Parks Conservation Fund. But by contrast, another bill concerned with “overreach,” House Bill 2127, also known as the “preemption bill” and formally titled the Texas Regulatory Consistency Act, bars cities and counties from creating or enforcing regulations on the environment, labor law, and a wide range of other issues that go beyond state law. Supporters said the law was important to protect business and create jobs.

Much of the rhetoric from the top of the state government ladder this session was about limiting local control in order to constrain local leaders who sought to push farther than state leaders wished or thought appropriate. Yet, local regulation and resource protection do not have to be onerous. Indeed, in Texas, especially Texas counties, sometimes government efforts can seem cumbersome or hostile precisely because development regulations are so impoverished, poorly designed and constrained by state law, owing to an antiquated, patchwork design in need of reimagining.

* * *

In summary, the lessons from this paper can be rendered succinctly:

Growth is coming. The open spaces are disappearing. The climate is not the one we once knew. The tools we have in Texas are far from perfect; yet, they can be effective – certainly better than doing nothing, than waiting for the perfect legislative solution that may never arrive.

The conclusion, then, is this: Don't despair. Don't overreach. Be fair. Build consensus where possible. Be thoughtful and creative.

But most of all, act.

Appendix A: History and Context for County Authority

County government in Texas grew from ancient British seeds but was shaped into its unique modern form through Spanish, Mexican, and Civil War influences. Many of today's county customs – and the associated limitations on growth management – can be traced directly to Reconstruction in Texas, then through competing western and southern cultural influences to the Progressive Era, and on to more urban-oriented challenges today.

In the aftermath of the Civil War, Texans experimented with an activist government. But in 1873, with most former Confederates once again allowed to vote, and with violence widespread against Blacks and white Union sympathizers, the state turned a different direction. In a disputed election, Richard Coke became governor of Texas, with the help of an Austin company of militia that took his side over the incumbent, E.J. Davis, a former Union general and a Republican who had opposed secession before the war.

Davis had imposed new taxes to pay for public schools; used state police to quash bands of outlaws that roamed the state in the post-war chaos; and pursued broad civil rights for freed slaves. Coke, by contrast, had been a delegate to the Secession Convention, a Confederate officer, and suffered wounds fighting against the Union. He ran on a platform that opposed almost everything Davis stood for, especially the centralization of education, civil rights, and government power.

For a brief time, it looked as if there might even be civil war again in Texas over the outcome of the election (and Coke's refusal to abide by a state supreme court decision that would have invalidated the vote). The federal government – weary of Reconstruction conflicts – declined to send troops to support Davis, and the election turmoil soon was over. But it was in this atmosphere that the new governor undertook as one of his first priorities a call for a constitutional convention.

The result was the convention of 1875, which wrote the state's sixth constitution, the one still in effect today. It was ratified by voters in February of 1876. Some aspects of land titles and land law, and certain judicial procedures, reflected the state's Spanish and Mexican heritage. The constitution also reflected the state's rural, agrarian roots. And much of the document is clearly a reaction to Reconstruction and the Davis administration.

The Constitution of 1876 embraced segregation, moved away from state funding of schools, and implemented more local control of school policies. It provided for local-option elections for alcohol; it sought to protect farm interests and promoted railroads. It also demonstrated suspicion of government – lowering government salaries, decentralizing power and responsibility, detailing limitations on government action, and

creating a watchdog system with multiple elected offices in state and local government that are designed to check the authority – and, some would say, even the efficiency – of government institutions.

It is in this context of reaction and reform that we received the basics of today's county government.

When the constitution was created, there was not one city in Texas with a population of 25,000. Galveston was the largest municipality. San Antonio had less than 20,000 residents; Austin and Dallas each had less than 10,000. By contrast, Boston had more than 300,000 citizens, Chicago was approaching a half million, and New York boasted almost two million residents by the decade's end.

Much of Texas, meanwhile, was still unsettled by Americans, and most Texans lived on farms and ranches. Though land speculation had been a driving force in the state since the days of Stephen F. Austin and the *empresarios*, there were virtually no subdivisions of the type common in Texas today anywhere in the state. The overwhelming land use was agricultural or uncultivated open space, with little industry – and little concept of the crowding and urban conflicts that would soon bring land use regulation to the fore in the north and east.

At the close of the 19th century and through the early 20th century, more settled parts of the country began to grapple in revolutionary ways with urban problems. Though Texas grew rapidly, its cities and manufacturing base remained small by national standards. It remained a rural, not an urban, state. In Texas, big open spaces, available land, cowboy culture, old Reconstruction suspicions, and the dearth of urban enclaves made land use regulation less of an issue.

At the same time, the Progressive Era and journalism's Muckrakers turned much of the nation's attention to blighted housing and the despoiling of natural resources, Texas was still settling its frontier – nine counties were not even organized until after 1900, several after 1910. Progressive political battles came to Texas but were more focused on women's suffrage, temperance, oil regulation, railroads and highways, Prohibition, and – closely intertwined – issues of culture clash, ethnic rivalries, religion, and white, Protestant supremacy.

Divergence of City Authority

In a landmark decision in 1926, *Village of Euclid v. Ambler Realty Company*, the U.S. Supreme Court legitimized the concept of “police powers” for local government on issues related to public health, safety, morals, or the general welfare. The decision upheld a relatively new type of land use regulation that was tested in Euclid, Ohio – zoning. The Court ruled that local governments could, under certain circumstances,

interfere in private business interests, on private property, to secure the public good. Traditional zoning ordinances to this day are often referred to as “Euclidean zoning.”

The next year, the Texas legislature enacted enabling statutes to facilitate zoning regulations in Texas. Before this, several Texas cities, including Dallas, had experimented with restricting commercial land use in residential areas only to see their regulations overturned in state court as an improper use of governmental authority (*Spann v. City of Dallas*).

The 1927 action by the legislature allowed incorporated cities and villages in Texas to impose ordinances for the purpose of “promoting health, safety, morals, or the general welfare of the community ... to regulate and restrict the height, number of stories and size of buildings ... the percentage of a lot that may be occupied, the size of the yards, courts and other open spaces, the density of population, and the location and use of buildings, structure, and land for trade, industry, residence, and other purposes.” Much of that language is relevant today and would resurface in future debates about county governance.

The law was tested in 1934 at the Texas Supreme Court in *Lombardo v. City of Dallas*, a case where a filling station was denied a permit to build in a residential district. The court upheld the validity of the 1927 legislative statutes and ruled that regulations are not unconstitutional in Texas “merely because they operate as a restraint upon private rights of personal property”; and, that “police regulations do not constitute a taking of property under the right of eminent domain; and compensation is not required ... by the proper exercise of the police power,” provided the rules are based on public necessity and have a “real, substantial relation to that object.” The opinion goes on to state that an ordinance would be invalid if unreasonable or arbitrary, or “based purely on aesthetic considerations.” This largely applies today, though the legislature has also strengthened private property rights with a “takings” statute.

After Texas cities gained zoning and land use authority in 1927, counties would get their turn.

With the Great Depression underway, Texans in 1932 were in a mood for change, giving 85 percent of their vote to Franklin Roosevelt and the New Deal while also turning out the incumbent governor in favor of the notorious “Ma” Ferguson, who promised bolder action on the economy and won her comeback bid. (She also opposed both the Klan and Prohibition.) When the new administrations took office in 1933, the Texas Legislature undertook a number of significant actions, including the passage of a proposal to put a constitutional amendment before voters, one that would allow certain counties the option of establishing Home Rule charters. Effectively, this Home Rule offered Texas counties the possibility of land use regulation of much the same type as cities enjoyed.

The Speaker of the Texas House in that session was a conservative rancher from the Texas Hill Country, Coke Stevenson. As a point of trivia, Stevenson would go on to be

governor and lose a controversial election to the United States Senate to Lyndon Johnson. Meanwhile, Texas voters endorsed the constitutional amendment with more than 70 percent support, making it law.

However, the Depression-era “home rule” experiment for counties was not successful. First, it was bracketed to counties with more than 62,000 residents. Second, the statute itself was convoluted, and it required a complicated affirmative vote by citizens of the county. Separate tallies had to be made of citizens within incorporated and unincorporated areas, and the proposition had to pass in both populations – rural and urban.

At a time when most Hill Country counties held 12,000 residents or less, only 12 counties were eligible under the bracket when the legislation was passed. That number rose to 15 counties by the 1940 census. But only one county managed to bring the proposition to a vote. That was El Paso County in 1934, the year after the constitutional amendment was approved. There, a majority of county residents overall voted for the proposed home rule charter, combining certain city-county offices and giving the county more authority, but the proposition failed to carry a majority in the unincorporated area of the county and so failed.

In addition to the bracket, the legislation allowed smaller counties to call for a home rule election, provided they received a two-thirds vote of support for the idea from the legislature. Delta County in northeast Texas tried this route. Organizers prepared a proposal and submitted it to the attorney general for review, but Attorney General James Allred found contradictions in the document – arising at least in part from the confusing language in the enabling legislation – and ruled the petition invalid.

Delta County’s efforts never went to a vote, and neither did any other county, though residents in Dallas County got a committee hearing in 1949 on a local bill that would have allowed a simple majority vote. That effort eventually died in committee, amid fears expressed at committee hearings that the City of Dallas would dominate the arrangement at the expense of smaller cities and rural areas. According to the *Southwestern Social Science Quarterly* of September 1950, Travis, Tarrant, Bexar, Dallas, Harris McLennon, Galveston, and Hidalgo counties also saw movements to institute home rule, but none of them came to a vote.

By 1969, no county in the state had successfully implemented home rule under the enabling legislation and the legislature later rescinded it.

In the 1980s, counties again saw landmark action in the legislature.

In 1987, the state adopted Chapter 232 of the Texas Local Government Code, the basis of modern subdivision rules (the authority to require plats had come in the 1950s).

In 1989, the legislature granted Ellis County (county seat: Waxahachie) broad planning and zoning authority to deal with the land around an \$11 billion Superconducting Supercollider that had been announced by the federal Department of Energy. The project and the idea of comprehensive planning in Ellis County both later fizzled.

Beginning about that same time, the state enacted a series of laws and administrative rules to address substandard “colonia” development near the Texas-Mexico border. In 1987 the legislature authorized grants to improve water and wastewater service near the border, and the following session, in 1989 created EDAP — the Economically Distressed Areas Program. Some Hill Country counties on the region’s southern fringe are (or could become) EDAP eligible.

The program — codified in Chapter 364 of the Texas Administrative Code — allows for Texas Water Development Board (TWDB) grants to improve water and wastewater service in counties within 50 miles of the border or other counties that fall below a certain economic threshold. To qualify for the TWDB money today, a county must take certain actions, including the adoption of the state’s Model Subdivision Rules, or something equivalent, adopted by the TWDB.

In 1995, the state took further action against border *colonies*, adopting Subchapter B of Chapter 236 (subdivision rules) in the Local Government Code. Subchapter B to 28 counties with all are part of their land within 50 miles of the Mexican border, plus Nueces County (Corpus Christi). It gave border counties more authority over land development than most counties and mandated the use of model subdivision rules developed by the TWDB.

Appendix B: Survey Results

Since the Subchapter E language for counties was based in part on language and precedent about what cities could already do in their ETJs, the original work included a survey to determine how select cities of different sizes, from different regions of the state, were applying land use authority and natural resource protection (including water measures) in their ETJs.

Table 4: How Municipalities Exercised Power in the Extraterritorial Jurisdiction* (2007)

ETJ Regulations: Regulated Item x City	Austin	Baytown	Brownsville	Buda	Corpus Christi	Del Rio	Denton	El Paso	Flower Mound
Subdivision	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue
Stormwater Detention	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue
Streets	Blue	Blue	Blue	White	Blue	White	Blue	Blue	Blue
Utilities	Blue	Blue	Blue	Blue	Blue	White	Blue	Blue	Blue
Erosion/Sedimentation /BMPs	Blue	Blue	Blue	Blue	Blue	White	White	Blue	Blue
Parkland Dedication/Fee in lieu	Blue	White	White	White	Blue	White	Blue	White	White
Signs	Blue	White	Blue	White	White	White	White	White	Blue
Impact Fees	Blue	Blue	Blue	Blue	Blue	White	White	White	White
Water Quality Ponds or other	Blue	White	Blue	Blue	Blue	White	White	White	White
Site Grading for drainage	Blue	Blue	Blue	Blue	Blue	White	White	White	Blue
Site Design & Layout	White	Blue	White	White	Blue	White	White	White	Blue
Impervious Cover	Blue	White	White	Blue	White	White	White	White	White
Tree Protection	Blue	White	White	White	White	White	White	White	Blue
Environmental Setbacks	Blue	White	White	Blue	Blue	White	White	White	Blue
Site/Building Permits	Blue	White	White	White	Blue	White	White	White	Blue
Landscaping	White	White	White	White	White	White	White	White	Blue
Setbacks	White	White	White	White	White	White	White	White	White
Building Height	White	White	White	White	White	White	White	White	White
Density	White	White	White	White	White	White	White	White	White

ETJ Regulations: Regulated Item x City	Georgetown	Houston	Odessa	San Antonio	Sugarland	Temple
Subdivision	Blue	Blue	Blue	Blue	Blue	Blue
Stormwater Detention	Blue	Blue	Blue	Blue	Blue	Blue
Streets	Blue	Blue	Blue	Blue	Blue	Blue
Utilities	Blue	Blue	Blue	Blue	Blue	Blue
Erosion/Sedimentation /BMPs	White	White	White	Blue	Blue	Blue
Parkland Dedication/Fee in lieu	Blue	White	White	Blue	Blue	Blue
Signs	Blue	Blue	White	Blue	White	White
Impact Fees	Blue	White	White	Blue	White	White
Water Quality Ponds or other	Blue	White	White	Blue	White	White
Water Quality: Filtration and Sedimentation	White	White	White	White	White	White
Site Grading for drainage	Blue	White	White	White	White	White
Site Design & Layout	Blue	White	White	Blue	White	White
Impervious Cover	Blue	White	White	Blue	White	White
Tree Protection	White	White	White	Blue	White	White
Environmental Setbacks	Blue	White	White	White	White	White
Fire Code	Blue	White	White	White	White	White
Site/Building Permits	Blue	White	White	White	White	White
Landscaping	White	White	White	White	White	White
Setbacks	White	White	White	White	White	White
Building Height	White	White	White	White	White	White
Density	White	White	White	White	White	White

**This chart details known regulations prior to 2007 and after 2001. This is a recreation of the original data sometime in that period before Buda voted to become a Home Rule City. This chart was partially updated in 2022 from a survey of cities by Gap Strategies for this report. This is an illustrative example of how cities are using authority in ETJs.*

Table 5: How Municipalities Exercised Power in the Extraterritorial Jurisdiction (2023)

ETJ Regulations: Regulated Item x City	Buda	Dripping Springs	Flower Mound	Kyle
Subdivision	Blue	Blue	White	Blue
Stormwater Detention	Blue	Blue	White	Blue
Streets	Blue	Blue	White	White
Utilities	White	Blue	White	White
Erosion/Sedimentation/BMPs	Blue	White	White	Blue
Parkland Dedication/Fee in lieu	Blue	Blue	White	Blue
Signs	Blue	Blue	White	Blue
Impact Fees	White	Blue	White	Blue
Water Quality Ponds or other	White	White	White	Blue
Water Quality: Filtration and Sedimentation	Blue	White	White	White
Site Grading for drainage	White	White	White	Blue
Site Design & Layout	White	Blue	White	White
Impervious Cover	Blue	White	White	Blue
Tree Protection	Blue	White	White	White
Environmental Setbacks	Blue	White	White	White
Fire Code	Blue	White	White	White
Site/Building Permits	White	White	White	White
Landscaping	White	White	White	White
Setbacks	White	White	White	White
Building Height	White	White	White	White
Density	White	White	White	White

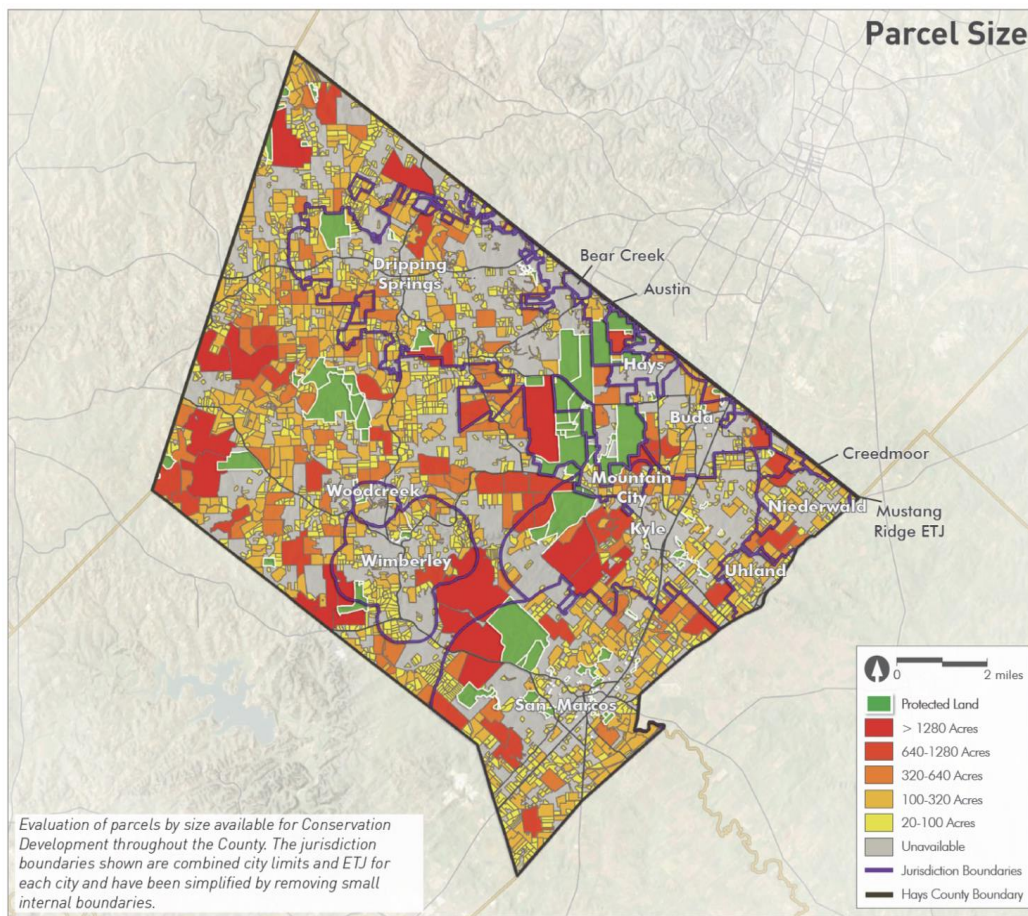
These four cities responded to the City Survey. Flower Mound’s blank column reflects that there is no longer an affiliated ETJ.

Appendix C: Hays County Conservation Plan

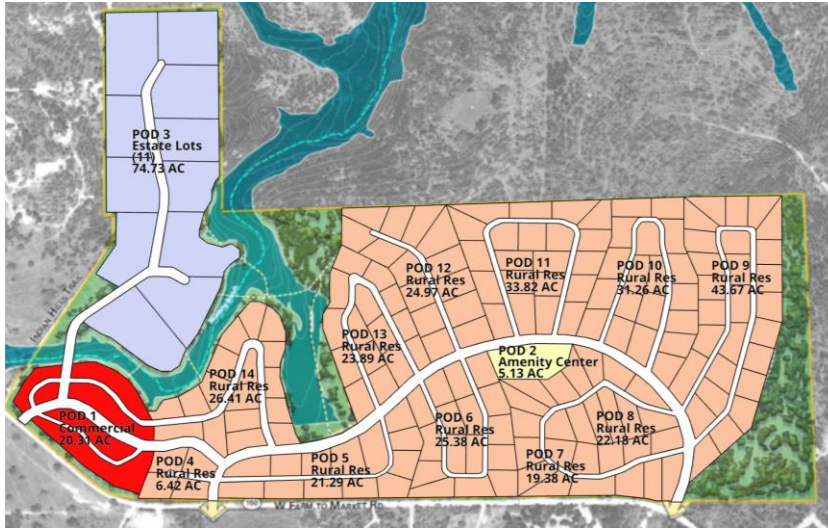
The Hays Conservation Development Plan (RFP 2019, submitted 2022) proposed and proved the viability of conservation design for Hays County as populations – and the threat to the Hill Country county’s resources – continue to soar. The plan demonstrates, through the Michaelis Tract case study, how regulatory, financial, and market desires can be met. The end result is a subdivision that pays respect to the area’s beauty and heritage while accepting the growth of its population. Exhibit A shows the Hays County land at the time of the study. Exhibits B - F present the different types of subdivision planning and a final comparative chart of study results.

A. Hays County Map- Parcels by Size Available for Conservation Development

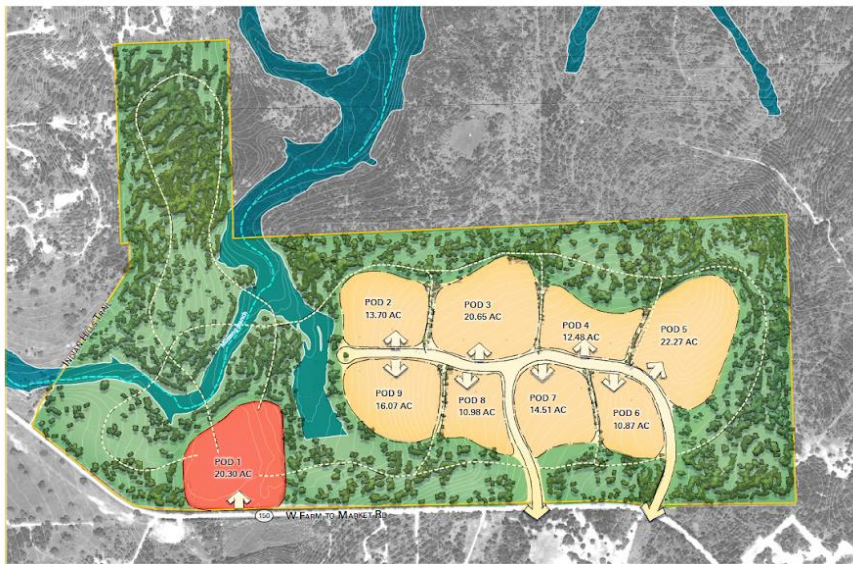
The map below details parcels by size available for conservation development. Evaluation during the course of the study found that parcels of less than 20 acres dominate population centers and are unlikely to crop up. Instead, the outskirts of municipalities and ETJs, where acreage is greater, are good sites for conservation development.



B. Conventional Subdivision Planning



C. Conservation Subdivision Plan 1



D. Conservation Subdivision Plan 2



E. Context-Sensitive Subdivision Plan



F. Charette Results: Michaelis Tract

	CONVENTIONAL SUBDIVISION	CONTEXT-SENSITIVE SUBDIVISION	CONSERVATION SUBDIVISION 1	CONSERVATION SUBDIVISION 2
TOTAL LOT	182*	276	194	87

Appendix C: Hays County Conservation Plan - Michaelis Example

YIELD				
Conservation land**	5%	53%	62%	65%
Total infrastructure CONSTRUCTION COST	\$13M	\$17M	\$15M	\$8M
Infrastructure cost per lot	\$63,500	\$55,800	\$67,500	\$95,300

*If a sustainable, public water supply had not been available on this site, then lot yield would have been much less.

**Percentage of gross property that is dedicated to Conservation Land. Open Space does not include floodplain land.

Appendix D: Original County Toolkit (2007)

Authority Under Subchapter E	Clarified or Expanded Authority	For the Bold	Looking for Trouble
Healthful, Orderly, and Moral Development			
Floor area ratio to lot square footage*			
Bulk, height, number or size of buildings*			
Number of residential units per acre			
General zoning (zoning districts or use regulation)*			
Special zoning: SOBs, airports, junkyards			
Water quality: filtration and sedimentation			
Impervious cover			
Tree protection			
Parkland dedication or fee in lieu			
Developer participation contracts*			
Sign Control			
Landscaping			
Critical environmental feature setbacks			
Fire code			
Lighting: hazardous roadway glare			
Lighting: dark sky/offensive flare			
Noise abatement			
Subdivision & Plan Review			
Utility connections			

Authority Under Subchapter E	Clarified or Expanded Authority	For the Bold	Looking for Trouble
Establish minimum lot frontages*			
Site development permit			
Impact fees			
Stormwater Management			
Broad stormwater (drainage) planning*			
Stormwater detention			
Erosion & sedimentation control			
Review of subdivision/site grading plan			
Transportation Planning			
ROW widths up to 120 ft.*			
ROW over 120 ft. (per MPO plan)*			
Setbacks for future ROW without time limits*			
Major thoroughfare plan*			
* Items specifically addressed in SB 873 (basis for Subchapter E)			

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