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Overcoming Human-Nature Dualism In The Texas Hill Country: Local Governments And Urban Spaces

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CONTENTS

SEPTEMBER / OCTOBER 2024

"IT AIN'T NECESSARILY SO"- PUTTING *LOPER BRIGHT* IN PERSPECTIVE

By: Norman A. Dupont, Counsel to Aleshire & Wynder LLP, Westlake Village. California

In reversing four decades of what had been settled *Chevron* deference, the Supreme Court's recent *Loper Bright Enterprises* decision promises to radically restrict federal agency authority and replace it with judicial oversight. But that transformation may not be as sweeping at the state and local level.

PAGE 6

FIT FOR DUTY: A MUNICIPAL LAW PRACTITIONER'S GUIDE TO EFFECTIVE AND DEFENSIBLE PHYSICAL ABILITIES TESTING

By: Christoper Towle, City Attorney, Newton, Kansas

It is essential that employees--whether long-time staff or new applicants—are capable of handling the physical requirements of their jobs. At the same time, employers must be alert to tests and measurement criteria that unfairly discriminate against some workers.

PAGE 10

OVERCOMING HUMAN-NATURE DUALISM IN THE TEXAS HILL COUNTRY: LOCAL GOVERNMENTS AND URBAN SPACES

By: AJ Urteaga, Assistant City Attorney, Land Use & Real Estate Division, Austin, Texas

A common perception is that biodiversity has little to do with heavily populated urban areas. But the reality is that cityscapes can be home to a wider array of plant and animal life than most of us would suspect—it just takes a broader awareness of the possibilities and a shift in focus.

PAGE 16

DEPARTMENTS

20 LAND USE
A Brief Look at Land Condemnation
By: Ben Mount, Senior Assistant General Counsel, North Carolina League of Municipalities
Municipal infrastructure and eminent domain.

24 FIRST AMENDMENT
Prayer at Council Meetings - Who Prays and How is that Decided?
By: Julian Grant, Deputy City Attorney, San Marcos, Texas
The constitutional nuances of legislative prayer.

28 INSIDE CANADA
Blocked Drainage, Illegal Tempos, Arson Allegations, and More
By: Monica Ciriello, Director of Municipal Law and Licensing Compliance, City of Hamilton, Ontario
Recent Canadian cases of interest.

30 AMICUS
Supreme Court: On to the Next Term
By: Amanda Karras, IMLA Executive Director and General Counsel
Another round of transformational cases awaits.

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Overcoming Human-Nature Dualism in the Texas Hill Country: the Role of Local Governments and Urban Spaces

By: AJ URTEAGA,
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INTRODUCTION

The Texas Hill Country is an iconic landscape known for its unique beauty and rich biodiversity. Located above the Edwards Aquifer at the southeastern edge of the Edwards Plateau, the region's rolling hills, karst geography, and crystal-clear springs support a number of plant and animal species found nowhere else in the world. However, rapid population growth and sprawling development continue to transform the area, threatening several endangered species. Habitat destruction making way for housing and other urban development is the leading cause of species decline in the Hill County, yet prior conservation efforts have largely ignored the potential of these newly urbanized areas to help promote biodiversity.

Traditional conservationist thinking has tended to equate the environment as belonging only to "rural" or "wild" places; places wholly separate and that need to be protected from the encroachment of urban society.[1] As a result, much of the biodiversity governance at the local level has focused on the designation and intensive management of protected areas.[2] While important, this urban vs. nature dualistic view overlooks the ways nature inhabits a city, the way cities rely on nature, and the potential benefits that forms of biodiversity can bring to urban areas.

Cities and other local governments are key jurisdictions in a world of multi-level governance and will play an important role in addressing the loss of nature. Though cities are often thought of as species- deserts and as themselves drivers of biodiversity loss, there is an increasing recognition of the role that urban green spaces, waterways, and wetlands serve in conservation, and their larger contributions to human health and well-being as whole.[3] Whether intended or unintended, cities provide a diverse array of unconventional habitats for a number of plant and animal species. These spaces provide opportunities for people in urban and suburban communities to connect with nature and instill values necessary for broader support of environmental solutions.

Challenges in Local Biodiversity Governance

Located in the south-central portion of the state, at the convergence of several distinct ecoregions, the Texas Hill Country supports a diversity of life including several species found nowhere else in the world. The region is situated at a biodiversity crossroads, home to species representative of the desert to the west, grasslands to the north, forest to the east, and tropics to the south. Today, however, the Hill Country and its abundance the very resources that have drawn and supported humans here for generations are under threat due to sprawling development, changing hydrologic conditions, and a unique set of regulatory challenges and competing political considerations that impact biodiversity governance and ecosystem services at the local level. The Texas Hill Country is experiencing rapid growth and is among the fastest-growing regions in the United States. With the population that has increased by 50% in just the last 20 years,[4] the area faces significant challenges in balancing urban expansion with habitat conservation.

The primary causes of biodiversity loss in the Texas Hill Country are habitat destruction, degradation, and fragmentation due to increased impervious development, particularly along the I-35 Corridor and in unincorporated areas, or areas outside of city limits. For example, over the just the last twenty years, the population in unincorporated areas of Hays and Comal County have grown by 195% and 176%, respectively.[5] Despite the 19 municipal governments within the two counties, more than 40% of the population now live in unincorporated areas.[6] Across the entire region, the unincorporated population has more than doubled since 1990, not accounting for second homes or short-term rentals.[7] This pattern of development creates regulatory and spatial challenges with respect to land conservation and habitat protection at the local level.

Texas is unique in that city and county governments differ wildly with respect to their ability to regulate land use and set development standards within their jurisdictional boundaries. Pursuant the Texas Constitution, most cities in the Hill Country with a population greater than 5,000 have adopted a "home- rule" charter, which establishes their city government structure and gives it the full power of local self- governance, subject only to explicit state and federal statutory limitations.[8] This gives cities more autonomy and flexibility to manage growth, as they are authorized to adopt a comprehensive plan that permits zoning regulations to incentivize or prohibit certain uses altogether in areas within their jurisdiction.[9]

A county, by contrast, has neither a charter nor home-rule authority to adopt a comprehensive plan; a county government has no authority except that expressly granted to it by the Texas Constitution or a state statute.[10] Thus, unlike most cities, no county in Texas has general ordinance-making authority to address biodiversity challenges, and their ability to plan for growth and minimize its impact is severely limited to by statute.[11] For example, though both cities and counties have nondiscretionary authority over platting in Texas, cities can set more stringent standards for density, lot size,[12] impervious cover, water, and wastewater system performance without action from the Legislature, and require additional fees to offset the impacts of development, subject to express limitations.[13] A county, however, is required to approve developments that satisfy the requirements prescribed in the State and Local Government Code, which must be amended by the Legislature and does not allow for the collection impact fees. This narrow view of state-delegated authority is known as "Dillion's Rule," and has been replaced by a broader interpretation of county regulatory authority in almost every other state.[14] The inability of Hill Country counties to employ these traditional land use controls has resulted in unregulated sprawl in these areas, with unsustainable impacts on the region's biodiversity and natural resources.

Texas is unique in that city and county governments differ wildly with respect to their ability to regulate land use and set development standards within their jurisdictional boundaries

Today, only 10-percent of the total land area of the Hill Country has been incorporated by a municipality,[15] leaving the other 90% unincorporated and, like most of Texas, predominately privately- owned. The inability of county governments to set stricter regulations on or collect impact fees from development, along with lower land prices, lower property taxes, and the desire of many to experience the natural landscape of the region, have only incentivized further growth away from cities and into these areas. Urbanization of these areas has a number of direct impacts on biodiversity, including habitat loss and degradation, altered disturbance and modified soil regimes, and the loss of endemic species due to the introduction of invasives.[16] However, the effects of this urban growth are compounded given this lack of regulatory authority to set stricter standards necessary to limit the spatial footprint of new development.

Without the ability to comprehensively plan, the process of selecting suitable land (and what to build on it) is often left to developers, and typically determined based on the availability, affordability, and marketability of land, without consideration of ecosystem services.[17] Consequently, new developments are rarely connected or adjacent, resulting in significant fragmentation of the natural habitat and the compounding edge effect at the boundaries of this new development. Additionally, because much of this growth in these areas has been accommodated by large residential subdivisions, it has come at a net-fiscal drain on county resources. Given the distance of these subdivisions from other areas of the human environment, this pattern of growth is often referred to as "sprawl," characterized by low density, auto-dependent development occurring on the outskirts of urban centers, with significant indirect impacts on the human and natural environment.[18]

Beyond the effects of increased traffic congestion, pollution, and land consumption, this pattern of development comes at an economic cost to local communities. A "Cost of Community Services" analysis for Hays

Continued on page 18

Urban Spaces *cont'd from page 17*

County conducted by the American Farmland Trust observed that for every dollar generated in taxes from residential property, $1.26 was spent on providing services to those areas.[19] Because counties cannot charge impact fees to offset the costs of capital improvements and infrastructure expansion necessitated by these new developments, counties must offset these losses by increasing taxes and service fees across the entire tax base, or generating it from new commercial, industrial, and agricultural properties, which provide a net gain to local governments.[20] Though without zoning authority, they cannot plan out where best to locate those potentially high-impact uses.

Recent legislative changes have further complicated the landscape for local governance. Senate Bill 6, passed in 2017, limits cities' ability to annex properties within their extraterritorial jurisdiction (ETJ) unilaterally.[21] More recently, Senate Bill 2038, passed in November of 2023, allows property owners in a city's ETJ to unilaterally remove themselves from city regulations and place themselves under county jurisdiction.[22] This change has lead to less stringent development oversight in areas crucial for biodiversity conservation.

Even with the tools necessary for effective biodiversity governance, local governments must balance competing economic, infrastructural, and social considerations that too impact the human and natural environment. Despite cities more expansive authority to regulate development, growth management policies that confine development to limited areas often have the effect of making housing more costly, discriminating against moderate- to low-income households and pushing development further into unincorporated areas.[23] Additionally, programs to buy and conserve open space in and beyond urban areas are often funded obligation bonds, which have the effect of increasing property taxes across the entire tax base and around the project once complete. Due to this potential displacement effect, efforts to bring parks and green space into existing urban areas, despite the ecological and community benefits, are often criticized for their failure to consider the impact to the human environment and their worst, have been termed "green-gentrification."[24] Overcoming these perceptions while considering impacts to interconnected the human environment will be important for successful biodiversity governance.

However, managing growth in the Hill Country and ensuring affordable housing are not exclusive, and local governments will play an active role in the provision of both.

Role of Local Govts: Overcoming Human-Nature Dualism

Though urbanization is largely responsible for biodiversity loss in the Hill Country, these newly urban areas also have the tremendous potential to aid in greater conservation efforts and provide a number of ecosystem services to local communities. In this era of rapid suburban and exurban sprawl, the continued loss of natural resources and important habitat for biodiversity has led to a movement to preserve open space and rural communities. As developers search to find new sites to house the growing population in this region, environmentalists and conservations have been at work to preserve habitat and open spaces from disappearing under this new development.[25] The challenge, of course, is that acquisition of these properties expensive and dependent on market availability. As a result, these efforts have culminated in the permanent protection of a fragmented 546,301 acres, or only 5% of the total land area in the Texas Hill Country.[26] The bulk of this conserved lands are in Travis, Hays, Bexar, Uvalde, and Medina counties and are largely the result of obligation bonds funded by the significant tax bases of municipalities in these areas.[27] The exception to this is San Antonio, who have largely funded conservation efforts above the Edwards Aquifer Recharge Zone through an eighth-of-a-cent sales tax on every taxable dollar spent in the city.[28] This funding strategy has work well for the city and has been consistently reapproved by voters; however, because state law institutes a two percent cap for combined municipal and county sales tax, it is not available to most jurisdictions who have already allocated their maximum.[29] Thus, even with support from voters, local government land acquisition plans are severely limited by funding.

The primary goal of conservation is to prevent the further loss and degradation of natural ecosystems, and the primary preference has been given to conserve large, highly connected areas.[30] While these lands held in permanent protection are instrumental in preserving biodiversity and other critical ecosystem services in the region, merely designating reserves is not sufficient to protect the nature and biodiversity within them, as the direct and indirect impacts are felt beyond the footprint of new development. Additionally, a strategy focused exclusively on the conservation of these "natural" places fails to generate the broad future support needed to make biodiversity governance effective over the long term.[31] Long-term protection of biodiversity can only come with the recognition of the interconnectedness of nature and urban society, which requires an approach that considers both the conservation of natural areas and the integration of nature into urban planning and design. However, the traditional conservationist view of nature as a place that needs to be protected from the encroachment of urban society, has overlooked the ways nature inhabits urban areas, their reliance on nature, and the potential benefits that forms of biodiversity can

bring to urban society.

Urban green spaces are ecosystems that provide key services for urban communities and are essential for the long-term protection of biodiversity. While true that the lack of effective planning, even within incorporated areas of the region, have resulted in urban reserve and park systems that are often small, fragmented, disconnected, and generally located on leftover or undevelopable land, these areas nonetheless have been shown to make important contributions to conservation. Inseparable from these ecosystems are the services they provided, including soil production, erosion prevention, flood control, and groundwater recharge.[32] Urban green spaces have also been shown to provide a number of economic benefits to local areas, such as low-carbon stormwater management and, whether intended or unintended, provide a diverse array of unconventional habitats for a number of plant and animal species.

Perhaps most importantly, however, these spaces provide opportunities for people in urban and suburban communities to connect with nature, realize our place within it, and instill values necessary for broader support of environmental solutions. Though economics provide some justification, an affection for nature, with an accompanying sense that nature provides benefits to our lives, can help motivate us to make sacrifices necessary for sustainability.[33] Providing communities access to natural areas, however small, has the potential to foster this relationship with nature and instill values necessary for broad support of biodiversity governance.

Role of Local Governments: Highlighting New and Existing Socio-Ecological Solutions

Beyond the designation and intensive management of protected areas, minimizing habitat and biodiversity loss while limiting the degradation of related ecosystems services will require local governments to incorporate conservation efforts into their traditional land use controls. To encourage smarter growth in urban areas, it is clear that an expansion county authority over land use is required to manage growth in increasingly urbanizing unincorporated areas. While this would require action from the state, the Legislature has often passed statutes that give zoning authority to only certain counties, depending on the specific circumstances or needs present there.[34] For example, the Legislature determined that due to significant recreational use of certain parts of the Padre Island area, the commissioners' courts of Cameron County and Willacy County should have zoning authority "for the orderly development and use" of the area designate.[35] Given the tremendous growth and unique challenges facing the 19 counties in the Hill Country, a case could be made that limited zoning and comprehensive planning authority is needed in this area as well.

Urban green spaces are ecosystems that provide key services for urban communities and are essential for the long-term protection of biodiversity.

Yet, until the Legislature can be state's fastest-growing counties require the type of land use controls that exist in almost every other state, city and county governments in Texas must focus on maximizing their current authority over land use and continue to invest in urban open space. Parkland dedication ordinances and the evolving concept of "conservation development" are existing, though underutilized, tools for local governments to aid in larger biodiversity and conservation efforts.

A. Parkland Dedication Ordinances

Parkland dedication ordinances have emerged as a powerful tool for communities to address issues related to preserving open space in newly developing areas. In accordance with the authority of both cities and counties in Texas over platting,[36] a process required of every developer wishing to subdivide land into lots, local authorities can require developers to dedicate a portion of their land for use as a public park, or pay a "fee-in-lieu" of such dedication of an equivalent value, and charge a development fee to develop that land into a useable public park.[37] These regulations have been touted as a win-win for both conservation and urban development.

For conservationists, these ordinances have proven tremendously successful in preserving open space providing benefits for growing communities and biodiversity alike. For cities and ultimately its citizens at large, these ordinances place the burden of providing the space to the developer and are ultimately absorbed by the homeowner, the primary recipient of these community benefits. Compared to conventional revenue raising tools which increase

Continued on page 33



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Urban Spaces *cont'd from page 19*

property taxes across the entire tax base, parkland dedication ordinances are much more politically favorable for existing residents with the added advantage of being "hidden" to new homebuyers.[38] Despite these benefits, several Texas municipalities and many counties have yet to adopt similar subdivision ordinances, and many that are failing to maximize this conservation tool's full potential.

The failure of most local governments in the Hill Country to optimize the financial potential of parkland dedications is surprising given their legal validation. In the early days of parkland dedication ordinances, there were several challenges to their legality in Texas. However, in 1984 the Texas Supreme Court concluded that requiring parkland dedication or fees-in-lieu was a valid exercise city authority because such ordinances are substantially related to the "health, safety, and general welfare of the people," as required by the Texas Constitution.[39] The amount a local government can require, however, must be "roughly proportional" to the proposed development, a burden that must be shown by the government entity.[40] This requires cities and counties to make "individualized determinations" that every parkland dedication effects a roughly proportional response to the demand generated by a development, a burden which may contribute to their lack of widespread adoption and failure of many localities to maximize their use. However, if a locality enacts a dedication using a quantitative method, the burden shifts to the developer to show that the exaction is inappropriate.[41] The challenge, however, is the method of calculation used by almost all Texas cities which have adopted such ordinances is arbitrary rather than empirically derived, and those that are empirical are far from uniform.[42]

The variability and lack of uniform adoption of these parkland dedication ordinances provides an opportunity for growing cities and counties alike. A 2022 audit done by the Texas A&M AgriLife Extension titled "Parkland Dedication: Optimizing an Underutilized Resource," identified a number of deficiencies in existing parkland ordinances causing local governments to charge only a fraction of what could legally be required under the "rough proportionality" requirement.[43] Among the deficiencies included the limited application of these ordinances to residential development, and minimal adoption of the additional development fee requirement in addition to the dedication or fee-in-lieu.[44] Additionally, only two Texas cities (Temple and Austin) have addressed affordability concerns, exempting certified affordable housing projects approved by the city.[45] Given the legal validation and economic, social, and ecological benefits provided by parkland dedication ordinances, there is little reason for both cities and counties not to maximize their

Continued on page 34

Amicus *cont'd from page 31*

***Lackey v. Stinnie* – Section 1988 Attorney's Fees**

Another case that should be on local government attorneys' radar is *Lackie v. Stinnie,* which involves the important question of whether a plaintiff who successfully obtains a preliminary injunction can obtain attorney's fees under Section 1988 if the defendant thereafter voluntarily changes its conduct and there is never a permanent injunction or full ruling on the merits. Because Section 1988 provides for attorney's fees in Section 1983 actions and those fees can sometimes outstrip the dollar value of the verdicts themselves, this is an important case for local governments.

In this case, five named plaintiffs brought a class action lawsuit against the Virginia Department of Motor Vehicles to challenge the constitutionality of a (now repealed) law, Section 46.2-395 of the Virginia Code. This law required courts to automatically suspend a convicted criminal's driver's license if they failed to pay certain court fines and fees. The plaintiffs alleged the law was unconstitutional by violating their procedural and substantive due process rights as well as other claims. They sought preliminary and permanent relief to prevent enforcement of the statute and sought reinstatement of the licenses for the Virginians' whose licenses had been suspended.

The district court granted a preliminary injunction, finding the plaintiffs were likely to succeed on the merits as to their procedural due process claims (one of the five claims brought). The court set the case for a bench trial, but before the trial, the Virginia General Assembly passed a Budget Amendment that suspended the enforcement of the law for one year. The court then stayed the case pending the next legislative session, which the Commissioner represented to the court was likely to result in a full repeal of the law. That subsequent repeal took place, and the court then dismissed the action as moot. The court therefore never issued a permanent injunction or declared the law unconstitutional (it was only ever found to be "likely" unconstitutional under the preliminary injunction standard).

After the case was dismissed, the plaintiffs sought attorney's fees under Section 1988. The appellate fees alone were over $767,000.

Under 42 U.S.C. § 1988(b), in certain civil rights cases, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee." In *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res,* the Supreme Court held for a party to "prevail" under Section 1988 for the purposes of attorney's fee awards, the relief must be "judicially sanctioned."[25]

Continued on page 37

potential.

Recent legislation has added another layer of complexity to this issue. House Bill 1526, passed in November 2023, standardized municipal parkland dedication ordinances for cities with populations over 800,000.[46] While the bill aims to create uniformity, it effectively caps the amount of parkland large cities can require from developers in comparison to then adopted parkland ordinances. This change further highlights the ongoing tension between local control and state preemption in Texas, particularly in matters of land use and development regulation.

Despite these challenges, there's significant room for improvement in the use of parkland dedication ordinances for counties and smaller cities. For local governments, maximizing this underutilized tool will be important to offset the impacts of development and provide substantial funding for open space needed to build a greater affection for nature and biodiversity in urban areas.

B. Conservation Development

The importance of small areas of fragmented urban nature for biodiversity conservation also suggests that addressing biodiversity goals requires multiple sites and actors not directly engaged in the formal land-use planning or regulatory process. Because counties' limited land use authority, biodiversity governance in much of the Hill Country will largely fall on developers. However, given the growing conservation ethic and initiatives being taken by developers today, there is some room for hope.

For example, conservation development is a type of planned unit development (PUD) that aims to balance land conservation and development goals.[47] The process involves designing and managing development projects in a way that preserves natural resources, protects biodiversity, and provides ecosystem services, while still accommodating the specific needs of a developer. Typically during the platting stage of subdivision development, a developer will first grid out its streets, then add lot lines based on existing regulatory requirements and their desired number of units.[48] Instead, conservation development, like golf course development, begins with the green space in mind and seeks to incorporate that space into the design from the outset. This may involve identifying and protecting important sensitive areas, or connecting existing green spaces to improve habitat connectivity.

Like parkland ordinances, conservation development is a tool that can help strike an important balance between biodiversity protection and accommodating growth in this region. Cities and counties that have adopted PUD or specific conservation development ordinances are able to meet with developers early in the design stage to learn their desired number of units to be built, modify existing zoning and subdivision ordinances to allow for smaller lots and higher density, and permanently protect the remainder of the site as open space.[49] Aside from the ecological and community benefits, like golf course developers, conservation developers also get the benefit of increased lot values that overlook the preserved spaces, as well as reduced infrastructure costs and a potential density bonus offered by municipalities in the region.[50] A prerequisite to siting these developments, however, is to inventory high priority biodiversity areas.

While conservation design can be done on a development-by-development basis, its impact is much greater when done in conjunction with a comprehensive inventory of important habitat on a regional scale. For example, many states and several non-Texas counties have used their zoning power to create "priority conservation areas," which limit development altogether in areas most important for the provision of ecosystem services.[51] Additionally, maps of "secondary conservation areas" have been adopted, providing notice to developers that underlying land will be subject to conservation development ordinances.[52] This provides consistency and predictability for developers prior to acquisition of the property and can avoid unnecessary conflicts and delays throughout the platting process. Along with these priority conservation areas, "priority development areas" can also be adopted, encouraging denser and affordable developments near existing public transportation infrastructure.

For biodiversity, regional planning at scale can provide for the cohesion of these newly created greenspaces, remedying issues of habitat fragmentation caused by current patterns of development.

Conservation development goes beyond preserving the inherently unbuildable areas, such as steep slopes, flood plains, and wetlands, and encourages additional preservation.[53] It aspires to help developers and local governments recognize that additional features are worthy of preservation as well, including woodlands, meadows, scenic views, and historic or cultural features, which is needed by the community at large to aid in larger conservation efforts.

Conclusions

Given local governments' authority over land use regulation, coupled with challenges posed by sprawling growth and development, cities and counties will play an important role in protecting biodiversity in the Texas Hill Country. The unique topography, geology, and hydrologic features of the Hill Country provide ecosystem services and support several threatened and endangered species found nowhere else in the world. While most efforts to protect biodiversity in the region have involved the acquisition and intensive management of protected habitat areas, acquisition of these lands for a number of economic, regulatory, and political reasons has been unable to keep up with population growth. Additionally, there is an increasing recognition that the impacts of this growth, including habitat destruction, fragmen-

tation, water quality impairment, and reduced aquifer recharge, stretch far beyond the physical footprint of the developments onto managed lands. Regulatory challenges and the resulting patterns of growth in this area and have only amplified these concerns, though these newly urbanized areas are often overlooked for their conservation potential. Traditional conservationist thinking has tended to equate the environment as belonging only to "natural places," areas wholly separate and that need to be protected from urban society. As a result, the focus has been to preserve large, contiguous tracts of land while ignoring the smaller spaces close to home.

Urban green spaces hold considerable potential to aid in conservation efforts and will play a critical role in preserving Earth's biodiversity. Aside from the traditional regulating and provisional services relied on by urban society, open space in urban areas provides spaces for people to experience nature in their everyday lives. By fostering this relationship in urban areas, people are better able to recognize the interconnectedness of humans with natural environment, and develop a connection and affection for nature necessary for support of broader socio-ecological solutions for the protection of biodiversity.

Local tools such as parkland dedication ordinances and conservation development have tremendous potential to aid in the provision of these spaces, yet, their lack of widespread adoption, and the limited authority of county governments to comprehensively plan and set more stringent regulations on development, has limited their effectiveness. As the population of this region projects to increase by an additional two million people over the next two decades,[54] planning for their growth while maintaining sufficient open space will be critical to maintaining biodiversity and interconnected ecosystem services in this region.

Notes

1. Ingrid J. Visseren-Hamakers, and Marcel T.J. Kok, (eds.) Transforming Biodiversity Governance. Cambridge University Press, 2022 at 293.
2. *Id.*
3. *Id.* at 296.
4. Texas Hill Country Conservation Network, *The State of the Hill Country: Eight Conservation and Growth Metrics for a Region at a Crossroads*, Feb. 2022, at 13, https://hillcountryalliance.org/wp-content/uploads/State_of_the_Hill_Country-Network_REPORT_2022.pdf.
5. *Id.*
6. *Id.* at 15.
7. *Id.*
8. Tex. Const. Art. XI, § 5.
9. Cities have broad zoning and other land use regulatory authority within their corporate limits. Extraterritorial powers, however, must be authorized by statutes. *See* Tex. Att'y Gen. Op. LO-97-055 (1997); Town of Lakewood Vill. v. Bizios, 493 S.W.3d 527, 531 (Tex. 2016).
10. Tex. Const. Art. V, § 18(b); *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28 (Tex. 2003).
11. Tex. H.R. Housing Research Organization Focus Rep No. 77-26, at 2 (2002).
12. *Integrity Group, Inc. v. Medina County. Com'rs Court*, No. 04-03-00413-CV, 2004 WL 2346620, *1 (Tex. App.—San Antonio Oct. 20, 2004, pet. denied). In *Medina County*, the court explained that county's platting powers were limited to those allowed by the platting statute in Chapter 232 of the Local Government Code, and therefore they could not deny a reject an application for a proposed development over the Edward's Aquifer based on lot size.
13. Tex. Loc. Gov't Code Ann. § 232.101.
14. John R. Nolon, *State and Local Jurisdiction: Local Land Use Solutions*, Pace University School of Law Land Use Law Center, Oct. 2019, https://law.pace.edu/sites/default/files/LULC/State%20and%20Local%20Jurisdiction.pdf.
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Continued on page 36

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