

# **A Review of the Impacts of Senate Bill 2038 on Land Use and Water Supplies in Central Texas**

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Rachel N. Hanes  
Policy Director  
Greater Edwards Aquifer Alliance

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## CONTENTS

<b>INTRODUCTION.....</b>	<b>2</b>
<b>CONTEXT.....</b>	<b>2</b>
WHAT IS THE ISSUE? .....	2
HOW DID IT HAPPEN? .....	3
WHAT ARE EXTRATERRITORIAL JURISDICTIONS? .....	4
<i>Definition and regulatory framework of ETJs.....</i>	<i>4</i>
<i>History of ETJs.....</i>	<i>5</i>
WHAT DOES THE NEW LAW DO? .....	6
<i>What is the petition process?.....</i>	<i>7</i>
<i>What is the election process?.....</i>	<i>7</i>
<i>Are there any exceptions?.....</i>	<i>8</i>
<b>STATE OF PLAY.....</b>	<b>10</b>
WHAT IS HAPPENING IN CENTRAL TEXAS?.....	10
WHY IS THIS A PROBLEM? .....	13
<i>Local government regulatory authority in the ETJ.....</i>	<i>13</i>
<i>What are the impacts on local government operations?.....</i>	<i>14</i>
<i>What are the impacts on land management and planning?.....</i>	<i>16</i>
<i>What are the impacts to water sources?.....</i>	<i>20</i>
Case Study: Impervious Cover Limits.....	22
<b>RECOMMENDATIONS .....</b>	<b>28</b>

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## Introduction

Texas Senate Bill 2038, passed by the 88<sup>th</sup> Legislature in 2023, went into effect on September 1, 2023. The law provides property owners a mechanism to dis-annex their land from a city's extraterritorial jurisdiction (ETJ). Since its implementation, hundreds of petitions for release from ETJs have been submitted to and approved by municipalities throughout Central Texas. The released areas are now subject only to county and state regulations. These releases have the potential to put much of the land over the Edwards Aquifer Recharge Zone and throughout the environmentally sensitive Edwards and Trinity Aquifer watersheds at risk of environmental degradation, threatening the health, safety, and quality of life of Texans. This report will:

1. Detail the provisions of the new law;
2. Provide an overview of ETJ regulations;
3. Provide a snapshot of the land withdrawn from Central Texas ETJs;
4. Illustrate the implications for planning, land management, and water supplies in the region; and
5. Outline policy recommendations.

## Context

### What is the issue?

Senate Bill 2038 (SB 2038) passed the 88<sup>th</sup> Texas Legislature on May 19, 2023 and went into effect on September 1, 2023. Originally proposed by State Senator Paul Bettencourt (R-Houston), the bill provides for the dis-annexation, or release, of an area from a municipality's extraterritorial jurisdiction by petition or election.

The bill's supporters state that residents and property owners in a municipality's ETJ are subject to municipal regulatory authority yet have no vote in that municipality; they argue this situation means cities have outsized control over areas in the ETJ, leaving some property owners subject to regulations and restrictions with which they may not agree.<sup>1</sup> Detractors, meanwhile, argue the bill is detrimental to municipalities' efforts to manage and regulate area and regional

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growth, creates uncertainty, puts additional pressures on county governments, and impacts long-term planning and environmental protection efforts.

### How did it happen?

Senate Bill 2038 is the latest, and most successful, in a litany of bills put forward in the Texas Legislature to deregulate the ETJ. For example, in 2017, a variety of bills were introduced related to municipal regulation in the ETJ. One pair of bills – House Bill (HB) 2535 and SB 782 – was put forward to prohibit tree protection and preservation ordinances, with language specifically prohibiting cities from regulating trimming or removal of trees in the ETJ.<sup>2</sup> These bills died in committee after significant statewide public backlash. Various groups involved in the matter at the time, however, expected that “more efforts to limit what cities can do [might] follow the Texas tree bill because ‘states want to have a firm hand in how cities regulate...it’s about local control vs. state control’.”<sup>3</sup> They were right.

In 2021 alone, three separate bills were introduced to limit city regulations in the extraterritorial jurisdiction. HB 1885 was an attempt to restrict municipal regulation in certain areas, and HB 3519 and SB 1992 were the initial attempts to allow for the release of areas from ETJs by petition or election. These pieces saw opposition from cities, environmental groups, municipal groups, and some counties; the latter two bills died in committee and HB 1885 died in chamber.<sup>4</sup> Though none of these bills passed during the 2017 or 2021 session, they helped set the stage for SB 2038 in the 88<sup>th</sup> legislative session.

In December 2021, following the failure of the three bills put forward earlier that year, the Texas Public Policy Foundation published a memo arguing for the abolition of the ETJ as a concept. Several months later, in April 2022, the Lieutenant Governor charged the Senate Local Government Committee with studying in the interim legislative session “issues related to municipal extraterritorial jurisdictions and annexation powers, including examining possible dis-annexation authority.” He charged the committee with determining “whether extraterritorial jurisdictions continue to provide value to their residents and [to] make recommendations on equitable methods for dis-annexation.”<sup>5</sup>

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At the end of a September 13, 2022 hearing on the interim charge, the committee made the following recommendations for the legislative session:

1. “The Legislature should consider adopting legislation to create a method for reconciling a controlling regulatory regime for purposes of land development regulations in ETJs where municipal and county regulations conflict.
2. The Legislature should consider adopting legislation creating a statewide model for municipal dis-annexation.”<sup>6</sup>

The 88<sup>th</sup> legislature followed through on the interim committee’s recommendations. Introduced on March 9, 2023, Senate Bill 2038 was passed on May 19 and went into effect on September 1, 2023.

## What are Extraterritorial Jurisdictions?

### Definition and regulatory framework of ETJs

Extraterritorial jurisdictions are “the unincorporated area that is contiguous to the corporate boundaries of a municipality.”<sup>7</sup> How large a city’s ETJ is depends on the size of that city. ETJs can range in size from one-half mile out from the corporate boundaries of the city up to 5 miles. Due to a variety of local circumstances, ETJs may differ in size from what is provided by state law. For example, if a city incorporates directly adjacent to an existing city, the new city may have a smaller ETJ than they would otherwise, as ETJs may not overlap.<sup>8</sup>

The authority of cities to regulate in their ETJ is quite limited. Cities are prohibited by state law from regulating in the ETJ:

- (1) the use of a building or property for business, industrial, residential, or other purposes;
- (2) the bulk, height, or number of buildings constructed on a tract of land;
- (3) the size of a building that can be constructed on a tract of land;
- (4) the number of residential units that can be built per acre of land; and
- (5) the size, type, or method of construction of a water or wastewater facility that can be constructed to serve a developed tract in certain circumstances.

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(Home rule cities also may not require landowners developing in the ETJ to follow the city's building codes).<sup>9</sup>

In their ETJ, cities may regulate cemeteries, annexation, subdivision and platting regulations, signs, nuisances within 5,000 feet, policing city-owned property, utility systems, and pollution control and abatement.<sup>10</sup> Cities and counties must enter into agreements allocating their respective authority to regulate subdivision and platting regulations within the ETJ.<sup>11</sup>

While some residents of ETJs may feel a sense of “regulation without representation,” as only city residents may vote in city elections, there is less “taxation without representation.” A city is not automatically authorized to impose a tax on an area due to that area's inclusion in the ETJ of the city. Rather, the city “must identify express or implied authority” in state law to impose a tax in its extraterritorial jurisdiction.<sup>12</sup>

It was this sense of “regulation without representation” that led Senator Bettencourt to author SB 2038 to “create an exit path that didn't previously exist for Texans in an ETJ displeased with city regulations.”<sup>13</sup> Property owners who dis-annex from an ETJ will then be subject only to the less stringent state and county government regulations.

### History of ETJs

ETJs as a concept were created by the Texas Legislature in 1963 through the Municipal Annexation Act. They are meant to function as something of a buffer zone around cities to “promote and protect the general health, safety, and welfare of persons residing in *and adjacent to*” cities (emphasis added).<sup>14</sup>

Cities in Texas have had some form of extraterritorial regulatory power since at least 1913, when the Legislature granted them the “power to define all nuisances and prohibit the same within the city and outside the city limits for a distance of five thousand feet; to have the power to police all parks or grounds, speedways, or boulevards owned by said city *and lying outside of said city*” (emphasis added).<sup>15</sup>

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Prior to the Municipal Annexation Act in 1963, cities could annex land all the way up to the corporate boundaries of another city, which led to multiple inter-city conflicts.<sup>16</sup> With this legislation, cities could now only annex land located within their ETJ. Cities are not required to annex land within their extraterritorial jurisdiction, even if requested by residents in the ETJ, but they do have the – recently limited – power to do so.<sup>17</sup>

The creation of ETJs may have alleviated some city-to-city conflicts, but conflicts over the annexation powers of cities and between municipalities and residents in unincorporated areas have endured. Bills to limit the annexation power of cities have been introduced in every legislative session for the past 50 years.<sup>18</sup>

Until 2017, home rule cities had mostly unilateral annexation power. In September 2017, the Legislature amended the Municipal Annexation Act to limit the opportunities available to home rule cities in large counties to unilaterally annex areas in their ETJs.<sup>19</sup> This change to annexation rules lasted two years. In 2019, HB 347 passed, which ended the ability of cities to exercise most of their unilateral annexation power, regardless of the size, type, or location of the city.<sup>20</sup> Four years later, SB 2038 went even further, letting areas in municipalities' ETJs dis-annex.

### What does the new law do?

Senate Bill 2038 amends Chapter 42 of the Texas Local Government Code, providing for “the release of an area from a municipality’s extraterritorial jurisdiction by petition or election.”<sup>21</sup> Retroactive to January 1, 2023, SB 2038 also prohibits the automatic expansion of the ETJ due to annexation. Extraterritorial jurisdiction expansion after annexation may now only occur if property owners who would previously have been included in the new ETJ request that their properties be included post-annexation. For ETJ acquired through annexation commenced after January 1, 2023 but before September 1, 2023, the municipality is required to release those areas to comply with the new law.<sup>22</sup>

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## What is the petition process?

By modifying the Local Government Code, SB 2038 allows a resident of an area in an ETJ or the owner(s) of the majority in value of an area in an ETJ consisting of at least one parcel to file a petition for release with the relevant municipality. No later than 180 days after the date the first signature is obtained, the petition must be signed by:

1. More than 50 percent of the registered voters of the applicable area as of the date of the preceding uniform election; or
2. A majority in value of the holders of title of land in the applicable area, as indicated by the tax rolls of the applicable appraisal district.

If the area requesting release is owned by just one landowner or entity, only they are required to sign the petition.

Once the petition is verified by the responsible authority, the municipality is required to notify the residents and landowners in the applicable area of the results of the petition. The city is required under the law to immediately release the area from the ETJ if the petition is valid and the required number of signatures is obtained.

If the city fails to release the requested area either by the 45<sup>th</sup> day after the petition is received or by the next meeting of the city's governing body occurring after the 30<sup>th</sup> day from receiving the petition, the area is automatically released by operation of law. Unless the owner(s) of the released area request to be included in another municipality's ETJ, the released area will not become part of another ETJ upon its release.<sup>23</sup>

Cities have no real ability to deny a petition. As long as the petition meets the provisions of the law, the land will be automatically released 45 days after submission, even if the petition is denied.<sup>24</sup> To date, it appears the majority of release requests have occurred via petition.

## What is the election process?

SB 2038 also allows a resident of an area in an ETJ to request the municipality hold an election for the registered voters residing in that area to vote on the



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question of whether to release the area from the ETJ. The resident may do so by filing a petition with the city that includes valid signatures of at least five percent of the registered voters residing in the area as of the date of the most recent uniform election.

Municipalities have the option to voluntarily release the area for which the election is to be held before the date of the election. If the city chooses not to do so, on the first uniform election date falling on or after the 90<sup>th</sup> day after the petition is received, the city must hold the election. The election must be held so that the qualified voters of the area in question may vote on the release and in the same manner as the municipality's general elections. The city must pay for the costs of the election.

No later than 48 hours after the election canvass, the city must notify the residents of the proposed released area of the election results. If a majority of qualified voters approve the proposed release, the municipality must immediately release the area from the ETJ. If the city fails to do so by either the next meeting of the governing body or fifteen days after the election canvass date, whichever is later, the area is to be released by operation of law. Unless the owner(s) of the released area request to be included in another municipality's ETJ, the released area will not become part of another ETJ upon its release.<sup>25</sup>

### Are there any exceptions?

There are a few exceptions to the provisions laid out in SB 2038. The following areas are exempt from the above processes:

1. Areas located within 5 miles of the boundary of a military base at which an active training program is conducted;
2. Areas voluntarily annexed into the ETJ that are located in a county:
  - a. In which the population grew by more than 50 percent from the previous federal decennial census in the federal decennial census conducted in 2020, and
  - b. That has a population greater than 240,000;
3. Areas within the portion of an ETJ of a municipality with a population of more than 1.4 million that is:

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- a. Within 15 miles of the boundary of a military base at which an active training program is conducted; and
  - b. In a county with a population of more than 2 million;
4. Areas located in a designated applicable industrial district; or
  5. Areas located in an area subject to a strategic partnership agreement entered into between a municipality and certain conservation and reclamation districts.

Once an area is dis-annexed from the ETJ, the property owners may request at a later date to be annexed back into the ETJ and subsequently into the municipality's corporate boundaries. However, the municipality is not required to accept the annexation requests and may decline to do so.<sup>26</sup>

The exception for areas surrounding military bases highlights the fact that policymakers were aware of the potential damaging impacts to the natural environment that could arise from areas being able to withdraw from ETJs. State Senator José Menéndez (D-San Antonio) raised this point in the September 13, 2022 hearing on the interim charge for ETJ release, saying:

Military installations “require certain things like dark skies for operation...and most of those sit outside city limits but the only way to protect those facilities is through the ETJ...my concern is...as we move forward...we need to think about the impact this will have on the military installations we have...I hope you remind [developers]...about the success they have had in many parts of our state comes as a direct result of the ETJ of being able to protect the single source of water we had in our county, which was our aquifer...we have to be very careful.”<sup>27</sup>

By including an exception for areas near military bases, it is assumed the legislators acknowledged the Senator's point that extraterritorial jurisdiction regulation by cities was beneficial to the natural environment and subdivision development near these military bases. There is not an apparent reason why these same benefits would not apply in other ETJ areas throughout the state not located near military installations.

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## State of Play

### What is happening in Central Texas?

Immediately following the passage of Senate Bill 2038, landowners and residents in ETJ areas throughout the state began preparing to dis-annex. Many submitted their dis-annexation petitions the first day allowed – September 1, 2023. Since then, hundreds of release requests totaling thousands of acres have been submitted and granted.<sup>28</sup>

For the purposes of this report, ETJ release petitions in the Central Texas cities of Austin, Boerne, Buda, Bulverde, Dripping Springs, Georgetown, Hays, Kyle, New Braunfels, Round Rock, San Antonio, San Marcos, and Wimberly were analyzed. These cities generally fall along the high-growth corridor of Interstate 35 between San Antonio and Austin or are experiencing similar regional growth. Large portions of many of the cities' ETJs lie over the recharge zone of the Edwards Aquifer (See Figure 1) and some overlay the contributing zone of the Edwards and the recharge zone of the Trinity Aquifer.

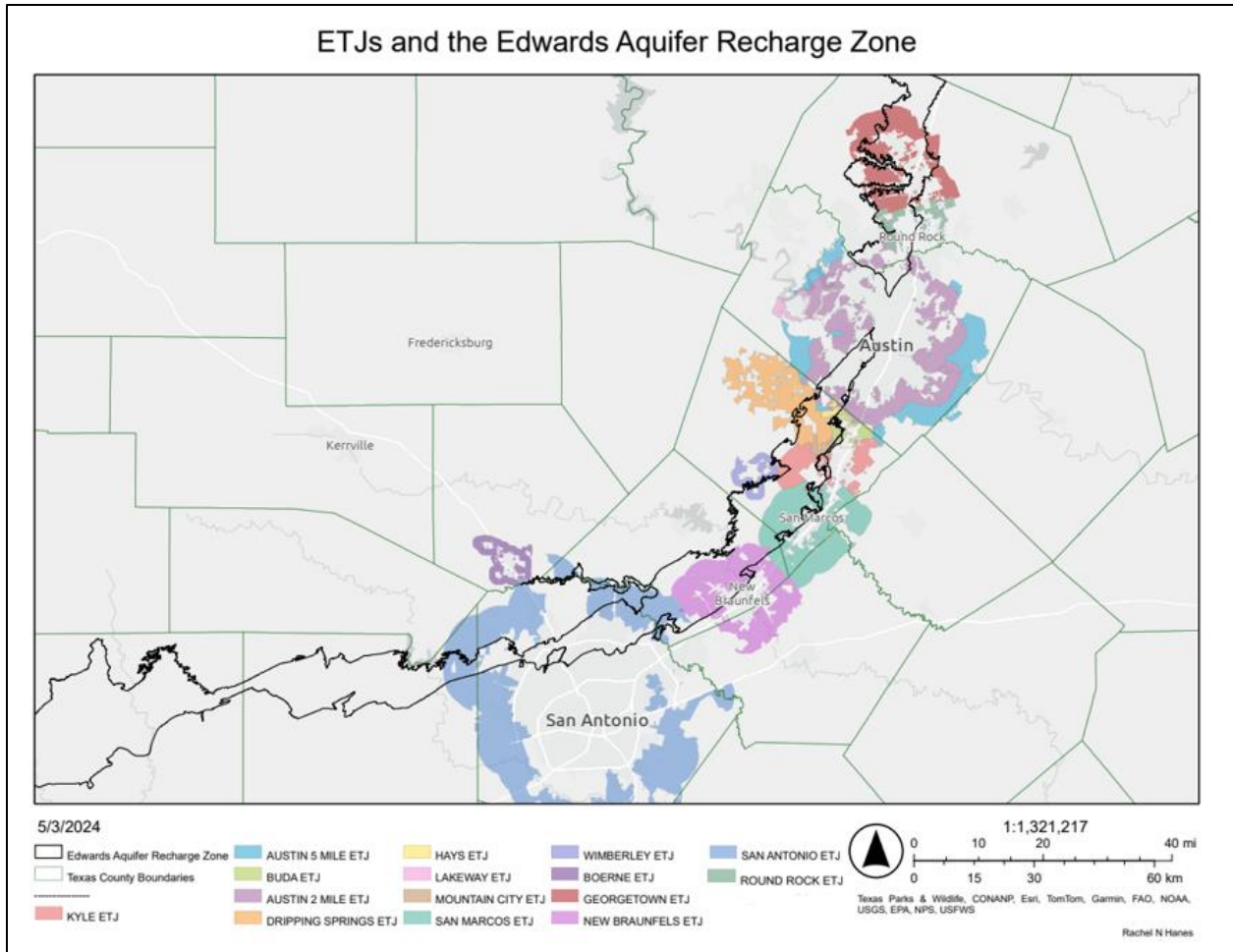


Figure 1. Map of ETJs that fall over the Edwards Aquifer Recharge Zone. Not all municipalities in the region had an accessible shapefile for their ETJ, and some municipalities had shapefiles that included neighboring ETJs, thus the slight discrepancy between the ETJs portrayed here and the list of analyzed municipalities. ETJ boundaries are current as of March 2024.

Open Records Requests submitted to each of these municipalities returned varying information regarding the release petitions, but enough data was gathered for the time period of September 1, 2023 to approximately March 1, 2024 to appropriately summarize.

Each of the cities analyzed have received multiple petition requests; at least 551 requests in total were received during the study period. Though difficult to confidently determine exactly how many acres have been requested to be withdrawn from the municipalities' ETJs, this number is at minimum 17,424 acres (See Table 1).

Between September 1, 2023 and (approximately) March 1, 2024					
ETJs	Primary Counties	ETJ Square Miles	ETJ Acres	(Minimum) Number of Release Requests	(Minimum) Acres Released
Austin ETJ	Travis	318.96	204,134.40	322	5,000.00
Boerne ETJ	Kendall	33.57	21,485.09	25	193.25
Buda ETJ	Hays	13.73	8,787.20	5	500.00
Bulverde ETJ	Comal	55.00	35,200.00	10	279.60
Dripping Springs ETJ	Hays	52.15	33,376.00	44	1,296.27
Georgetown ETJ	Williamson	119.33	76,371.20	29	1,234.19
Hays ETJ	Hays	145.33	93,011.20	3	367.59
Kyle ETJ	Hays	24.57	15,724.80	8	290.71
New Braunfels ETJ	Comal	152.29	97,464.34	17	2,552.35
Round Rock ETJ	Williamson	28.35	18,144.00	9	40.94
San Antonio ETJ	Bexar	612.73	392,147.20	4	1,713.87
San Marcos ETJ	Hays	145.33	93,011.20	64	3,715.37
Wimberly ETJ	Hays	24.57	15,724.80	11	239.95
<b>Total</b>				<b>551</b>	<b>17,424.08</b>

Table 1. Data regarding the surveyed cities, including the estimated size of their ETJs as of September 1, 2023; the minimum number of petitions requests received for ETJ release; and the estimated minimum number of acres released based on information provided through Open Records requests and County Appraisal District data. Data presented is as true as possible given data gathering constraints and is current only as of March 2024.

While many of the submissions are from private landowners withdrawing small acreage lots, plenty appear to be from developers withdrawing large tracts from the ETJ.<sup>29</sup> At this time, it does not appear there are many, if any, instances where multiple parcels combined were released based on a petition of fifty percent or more of the registered voters in an area or majority in value of titleholders. There also does not appear at this time to have been a request for an election to be held for the release of any properties in the analyzed cities' ETJs. However, this is difficult to ascertain given the varied information provided by each municipality and does not mean that these forms of release have not or will not occur.

As of the preparation of this report, the constitutionality of SB 2038 is disputed. Multiple municipalities, including several in the Central Texas region, have filed a lawsuit against the State of Texas or have joined said lawsuit. The lawsuit claims Senate Bill 2038 violates Section 42.023 of the Local Government Code, violates separation of powers, is unconstitutionally vague, violates due course of law for lack of notice, violates equal protection, and violates Texas Government Code

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311.032.<sup>30</sup> Legal experts believe this lawsuit will end up at the Texas Supreme Court.

At this time, it is not clear what impact the lawsuit will have on ETJ releases that have already occurred or on those that may occur while the lawsuit makes its way through the legal system. The Senate has already committed to analyzing the impacts of the bill as part of its Local Government Committee interim charges for 2024, which speaks further to the confusion surrounding the law and its varied impacts.<sup>31</sup>

## Why is this a problem?

### Local government regulatory authority in the ETJ

Although municipalities are limited in what they can regulate within their extraterritorial jurisdiction compared to within their corporate boundaries, they have greater regulatory authority in ETJs than do counties. Many of the regulations implemented by cities in their ETJs are those related to quality of life for residents within both the extraterritorial jurisdiction and city limits.

City ETJ ordinances related to tree preservation, regulating nuisances, impervious cover limits, water quality protection, and limiting incompatible land use (through development agreements) all protect the general health, safety, and welfare of residents in ways county governments are not able.

These same ordinances, along with the ability to require impact fees, adherence to comprehensive plans, regulation of lot sizes in certain circumstances, and landscaping ordinances, all help promote rational development. County governments often have limited to non-existent authority to regulate or do not take full advantage of the tools available.<sup>32</sup>

Shifting the regulatory authority in the ETJ from municipalities to counties could severely curtail the tools available to govern responsible and rational growth and development. This regulatory shift could negatively impact the quality of life of residents in the ETJ who expect these protections, especially as the region experiences rapid population growth.

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## What are the impacts on local government operations?

Municipal and county governments will both bear the burden of the implementation of SB 2038, albeit in different ways. Area residents will likely continue to use city amenities but will not pay city taxes in the future, as they no longer have the possibility of being annexed into the city's corporate boundaries.

A city manager from Navasota, one of the cities participating in the lawsuit against the state regarding SB 2038's constitutionality, summed up the difficulties facing cities and counties when areas dis-annex from the ETJ. The Navasota City Manager questioned a residential development that dis-annexed its property from the city's ETJ, asking:

“Who's going to police it and who's going to provide fire services out there? The way the development would occur, most of the access would come off a county road. Is the county going to have to expand that to a three or four lane county road?”<sup>33</sup>

The law imposes several unfunded mandates on the city, if certain provisions of the law are undertaken by property owners. Cities are required to immediately update the required publicly available map of the city's boundaries and ETJ when either annexing or releasing territory.<sup>34</sup> With the fast pace of releases and the ability of any parcel to be released regardless of its location in the extraterritorial jurisdiction, maintaining an up-to-date map could be difficult and expensive for city staff.

Further, cities will be required to bear, without funding assistance from the state, the costs of holding an election and the costs of notifying the appropriate residents and property owners of the results of both petitions and elections.<sup>35</sup>

Unlike Texas, many states that do not provide cities with the power to unilaterally annex do, however, provide “direct financial assistance to cities in recognition of the fact that cities provide basic services on which the entire state depends.”<sup>36</sup> Texas is one of just 12 states that do not provide state financial assistance to cities, nor does it any longer provide unilateral annexation authority.<sup>37</sup>

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This conundrum faced by Texas cities will likely be compounded by the new permission granted by the bill for land to be dis-annexed from the ETJ, further limiting the area in which the city can expand. This could result in “lower levels of service to Texans living just outside cities, which can mean lower levels of economic productivity outside the city and lower standards of living.”<sup>38</sup>

The inability of cities to unilaterally annex land in their ETJ, now compounded by the ability of land in the ETJ to be removed, “can impose future costs and constraints on the entire region.”<sup>39</sup>

When areas dis-annex from a city’s ETJ, it is then the responsibility of the county to provide law enforcement and emergency services and to take over platting and subdivision regulation. Some county commissioners are concerned about their county’s ability to take on this responsibility. For example, Williamson County Commissioner Cynthia Long was quoted in a Community Impact article, saying “We will end up having to take over, and we don’t currently have the staff, so we’ll have to increase our staff, and it’ll drive costs up.”<sup>40</sup>

Hays County Commissioner Walt Smith stated in a separate interview, “I don’t think that our legislators understand what the impact could be in a lot of these communities,” due to the additional weight being placed upon county governments.<sup>41</sup> The Texas Conference of Urban Counties opposed the bill under similar assumptions, worrying that the bill will strain counties unprepared or unequipped to provide services previously provided by the city and that emergency responses could become complicated.<sup>42</sup>

The ability of property owners to remove areas from the ETJ will result in “ETJs that look like Swiss cheese [on the map].”<sup>43</sup> Cities and counties are required by Local Government Code Chapter 242 to enter written agreements outlining which government is responsible for regulating subdivision plats and approving related permits. The fast pace at which areas in the extraterritorial jurisdiction may be released and the effect of the releases on the integrity of the ETJ may result in a confusing regulatory regime for cities and counties both; it could be difficult to track which government entity is responsible for regulating which area.<sup>44</sup>



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## What are the impacts on land management and planning?

Senate Bill 2038 impedes the ability of municipal governments to adequately plan for future development and could lead to inappropriate land uses in the ETJ. The Mayor of Georgetown summarized these impacts:

The city devotes time, energy, and tax dollars “to planning not only for the growth of the city but the development of its ETJ so as to benefit all residents, including property owners in the ETJ. However, Senate Bill 2038 largely strips us of our ability to do so and provides a perverse incentive for cities to stop building infrastructure. Giving property owners the unilateral ability to ‘opt-out’ of the ETJ, without the consent of other property owners nearby, and without [heed] to our master plans and standards that were developed with community input, will only lead to haphazard and inconsistent development...”<sup>45</sup>

Planning staff of municipalities in Central Texas maintain that the ability of parcels to be removed from the ETJ makes planning for future city infrastructure difficult. Because the city’s ETJ can constantly change, city staff face uncertainties in determining which areas of the ETJ may eventually be annexed, making it difficult to then determine where to build infrastructure and at what capacity to build it. For example, city staff may not be reasonably sure “when or where to build additional wastewater treatment plants and how large to make them” if they cannot be sure of the direction of growth of the city.<sup>46</sup>

This difficulty in planning can impact residents within both the city limits and the ETJ. If a city over-sizes infrastructure in anticipation of future growth in an area that later dis-annexes from the ETJ, the burden of this oversizing cost will fall on existing residents by way of increased utility rates to compensate for the loss of impact fees that normally would have been paid by the developer.<sup>47</sup> On the other hand, if a city chooses not to build infrastructure in the anticipation of limited future growth or annexation, there is a risk that current and future ETJ residents will be forced to deal with substandard and inconsistent development.<sup>48</sup>

Senate Bill 2038 may also impede planning efforts by retroactively impacting development agreements with landowners in the ETJ and by dissuading future

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development agreements. Under Local Government Code Section 212.172, municipalities may make development agreements with landowners in their extraterritorial jurisdiction.

Development agreements guarantee the ETJ status of the land in question and prevent it from being annexed for up to 45 years, at which time the land may be annexed by the city. In return for this guarantee, the city may extend its planning authority over the land; authorize enforcement of certain land use and development regulations; provide key infrastructure such as streets, drainage, and utility systems; and authorize enforcement of environmental regulations, among any other agreed upon provisions.<sup>49</sup>

Development agreements are common across Texas. It appears that SB 2038 could “be used to allow developers to get the benefit of infrastructure improvements costing the city millions of dollars while denying [the] city the ability to annex the property in the future.”<sup>50</sup> This could happen when a city enters a development agreement to provide infrastructure and utility extensions for land “based upon the promise that the property will be annexed into the city to expand its tax base” at a later date but then the property is pulled out of the ETJ upon provision of those services.<sup>51</sup>

The impact on development agreements is not a hypothetical. In Austin, Tesla, Inc. has pulled its manufacturing plant from the city’s extraterritorial jurisdiction in order to remove its plant from Austin’s environmental regulations in the ETJ. However, the company cited those same environmental regulations when it declined to agree to “enhanced protections for local neighborhoods and the environment” in a community benefits agreement with Austin.<sup>52</sup> Now the plant is subject only to county and state environmental regulations, which are less stringent than those in the ETJ and further still from those that were proposed in the community benefits agreement and declined on the basis of the plant being included in the ETJ.

Situations like these may influence cities not to enter development agreements going forward, on the risk they may not recoup the costs with a future added tax

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base and that developments may move to skirt environmental regulations down the road after having received city infrastructure and services.

The uncertainty caused by SB 2038 on planning and development in the ETJ impacts current residents of the extraterritorial jurisdiction and potentially creates a dampening effect on future investment in the ETJ. A resident of Georgetown's ETJ testified to this effect:

“One of the motivations for someone like myself to buy property and invest in that kind of a commercial development is it's inexpensive because it's not in the city limits, it's not in Austin, it's not in Round Rock. It's in the path of development... Another motivation is it's in the ETJ. So you have some assurance that what occurs around you has some level of control, some level of planning, some guidelines that have to be followed, it's not the wild wild west. With this law that's been passed in the legislature, it seems that we're going to end up with ETJs that look like Swiss cheese [on the map] before long. How do you possibly invest in an ETJ when you do not know what can happen right next door to you?”<sup>53</sup>

Furthermore, SB 2038 complicates long-range planning efforts by potentially creating competition between cities for land, especially for fast-growing cities.<sup>54</sup> Various cities, in Central Texas and elsewhere in the state, have raised the issue of city hopping as a complication to their planning efforts.<sup>55</sup>

The Fort Worth Assistant Manager outlined the city hopping issue, stating:

“Now, the property owners are in a position to cherry-pick which city they want to work with. So it creates competition, if you will, between communities, but it also can kind of mess up your planning for infrastructure planning and land use planning if property owners can try to come and go.”<sup>56</sup>

The City of Round Rock Planning Director echoed this point, stating that the ability of areas within extraterritorial jurisdictions to city hop – whether that be

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leaving one city to join Round Rock's ETJ or leaving Round Rock's ETJ to join another – creates uncertainty in their planning process.<sup>57</sup>

At a smaller scale, residents in the extraterritorial jurisdiction or adjacent to properties in the ETJ may have their own ability to plan for their property impacted. Though the law was passed as a means to remedy “regulation without representation” for ETJ residents, it has the potential ability to further impact ETJ residents without providing them with meaningful opportunities for protest or assent. According to the Mayor of Cedar Park, west of Round Rock:

“If your neighbors deannex in a way that you are no longer contiguous with the city, your neighbors may have prevented you from ever being annexed. That may have an impact on the options for that land in the future.”<sup>58</sup>

Further still, SB 2038 does not just allow a property owner to alter their own status in the ETJ. The law also permits property owners to potentially alter the “rights of other landowners who may not even want to be removed from a city's ETJ and affords [those landowners] absolutely no prior notice or meaningful opportunity to be heard before removal is automatically effectuated.”<sup>59</sup>

Once a property is released from the ETJ, “all ETJ regulations the city previously adopted that apply to the property are effectively nullified...and future ETJ regulations would be of no force and effect.”<sup>60</sup> However, for neighboring properties that remain in the ETJ, these regulations would still apply.

This uneven dynamic could result in inconsistent development and incompatible land uses, such as industrial plants next to residential lots or developments that create flooding and wastewater impacts that would otherwise be prohibited if the dis-annexed properties remained in the extraterritorial jurisdiction.<sup>61</sup> Not only could these incompatible land uses and development impacts affect a remaining ETJ property owner's ability to use their land, it could also affect their property values or make it difficult to sell their property in the future.<sup>62</sup>

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## What are the impacts to water sources?

Senate Bill 2038 gives landowners the power to exempt their land from certain water quality protections in the ETJ, which “can adversely affect the public interest and the interests of downstream users and the landowners’ neighbors who may prefer to stay in the ETJ.”<sup>63</sup> The potential negative effect of the law on water sources is of great concern in Central Texas, especially in the Edwards and Trinity aquifer regions.

Aquifers, springs, streams, and rivers in Central Texas are vital drinking water sources and economic engines. As such, many municipalities in this region have water quality protection ordinances and impervious cover limits that apply both within city limits and within the extraterritorial jurisdiction. These provisions are meant to protect water quality not just for city residents, but also for residents in the ETJs and for the wider region.

As land is withdrawn from ETJs, these stricter protections will cease to apply to the withdrawn parcels, potentially endangering local and regional water supplies. County and state regulations will prevail. This scenario will not only leave pockets of land within municipalities’ ETJs under less stringent protection, it will leave all residents in the area who rely on local water supplies at greater risk.

Most, though not all, of the municipalities analyzed for this report have some form of water quality protection ordinance or impervious cover limit or both that applies to subdivisions within the municipality’s corporate boundaries and within the ETJ. Most also have levels of protection specific to the Edwards or Trinity aquifer recharge zones (See Table 2).

Municipality	Water Quality Protection Ordinance?	Impervious Cover Limits?	Aquifer Recharge Zone Specific Regulations?	Preceding Regulations Applicable in ETJ?
Austin	Yes	Yes	Yes	Yes
Boerne	Yes	Yes	Yes	Yes
Buda	Yes	Yes	Yes	Yes
Bulverde	Not above TCEQ	Yes	Yes	Yes
Dripping Springs	Yes	Yes	Yes	Yes
Georgetown	Yes	Yes	Yes	Yes
City of Hays	Yes	Yes	Yes	Yes
Kyle	No	No	Yes	Yes
New Braunfels	No	No	Yes	Yes
Round Rock	No	No	No	NA
San Antonio	Yes	Yes	Yes	Yes
San Marcos	Yes	Yes	Yes	Yes
Wimberly	Yes	Yes	Yes	Yes

Table 2. Outline of water quality-related environmental ordinances of the surveyed municipalities, as of April 2024.

With the passage of SB 2038, there is no doubt as to whether new subdivisions will be built on land withdrawn from ETJs; there are concerns that these new subdivisions “will be built in environmentally sensitive areas that cannot sustain such high densities without seriously compromising the ecosystem benefits that undeveloped land provides – especially in the Aquifer Recharge and Contributing zones.”<sup>64</sup>

Various city officials in Central Texas have spoken against SB 2038 due to its potential impacts on water supplies in the region. A few examples are highlighted here:

“Because SB 2038 would allow landowners to disannex from the ETJ jurisdiction without justification and without equivalent levels of environmental protection for regional water quality to be provided by the county, we respectfully oppose SB 2038.” – Katie Coyne, Environmental Officer, City of Austin<sup>65</sup>

“SB 2038 also voids our ability [to] manage environmental standards, and to protect the fresh water source for Georgetown and beyond.” – Josh Schroeder, Mayor, City of Georgetown<sup>66</sup>

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City leaders in Hays City are “concerned about the potential adverse impacts of dense development on the Edwards Aquifer, which serves as the city’s primary water source.”<sup>67</sup>

Roxanne O’Neal, a Hays City Council member, “called what’s currently proposed an ‘environmental disaster’ – she said developers could drill wells into an aquifer that is facing emergency drought levels and dispose of treated wastewater near creeks and tributaries that flow into Barton Springs. ‘The geology behind our city, all the way to Little Bear Creek, is a very important recharge zone for the aquifer and everybody’s wells,’ she said.”<sup>68</sup>

Some developers and businesses, meanwhile, have highlighted that one appeal of the law is the ability to not be subject to stricter environmental regulations, which include cities’ water protection ordinances, and that instead they will be able “to build and operate under more limited county and state oversight.”<sup>69</sup>

The president of a development consulting firm based in Austin “believes the new law and ETJ release process can make properties more developable – and therefore more valuable – *by bypassing certain environmental regulations* and Austin’s ‘notorious’ permitting process” (emphasis added).<sup>70</sup>

Whether developers or other landowners will take advantage of the law in order to skirt stricter environmental regulations is not a theoretical scenario: Tesla, Inc. has removed its electric vehicle factory from Austin’s ETJ so that the factory “will no longer be subject to city of Austin environmental regulations.”<sup>71</sup>

### *Case Study: Impervious Cover Limits*

Limiting impervious cover over environmentally sensitive areas is exceedingly critical to the protection of local and regional water supplies – polluted runoff “is widely recognized by scientists as the greatest threat to water quality.”<sup>72</sup> Increases in impervious cover lead to increased sedimentation and pollution of runoff, which can negatively impact the storage capacity of reservoirs and drinking water treatment processes.<sup>73</sup> Impervious cover “reduces ground water recharge, threatening aquifer supplies, as well as impacting [groundwater-based]

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flow to streams, especially during periods of low rainfall,” which then impacts surface water supplies.<sup>74</sup>

By decreasing the ability of the ground to infiltrate storm water, impervious cover can lead to significant increases in the volume and velocity of flooding. Thus, even as flooding increases, leading to an appearance of more water, water tables begin to drop, leading to springs, streams, and wells fed by groundwaters to dry up.<sup>75</sup> With increasing impervious cover, cities, counties, and other local authorities must spend more of their limited budgets on flood preparation and prevention, emergency responses, new water supplies, and more expensive water treatments.

Impervious cover limits provide good examples of the more stringent environmental regulations that will no longer be applicable to released properties. Ten of the 13 cities surveyed had some form of impervious cover limit, which highlights the scope of the potential negative impact of deregulation in the ETJ. With the implementation of SB 2038, these limits and any watershed or water quality protection ordinances that were applicable to land within the ETJ are no longer applicable if a parcel is removed.

Properties released from extraterritorial jurisdictions are no longer required to follow any of these protective requirements. Upon dis-annexation, these parcels would be subject only to county and state regulations, the majority of which do not set impervious cover limits to protect water supplies, even in aquifer recharge zones.

Title 30, Chapter 213 of the Texas Administrative Code contains the state regulatory provisions related to the protection of the Edwards Aquifer Recharge Zone. It only has one provision related to impervious cover, and the provision is not a limiting requirement:

“An individual landowner who seeks to construct his/her own single-family residence or associated residential structures on the site is exempt from the Edwards Aquifer protection plan application



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requirements under this section, provided he/she does not exceed 20% impervious cover on the site.”<sup>76</sup>

The Edwards Aquifer Authority – a political subdivision of the state authorized to manage, enhance, and protect the Edwards Aquifer system – has no protective impervious cover limitations established in its rules.<sup>77</sup>

Of the counties containing the surveyed municipalities, only two – Hays and Travis – had any type of impervious cover incentive or limitation. In Hays County, these incentives were applicable only to conservation developments, which is an optional category of development. Very few, if any, developers take advantage of this option.<sup>78</sup>

Travis County is the only county of those analyzed that had impervious cover limits required by its subdivision regulations; these limits are applicable to subdivisions overlying portions of the Trinity and Edwards aquifers (See Figure 2).<sup>79</sup> Travis County is able to regulate impervious cover in portions of the county because it has an interlocal agreement with the City of Austin, which covers much of the county.<sup>80</sup>

The cities that set forth an impervious cover limit did so as part of a watershed protection ordinance or as part of their subdivision development regulations (See Table 2). All of the limits on impervious cover identified apply to the extraterritorial jurisdictions of those municipalities, and many of the impervious cover limits apply either specifically to or more strictly to aquifer recharge zones. These limits within both the corporate boundaries and extraterritorial jurisdictions of cities will be increasingly integral to the protection of the region’s water supplies as Central Texas continues to rapidly develop.<sup>81</sup> A few of these impervious cover limit sections are shown below (See Figures 3 – 7):

<b>482.216</b>	<b>Water Availability Protection of Surface and Groundwater Quantity and Quality<sup>17</sup></b>
(a)	Except for residential subdivisions governed by Subsection (b), subdivisions over the part of the Trinity Aquifer in a Western Watershed or over the Edwards Aquifer Recharge or Contributing Zone shall comply with this subsection.
	(1) Impervious cover in a commercial subdivision shall not exceed 45%, except impervious cover shall not be limited if the subdivision:
	(A) has its primary driveway access on a state road, or
	(B) complies with Section 482.944(b)(3), Alternate Standards.
	(2) Impervious cover in residential subdivisions shall not exceed 30%, except impervious cover shall not be limited if:
	(A) the total number of lots in the subdivision does not exceed the number of acres in the subdivision; or
	(B) the subdivision includes a conservation area meeting the conservation development requirements of Section 482.226, Conservation Area.
(b)	A residential subdivision that is supplied by groundwater from the Trinity or Edwards aquifers shall comply with this subsection in lieu of Subsection (a).
	(1) In subdivisions supplied by individual wells on lots, all lots shall be at least five acres in size.
	(2) In subdivisions supplied by a centralized groundwater system:
	(A) all lots shall be at least three acres in size; or
	(B) the total number of lots shall not exceed the number of acres in the subdivision divided by four.

Figure 2. Travis County impervious cover limits as outlined in Travis County Development Regulations Section 482.216.

§ 30-5-514 - POLLUTION PREVENTION REQUIRED.

- (A) In the watersheds contributing to Barton Springs, no development nor any revision, extension, or amendment thereof, may be approved unless it is designed, carried out, and maintained on a site-by-site basis to meet the pollution prevention requirements set forth below for the life of the project. In order to prevent pollution, impervious cover for all such development shall be limited to a maximum of 15 percent in the entire recharge zone, 20 percent of the contributing zone within the Barton Creek watershed, and 25 percent in the remainder of the contributing zone. The impervious cover limits shall be calculated on a net site area basis. In addition, runoff from such development shall be managed through water quality controls and onsite pollution prevention and assimilation techniques so that no increases occur in the respective average annual loadings of total suspended solids, total phosphorus, total nitrogen, chemical oxygen demand, total lead, cadmium, E. coli., volatile organic compounds, pesticides, and herbicides from the site. For a given project, impervious cover shall be reduced if needed to assure compliance with these pollutant load restrictions.
- (B) Within the watersheds contributing to Barton Springs, Section 25-8-92 (Critical Water Quality Zones Established) of the Land Development Code is amended so that in no event shall the boundary of the critical water quality zone be less than 200 feet from the centerline of a major waterway or be less than 400 feet from the centerline of the main channel of Barton Creek. No pollution control structure, or residential or commercial building, may be constructed in the critical water quality zone in these watersheds.

Source: City Code Section 25-8-514; Ord. 031211-11; Ord. 031211-42; Ord. 20131017-046; Ord. No. 20170615-102, Pt. 52, 6-15-17.

Figure 3. City of Austin impervious cover limits as outlined in Austin Code of Ordinances Section 30-5-514.<sup>82</sup>

Sec. 9.04.062 - Impervious cover

Per the city comprehensive plan, it is the intent of this section to preserve and protect the quality of watersheds and limit the amount of impervious cover in development. Recognizing there is an established correlation between increasing impervious cover and the impairment of water quality and increased erosion, the following limitations on impervious cover are set forth:

- (1) *Maximum limits.* Maximum limits on impervious cover are established as follows on developments occurring after the effective date of this article:
- a. For areas within the recharge and contributing zones of the Edwards Aquifer or Trinity Aquifer in the ETJ, the maximum impervious cover limit is 30 percent.
  - b. For areas within the city limits, impervious cover limits for tracts are established in the city's zoning ordinance according to the particular zoning district the tract is designated.

Figure 4. City of Wimberly impervious cover limits as outlined in Wimberly Code of Ordinances Section 9.04.062.<sup>83</sup>

Sec. 22.05.016. - Impervious cover.

- (a) Maximum limitations. Maximum limitations on impervious cover are established as follows on developments for which a site development plan is first filed after the effective date of this article:
- (1) For areas within the Edwards Aquifer recharge zone: Ten percent.
  - (2) For areas within the Edwards Aquifer contributing zone in the ETJ: 35%.
  - (3) For areas within the city limits, refer to the zoning ordinance:
    - (A) Zoning. Impervious cover limits for tracts within PGAs are established in the city's zoning ordinance according to the particular zoning district the tract is designated.

Figure 5. City of Dripping Springs impervious cover limits as outlined in Dripping Springs Code of Ordinances Section 22.05.016.<sup>84</sup>

7. *Impervious cover in water supply drainage areas.* In order to reduce the potential pollutant and contaminant load which may ultimately be carried by drainage into the city water supply, the maximum percentage of the area which may be covered by impervious surfaces within any subdivision in any drainage basin above a city water supply reservoir shall be limited. the limits of the water supply drainage basin shall be determined according to USGS maps and confirmed in the plat by a survey of the proposed subdivision site. In a subdivision which is to be developed in more than one (1) land use, the impervious surfaces in streets and alleys shall be counted and assigned as divided equally between the lot areas on both sides of the street or alley according to the frontage of the lot areas in each contrasting land use.

[EXPAND](#)

Context - Development Pattern	Maximum Percent Impervious Cover
Residential, < 1 dwelling unit/acre (gross)	10%
Residential, 1-2 dwelling units/acre (gross)	30%
Residential, >2 dwelling units/acre (gross)	50%
Nonresidential	65%

Figure 6. City of Boerne impervious cover limits as outlined in Boerne Unified Development Code Section 8-2.7.<sup>85</sup>

**TABLE 6.4 IMPERVIOUS COVER LIMITS WITHIN THE EDWARDS AQUIFER RECHARGE ZONE**

SIZE OF SITE	IMPERVIOUS COVER LIMIT
Up to and including three acres	40%
More than three acres and less than five acres	30%
Five acres or more	20%

Figure 7. City of San Marcos impervious cover limits as outlined in San Marcos Development Code Section 6.3.3.1.<sup>86</sup>

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## Recommendations

Millions of people rely on the aquifers and surface waters of Central Texas. Protection of property rights in extraterritorial jurisdictions must be responsibly balanced with the protection of the health, safety, and quality of life of all those who depend on these water sources, today and for generations to come.

Central Texas is rapidly growing, while at the same time experiencing the compounding impacts of increasing temperatures, more frequent drought, and more varied rainfall.<sup>87</sup> To ensure there is consistently water of appropriate quantity and quality available, and to limit the impacts on water supplies caused by increased development, the legislature should reevaluate and amend or repeal Senate Bill 2038.

At a minimum, the law should be amended to ensure land overlying aquifer recharge and contributing zones must still adhere to protective municipal regulations, such as impervious cover limits and water quality protection ordinances. An ideal, though admittedly unlikely, result of the reevaluation would be the repeal of SB 2038 and the re-annexation into cities' ETJs of the land released, if the cities choose to accept back the land.

Regardless of whether the legislature chooses to amend or repeal SB 2038, the legislature should grant expanded authority related to water quality protection and land use to counties, at least in the Trinity and Edwards aquifer region, and/or consider explicitly directing the Edwards Aquifer Authority to adopt and enforce impervious cover regulations for the Edwards Aquifer Recharge and Contributing zones within its boundaries.

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