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Just Outside of Manteo and Murphy

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INTRODUCTION

Many North Carolina politicians refer to the entirety of the state by saying “from Manteo to Murphy.”¹ Manteo, North Carolina, is a small

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beach town on Roanoke Island on the eastern edge of the state, while Murphy, North Carolina, is a similarly sized town in Cherokee County, the state's westernmost county. Including Manteo and Murphy, North Carolina is home to 552 municipalities.² They range in size from Charlotte, with over seven hundred thousand people, to Fontana Dam, with a population of less than twenty-five.³ Together, these 552 towns⁴ are home to just over fifty percent of the state's entire population of 10.7 million.⁵

However, the unincorporated areas of North Carolina's one hundred counties ("from Dare to Cherokee") are home to almost as many people.⁶ The people living in unincorporated areas of North Carolina's counties are almost as dependent on the neighboring municipalities as those who live inside the town boundaries.⁷ Non-municipal residents travel to incorporated municipalities to work, receive government services, purchase essentials, or seek out entertainment.⁸

Some even view the area just outside of town limits as the most desirable place to live.⁹ Such locations offer the conveniences of a town while allowing residents to maintain a rural lifestyle and avoid higher municipal taxes.¹⁰ Others reside in the area just outside of a town because it

1. Jonah Kaplan, *Deals or Disagreements? What To Expect in NC General Assembly's New Session with a Divided Government*, ABC11 (Jan. 9, 2019), <https://abc11.com/politics/deals-or-disagreements-whats-on-the-table-for-nc-general-assemblys-new-session/5041877/> [<https://perma.cc/SP7S-2R6Z>]; Wiley J. Williams, "Manteo to Murphy," NCPEDIA (2006), <https://www.ncpedia.org/manteo-murphy> [<https://perma.cc/5DFJ-TXYW>].

2. *How NC Cities Work*, NC LEAGUE MUNICIPALITIES, <https://www.nclm.org/advocacy/how-nc-cities-work> [<https://perma.cc/7DX-T8BJ>].

3. *North Carolina Municipalities Ranked by the June 1, 2016 Estimated Population*, OFF. ST. BUDGET & MGMT., https://files.nc.gov/ncosbm/demog/rankedbysizesmallest_2016.html [<https://perma.cc/848P-J67B>].

4. This Comment will use the terms town, city, and municipality interchangeably throughout.

5. *Estimates of Municipal and Non-Municipal Populations of North Carolina and North Carolina Counties for July 1, 2016: Standard Population Estimates*, N.C. OFF. ST. BUDGET & MGMT., https://files.nc.gov/ncosbm/demog/muninonmunipop_2016.html [<https://perma.cc/P7MJ-2CHT>].

6. *Id.* (identifying the non-municipal population of the state as forty-four percent of the entire state's population).

7. See Nathan Arnosti & Amy Liu, *Why Rural America Needs Cities*, BROOKINGS (Nov. 30, 2018), <https://www.brookings.edu/research/why-rural-america-needs-cities/> [<https://perma.cc/F7C7-Q2EL>].

8. See *id.*

9. Joe Cortright, *Are Americans Fleeing Cities for Suburbs? Not So Fast*, CITYLAB (June 11, 2018), <https://www.citylab.com/life/2018/06/are-americans-fleeing-cities-for-suburbs-not-so-fast/562580/> [<https://perma.cc/MH7C-FJ8B>] (explaining that the growth of suburbs often outpaces growth of their related urban areas).

10. See *The Differences Between City, Suburban, and Rural Living*, PROP. MGMTT, INC. (Feb. 2, 2018), <https://www.rentpmi.com/blog/2018/02/02/the-differences-between-city-suburban-and-rural-living/> [<https://perma.cc/X8HN-GSQ4>].

is the only place they can afford.¹¹ For some, the areas just outside of municipalities are where their communities have lived for over a century.¹² While non-municipal residents may live near the city, they are not technically considered part of the city.¹³ They do not live there, so they do not vote there.¹⁴

Unincorporated residents look to the county as their primary representative.¹⁵ The county often takes on the responsibility of rendering services akin to those provided by a municipality, such as sewer and water services, building inspections, and planning for the county's unincorporated areas.¹⁶ Such services supplement those the county provides to all its residents—including those who live inside of municipalities—such as the administration of welfare programs and the county school district.¹⁷

Despite neither living inside the town nor voting there, many semi-urban residents of North Carolina might be surprised to learn that if they want to do anything with their property, they must apply for zoning permits with the neighboring town rather than with the county zoning office, the government office that ordinarily meets every other need for unincorporated county residents.¹⁸

The people who live outside a town's boundaries but have their land-use planning and zoning determined by that town are residents of the town's extraterritorial jurisdiction ("ETJ").¹⁹ Residents living in the ETJ do not vote for the town's elected leaders and do not have political means

11. *Id.*

12. Daniel T. Lichter et al., *Municipal Underbounding: Annexation and Racial Exclusion in Small Southern Towns*, 72 RURAL SOC. 47, 49 (2007) (discussing the concentration of black Americans in the Rural South outside the borders of established municipalities).

13. *Id.* at 50.

14. See N.C. GEN. STAT. § 160A-66 (2017) ("[E]ach city shall be governed by a mayor and a council of three members, who shall be elected from the city at large. . .").

15. *Basics of North Carolina County Government*, N.C. CTR. FOR COUNTY RES., <http://www.ncacc.org/DocumentCenter/View/1094/White-Paper-Basics-of-North-Carolina-County-Government?bidId=> [<https://perma.cc/A67A-BRC9>].

16. *Id.* Every North Carolina resident resides in one of the state's one hundred counties. *Id.* The county residents who do not live in city limits have only one local government office to look to: the county government. *Id.* Those residents living in municipalities have two different local government representatives: their town government and their county government. DAVID W. OWENS, *THE NORTH CAROLINA EXPERIENCE WITH MUNICIPAL EXTRATERRITORIAL PLANNING JURISDICTION* 3 (2006) [hereinafter OWENS, EXPERIENCE], https://www.sog.unc.edu/sites/www.sog.unc.edu/files/additional_files/ss20.pdf [<https://perma.cc/6K95-NMB4>]. In North Carolina, counties and municipalities only have governing authority that has been delegated to them by the North Carolina General Assembly. *How NC Cities Work*, *supra* note 2.

17. OWENS, EXPERIENCE, *supra* note 16, at 1.

18. DAVID W. OWENS, *LAND USE LAW IN NORTH CAROLINA* 30 (2d ed. 2011) [hereinafter OWENS, LAND USE LAW].

19. *Id.*

other than speaking at public hearings; thus, they have little recourse to influence the zoning decisions made about their property.²⁰

A town can make zoning and construction decisions about an ETJ without accountability to the ETJ residents. For example, the town council in Mebane, North Carolina, approved plans to route a new highway through West End, a community in Mebane's ETJ, to avoid affecting town residents' property values (and therefore the town's tax base).²¹ The ETJ residents in West End did not have any political power to hold the town officials accountable for this decision.²²

The justifications offered for allowing towns to exercise their zoning power outside of their borders seem reasonable at first glance. For one, municipalities were presumed to have a justifiable interest in the areas just outside of their boundaries.²³ Because the areas just outside town borders are what people see first when entering the town, logically, towns have an interest in maintaining the appearance and development of these areas.²⁴ Essentially, the ETJ was justified to prevent the development of shanty towns on the outskirts of municipalities because the town did not want visitors to see undesirable land uses.²⁵

Second, exercising zoning power outside town boundaries gives municipalities the ability to control development outside of the town's borders as the town population grows.²⁶ When the statute granting ETJ authority to all municipalities became law, North Carolina's population was growing steadily, and that growth was relatively evenly distributed across the state.²⁷ If North Carolina's towns were growing, then it was reasonable to assume that towns were going to outgrow current boundaries and need to expand.²⁸ But haphazard expansion would not have been healthy growth for the state, so the General Assembly presumed that this

20. *Id.*

21. Danielle Purifoy, *A Place Called Mebane*, SCALAWAG (Aug. 8, 2016), <https://www.scalawagmagazine.org/2016/08/a-place-called-mebane/> [https://perma.cc/BM5D-UK7F].

22. *See id.* ("The city's boundaries stretch around their homes and even bisect their streets, but never in the over 100 years since emancipated Blacks settled on these lands has the City of Mebane incorporated them into its polity. They can neither vote in municipal elections nor run for public office. And yet, Mebane controls their land for up to three miles outside the city limits.")

23. JOSEPH M. HUNT, JR., ET AL., NORTH CAROLINA GENERAL ASSEMBLY REPORT OF THE MUNICIPAL GOVERNMENT STUDY COMMISSION 18 (1958) [hereinafter HUNT, MUNICIPAL REPORT].

24. *Id.*

25. *See id.*

26. *See id.*

27. *North Carolina Population 2019*, WORLD POPULATION REV. (Apr. 1, 2019), <http://worldpopulationreview.com/states/north-carolina-population/> [https://perma.cc/C7PL-8JAT].

28. HUNT, MUNICIPAL REPORT, *supra* note 23, at 23.

growth could be planned by giving municipalities the authority to zone outside of the town boundaries.²⁹

This Comment will concentrate on the second concern raised by the state's municipalities—that of organized growth. Residents' interest in external perceptions of their town is complex enough to deserve its own analysis, especially considering differing cultural perceptions for land development. The scope of this Comment is limited, therefore, to the ETJ as it relates to the growth of municipalities.

For many North Carolina municipalities, the growth that occurred in the mid-twentieth century has reversed into population decline. While growth in the state overall has continued, it is concentrated in an increasingly small number of areas (e.g., the greater Charlotte area, the Triangle,³⁰ and the Triad³¹).³² Though municipal growth may not be as concentrated as it once was,³³ thirty-four counties in the state experienced a decrease in the rate of growth between 2016 and 2017.³⁴

While many municipalities have seen population growth level off, they have also lost the ability to grow their boundaries on their own terms. The General Assembly passed the ETJ statute in 1960³⁵ with growth in mind, and a majority of current municipal officials say that they intend to annex the area that the town is regulating via ETJ.³⁶ However, forcing annexation of these areas has become fiscally problematic because of a major change in the state's annexation statute that occurred in 2011.³⁷ Towns are now practically limited to growing boundaries because it must assume some of the cost of annexation.³⁸ This could result in a number of

29. *Id.*

30. North Carolina's Research Triangle is composed of Chapel Hill, Durham, and Raleigh. *Research Triangle Park*, NCPEDIA (2006), <https://www.ncpedia.org/research-triangle-park> [<https://perma.cc/R98L-T4KR>].

31. North Carolina's Piedmont Triad is made up of Winston-Salem, Greensboro, and High Point. *About the Region*, PIEDMONT TRIAD REGIONAL COUNCIL, <https://www.ptrc.org/about/about-the-region> [<https://perma.cc/V4TD-BMW3>].

32. See Rebecca Tippet, *Are NC County Growth Patterns Shifting?*, CAROLINA DEMOGRAPHY, <https://demography.cpc.unc.edu/2018/03/22/are-nc-county-growth-patterns-shifting/> [<https://perma.cc/R3FW-WBH7>] (stating that thirty-four of North Carolina counties experienced negative growth between 2016 and 2017).

33. *Id.* (“During the first half of the decade, more than half (53%) of the state's growth occurred in one of three counties: Wake, Mecklenburg, and Durham.”)

34. *Id.*

35. Act of June 29, 1958, ch. 1204, 1959 N.C. Sess. Laws 1354, 1354–55 (codified as amended at N.C. GEN. STAT. § 160-181.2 (2017)).

36. OWENS, EXPERIENCE, *supra* note 16, at 10.

37. Act to Reform the Involuntary Annexation Laws of North Carolina, ch. 396, 2011 N.C. Sess. Laws 1649 (codified as amended in scattered sections of N.C. GEN. STAT. § 160A).

38. See N.C. GEN. STAT. § 160A-58.56(b) (2017).

ETJ communities being left in planning and development limbo with no end in sight.

Some argue that communities left in ETJs function as dumping grounds for municipalities' undesirable land uses while not being able to participate in the town governance that regulates land use and development planning.³⁹

This Comment will proceed in three parts to address: (1) why are many ETJ communities unlikely ever to be annexed by the town that regulates them; (2) are these communities actually being harmed by the use of ETJs; and (3) how can communities that no longer wish to be regulated by a neighboring town remedy their situation?

Part I will provide a summary of the ETJ and annexation legislation to demonstrate that, when these statutes were passed in 1959 and 1960, they were intended to focus on municipal growth. It will then show that the annexation reforms passed in 2011 and 2012 by the newly elected and Republican-controlled state government⁴⁰ disrupted the intent of these statutes by making annexation more difficult. When considered with the fact that small-town growth is not proceeding as it has in the past, this means that many North Carolina residents are stuck in a neighboring town's ETJ and will most likely never be annexed into the city limits.

Part II will examine the theorized negative consequences of living in an ETJ. Publicly available data and research by advocacy organizations suggests that many theorized negative consequences might be overexaggerated. The data also reveals that some ETJ communities are not receiving water and sewer services while communities within the municipal boundaries and communities outside of the ETJ are. But even in communities where a concentration of undesirable land uses does not exist, residents may still feel disenfranchised when they learn that decisions are made for them by people they did not directly elect because county residents have the right to vote for only county commissioners and on matters of county concern.

Part III will describe what options ETJ residents in North Carolina have if they no longer want to be in the ETJ. This part will first look at what options already exist and will primarily focus on the available annexation pathways for ETJ residents. The annexation reforms of 2011 created new pathways for distressed areas to force annexation, but annexation is not the answer for all. There are no statutory paths for ETJ

39. Purifoy, *supra* note 21, at 18.

40. *GOP Takes Control of State Legislature*, WRAL (Nov. 3, 2010), <https://www.wral.com/news/local/politics/story/8556651/> [<https://perma.cc/VTN4-6GEB>] (stating that the North Carolina Republican "party had seized control of the state General Assembly for the first time in more than a century").

residents that might wish to be released from the ETJ without being annexed into the town. Finally, this part will then propose some possible changes to the ETJ statute that would give landowners more of a voice in the zoning and land-use planning decisions that are made about their property.

I. WHY ARE MANY ETJ COMMUNITIES UNLIKELY EVER TO BE ANNEXED INTO THE TOWNS THAT ARE REGULATING THEM?

The areas surrounding a town are regulated by two statutes: the ETJ statute⁴¹ and the annexation statute.⁴² The state started with granting towns zoning powers and then granting general ETJ zoning and annexation powers.⁴³

A. *History of Zoning and Early Efforts to Zone Outside of Town Boundaries*

Zoning laws resulted from a perceived need for a town to control the development that was taking place within its borders.⁴⁴ These laws typically divide a municipality into districts and regulate the types of buildings and uses that are allowed to occur in that district.⁴⁵ Zoning laws were held to be constitutional in *Village of Euclid v. Ambler Realty*,⁴⁶ which allowed municipalities to enact laws that determine how a landowner can and cannot use his land.⁴⁷ Through the mid-nineteenth century, zoning became more and more common until it became the norm for municipalities to have zoning ordinances in place.⁴⁸

In North Carolina, the legislature initially granted zoning authority to a municipality on a case-by-case basis.⁴⁹ The General Assembly finally

41. Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State, ch. 111, § 2.4, 2019 N.C. Sess. Laws —, — (to be codified at N.C. GEN. STAT. § 160D-2-2(e)), <https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2019-2020/SL2019-111.pdf> [<https://perma.cc/V8YJ-9ZGR>]; see also N.C. GEN. STAT. § 160A-360(b) (2017), *repealed by* Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.2, 2019 N.C. Sess. Laws at —.

42. N.C. GEN. STAT. § 160A-21 (2017).

43. See *id.*

44. See Amanda Erickson, *The Birth of Zoning Codes, a History*, CITYLAB (June 19, 2012), <https://www.citylab.com/equity/2012/06/birth-zoning-codes-history/2275/> [<https://perma.cc/V7SD-DWEW>].

45. See OWENS, LAND USE LAW, *supra* note 18, at 13.

46. 272 U.S. 365, 390–95 (1926) (holding that a zoning ordinance must be clearly unreasonable before it can be declared unconstitutional).

47. *Id.*

48. OWENS, LAND USE LAW, *supra* note 18, at 15.

49. *Id.* at 16.

granted general zoning powers to North Carolina municipalities in 1923.⁵⁰ As municipal governments enacted zoning laws within town boundaries, a few towns tried to exercise control over the areas outside of municipal limits.⁵¹

For instance, the town of Washington, North Carolina, tried to regulate the dumping of fish into its water source that was occurring outside of the town limits.⁵² In *State v. Eason*,⁵³ the Supreme Court of North Carolina held that a city is permitted to regulate only what the state legislature has authorized it to regulate, and Washington had not been granted authority to regulate the dumping of fish on the other side of the river.⁵⁴

The court explicitly noted in this case that if the legislature granted this power to Washington, then there would be nothing inherently unconstitutional about the town exercising the power despite the fact that it would be acting outside of its territorial limits.⁵⁵

Later, the legislature began to grant certain municipalities the power to regulate beyond their borders.⁵⁶ The legislature granted Greensboro the power to regulate sanitation for up to a mile outside of its boundaries.⁵⁷ This grant of power survived a court challenge in *State v. Rice*, confirming the power of the state legislature that the court established in *State v. Eason*.⁵⁸

50. Act to Empower Cities and Towns to Adopt Zoning Regulations, ch. 250, 1923 N.C. Sess. Laws 572, 572–76.

51. See, e.g., *State v. Eason*, 114 N.C. 787, 787–97, 19 S.E. 88, 88–91 (1894).

52. *Id.* at 795–96, 19 S.E. at 90–91.

53. *Id.* at 787, 19 S.E. at 88.

54. *Id.* at 795–96, 19 S.E. at 90–91.

55. *Id.* at 792, 19 S.E. at 89. (“[T]he legislature unquestionably had the power to extend the jurisdiction of the town, for police purposes, to the middle of the river or to the opposite bank; and had the line been described as crossing the other side when it reached the river, and running thence along that shore to a point opposite the beginning, thence to the beginning, the effect would have been to extend the boundary for the exercise of the power to prohibit nuisance, delegated to the town, across the adjacent bed of the river, while the territorial limit of its authority for all purposes other than the exercise of police powers would have been the low-water mark on the north bank.”).

56. See *State v. Rice*, 158 N.C. 635, 635, 74 S.E. 582, 582 (1912) (discussing the charter of Greensboro, in which the General Assembly provided that all ordinances of the city enacted “in the exercise of police powers given to it for sanitary purposes or for the protection of the property of the city, shall apply to the territory outside of the city limits within one mile of same in all directions”); OWENS, EXPERIENCE, *supra* note 16, at 6 (stating that the General Assembly granted Raleigh, Chapel Hill, Gastonia, and Tarboro the power to adopt zoning ordinances in the one-mile area surrounding their municipal limits).

57. See 158 N.C. at 635, 74 S.E. 582, 582.

58. *Id.* at 638, 74 S.E. 582, 583 (“The question is not how the city authorities are chosen, but what power the Legislature has conferred upon them over adjacent districts beyond the city limits in which may be set up establishments, businesses, or other things which would be injurious to the health of its people.”).

The legislature then began to grant the general zoning power to a handful of municipalities to help address growing populations.⁵⁹ In 1949, the towns of Raleigh, Chapel Hill, Gastonia, and Tarboro were all granted the power to adopt zoning ordinances in the one-mile area surrounding municipal limits.⁶⁰

A decade later, the General Assembly created the Municipal Government Study Commission (“Commission”) to examine the difficulties that municipalities were experiencing related to growth and expansion.⁶¹ The resulting report recognized that all towns have a significant interest in the land that borders municipality limits and made recommendations for the establishment of an extraterritorial zoning statute that granted, writ large, the authority to all municipalities of a certain size to enact zoning ordinances for the areas outside municipal boundaries.⁶² The resulting statute is discussed in detail below, but it by and large incorporated the recommendations of the study report and granted ETJ authority to municipalities.⁶³

The report emphasized that towns have a “special interest in the areas immediately adjacent to their limits. These areas, in the normal course of events, will at some point be annexed to the city bringing with them any problems growing out of their chaotic and disorganized development.”⁶⁴ The statute emphasized that the decision as to what areas to zone outside the town limits must be based on “existing or projected urban development and areas of critical concern to the city as evidenced by officially adopted plans for its development.”⁶⁵ The report and the statute, while acknowledging that there were exceptions to this rule, emphasized that, overall, the tool of ETJ zoning should be used as a means for planning the growth of urban areas.⁶⁶

59. OWENS, EXPERIENCE, *supra* note 16, at 6.

60. *Id.*

61. See HUNT, MUNICIPAL REPORT, *supra* note 23, at Introductory Letter; JOSEPH M. HUNT, JR. ET AL., REPORT OF THE MUNICIPAL GOVERNMENT STUDY COMMISSION, NORTH CAROLINA GENERAL ASSEMBLY, SUPPLEMENTARY REPORT at Introductory Letter (1959) [hereinafter HUNT, SUPPLEMENT].

62. HUNT, MUNICIPAL REPORT, *supra* note 23, at 18; see Act of June 29, 1958, ch. 1204, § 1, 1959 N.C. Sess. Laws 1354, 1354–55 (codified as amended at N.C. GEN. STAT. § 160-181.2 (2017)).

63. See *infra* Section I.B.

64. HUNT, MUNICIPAL REPORT, *supra* note 23, at 18.

65. See Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State, ch. 111, § 2.4, 2019 N.C. Sess. Laws —, — (to be codified at N.C. GEN. STAT. § 160D-2-2(e)), <https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2019-2020/SL2019-111.pdf> [<https://perma.cc/V8YJ-9ZGR>]; see also N.C. GEN. STAT. § 160A-360(b) (2017), *repealed by* Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.2, 2019 N.C. Sess. Laws at —.

66. See *id.*; HUNT, MUNICIPAL REPORT, *supra* note 23, at 18.

Recognizing the problematic nature of simply planning for future growth without a plan for what to do with urbanized areas once they have developed, the Commission requested a study on how municipalities should proceed with annexing areas that have developed or will develop.⁶⁷ Subsequently, the Commission published a supplement to its ETJ report focused almost exclusively on annexation.⁶⁸ Specifically, a memo summarizing the reports and resulting legislation written by George Esser (who served as staff to the Commission) emphasized that annexation could not be the only solution to a growing urban area's problems.⁶⁹ Instead, the memo said that annexation must be considered with planning proposals, such as the ETJ power, to work towards sound urban growth.⁷⁰ The ETJ and annexation statutes passed in the late 1950s were intended to work together toward sound urban development.⁷¹

B. *The ETJ Statute*

The ETJ statute, passed by the General Assembly in 1960, has not changed much since its initial passage. Section 160A-360 provides that all municipalities have the power to zone within “a defined area extending not more than one mile beyond its limits.”⁷² In addition to this initial grant of power, the statute allows towns of larger populations to extend this area up to three miles with the approval of the county that has jurisdiction over the area.⁷³ If a county is already zoning the area then the town cannot extend its zoning authority into it.⁷⁴ Furthermore, a property owner who has acquired

67. See HUNT, SUPPLEMENT, *supra* note 61, at 5.

68. See *generally id.* (discussing issues relating to annexation and the impact of legislative changes on annexation).

69. See GEORGE H. ESSER, JR., STAFF MEMORANDUM PREPARED FOR THE MUNICIPAL STUDY COMMISSION 64–65 (1958), <https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/mgsc-1958%20esser%20memo.pdf> [<https://perma.cc/QLH6-KYX9>].

70. See *id.* at 75.

71. George H. Esser, Jr., *Legislation of Interest to Municipal Officials*, POPULAR GOV'T, June 1959, at 14 (describing “package of bills” including both ETJ and annexation legislation as “designed to meet the challenges of urban growth”).

72. Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State, ch. 111, § 2.4, 2019 N.C. Sess. Laws —, — (to be codified at N.C. GEN. STAT. §§ 160D-2-1(a), -2-2(a) to (b)), <https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2019-2020/SL2019-111.pdf> [<https://perma.cc/V8YJ-9ZGR>]; see also N.C. GEN. STAT. § 160A-360(a) (2017), *repealed by* Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.2, 2019 N.C. Sess. Laws at —.

73. Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.4, 2019 N.C. Sess. Laws at — (to be codified at N.C. GEN. STAT. §§ 160D-2-1(a), -2-2(a) to (b)); see also N.C. GEN. STAT. § 160A-360(a) (2017), *repealed by* Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.2, 2019 N.C. Sess. Laws at —.

74. Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.4, 2019 N.C. Sess. Laws at — (to be codified at N.C. GEN. STAT. § 160D-2-2(c)); see also

vested rights under a permit prior to the initiation of ETJ retains the ability to exercise those rights.⁷⁵

The statute also requires that, if and when a municipality chooses to adopt a zoning ordinance for its ETJ, it must give the residents of the ETJ proportional representation on the planning board.⁷⁶ This is done by appointing “at least one resident of the entire extraterritorial zoning and subdivision regulation area to the planning board of adjustment that makes recommendations or grants relief in these matters.”⁷⁷ According to a University of North Carolina School of Government survey conducted in 2004–2005, sixty-two percent of responding municipalities utilized the ETJ power in some way.⁷⁸

Challenges to the ETJ power by ETJ residents have mostly failed due to lack of standing.⁷⁹ So far, any successful challenges to the exercise of ETJ power have succeeded only because of the town’s failure to follow proper procedure to establish an ETJ.⁸⁰ Courts have continually upheld the right of the state to grant the ETJ power to a municipality and the rights of municipalities to exercise it as long as it complies with the statute.⁸¹

C. *The Original Annexation Statute*

After decades of expanding municipal boundaries on a case-by-case basis, North Carolina’s 1947 annexation statute allowed annexation to be

N.C. GEN. STAT. § 160A-360(e) (2017), *repealed by* Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.2, 2019 N.C. Sess. Laws at —.

75. Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.4, 2019 N.C. Sess. Laws at — (to be codified at N.C. GEN. STAT. § 160D-2-2(k)); *see also* N.C. GEN. STAT. § 160A-360(i) (2017), *repealed by* Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.2, 2019 N.C. Sess. Laws at —.

76. Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.4, 2019 N.C. Sess. Laws at — (to be codified at N.C. GEN. STAT. § 160D-3-7); *see also* N.C. GEN. STAT. § 160A-362 (2017), *repealed by* Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.2, 2019 N.C. Sess. Laws at —.

77. Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.4, 2019 N.C. Sess. Laws at — (to be codified at N.C. GEN. STAT. § 160D-3-7); *see also* N.C. GEN. STAT. § 160A-362 (2017), *repealed by* Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.2, 2019 N.C. Sess. Laws at —.

78. OWENS, EXPERIENCE, *supra* note 16, at 9.

79. *See, e.g.*, *Templeton v. Town of Boone*, 208 N.C. App. 50, 54–56, 701 S.E.2d 709, 713–14 (2010).

80. *See, e.g.*, *Town of Swansboro v. Odum*, 96 N.C. App. 115, 117, 384 S.E.2d 302, 302 (1989); *Town of Lake Waccamaw v. Savage*, 86 N.C. App. 211, 215, 356 S.E.2d 810, 812 (1987).

81. *See, e.g.*, *Taylor v. City of Raleigh*, 290 N.C. 608, 619, 227 S.E.2d 574, 582 (1976); *Macon County v. Town of Highlands*, 187 N.C. App. 752, 758, 4 S.E.2d 17, 21 (2007); *Town of Green Level v. Alamance County*, 184 N.C. App. 665, 675, 646 S.E.2d 851, 857 (2007); *Bryan v. Raynor*, 94 N.C. App. 91, 98, 379 S.E.2d 880, 884 (1989).

initiated by the city with no input from the to-be-annexed landowners.⁸² Some considered this legislation a failure, however, because it required a level of legislative intervention.⁸³ The general assembly passed a new, more comprehensive annexation statute in 1959.⁸⁴

Though small changes were made to this statute between 1959 and 2010, it was still recognizable until the Annexation Reform Act of 2011.⁸⁵ To explain how the Annexation Reform Act altered the previous annexation legislation, the following paragraphs will analyze the annexation statute as it was codified in the 2009 North Carolina General Statutes.⁸⁶

The 2009 annexation statute noted that sound urban development is essential to economic development and that municipal boundaries should extend to include areas intensively used for residential, commercial, industrial, institutional, or governmental purposes to provide high-quality services needed therein for public health, safety, and welfare.⁸⁷ Along with these greater policy goals, the statute regulated towns of five thousand people or fewer differently than towns of greater than five thousand.⁸⁸

Under this annexation statute, a municipality could not annex land unless the land had been developed for “urban purposes.”⁸⁹ “Urban purposes” was defined by what percentage of the land to be annexed, at the time, was used for residential, commercial, industrial, institutional, or governmental purposes.⁹⁰ In addition, cities of more than five thousand

82. See INST. OF GOV'T, UNIV. OF N.C. CHAPEL HILL, 1947 LEGISLATIVE SUMMARY: GENERAL ASSEMBLY OF NORTH CAROLINA 25–26 (1947).

83. Frayda S. Bluestein, *The Development of North Carolina's Annexation Legislation: The 1947 Legislation*, UNC SCH. GOV'T, <https://www.sog.unc.edu/resource-series/development-north-carolina's-annexation-legislation-1947-legislation> [<https://perma.cc/Z8RM-FFRU>]. The legislature was still spending a substantial amount of time on special annexation legislation for individual cities to expand their boundaries. *Id.*

84. Act of June 29, 1958, ch. 1204, § 1, 1959 N.C. Sess. Laws 1354, 1354–55 (codified as amended at N.C. GEN. STAT. § 160-181.2 (2017)).

85. See generally Act to Reform Involuntary Annexation Laws of North Carolina, ch. 396, 2011 N.C. Sess. Laws 1649 (revising North Carolina's annexation statute).

86. N.C. GEN. STAT. § 160A-31 (2009), amended by Act to Reform the Involuntary Annexation Laws of North Carolina, ch. 396, § 10, 2011 N.C. Sess. Laws 1694, 1667–70.

87. *Id.* § 160A-33, repealed by Act to Reform the Involuntary Annexation Laws of North Carolina, ch. 396, § 1, 2011 N.C. Sess. Laws 1649, 1649.

88. *Id.* (stating that towns with populations greater than five thousand people were given greater annexation powers than towns of less than five thousand because it was presumed that towns with larger populations were growing at faster rates), repealed by Act to Reform the Involuntary Annexation Laws of North Carolina, ch. 396, § 1, 2011 N.C. Sess. Laws 1649, 1649.

89. *Id.* § 160A-36(c), repealed by Act to Reform the Involuntary Annexation Laws of North Carolina, ch. 396, § 1, 2011 N.C. Sess. Laws 1649, 1649.

90. See *id.*

people could annex an undeveloped area (i.e., non-urban area) if it lies between the municipal limits and an area developed for urban purposes.⁹¹

This statute also allowed for two different methods of annexation: voluntary or involuntary.⁹² Voluntary annexation by petition allowed property owners, regardless of whether the land had been developed for urban purposes, to present a petition to the appropriate board signed by every single property owner in the relevant area, asking for the municipality to annex their land.⁹³ The town was permitted to annex this area but not required to do so.⁹⁴

Under this annexation statute, towns could also initiate and complete involuntary annexation, even over land where property owners did not want to be annexed by the town.⁹⁵

D. *How the ETJ Statute and Annexation Statutes Initially Worked Together*

The same legislature passed both North Carolina's ETJ statute and annexation statute in response to the report by the Commission and intended the statutes to work together. In at least a majority of instances, planning officials intended for ETJs to be related to future annexations.⁹⁶

The logic of the two statutes jibes easily. A municipality should have the ability to plan ahead for annexation by exercising some control over the areas it plans to annex. A study conducted by the UNC School of Government supports this contention, reporting that two-thirds of responding municipalities intended the area they were regulating by ETJ to be annexed in the future.⁹⁷

The powers that a municipality had prior to the annexation reform allowed it to act on this plan.⁹⁸ Changes to the annexation statute made by the 2011–2012 state legislature foiled any possible cooperation between the

91. *Id.* § 160A-48(d), *repealed by* Act to Reform the Involuntary Annexation Laws of North Carolina, ch. 396, § 1, 2011 N.C. Sess. Laws 1649, 1649.

92. *See id.* § 160A-31(a), *amended by* Act to Reform the Involuntary Annexation Laws of North Carolina, ch. 396, § 10, 2011 N.C. Sess. Laws 1649, 1667–70; *see also* Daren Bakst, *Forced Annexation*, JOHN LOCKE FOUND., <https://johnlocke.org/site-docs/research/2011issueguide/18forcedannexation.html> [<https://perma.cc/Z8Q4-6834>].

93. Bakst, *supra* note 92.

94. *Id.*

95. *See id.*

96. OWENS, EXPERIENCE, *supra* note 16, at 10.

97. *Id.*

98. N.C. GEN. STAT. §§ 160A-34, -46 (2011) (granting involuntary annexation authority), *repealed by* Act to Reform the Involuntary Annexation Laws of North Carolina, ch. 396, §§ 1, 7, 2011 N.C. Sess. Laws 1649, 1649; Nolan v. Village of Marvin, 360 N.C. 256, 262, 624 S.E.2d 305, 309 (2006) (upholding power of municipalities to engage in involuntary annexation so long as the municipality complies with the procedures of the statute).

statutes. Even if the use of ETJs and future annexation were not tied, the annexation reforms passed in 2011 effectively erased the ability of towns to use these tools as the earlier legislature intended.⁹⁹

E. Annexation Reform

The 2010 general election led to a drastic shift in the composition of the North Carolina General Assembly.¹⁰⁰ The legislature became significantly more conservative and an emphasis on property rights led to an overhaul of the state's annexation statute.¹⁰¹ There were four significant changes to the law.

First, the new annexation statute completely eliminated the distinction between municipalities with populations greater or fewer than five thousand people.¹⁰² This removed a fundamental path to growth that was available to larger towns before the reform: the ability to include undeveloped land in an annexation proposal if the land was between the town boundaries and a developed area that the town sought to annex.¹⁰³

Second, the new annexation statute added a referendum requirement that allows property owners, subject to involuntary annexation, to vote down the annexation.¹⁰⁴ Municipalities wishing to annex contiguous land would be required to hold a referendum. If less than half of the affected population voted in favor of the annexation, it would not move forward.¹⁰⁵ Municipalities were also required to pay for this referendum.¹⁰⁶

99. See Laura Leslie, *Annexation Changes 'Punitive'?*, WRAL (May 17, 2012), <https://www.wral.com/news/state/nccapitol/blogpost/11110324/> [https://perma.cc/BPN9-4VJJ] (reporting that during the passage of the Annexation Reform Act, there were nine forced annexations under way).

100. *GOP Takes Control of State Legislature*, WRAL (Nov. 3, 2010), <https://www.wral.com/news/local/politics/story/8556651/> [https://perma.cc/AW4X-9WGS] (“[T]he [Republican] party . . . seized control of the state General Assembly for the first time in more than a century.”).

101. See Sarah Burrows, *Forced Annexation Could Become History in North Carolina*, CAROLINA J. (May 2, 2011, 12:00 AM), <https://www.carolinajournal.com/news-article/forced-annexation-could-become-history-in-north-carolina> [https://perma.cc/S9JM-26W5].

102. Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (codified as amended at N.C. GEN. STAT. §§ 160A-58.50 to -58.63 (2017)).

103. *Id.*

104. Act of May 30, 2012, ch. 11, § 1, 2012 N.C. Sess. Laws 19, 19–20 (codified at N.C. GEN. STAT. § 160A-58.64 (2017)).

105. The original Annexation Reform legislation did not require a referendum but rather gave property owners the ability to deny the annexation by petition. Frayda S. Bluestein, *Annexation Reform: Referendum Replaces Petition to Deny*, COATES' CANONS: N.C. LOC. GOV'T L. (June 28, 2012), <https://canons.sog.unc.edu/annexation-reform-referendum-replaces-petition-to-deny/> [https://perma.cc/QFK6-T52P]. The ability to petition was struck down by a Wake County Superior Court Judge as unconstitutional. *Id.* The legislature responded by changing the petition to a referendum requirement in 2012. *Id.*

106. *Id.*

Third, the new statute required that if a municipality planned to provide water and sewer service to an annexed area—which it is required to do if it is providing water and sewer service within the existing town limits—it must build the connecting lines free of charge to each residence that wishes to participate.¹⁰⁷ Previously, when towns provided newly annexed properties with access to these services, the individual land owners were responsible for connecting to the city-owned lines and paying for that connection.¹⁰⁸ Now, municipalities not only have to pay for the main line but must also provide the individual hookups to the line free of charge.¹⁰⁹ This significantly increased the potential cost of any involuntary annexation.¹¹⁰ Furthermore, the statute required that the connecting lines be completed within three-and-a-half years of the annexation.¹¹¹

Fourth, and most interestingly, the statute gave economically distressed areas—those where fifty-one percent of the households have an income less than 200 percent of the federal poverty level—the ability to require a neighboring town to annex the area by presenting the town with a petition signed by seventy-five percent of the property owners in the area.¹¹² In this situation, the town does not have a choice and must annex the area requesting it.¹¹³ In addition, residents, rather than the property owners, who live in an economically distressed area can request annexation with a petition signed by two-thirds of the residents, but the town is not required to acquiesce to their request in this case.¹¹⁴ Both of these annexation methods require fewer signatures than voluntary annexation under the previous law, which required 100 percent agreement.¹¹⁵

In a blog post published soon after the annexation reforms became law, Frayda Bluestein, a professor at the UNC School of Government, detailed the increased costs that a city looking to expand its borders via involuntary annexation would incur, and she posited that involuntary annexations would become less common due to cost concerns.¹¹⁶

107. Frayda S. Bluestein, *Annexation Reform: A Summary of the New Law*, COATES' CANONS: N.C. LOC. GOV'T L. (Aug. 2013), <https://canons.sog.unc.edu/annexation-reform-and-interesting-new-proposal-in-the-legislature/> [https://perma.cc/V93Z-FZG2].

108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *See id.*; *see also* Frayda S. Bluestein, *Water and Sewer Extensions "At No Cost"—Analyzing the New Annexation Law*, COATES' CANONS: N.C. LOC. GOV'T L. (Aug. 2, 2011), <https://canons.sog.unc.edu/water-and-sewer-extensions-at-no-cost-analyzing-the-new-annexation-law/> [https://perma.cc/2EYA-JFK3].

According to an interview with the North Carolina League of Municipalities,¹¹⁷ the League is unaware of a single involuntary annexation that has taken place since the passage of the 2011–2012 annexation reform laws.¹¹⁸

Now that the ETJ and annexation statutes are not able to work together as originally intended, many ETJ residents who may have eventually been annexed and provided with city services in exchange for higher property taxes are now stuck in planning limbo. With the increased cost of involuntary annexation and the logistical difficulties of voluntary annexation, some residents may find themselves living permanently in an ETJ. Part II will examine whether there are detriments to living in an ETJ without hope of annexation.

II. ARE COMMUNITIES ACTUALLY BEING HARMED BY THE USE OF ETJS?

Many have written about the dangers of living on the urban fringe, claiming that undesirable land uses are overly concentrated in these areas and that the harms affect minority and lower-income communities more than any other.¹¹⁹

Considering an ETJ as a statutorily defined urban-fringe area, this part will proceed by examining a series of perceived shortcomings to living in an ETJ and by using publicly available data and research from the Cedar Grove Institute and UNC Center for Civil Rights to determine whether those shortcomings actually exist. Specifically, it will examine four different shortcomings that are often perceived or assumed about ETJs: (1) lack of representation in town decisions about ETJ communities, (2) racial motivation and use of ETJs to isolate minority communities, (3) disproportionate concentration of undesirable land uses in ETJs, and (4) lack of government services in urbanized ETJ communities.

A. *Lack of Representation in Town Decisions about ETJ Communities*

The first perceived shortcoming with the use of ETJ planning is a lack of representation of the affected property owners on the board making

117. *Who We Are*, N.C. LEAGUE MUNICIPALITIES, <https://www.nclm.org/who-we-are> [<https://perma.cc/3GBS-49DM>] (“The North Carolina League of Municipalities is a service and advocacy organization representing nearly every city and town in North Carolina, helping them to more effectively and efficiently serve their residents.”).

118. Email from Kim Hibbard, Gen. Counsel Emerita, N.C. League of Municipalities, to Matthew L. Farley, (Jan. 24, 2019, 04:29 EST) (on file with North Carolina Law Review). In comparison, there were nine annexations taking place when the legislation was passed. Leslie, *supra* note 99.

119. See generally Lichter, *supra* note 12 (discussing the effects of non-municipal residency on black populations in the South); Purifoy, *supra* note 21 (discussing the impact of ETJ and annexation on black communities in North Carolina).

decisions regarding development plans.¹²⁰ By definition, property owners in the ETJ own property that falls outside of the town limits and therefore those owners, unless they are also currently residing and registered to vote inside the town limits, are ineligible to vote in town elections.¹²¹ The relevant election would be the town council or town board that is responsible for appointing the planning board. The planning board controls the planning in the ETJ, subject to the final say of the town council or town board on many types of decisions made by the planning board.¹²²

The Supreme Court of North Carolina has held that this additional representation is not constitutionally necessary because the ETJ residents actually receive all the representation required by the State Constitution via the North Carolina General Assembly, the body that granted the power to the towns to exercise the extraterritorial zoning authority.¹²³ However, the ETJ statute requires the planning board to have proportional representation for affected residents living outside of the town boundaries. If a town has exercised the ETJ power, there must be at least one ETJ representative on the planning board even if the ETJ population is not large enough to proportionally justify a full member on the board.¹²⁴ This provision has even caused some to cite North Carolina's ETJ statute as an exemplar for providing representation to residents who live in the ETJ.¹²⁵ Members representing the ETJ are appointed by the county commissioners who represent the ETJ residents.¹²⁶

120. See, e.g., Purifoy, *supra* note 21 (highlighting an example of a municipality with underrepresented property owners).

121. *Municipal Elections*, N.C. ST. BOARD ELECTIONS, <https://www.ncsbe.gov/elections> [<https://perma.cc/R6NF-JUMH>] (“Although municipal elections are conducted by county boards of election, only residents of the municipality are qualified to vote in the election. These voters must have resided in the municipality for at least 30 days prior to the date of the election.” (emphasis added)).

122. See OWENS, LAND USE LAW, *supra* note 18, at 8–9.

123. *State v. Rice*, 158 N.C. 635, 636, 74 S.E. 582, 582 (1912). According to a UNC School of Government Survey, twenty-four percent of responding cities did not have adequate ETJ representation. OWENS, EXPERIENCE, *supra* note 16, at 12.

124. Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State, ch. 111, § 2.4, 2019 N.C. Sess. Laws —, — (to be codified at N.C. GEN. STAT. § 160D-3-7), <https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2019-2020/SL2019-111.pdf> [<https://perma.cc/V8YJ-9ZGR>]; see also N.C. GEN. STAT. § 160A-362 (2017), *repealed by* Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.2, 2019 N.C. Sess. Laws at —.

125. Andrew P. Gulotta, Comment, *Darkness on the Edge of Town: Reforming Municipal Extraterritorial Planning & Zoning in Illinois to Ensure Regional Effectiveness & Representation*, 28 ST. LOUIS U. PUB. L. REV. 495, 518 (2009).

126. Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.4, 2019 N.C. Sess. Laws at — (to be codified at N.C. GEN. STAT. § 160D-3-7); see also N.C. GEN. STAT. § 160A-362 (2017), *repealed by* Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.2, 2019 N.C. Sess. Laws at —.

However, there are still a number of shortcomings with this setup. First, the planning board is not always a board of final decision.¹²⁷ Many board decisions can be reversed or amended by the town council from which the ETJ residents do not have any recourse.¹²⁸ Therefore, in instances where the planning board is merely making a recommendation to the town council, the ETJ representative on the planning board or board of adjustment does not have meaningfully more influence over the final decision than an ETJ resident who is not a member of the planning board.¹²⁹

Second, there is no guarantee that the ETJ representative will be incentivized to advocate effectively for the entire ETJ as opposed to just the area where the representative lives. There are very few requirements for who the ETJ representative must be.¹³⁰ The statute requires only that the representative be a resident of the ETJ,¹³¹ but the ETJ will often extend from many different parts of the town boundary into areas that have very different characteristics. Under the current ETJ statute, there is nothing to prevent the representative being appointed from a wealthy subdivision that has purposefully stayed outside of the town limits to avoid property taxes and would continue to advocate for remaining in the ETJ, even though, across town, remaining in the ETJ would have a negative effect.¹³²

Also, many county residents may have no incentive to elect county commissioners who will appoint an ETJ representative that will effectively advocate for the ETJ. Those living in the county and outside of the ETJ typically have a desire to constrain city growth so that it does not interfere with their rural lifestyle while those in the town limits have a desire to push any undesirable land uses out of town limits.¹³³ The town residents and the

127. See OWENS, LAND USE LAW, *supra* note 18, at 9.

128. *Id.* (stating planning boards and boards of adjustment are often only making a recommendation to the governing council and are often subject to review).

129. Adam Lovelady, *Planning Board Basics*, COATES' CANONS: N.C. LOC. GOV'T L. (July 24, 2013), <https://canons.sog.unc.edu/planning-board-basics/> [<https://perma.cc/V7UC-ZTQH>].

130. See Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.4, 2019 N.C. Sess. Laws at — (to be codified at N.C. GEN. STAT. § 160D-3-7); see also N.C. GEN. STAT. § 160A-362 (2017), *repealed by* Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.2, 2019 N.C. Sess. Laws at —.

131. See Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.4, 2019 N.C. Sess. Laws at —; see also N.C. GEN. STAT. § 160A-362 (2017), *repealed by* Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.2, 2019 N.C. Sess. Laws at —.

132. See *infra* text accompanying notes 154–67.

133. AM. PLANNING ASS'N, RURAL AND SMALL TOWN PLANNING 77 (Judith Getzels & Charles Thurow eds., 1979) (“[County] zoning is [an] attempt[] to counterbalance strong, natural market pressures for converting open space into urban development.”); see also Michael Wheeler, *Negotiating NIMBYs: Learning from the Failure of the Massachusetts Siting Law*, 11 YALE J. ON REG. 241, 243 (1994).

non-ETJ county residents are thus mutually pushing undesirable uses toward each other, and it would make sense that the uses congregate in the ETJ.

Furthermore, there are situations where even a directly elected member of the local planning authority would not make much of a difference because there are many small towns in rural North Carolina that do not have hired planning staff or even a standing planning board or board of adjustment.¹³⁴ In many towns where the town clerk is the only town employee that is easily contacted,¹³⁵ the county-appointed representative that is supposed to be the voice of ETJ residents in planning and land use decisions in both the ETJ and the town itself may not even exist.¹³⁶

B. *Racial Motivation and Use of ETJs to Isolate Minority Communities*

In the rural South, post-slavery land settlement and migration patterns often resulted in black communities forming on the periphery of established white communities.¹³⁷ Black and other minority citizens were forced out of developed urban areas into the county jurisdiction where urban services were not provided.¹³⁸ However, these communities were integral to the functioning of the city as labor and consumer.¹³⁹

Tools like ETJ, which allow regulation of a specified area without providing services, are often scrutinized for racial animus or presumed to

134. See A. Fleming Bell, II, *The Attorney and the Clerk*, in COUNTY AND MUNICIPAL GOVERNMENT IN NORTH CAROLINA 231, 242 (Frayda S. Bluestein ed., 2d ed. 2014).

135. See *id.*

136. See Tod Newcombe, *IT Department? In Small-Town Governments, They Rarely Exist*, GOVERNING: THE STS. & LOCALITIES (July 2017), <http://www.governing.com/columns/tech-talk/gov-information-technology-small-governments.html> [<https://perma.cc/LAK3-R4CZ>] (detailing how small municipal governments in many states are unable to afford IT departments). North Carolina statutes do not require towns to establish standing planning boards or boards of adjustment because the town council is allowed to function as either of these boards if necessary. See OWENS, LAND USE LAW, *supra* note 18, at 8. But, in these towns, it is unclear if an ETJ representative is actually ever involved in planning decisions. See *id.* at 8–10.

137. ALLAN M. PARNELL ET AL., THE PERSISTENCE OF POLITICAL SEGREGATION: RACIAL UNDERBOUNDING IN NORTH CAROLINA (2004), https://www.cedargroveinst.org/files/regional_underbounding.pdf [<https://perma.cc/F6Y8-CZWY>].

138. *Id.* at 1 (“African American neighborhoods are kept just outside of a town’s boundaries, resulting in lower levels of services, reduced access to infrastructure, and limited or no political voice in land-use and permitting decisions.”).

139. Sam Roberts, *Commuters Nearly Double Manhattan’s Daytime Population*, *Census Says*, N.Y. TIMES (June 3, 2013, 11:56 AM), <https://cityroom.blogs.nytimes.com/2013/06/03/commuters-nearly-double-manhattans-daytime-population-census-says/> [<https://perma.cc/7LVA-7Q46> (dark archive)] (finding that commuters nearly double Manhattan’s daytime population and function as a serious economic force in the city despite not living there).

be racist in motivation and effect because they predominantly affect Black communities that developed on the outskirts of towns.¹⁴⁰

Mapping the prevalence of black and other minority communities being regulated by ETJs, rather than being annexed, is difficult to do because race mapping is primarily analyzed using census data that does not account for town or county lines when choosing where to map.¹⁴¹ But large-scale mapping is not necessary to show that ETJs have been used by some communities to intentionally or unintentionally discriminate against minority communities because organizations like the Cedar Grove Institute and the UNC Center for Civil Rights have documented this already.¹⁴²

The neighborhoods of West End in Mebane and Jackson Hamlet and Midway in Moore County each provide examples of primarily Black neighborhoods left in planning limbo by the predominantly White towns.¹⁴³ The land around these communities has been annexed and provided with city services, leaving very little means to advocate for development because they have no meaningful voting representation in the town.¹⁴⁴

Black neighborhoods are also disproportionately passed over entirely for annexation.¹⁴⁵ In North Carolina, where satellite annexation is allowed, municipalities can easily and strategically avoid black communities when making annexation decisions. Satellite annexation allows towns to annex noncontiguous pieces of land under certain circumstances, such as a town annexing a large industrial development.¹⁴⁶ Satellite annexation can allow a town to annex valuable pieces of property without having to annex areas that would end up costing the city rather than benefitting it.

The manipulation of town boundaries to exclude black communities from joining towns and the expansion of towns into white areas to dilute black votes within the municipality was not uncommon in the latter half of

140. See UNC CTR. FOR CIV. RIGHTS, *INVISIBLE FENCES: MUNICIPAL UNDERBOUNDING IN SOUTHERN MOORE COUNTY*, at ii (2006), <http://www.law.unc.edu/documents/civilrights/briefs/invisiblefencesreport.pdf> [<https://perma.cc/2LCV-5J6A>].

141. Racial data is recorded at its smallest level in census block groups that can be relatively large. Using census block groups to determine whether people of different race or ethnic groups are living inside or outside of an ETJ would be imprecise. For an example, see *2010 Census—Census Block Map (Index): Alamance County, N.C.*, U.S. CENSUS BUREAU, https://www2.census.gov/geo/maps/dc10map/GUBlock/st37_nc/county/c37001_alamance/DC10_BLK_C37001_000.pdf [<https://perma.cc/CK2B-XPCL>].

142. See UNC CTR. FOR CIV. RIGHTS, *supra* 140, at ii.

143. *Id.*

144. N.C. GEN. STAT. § 160A-66 (2017) (describing the qualification for municipal elections that require residence within the municipal limits).

145. Lichter, *supra* note 12, at 59.

146. See N.C. GEN. STAT. § 160A-58 (2017); *id.* 160A-58.1, *amended by* Act of June 30, 2017, ch. 85, § 3.(b), 2017 N.C. Sess. Laws 728, 729.

the twentieth century.¹⁴⁷ The United States Supreme Court, for instance, reversed a town's annexation in *Gomillion v. Lightfoot*¹⁴⁸ because it determined that the town's purpose was explicitly to exclude black citizens from becoming part of the town.¹⁴⁹

In reaction to *Gomillion*, and to further counteract this trend, the Civil Rights Act of 1964¹⁵⁰ contains a provision that requires the U.S. Department of Justice's ("DOJ") approval for annexation across the South to prevent the dilution technique from being used; the DOJ, however, has rarely struck down an annexation.¹⁵¹ This was known as preclearance. In certain counties with a demonstrated history of segregation, certain policies that had discriminatory potential required preclearance. Now, DOJ preclearance is no longer required because *Shelby County v. Holder*¹⁵² undercut this section of the Voting Rights Act.¹⁵³

Though infrequent, there are documented examples of established white communities having complete planning control over historically black communities but providing no services to those communities in return. In Silver City, which is a predominantly black community in Hoke County, North Carolina, all the planning decisions are made by the town of Raeford, a predominantly white community.¹⁵⁴ Three black communities in the ETJ of Mebane, North Carolina, have been excluded from Mebane's annexed growth while having to deal with the difficulties of urban

147. See PARNELL ET AL., *supra* note 137, at 1; see also Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1104 (2008) (citing Daniel T. Lichter et al., *Municipal Underbounding: Annexation and Racial Exclusion in Small Southern Towns*, 71 RURAL SOC. 47, 63–65 (2007)) ("Towns with predominantly white populations were much less likely to annex black unincorporated areas, even with statistical controls on the size of the black fringe population.").

148. 364 U.S. 339 (1960).

149. *Id.* at 347.

150. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

151. See PARNELL ET AL., *supra* note 137, at 2–3.

152. 570 U.S. 529 (2013).

153. See *Shelby County*, 570 U.S. at 529 ("It's failure to act leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance."). For an example of how states have interpreted this, see TEX. MUN. LEAGUE, HANDBOOK FOR MAYORS AND COUNCILMEMBERS 31 (2017), <https://www.tml.org/DocumentCenter/View/66/2017-Handbook-Mayors-Council-Members-PDF> [<https://perma.cc/QNS3-YWJZ>] (providing an update from the Texas Municipal League advising their members that Section V preclearance is no longer required for annexations).

154. See PARNELL ET AL., *supra* note 137, at 5.

density.¹⁵⁵ Monroe Town and Jackson Hamlet in Moore County are other examples.¹⁵⁶

Whether or not the decisions made by municipalities in annexing or extending ETJs are racially motivated, these annexation decisions sometimes end up having a racially disparate impact.¹⁵⁷ ETJs are creating pockets of poverty that are harder to redevelop, and those affected by this policy in rural North Carolina are predominantly black.

C. *Disproportionate Concentration of Undesirable Land Uses in ETJs*

Pieces written about the negative effects of ETJ zoning often presume that undesirable land uses will be disproportionately concentrated in the ETJ area.¹⁵⁸ The reasoning behind this presumption makes sense; incentives are aligned for town residents to push undesirable land uses outside of their borders while county residents will push those same land uses back towards the town to maintain the character of their communities.¹⁵⁹

But what are undesirable land uses? Typically, undesirable land uses are those that will have some sort of negative impact on the people living and working in the surrounding areas, including noise, odor, and light emissions, or simply displeasing to the eye.¹⁶⁰ Some examples of undesirable land uses include power plants, heavy industry, waste water treatment plants, confined animal feeding operations, and adult entertainment.¹⁶¹

It would not be surprising that some of these undesirable uses might end up congregated on the outskirts of an urban area—that is, in the ETJ—considering that undesirable land uses are disproportionately sited in

155. *See id.* The ETJ communities surrounding Mebane, North Carolina, live at a density where septic systems are failing, resulting in contaminated well water and another section was rezoned to a manufacturing zoning class without ETJ resident input. *Id.*

156. *See* UNC CTR. FOR CIV. RIGHTS, *supra* note 140, at 1.

157. *See generally* Washington v. Davis 426 U.S. 229 (1976) (holding that laws are constitutionally valid even if they have a racially disparate impact so long as the law was not passed with a racial animus).

158. *See* Anderson, *supra* note 147, at 1152–53 (“The risk that unincorporated areas will bear a disproportionate share of regional land-use burdens is compounded by the fact that many states have conferred extraterritorial powers on cities, an exception to the general rule that borders define the limits of local government authority.”).

159. AM. PLANNING ASS’N, *supra* note 133, at 77; *see also* Wheeler, *supra* note 133, at 243.

160. *See* Daniel Kevin, “Environmental Racism” and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies, 8 VILL. ENVTL. L.J. 121, 121 (1997) (listing hazardous waste facilities, solid waste disposal sites, and contaminated industrial sites as undesirable land uses).

161. *See id.*; Vanessa Zborek, “Yes, in Your Backyard!” Model Legislative Efforts to Prevent Communities from Excluding CAFOs, 5 WAKE FOREST J.L. & POL’Y 147, 172 n.129 (2015).

minority communities.¹⁶² Those in the urban setting might not want these uses to take up their valuable living space or pollute their quality of life. These urban residents could pressure their representatives (on the town council or the planning board) to focus development of necessary but sometimes harmful uses as far away from the urban center of living but still close enough to be useful to these residents.¹⁶³

County residents living outside of the ETJ will apply similar pressures for some of the uses.¹⁶⁴ County residents often want to maintain the rural environment they enjoy and pressure their elected representatives on the board of county commissioners to push development of undesirable land uses towards the urban areas via county planning and development policies.¹⁶⁵

If these two pressures functioned as theorized, then all undesirable land uses should end up near the urban fringe with a good number falling in ETJs.

However, the claim that political will is the sole determinant for siting undesirable land uses has not necessarily been borne out by research, likely given that data to assess this claim is not well documented. I sought to test this claim by pulling from public data sets, including: (1) wastewater treatment plants, (2) sewer water treatment plants, (3) fossil fuel burning power plants, (4) landfills, (5) major source of air pollution, and (6) industrial waste sites.¹⁶⁶ Unfortunately, the existing databases are often incomplete or do not clearly or precisely identify the location of geographical and historical boundaries of undesirable land uses.¹⁶⁷ The lack

162. See Kevin, *supra* note 160, at 123–25.

163. See, e.g., Wheeler, *supra* note 133, at 243.

164. AM. PLANNING ASS'N, *supra* note 133, at 77.

165. See, e.g., HEATHER BALLASH, KEEPING THE RURAL VISION 23 (1999), <http://mrsc.org/getmedia/2ff2491c-e490-49e8-9bb4-6c4aa197514d/RuralDevelopmentPlanning.aspx> [<https://perma.cc/6KFD-EY3H>] (highlighting an example where rural residents “protect[ed] rural character”).

166. See, e.g., *Active Permitted Landfills Map*, N.C. ENVTL. QUALITY, <https://deq.nc.gov/active-permitted-landfills-map> [<https://perma.cc/JMW7-S36H>]; *Inactive Hazardous Sites Map*, N.C. ENVTL. QUALITY, <https://deq.nc.gov/about/divisions/waste-management/waste-management-rules-data/waste-management-gis-maps/ihs-map-viewer> [<https://perma.cc/763K-PG4Y>]; *Maps: Power Plants*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/maps/layer_info-m.php [<https://perma.cc/T6F8-ERUR>]; *Sewer Treatment Plants*, NC ONEMAP, <http://data.nconemap.gov/geoportal/catalog/search/resource/details.page?uuid=%7BF82748A9-C2D2-4B47-B570-BD55462BB6AE%7D> [<https://perma.cc/7X8E-M9B9>]; *Water Distribution Treatment Plants*, NC ONEMAP, <http://data.nconemap.gov/geoportal/catalog/search/resource/details.page?uuid=%7B96A2BD7C-48BA-4F84-9EE7-1854C1BD0241%7D> [<https://perma.cc/FDU4-AVE6>].

167. See *Active Permitted Landfills Map*, *supra* note 166 (providing pinpoints of locations of permitted landfills but not their size or geographical boundaries); *Inactive Hazardous Sites Map*, *supra* note 166 (“Disclaimer: NC DEQ staff have compiled this dataset to the best of their abilities using the resources available to them. NC DEQ neither verifies nor guarantees the

of both data and research leave this theory as exactly that: a theory. In order to appropriately address the impact of ETJs on its residents, determining the answer behind the theory is important. Therefore, further research should focus on whether undesirable land uses are actually disproportionately located in ETJs.

D. Provision of Services

Because ETJ residents live under the control of two regulating groups—both the county and the town—the ETJ may be ignored by both the county and town governments because each believes that the other will take responsibility for the area.¹⁶⁸ Because the powers of town governments and county governments might be listed in different ordinances, each town may not have the same powers available to it in the ETJ.¹⁶⁹ This means there is no uniform determination of what power belongs to which entity.¹⁷⁰

This may not be a problem if the ETJ is to be annexed in the near future. Annexation laws (even prior to the 2011 and 2012 annexation reforms) require the town to provide the same municipal services to annexed areas that are provided within the city limits.¹⁷¹ One of the main services that is not commonly provided to ETJ residents is water and sewer services even though some ETJs have a density that makes sewer services a necessity.¹⁷² Dense communities that are zoned for future development but left in the ETJ, because the annexation statute no longer makes annexation economically feasible, might thus find themselves in a public health crisis.¹⁷³

accuracy, reliability, or completeness of any data provided. NC DEEQ provides this data without warranty of any kind whatsoever, either express or implied, and shall not be liable for incidental, consequential, or special damages arising out of the use of any data provided herein.”); *see also* *Water Distribution Treatment Plants*, *supra* note 166 (providing data of water distribution treatment plants gathered in 1997 and 2000). Although information about the current locations of ETJs is available for some counties, *see, e.g., Download GIS Data, JOHNSTON COUNTY, N.C.*, <http://www.johnstonnc.com/gis2/content.cfm?PD=data> [https://perma.cc/ML9C-W3CU] (providing ETJ boundaries for Johnston County), existing databases do not have information for all counties. Furthermore, the imprecise locations of undesirable land uses and the fact that data for the locations of both ETJs and undesirable land uses are not available for the same time frames make drawing meaningful conclusions from these data sets very limited.

168. OWENS, EXPERIENCE, *supra* note 16, at 11.

169. *See id.* at 11 n.58.

170. *See id.*

171. N.C. GEN. STAT. § 160A-58.56 (2017).

172. *See* PARNELL ET AL., *supra* note 137 (“This neighborhood [in Southern Pines’ ETJ] has neither water nor sewer. The residents petitioned Southern Pines for annexation in order to get water and sewer. Their request was denied.”); *see also id.* (highlighting that for involuntary annexations, municipalities must extend water and sewer lines within two years of annexation).

173. *See, e.g., id.* (“Residents of White Level [a predominately black ETJ community] requested annexation in 1997 because of problems with their septic tanks, but the town took no action. Human fecal bacteria attributed to failing septic systems have been found in all three

Some areas that are outside of a town's municipal boundary reach a population density that qualifies as urban under the U.S. Census.¹⁷⁴ In the past, rural areas have typically been left to their own devices when it comes to water and sewer planning—often resulting in the use of private wells and septic tanks.¹⁷⁵ But rural counties are finding themselves responsible for larger and denser populations than ever before and have begun providing water and sewer services to some parts of their communities in the same way a municipality would.¹⁷⁶

When a county chooses to provide water and sewer services, it might target unincorporated urban areas for cost and health reasons.¹⁷⁷ However, when these unincorporated areas that might require sewer and water services are in a town's ETJ, a county may choose to provide services in other areas because it erroneously believes that it is the responsibility of the town to provide for these areas.¹⁷⁸

There are several examples throughout the state of counties that provide water and sewer services for some densely populated areas, but the county cuts services off right at the ETJ.¹⁷⁹ Similarly, the town will provide water and sewer within the city limits, but the services will not be provided in the ETJ.¹⁸⁰ To illustrate this principle, I have examined data from the North Carolina OneMap service which completed a thorough study of the sewer system in each of North Carolina's 100 counties, using data from 2003.¹⁸¹

Outside of Goldsboro, North Carolina, Wayne County elected to provide sewer services to a census-defined urban area that lacked sewer services.¹⁸² Meanwhile, the town of Goldsboro provided sewer services

neighborhoods.”); Purifoy, *supra* note 21 (showing how these situations can lead to “abandoned houses, substandard housing, . . . [and a] lack of water and sewer infrastructure”).

174. Anderson, *supra* note 147, at 1100; *Smoothed Urban Boundary*, NC ONEMAP, <http://data.nconemap.gov/geoportal/catalog/search/resource/details.page?uuid=%7B552ED374-BAAB-4F56-B369-DEB93F2E4ABF%7D> [https://perma.cc/4QBD-AUN5].

175. *See* AM. PLANNING ASS'N, *supra* note 133, at 181, 191–92.

176. *See id.* at 181 (describing how suburban areas provide water and sewer services when on-site services become impossible).

177. *See, e.g.*, Julia Marie Naman & Jacqueline MacDonald Gibson, *Disparities in Water and Sewer Services in North Carolina: An Analysis of the Decision-Making Process*, 105 AM. J. OF PUB. HEALTH e20, e22–e24 (2015), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2015.302731> [https://perma.cc/2B9B-G3ZU] (describing the conflicts preventing a county from providing sewer service).

178. *Id.*

179. *See, e.g.*, *Type A Current Public Sewer Systems*, NC ONEMAP GEOSPATIAL PORTAL <http://data.nconemap.gov/geoportal/catalog/search/resource/details.page?uuid=%7B5CF6143E-F6EA-4420-B18E-054415C3E108%7D> [https://perma.cc/HZ4P-USXV].

180. *Id.*

181. *Id.*

182. *See id.*

within its boundaries and only to small pieces of the ETJ.¹⁸³ Thus, large swaths of the Goldsboro ETJ that are considered urban by the census are not provided sewer services by either the town or the county.¹⁸⁴ When and if the county next chooses to provide sewer service, it may not choose to do so in the ETJ because of the common belief that the ETJ will eventually be annexed so county resources would be better spent elsewhere.¹⁸⁵

In Nash County, North Carolina, which has a robust county sewer system, there are ETJ sections considered to be urban around both Rocky Mount and Nashville that do not receive county sewer services.¹⁸⁶ Both Rocky Mount and Nashville provide sewer to their municipal residents, but this service stops right at the town line and does not extend into the ETJ.¹⁸⁷ Nash County does provide sewer services to some of the ETJ surrounding the towns of Bailey and Spring Hope; however, none of these towns or the ETJs qualify as urban by census standards and are in less need of these services than those not receiving it because each has not yet reached an urban density and could use wells and septic tanks rather than public water and sewer.¹⁸⁸

Of course, while there are visible examples of ETJ areas being ignored for the provision of services by both the municipality and the county, there are also some counties where urban areas within an ETJ are provided with water and sewer services.¹⁸⁹ The town of Clayton, a suburb of Raleigh in Johnston County, has a substantial ETJ, a large portion of which is considered to be an urban area, and much of that area is provided with sewer services.¹⁹⁰

Because of the uncertainty over the future of ETJ areas, county governments may not want to spend money to provide water and sewer services to these communities because they do not know if their investment will be worth it in the long run.¹⁹¹ On the other hand, the longer a town waits to annex and provide services to an ETJ community that needs them, the worse the problems in the ETJ will become, making it increasingly less likely that an annexation will ever be initiated by the town considering that towns are allowed to take cost into consideration when making annexation decisions.¹⁹²

183. *See id.*

184. *See id.*

185. *See* Naman & Gibson, *supra* note 177, at e21–e22.

186. *See Type A Current Public Sewer Systems*, *supra* note 179.

187. *See id.*

188. *See id.*

189. *See id.*

190. *See id.*

191. *See* Naman & Gibson, *supra* note 177, at e21–e22.

192. *See id.* at e21–e26.

III. HOW CAN COMMUNITIES THAT NO LONGER WISH TO BE REGULATED BY A NEIGHBORING TOWN REMEDY THEIR SITUATION?

While there does not seem to be a single issue plaguing every ETJ in the state, there are situations where communities are denied water and sewer services despite density and where the town's refusal to annex is racially motivated.¹⁹³ A solution must be provided for those who are stuck in planning limbo. The instinctive answer to an unincorporated urban community is to have the town annex the community so that it must provide services. But annexation may not be the appropriate solution in all or even most situations.

A. Existing Solutions

1. Annexation

If the primary concern is lack of necessary services—whether because it causes a lower standard of living or because it prevents the future economic development of the area¹⁹⁴—annexation might be the appropriate solution. This tool may in some ways be even more feasible in the wake of recent policy reforms.

With the changes to the annexation statute making involuntarily annexation of a property more expensive, the likelihood that communities in need of services will be annexed at the town's volition has decreased.¹⁹⁵ However, the Annexation Reform Act of 2011 did create a method for contiguous communities to demand annexation into a municipality, after which it is required by law for the town to provide services to these new residents in the same capacity as all other residents.¹⁹⁶

However, a community that wishes to be annexed will need to put in significant work to make it happen. The current annexation statute allows an adjacent economically distressed area to force annexation by presenting the municipality with a petition signed by seventy-five percent of the landowners in that area.¹⁹⁷ Seventy-five percent of property owners may seem like a daunting obstacle, but there is neither an area nor a population

193. See generally UNC CTR. FOR CIVIL RIGHTS, *supra* 140, at 1, 12–13, 29 (chronicling the effects of municipal underbounding on minority communities across the state).

194. See Naman & Gibson, *supra* note 177, at e20 (citing UNC CTR. FOR CIVIL RIGHTS, *supra* note 140, at 1–29) (“In addition to health concerns, well and septic system users cite stench, decreased property value, and high repair costs as adverse effects of relying on self-supplied systems.”).

195. See *supra* notes 104–09 and accompanying text.

196. N.C. GEN. STAT. § 160A-31 (2017), amended by Act to Reform the Involuntary Annexation Laws of North Carolina, ch. 396, § 10, 2011 N.C. Sess. Laws 1649, 1667–70.

197. *Id.* § 160A-31(b1), amended by Act to Reform the Involuntary Annexation Laws of North Carolina, ch. 396, § 10, 2011 N.C. Sess. Laws 1649, 1667–70.

requirement, so very small areas could force annexation by providing petitions with as few as one signature. For example, a single landowner who owns land abutting the town boundary that has a household income below the maximum threshold could, in theory, petition the town for annexation, and the town would have no choice but to oblige.

Of course, this solution is not perfect. The difficulties of community organizing and the likelihood of getting such a high percentage of signatures when annexation might result in higher property taxes could make these types of annexations difficult to achieve. The most democratic aspect of this new mechanism to trigger annexation allows the residents—rather than landowners—to petition for annexation into a municipality. From a public health perspective, residents will be the ones who are feeling the effects from lack of services, especially sewer and water services, where population density might be causing contamination of their water. While the categories of property owners and residents will often overlap, this is less and less common.¹⁹⁸

Even in the face of a public health concern, property owners who are not residents may be reluctant to sign a petition that will increase their property taxes because they will now be taxed by the municipality as well as the county. But a petition signed by residents rather than property owners has no compulsory effect; rather it gives the town the option to annex the property, not dissimilar to the option the town had before the annexation reforms were ever presented.¹⁹⁹

Property owners may be willing to sign the petition if annexation is desired to stabilize future economic development by assuring access not only to town services like sewer and water but also law enforcement or fire services. Residents—unlike property owners—may be wary of more investment in the community because it may lead to higher housing costs. However, even if all landowners and residents in a community wish to be annexed into a municipality to gain services, this new mechanism is available only in defined economically distressed areas where fifty-one

198. Millennials (adults currently under forty) are buying homes at rates lower than any previous generation and are choosing to rent rather than own either because of employment uncertainty or from lack of access to sufficient credit. See Aaron Hankin, *The Real Reasons Millennials Aren't Buying Homes*, INVESTOPEDIA (Oct. 29, 2018), <https://www.investopedia.com/news/real-reasons-millennials-arent-buying-homes/> [<https://perma.cc/33S9-H6PJ>].

199. Compare N.C. GEN STAT. § 160A-31(a), with *id.* § 160A-31(j), amended by Act to Reform the Involuntary Annexation Laws of North Carolina, ch. 396, § 10, 2011 N.C. Sess. Laws 1649, 1667–70.

percent of residents in households in the area wishing to be annexed have an income less than 200 percent of the federal poverty level.²⁰⁰

For areas that do not meet these criteria but wish to avail themselves of municipal services, their only other option is to ask the municipality to initiate an involuntary annexation. Due to the costs the city would have to incur, this option is unlikely to succeed.

2. Representation

Of course, annexation is not always the solution for landowners who simply want more control over their own property. Other possible remedies include more direct representation or setting temporal limits on the control that a municipality can exercise over its ETJ.

As the law currently stands, the planning board or board of adjustment must have proportional representation from residents of the ETJ.²⁰¹ The members are appointed by the board of county commissioners rather than elected by the people of the ETJ whom they will be representing. Appointed representation historically made sense because planning board members are usually not elected officials, except in the case where the town council is serving as the planning board.²⁰²

Electing the member who supposedly represents the interest of the ETJ residents is a simple solution to the problem of representation on the boards who decide the fate of ETJs.

Planning boards are composed in any way the community organizing the board sees fit,²⁰³ possibly meaning that towns and counties could implement this solution without waiting for the General Assembly to pass a statute. Though unconventional to elect only one member of the planning board while the rest of the board is appointed by the town council, it might be necessary to ensure that these decisionmaking bodies actually have the interests of their constituents at heart. In the grand scheme of things, it may simultaneously be better to push these representative boards towards being

200. N.C. GEN. STAT. § 160A-31(b1) (2017), *amended by* Act to Reform the Involuntary Annexation Laws of North Carolina, ch. 396, § 10, 2011 N.C. Sess. Laws 1649, 1667–70.

201. Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State, ch. 111, § 2.4, 2019 N.C. Sess. Laws —, — (to be codified at N.C. GEN. STAT. § 160D-3-1), <https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2019-2020/SL2019-111.pdf> [<https://perma.cc/V8YJ-9ZGR>]; *see also* N.C. GEN. STAT. § 160A-361 (2017), *repealed by* Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.2, 2019 N.C. Sess. Laws at —.

202. *See* Lovelady, *supra* note 129.

203. Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.4, 2019 N.C. Sess. Laws at — (to be codified at N.C. GEN. STAT. § 160D-3-1); *see also* N.C. GEN. STAT. § 160A-361(a) (2017), *repealed by* Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.2, 2019 N.C. Sess. Laws at —.

more democratic rather than less. While there are no guarantees that the person elected would have the best interests of every ETJ representative in mind, with a relatively small voting population it may be possible for a normally marginalized population to have a stronger voice than it may in large town elections.

When town residents are displeased by the decisions of the planning boards, they have the political option to vote in their town elections to elect new town board members who are responsible for appointing the members of the planning boards.²⁰⁴ ETJ residents, by contrast, do not have any political action they can take other than speaking at public meetings or writing to representatives who might not even consider ETJ residents to be their constituents because they cannot vote in municipal elections.²⁰⁵

B. Proposed Solutions

Simply having a representative on the planning board never truly solved the representation problem. Because many planning board decisions are subject to approval by the town board or town council, ETJ residents remain without meaningful representation on the board of final decision.²⁰⁶ Additionally, many smaller municipalities do not have standing planning boards or board of adjustments, but rather form ad hoc committees for each request that does not fit within the exact letter of the current zoning ordinance.²⁰⁷

To fully compensate for the lack of representation of ETJ residents in the planning process, there needs to be a statutory mechanism that requires municipalities to consider the needs of their ETJ communities.

I propose that this could be done effectively in three different ways:

1. Require ETJ Justification or Rationale

First, the legislature could require that, in every decision the planning board makes, it must consider and document the effects that the decision will have on the ETJ. However, this would be a persuasive measure with no real “teeth.”²⁰⁸ The purpose is to force the decisionmakers to remember that

204. Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.4, 2019 N.C. Sess. Laws at — (to be codified at N.C. GEN. STAT. § 160D-3-1); *see also* N.C. GEN. STAT. § 160A-361(a) (2017), *repealed by* Act to Clarify, Consolidate, and Reorganize the Land–Use Regulatory Laws of the State § 2.2, 2019 N.C. Sess. Laws at —.

205. N.C. GEN. STAT. § 160A-66 (2017) (describing the qualification for municipal elections that require residence within the municipal limits).

206. Lovelady, *supra* note 129.

207. *See supra* notes 143–45 and accompanying text.

208. Persuasive legislation aims to “change people’s behavior by forcing them to think about the harm they are causing and by publicizing that harm.” James Salzman, *Teaching Policy*

decisions regarding planning and development will have an impact on the ETJ. Hopefully, the decisionmakers will remember that the residents of the ETJ have no independent means to counter any of the negative planning impacts on their own. For example, Brunswick County, North Carolina, requires any municipality that plans to exercise its ETJ to justify it.²⁰⁹

2. Require ETJ Reevaluation

Second, the statute could mandate reevaluation of the town's ETJ at regular intervals. I propose that municipalities be required to reevaluate and justify their zoning and planning jurisdiction over the ETJ every five years.

This could simply consist of a meeting where the planning staff has prepared a report about the development status of the land within the ETJ and whether it is being used effectively to serve the residents of that area. A majority of responding municipalities in the UNC School of Government report stated that most considered the ETJ to be a tool prior to future annexation.²¹⁰ Annexation has become more difficult after the land reform bills of 2011 and 2012.²¹¹ Therefore, any report about the current status of an ETJ area should include an update on plans to incorporate ETJ areas into their borders and an estimated timeline for this happening.

The planning board should be required to give compelling justification for retaining planning and development jurisdiction over an area that does not receive the benefit of town services aside from the proximity to municipal services. A ten-year timeline would allow the town ample time to consider long-term planning goals while ensuring that the residents and landowners are not indefinitely held in an uncertain position. Prior to the public meeting where the ETJ is being reevaluated, public notice should be given to both residents and land owners in the ETJ by requiring mailings to every residence and, if different, the tax bill address for each residence to make sure that both residents and property owners are able to give their opinion on staying in the ETJ, being released from the ETJ, or potentially petitioning for certain areas to be annexed.

Further, at the meeting and in the mailings, the statute should require the planning board to provide information to the residents and property

Instrument Choice in Environmental Law: The Five P's, 23 DUKE ENVTL L. & POL'Y F. 363, 373 (2013) (citing Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227 (1995)).

209. OWENS, EXPERIENCE, *supra* note 16, at 13 ("Brunswick County requires each municipality requesting extraterritorial jurisdiction to explain its concerns about the area and to demonstrate its capability and qualifications to provide land use planning, infrastructure planning, and development regulations in the area.").

210. *See id.* at 10.

211. *See supra* Sections I.D–E.

owners about the annexation statutes and the ability of these residents or land owners to request or force annexation via petition.

To make sure this decision is taken seriously, the statute should include a private right of action for residents and land owners granting them standing to challenge the decision made at this regular reevaluation of the ETJ. Any resident or land owner in the ETJ should have the ability to challenge the decision made on the grounds that it was unreasonable and, if the Superior Court agrees,²¹² to force the planning staff and board to give more sound reasoning for their decision or possibly reverse it—whether this decision was to abandon the planning of a property or to retain planning jurisdiction even when it is not justifiably relevant to the development of the municipality itself.

The above solutions apply to areas that are already within the ETJ of a municipality. A prophylactic measure to prevent areas that do not wish to become part of a municipality's planning jurisdiction may also be required.

3. Referendum Requirement

Like the annexation reform passed in 2011,²¹³ the General Assembly could provide a referendum mechanism that allows residents to prevent a municipality from extending its planning jurisdiction further than it is currently extended. This would give the residents a chance to prevent problems potentially caused by the imposition of an ETJ by retaining land development and planning authority within their elected body, that is, the county board of commissioners.

This simple change would align with the property rights values of independence and self-determination that led to the annexation reform in the first place and would prevent unincorporated communities from being left in planning limbo where they will be forever regulated by a municipality that never intends to annex them into the municipality.

The statute could require towns to hold a referendum for all ETJ residents before the town is allowed to exercise its ETJ power over a new area. If a majority of voters rejected the expansion of the ETJ in the referendum, then the town could not exercise its ETJ.

212. *See generally* DAVID W. OWENS, REVIEW OF LAND USE DECISIONS 5–6 (2017), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/06%20Review%20of%20Land%20Use_Owens.pdf [<https://perma.cc/FHX4-G7MY>] (“[T]he superior court is limited to review of whether the board [of adjustment] properly affirmed or overruled the officer’s determination.”).

213. Act of June 17, 2011, ch. 396, § 1, 2011 N.C. Sess. Laws 1649, 1649–71 (codified as amended at N.C. GEN. STAT. §§ 160A-58.50 to -58.63 (2017)).

CONCLUSION

The use of ETJs does not always result in hardship for the residents or property owners of an area on the outskirts of town. Many subdivision residents who moved into neighborhoods with private trash and sewer services view residence in a municipal zoning jurisdiction as an asset, believing it will prevent unwanted land uses in their neighborhoods while not subjecting them to municipal property taxes.

Although most ETJs burden communities in some ways, the burden type is not the same across the board. Some may simply feel burdened by a lack of elected representation. Other communities, especially communities that are predominately Black or poor, may notice that they are excluded from town boundaries but are still required to go to the municipality whenever they want to do something with their own property.

Data shows municipalities that use the tool responsibly to plan for growth and to promote orderly development on the outskirts of towns benefit town residents and those living in the ETJ. However, it cannot be denied that this is a tool that can and has been used improperly and there should be more options for residents that wish to have more direct control over their land use planning decisions.

Residents who are stuck in planning and development limbo in the ETJ of a town that is no longer growing may be ignored in planning and development decisions. The ETJ may be seen as a convenient area that the town can zone to develop for the benefit of town residents while ignoring the effects that it will have on ETJ residents and remaining politically insulated from the effects of their decision because those ETJ residents are not able to express their disapproval of town officials at the ballot box.

A simple change to the ETJ statute requiring towns to justify the exercising of their extraterritorial zoning power every five years would give ETJ residents a specific time to air their grievances to town officials which could give ETJ residents a decision that they could challenge in court as arbitrary and capricious.

When it comes down to it, towns rely on ETJ residents and property owners to work and shop in their towns almost as much as they do their own residents and should not be able to take advantage of the fact that ETJ residents have no political recourse when making planning and zoning decisions on their behalf.

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