

GROWTH AND CONSERVATION IN TEXAS (ABRIDGED REPORT)

A PRIMER ON COUNTY TOOLS
AND PATHS FORWARD

2023



This is an abridged
version of a report
prepared by:



Gap Strategies

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 the white paper, “Growth and Conservation in Texas: A Primer on County Tools and Paths Forward.” It was completed in the spring of 2023, with amendments following the close of the 2023 legislative session.

The report 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.

This document is an abridged version of the full report. The full report can be found at: <https://hillcountryalliance.org/county-tools-report/>



Table of Contents

| | |
|---|----|
| Introduction | 1 |
| County Tools for Managing Growth and Conservation | 3 |
| Examples of Innovation | 7 |
| Conclusion | 12 |

Introduction

The Texas Hill Country is one of the fastest growing regions in the country. From 2010-2021, the fastest growing counties in the fastest growing state in the country (Texas) 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.

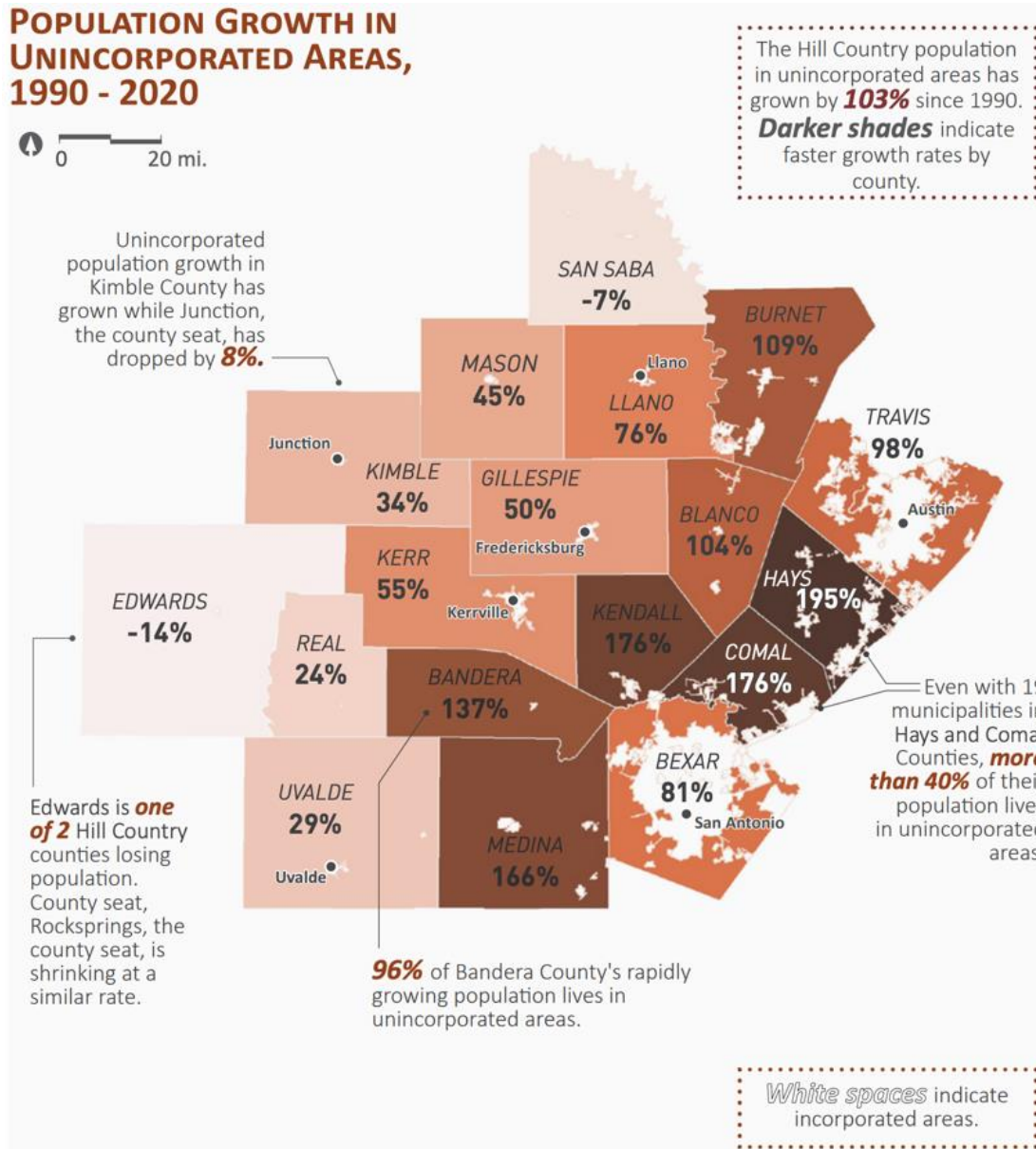


Figure 1.3 Population Growth in Unincorporated Areas, 1990-2020, prepared by Siglo Group for the Hill Country Conservation Network, State of the Hill Country Report, February 2022.

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.

This report presents regulatory tools that already exist but are underutilized, and addresses 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

Traditional Sources of Authority for County Tools

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 typically use for managing growth and conservation in the Hill Country:

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 Smaller Sources of Authority (non-exhaustive)

1. Local Government Code Chapters 241, 234, and 243
 1. Special zoning: airports, junkyards and Sexually-oriented businesses
2. Texas Health and Safety Code
 1. Ch. 121 (public health),
 2. Ch. 366 (On-Site Sewage)
3. Texas Transportation Code (TTC)
 1. Classify and name roads and misc. Authorities
 2. Regulate sight distance and driveways
4. Highway Beautification Act / TTC
 1. Ch. 391 (certain signage regulation - outdoor signage, junkyards)
5. Texas Property Code
 1. Ch 12. (plat filing)
6. Texas Utilities Code
 1. Ch. 181 (utility site approval)
7. Texas Water Code
 1. Ch 16 (water and flood planning)
8. Federal Floodplain Program
 1. Floodplain regulation and management
9. Priority Groundwater Management Area (PGMA)
 1. Water protections - quality and availability

Expanded County Tools Stemming from 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.

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.

Below are the clearly expanded authorities that SB 873 enabled.

Clarified powers from SB 873:

- **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

The bill also opened up opportunities that counties could consider to take patchwork approaches even further. These opportunities were not explicitly stated in SB 873, but could be implied by the language in the bill. The section that follows lists some implied

authorities stemming from SB 873– almost all of which some counties in the Hill Country have chosen to use (see the table in next section).

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 Hill Country Counties Are Utilizing Their Toolkits

For this report, Gap Strategies compiled a study of how counties are using their toolkits in the post-SB 873 landscape. The chart below represents responses from counties that completed the surveys. Green indicates that the county has rules in place to regulate the listed item. Red denotes items which cannot be regulated at the county level.

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.

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

Long-range and Strategic Planning

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. For examples, see page 26 of the full report.

Example: Guadalupe County (County Seat: Seguin). Guadalupe County 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).

For more examples, see page 26 of the full report.

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.

Example: Hays County. 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*. 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.

For more information, see page 29 of the full report.

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. Kendall County is exploring ways this legislative session (2023) 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, starting on page 39 of the complete version of this report.

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.

Example: 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.

For more information, see page 31 of the full report.

Protecting Water & Natural Resources

Stormwater and Impervious Cover Limits

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. 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)** - 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 resource drain.
- **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.

- **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 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.

A 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.

Conclusion

Texas will continue to grow, at least for the foreseeable future. And with it, the Hill Country. 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.

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. Success will require adaptation, resilience, persistence, and collaboration.

Yet the fight to preserve the Hill Country – and special places across Texas – is far from hopeless. 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.

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.