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**Shrink To Fit: How Municipalities Can (Permissibly) Control Growth On The
Suburban Fringe**

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Introduction

The vision of the American rural countryside, the small towns and villages beyond ceaseless activity of the cities and the charmless sameness of the suburbs is fast becoming a vision of the past. The increased availability and ease of transportation coupled with the general macroeconomic move from heavy industry to technology and service sector jobs have pushed the squall of urban sprawl to the quaint countryside.

The immediate predicament this poses to the rural municipality is how to maintain the rural nature that current residents enjoy and that attracts future residents who are poor in number and wealthy in income who can perpetuate this serene lifestyle. Stated conversely, the question is how to prevent unattractive high-density developments from occupying the open areas of the rural municipality. But this issue is quickly muddied by both legal and practical concerns. Legally, the municipality may have few options to limit growth because prospective zoning tools may be considered exclusionary or beyond the scope of the powers delegated to the municipality. Practically, the municipality cannot foreclose the possibility of future residential development because that would cap its revenue base at present levels

This paper will examine the problems faced by communities on the suburban fringe in designing growth control ordinances that are effective in limiting high density development, while at the same time allowing for the possibility of future revenue streams. Specifically, the paper will examine the use of negative special assessment districts as a means of indirectly controlling growth on the suburban fringe. This paper will examine the bases for creating such districts as well as their susceptibility to legal challenge.

II. Proposing A Solution

Given the unique circumstances that ultra-suburban sprawl presents to municipalities, the usual zoning tools are of little assistance to these municipalities. Bluntly re-zoning remaining open area for an agricultural or other non-residential use is unworkable because it eliminates a potential revenue source for the municipality and exposes current residents to higher tax rates. Increasing minimum lot sizes is generally unworkable because the legal authority to do so is virtually non-existent¹.

However, one possible solution provides opportunity to control unwanted high-density residential development, in a legally responsible and viable manner, while maintaining the possibility for low-density, community friendly growth. This targeted growth is made possible by the creation of a negative special assessment district.² Indeed, this concept has its roots in the beginning stages of the western states' ongoing struggle to effectively allocate fresh water, a regionally scarce resource.³

Specifically, in *Wilson v. Hidden Valley Municipal Water District*, the court reviewed a municipal action that created a special 1,230-acre district to which it claimed it would be the sole provider of water service.⁴ But because of the scarcity of water in the region and the sparsely populated community's minimal demand for the water, the municipal district lacked the infrastructure necessary to supply water for users within the district.⁵ Following creation of the special district two landowners within the district sought to have their lands excluded from the district to obtain a more expansive water supply from one of two massive neighboring water districts. The landowners deemed this "opt-out" necessary to develop more fully the commercial operations on their agricultural ranches.⁶

The property owners alleged that special districts could not be created “to serve as an illegal regulator of land use or as an illegal zoning agency.”⁷ Particularly, the landowners claimed that while special districts could be created for the improvement of municipal water services – by imposing a levy on the residents in the district - municipalities could not create such districts to place an onus upon the residents without some form of beneficial service. The court disagreed. While special districts are “normally formed and maintained for the purpose of bettering either the water supply or the water service, or both . . . in our view a water district may properly be formed and maintained for largely negative purposes as well as positive purposes.”⁸

Following *Wilson*, a municipality that seeks to limit high-density growth, without re-zoning or amending current zoning ordinances could achieve such a goal by designing an ordinance that creates a negative special assessment district. This district would likely encompass the as yet undeveloped land within the municipality. Indeed, the likely parcels within a negative special assessment district are those large parcels apart from the already developed areas of the municipality. These areas will likely be included because while municipal leaders would like to see the areas developed, they would prefer slow development of low-density single family homes rather than inviting a high-density use such as a trailer park or other high-density community.

But *Wilson*'s proposed solution is inadequate. This paper therefore proposes two significant extensions. First, the ordinance proposed in this paper would have a more solid and substantiated basis as a foundation for its passage and approval.⁹ Second, the proposed ordinance relies not only on the denial of municipal water services, but the

whole host of municipal services ranging from sewer and water provision to fire and police protection to garbage collection and road maintenance.¹⁰

Specifically, the proposed ordinance would contain the following three provisions: First, a statement that the purpose of the ordinance is to preserve scarce municipal resources which, if extended to new users, would create irreparable shortages in the provision of those services.¹¹ Second, the creation of a geographical district or districts, which are currently undeveloped but which the municipality would prefer be slowly developed by low-density single family homes. Third, a statement that the residents in this district will not receive any municipally funded or subsidized products or services.¹²

The practical effect of the ordinance extends beyond the stated purpose of conserving municipal resources. In fact, the ordinance will limit growth caused by high-density residential developments. This practical effect is achieved by statutorily altering the market¹³ for residences in the municipality. Whereas the normal market for residential development includes the menagerie of dwelling units ranging from condominiums, to apartments, to custom-built luxury homes, to trailer parks, to cookie-cutter planned communities, the statutorily altered market practically eliminates the high-density developer as a consumer in this market.

Specifically, high-density developments are deterred from developing in the negative special assessment districts because of the marketing dilemma they would face in trying to sell homes in the district to consumers. Indeed, developers building in these districts can either build the homes and assume all the capital costs of providing the municipal services to the customers, or build the homes and tell the customers that in

addition to paying for the home, the customer is responsible for obtaining any and all municipal services that it desires.

In both of the above undesirable options, the developer is confronted with a significant decrease in its profit margin. By agreeing to provide all the normal municipal services privately for the new customer the developer has dramatically increased its costs and if it wishes to maintain a workable profit margin it must pass this cost along to the consumer. In passing the cost along to the consumer, the developer misses its target market for high-density homes.¹⁴ Consequently, developing the land for a high-density residential use and then attempting to pass along the cost to the future residents of the development is an impractical solution. Alternatively, if the developer overtly passes the cost of the municipal services along to the consumer, by informing the consumer that the individual is responsible for acquiring and maintaining the array of municipal services the developer faces the same conundrum. Likewise, the cost the developer passes along to its customers makes its development cost-prohibitive to its target consumers.

Furthermore, the practical effect of ordinances denying even single municipal services to new developments has been recognized as a powerful growth control tool by the courts. Indeed, “the power to ‘cut off one’s water’ . . . is a potent weapon in effecting a no-growth policy within a community.”¹⁵ Likewise courts have recognized that the provision of municipal services may also be abused as a tool of “coercion” in dealings between the municipality and developers.¹⁶

Therefore, the passage of the three-part ordinance calling for the conservation of municipal resources by refusing to extend municipal services to certain geographical districts within the municipality would achieve the practical goal of limiting or

extinguishing growth within the municipality. Simultaneously, the ordinance would strictly prohibit a massive encroachment on existing municipal resources caused by a large-scale new development, thereby accomplishing the theoretical goal of preserving scarce municipal resources. But a successful ordinance must do more than this – it must not only achieve its practical and theoretical goals, it must also withstand challenges to its legitimacy. The following section discusses the legitimacy of this proposed style of ordinance in the face of three distinct legal challenges.

III. Legal Challenges to the Ordinance

The proposed ordinance faces three likely challenges: First, a direct challenge to the legitimacy of the ordinance.¹⁷ Second, the plaintiff could challenge that the ordinance amounts to a taking of private property without just compensation in violation of the Fifth Amendment.¹⁸ Third, that the ordinance denies the developer substantive due process rights and the rights of the equal protection of the laws guaranteed by the Fourteenth Amendment.¹⁹

A. Direct Challenge

The Court has long recognized that the local municipality's power to zone and regulate land use has its "justification in some aspect of the police power asserted for the public welfare."²⁰ As such, the Court established the general rule that the decision of the municipality to zone or regulate land use in one certain way and not another is subject to limited judicial scrutiny.²¹ Consequently, the general approach towards judicial review of municipal ordinances asks whether the state has articulated a legitimate goal to serve the needs of the public and whether the ordinance is rationally related to that goal.²²

Nearly always, the reviewing court will find that the stated goal is legitimate and that the ordinance is rationally related to that goal.²³

Later decisions have limited, however, the broad rule articulated by the Court in *Village of Euclid*.²⁴ Specifically, many courts, realizing the potential for arbitrary application and abuse of the zoning power, began classifying zoning actions as either “legislative” or “judicial.”²⁵ Indeed, the *Fassano* court noted that the more particularized the nature of the legislative action towards the interests of an individual or small group, the more likely it was to view the actions of the legislative body as judicial rather than legislative in nature.²⁶ So, where the court found that the action was more judicial than legislative in nature, it would review that “quasi-judicial” decision with less deference than a traditional legislative decision.²⁷

Practically, the distinction between what constitutes a legislative and a judicial or quasi-judicial decision involves a tenuous inquiry into the facts of the individual decision.²⁸ Generally, the inquiry turns on whether the legislative body creates a general policy for the betterment of the community or whether it is reacting to a concern of a specific individual or interest.²⁹

But just because a legislative decision affects a smaller interest does not necessarily dictate that it will be classified as a judicial rather than a legislative action.³⁰ Indeed, the size of the affected interest alone is “only one factor” considered in the determination of whether the action taken by the legislative body is legislative or judicial in nature.³¹ Rather, the court focuses its inquiry on whether the action of the legislative body is in harmony with the needs of the community or whether it meets or exploits the needs of the individual interest.³²

Courts should analyze a direct challenge to the proposed ordinance by conducting a two step analysis. First, the court must ask whether the decision of the legislative body was legislative or judicial in nature. Second, the court must apply the review mandated by this initial classification.³³

In conducting the first part of the analysis, a court is most likely to find that the actions of the legislative body enacting a negative special assessment district are legislative and not judicial in nature. Indeed, the *Wilson* court, presented with much the same issue, decided that the action of a quasi-legislative body³⁴ enacting an ordinance creating a negative special assessment district for the preservation of municipal water was a quasi-legislative action.³⁵

Initially, the court recognized that the decision to create the negative special assessment district facially appears more judicial than legislative in nature.³⁶ Specifically, the court admitted that the small nature of the affected interest and the fact that the legislative body conducted administrative hearings and not legislative fact-finding sessions were generally indicative of judicial rather than legislative action.³⁷ However, the court ultimately decided that these factors were not the touchstone of the legislative/judicial determination.³⁸ Rather, the court held that the legislative or judicial nature of an action depended on an analysis of “the nature of the *function* performed.”³⁹

In *Wilson*, the court held that the chief function of the Municipal Water District in creating the negative special assessment district was not acting as a disinterested tribunal, as though it were acting in a judicial function.⁴⁰ Rather, the Municipal Water District was acting as an interested party assessing and advancing the concerns of the community as a whole.⁴¹ Specifically, the Municipal Water District was asked to make a narrow

exception to a long-standing policy of the municipality.⁴² In upholding the character of the negative special assessment district against the exception claimed by the individual interests, the Municipal Water Board was acting in a legislative fashion by advancing the interests of its constituency against the requests of a select number of individuals.⁴³ Indeed, the action of the Municipal Water District was centered on the quintessential legislative function of determining whether the presented solution was “in harmony with the comprehensive plan. . . .”⁴⁴

The court should treat the proposed ordinance creating a negative special assessment district consistently with the challenge to the special assessment district presented in *Wilson*. As in *Wilson*, a municipality enacting a negative special assessment district does so not to vex any particular individual or interest, but instead to effectuate the desires of the community. The municipality proposing to enact a negative special assessment district is not passing a disinterested judgment on a proposal submitted to it.⁴⁵ Rather, the municipality is effectuating the desires of its citizens in legislating for the type of community that those citizens demand of their elected leaders.⁴⁶ Therefore, a court evaluating the actions of a municipality creating a negative special assessment district is likely to find that action is legislative in nature.

If the decision is legislative in nature, courts must afford that decision substantial deference.⁴⁷ This deference limits the court’s inquiry to a two-step facial analysis.⁴⁸ First, the court may ask whether the object of the municipality’s goal is legitimately within the police powers delegated to the state.⁴⁹ Second, the court may ask whether the solution proposed by the municipality is rationally related to the goal articulated by the municipality.⁵⁰

In order to withstand the court's mild scrutiny, the legislation must articulate a permissible municipal goal. In particular, the drafters of a negative special assessment district ordinance must clearly state that the purpose of the ordinance is to conserve scarce and dwindling municipal resources. Importantly, what the drafters of the ordinance must avoid is language that articulates the ordinance's practical side effects – the limitation of growth – as the goal of the ordinance. Indeed, this precise drafting is critical because while the preservation of municipal resources is a permissible goal for the municipality,⁵¹ a blunt and arbitrary limitation of growth is not a permissible goal.⁵²

The next requisite is that the proposed solution must be rationally related to the stated goal. Indeed, the relationship between the proposed solution and the stated goal need not be so strong that the proposed solution is the best or most effective means of accomplishing the stated goal.⁵³ Rather, the court need only find that the proposed solution is more than an “arbitrary fiat” imposed upon the citizenry without regard to the stated goal or any other goal.⁵⁴

Applied instantly, the creation of negative special assessment districts is directly related to the preservation of scarce municipal services and resources. Indeed, the negative special assessment districts prospectively cap the demand for municipal resources at a level which insures, all other things remaining equal, that the municipality may continue to provide services at their current quantity and quality levels. This action is not an “arbitrary fiat,” rather it is an effective and prospective measure for conservation of municipal resources – a legitimate aim for municipal governments.

B. Takings Challenge

Increasingly, the Court has imposed the Fifth Amendment protection in favor of property owners to check the increasing use of the zoning power by the state.⁵⁵ Over the past century the Court's interpretation of the Fifth Amendment has expanded to include two general sub-categories of evaluation, regulatory takings⁵⁶ and permanent physical invasion of property.⁵⁷ In each of these categories the government action, if it excessively interferes with the owner's property rights, may trigger the compensation requirement of the Fifth Amendment.

Within the subcategory of regulatory takings, the Court developed a categorical rule specifying situations in which the government would always be liable for a taking.⁵⁸ In particular, when a regulation forces a private property owner to "sacrifice *all* economically beneficial uses" of its land, then a taking has occurred.⁵⁹ In application, before the court may determine whether all economically viable use of the land has been stripped, it must first determine what the whole of the interest in the property is.⁶⁰ Although the Court has suggested in dictum that the appropriate test for determining the nature of the property interest in takings evaluations is an examination of "how the owner's reasonable expectations have been shaped by the State's law of property. . . ."⁶¹

Despite the existence of this categorical rule, uncertainty surrounds claims in which the government regulation has taken a substantial amount, yet not all, of the economic value of the property interest. Specifically, any government regulation that goes "too far" in dictating the way a private property owner may use that property remains a taking.⁶² Although the Court has since narrowed the ambiguous standard set forth in *Pennsylvania Coal* with the per se rules of *Lucas* and *Loretto*, it remains largely

unrefined when applied to takings involving less than “all economically viable use” of the property.

The only meaningful definition given to the scope of partial takings came from the Court in *Penn Central Transportation Company*.⁶³ In particular, the Court held that determining whether the regulation has gone “too far” is dependent on two key factors: the nature of the government action and the extent of interference that the government action produces.⁶⁴

Practically, any takings claim that may be advanced challenging the creation of the negative special assessment district would come from a property owner whose plans for residential development of its property were hampered by the additional costs or burdens imposed by the ordinance. Consequently, it is unlikely that any reviewing court will find that the ordinance constitutes a takings under any of the *per se* rules set forth above.⁶⁵

Accordingly, the analysis then shifts to the balancing test prescribed by *Penn Central*.⁶⁶ A court examining the negative special assessment district under a *Penn Central* analysis would first note that the government regulation at issue is more like an interference with the economic viability of the property than a physical invasion of the land. Indeed, the negative special assessment district does not seek to impose any government structure on the citizens’ land, but conversely seeks to keep local government services from ever reaching the affected citizens’ land. Consequently, employing the first stage of the *Penn Central* analysis, a court is likely to find that the regulation at issue is more like an interference with economic interests than a physical invasion of the land.

So, thus the second prong of the *Penn Central* test requires that the evaluating court will examine the extent to which the property owner's economic interests are hindered by the regulation.⁶⁷ In making this determination, the court must start with the deceptively difficult task of determining the "total" of the property interest at issue.⁶⁸ In fact, little judicial guidance exists on the difficult issue of determining the scope of the property owner's total interest in litigating a takings claim. The most influential view espoused on this subject comes from the Court's dictum in *Lucas*.⁶⁹ This view suggests that the court examine the property owner's reasonable expectations for use of the property given the state's property laws.⁷⁰

Employing the Court's dictum analysis from *Lucas*, a court reviewing a takings claim of a property owner within a negative special assessment district is likely to find that the property interest of the owner is slight. In fact, this property interest is not likely to extend to the right to construct a residence on that property. Indeed, the general rule is that state laws will not accord "legal recognition and protection"⁷¹ to a property owner's right to construct a home in an area designated for residential use.⁷² Likewise, zoning is not a state offer of "legal recognition and protection" to the right to receive municipal services. Therefore, if the developer no more than owns the property in question, then the state cannot affect or take any of the owner's economic property interests by creating a negative special assessment district.

But even if the developer obtained the necessary permits and the final discretionary permission of the municipality and incurred substantial expenditures in improving the property, the vested rights that the developer obtained still would not include a right or property interest in receiving municipal services. Indeed, the

possession of home or property within a municipality does not, in itself, guarantee access to any service that the municipality may provide.⁷³ Consequently, even though a developer may have a vested right to develop the property for a dense use, the municipality could still include that property in a negative special assessment district without affecting any of the developer's rights.

In sum, any potential challengers to the negative special assessment district are unlikely to show that the state violated either of the *per se* rules against takings. Likewise, a potential challenger to the negative special assessment district is unable to demonstrate that the creation of the negative special assessment district goes "too far" in interfering with a recognized property right. Consequently, any challenge to the creation of a negative special assessment district clothed as a takings challenge is likely to fail.

C. Fourteenth Amendment Challenges

From the text of the Fourteenth Amendment,⁷⁴ two main categories of challenges to state actions can arise. A person may claim that the state violated his or her Fourteenth Amendment rights either by denying that individual "due process" or by denying the individual "equal protection of the laws." Indeed, a dissatisfied property owner could plausibly employ either of these challenges against a municipal ordinance creating a negative special assessment district.

1. Substantive Due Process – Fundamental Right Challenge

Among other rights,⁷⁵ the Due Process Clause of the Fourteenth Amendment guarantees that the government cannot prohibit the exercise of certain "fundamental rights" enumerated in the Constitution or Bill of Rights or implied therein.⁷⁶ If the state proposes to restrict a fundamental right, it must articulate a compelling state interest and

it must show that the restrictive action is narrowly tailored to achieve that compelling interest.⁷⁷

In giving flesh to the skeletal terms of the Due Process Clause, the Court has recognized the existence of several “fundamental rights” afforded protection under the Due Process Clause.⁷⁸ However, courts have refused to recognize a right to receive municipal services as a “fundamental right.”⁷⁹ Indeed, this refusal is in harmony with the Court’s constitutional interpretation that the necessities of life are not “fundamental rights” safeguarded by the substantive Due Process Clause.⁸⁰ Consequently, any direct plea to the court that the negative special assessment district has denied residents their fundamental right to receive necessary municipal services is likely to fail.

A plaintiff may bring a more indirect substantive due process challenge to a negative special assessment district, however, by claiming an infringement on the fundamental right to interstate travel.⁸¹ Specifically, an individual could allege that the burdens implicitly placed on the property through the creation of a negative special assessment district would inhibit that individual’s ability to move freely to the area from another state.⁸²

Although the negative special assessment district places a penalty on those moving into the district, thereby burdening the movement of citizens from state to state, this burden does not directly effect *interstate* migration. Indeed, unlike the chief cases establishing the fundamental right to travel, the creation of a negative special assessment district does not contain a residency requirement for the reception of the municipal services.⁸³ Instead, the negative special assessment district provides that no homes, regardless of where the homeowner may have previously lived, will receive municipal

services.⁸⁴ Consequently, no interstate travel right is burdened or penalized by the creation of a negative special assessment district. Although relocation to the community adopting the negative special assessment district may be hampered by the creation of the district, such a right is not comparable to the fundamental right to interstate travel

2. Equal Protection Challenge

Stated broadly, the Equal Protection Clause requires the state to treat similarly situated individuals similarly. Indeed, the Equal Protection Clause was designed to eradicate government discrimination, explicit or implicit.⁸⁵ But the general protection granted by the Equal Protection Clause is tempered by the practical difficulty encountered in its administration. Specifically, because government action will always advantage or burden one group of people more or less than another group of people, a mathematically equal administration of the laws is impossible.⁸⁶

In order to advance the purposes of the Equal Protection Clause and simultaneously allow for the government to function, the Court has developed a multi-tiered system of evaluating whether a law impermissibly favors or burdens one group over another.⁸⁷ In fact, depending on the group against whom the discrimination is alleged, the state's action will be evaluated with strict, intermediate or mere rational basis level scrutiny.⁸⁸ Therefore, the analysis of an Equal Protection claim is a two-step process. The first step requires the evaluation of the interest that is subject to discrimination - in order that the court might properly determine what level of scrutiny to apply⁸⁹ - and the subsequent application of that scrutiny to the case at hand.⁹⁰

In Equal Protection actions challenging land use decisions, plaintiffs typically challenge the municipal or state action on one of two bases. If an appropriate plaintiff

class can be found, some plaintiffs may institute a suit claiming that the municipal action is racially discriminatory in both its intent and impact and consequently subject to strict scrutiny review.⁹¹ Alternatively, a plaintiff can claim that on the basis of some non-suspect classification the municipality discriminated against the plaintiff by either forcing the plaintiff to bear some extra burden thereby mandating minimum scrutiny review.⁹² Although a plaintiff could plausibly use either of these means to advance an Equal Protection challenge, the far more likely claim to emerge and succeed is a claim alleging discrimination against a non-suspect classification.

Indeed, the first difficulty in making an Equal Protection claim on behalf of a suspect class is finding a suspect class that has been injured by the action of the municipality.⁹³ Even supposing that a member of a suspect class is identified as receiving disparate treatment, this disparate treatment alone is not sufficient to maintain a claim for violation of the Equal Protection Clause.⁹⁴ Specifically, the plaintiff alleging an Equal Protection violation must demonstrate that the government intended to discriminate against the plaintiff's interests.⁹⁵

But demonstrating intentional discrimination is extraordinarily difficult under the standard set forth in *Arlington Heights* because the *Arlington Heights* factors require an almost overt statement by the legislative body evidencing intent to discriminate against a plaintiff.⁹⁶ Given that overt statements evidencing racism have all but been eradicated from official government discourse, it is extremely unlikely that a plaintiff could demonstrate government intent to discriminate against racial minorities. If intent to discriminate against a racial minority is not demonstrated the appropriate level of review is a rational relation review.⁹⁷

Alternatively, and practically more likely, developers owning land in the negative special assessment district will claim that the government action has unduly burdened them. In fact, developers challenging the creation of the negative special assessment district could easily demonstrate the prerequisite of disparate treatment before proceeding with an Equal Protection claim.⁹⁸ Indeed, the negative special assessment district ordinance on its face makes a classification. Specifically, this classification is between some houses in the municipal limits that will receive municipal services and some areas in which homes will not receive municipal services.

From this *prima facie* showing of disparate impact, the claimants must then demonstrate that the government created distinction is impermissible because the state action is not rationally related to any legitimate state goal.⁹⁹ In fact, it is likely that the arguments for an Equal Protection claim will pattern themselves after the arguments successfully advanced to defeat local ordinances that specify a minimum lot size as a subversive means of controlling community growth.¹⁰⁰

Indeed, the comparisons between minimum lot size requirements and the creation of the negative special assessment district illustrate the flexibility that the negative special assessment district provides.¹⁰¹ Although a minimum lot size requirement effectively proscribes the population and density of the municipality, this limitation does little to affect any other, more legitimate state goals, such as environment preservation or the provision of municipal services.¹⁰² Therefore, if the municipal ordinance is unable to rationally achieve a legitimate state goal, then the ordinance does not pass the Court's minimum scrutiny requirement and must be struck as violative of the Equal Protection Clause.¹⁰³

In contrast, the creation of a negative special assessment district places an immediate limitation on the demand for municipal services. Consequently, this immediate demand limitation not only plausibly achieves the legitimate state goal¹⁰⁴ of conserving municipal resources, it also actually achieves that goal by eliminating the possibility of future municipal resource users.¹⁰⁵ Therefore, the negative special assessment district plausibly and actually accomplishes - and is thereby rationally related to - the legitimate state goal of conserving municipal resources.

In sum, the negative special assessment district is likely not violative of the Equal Protection Clause. Indeed, unless a legislative body, through a series of actions strongly implies that the ordinance was enacted for an entirely impermissible and racially discriminatory purpose, then the ordinance is likely to avoid a strict scrutiny review. In fact, the likely scenario is that developers adversely impacted by the decision will claim that the ordinance could not plausibly relate to the goal of resource conservation articulated by the state. But because the municipality can objectively demonstrate that the negative special assessment district will immediately freeze the demand for scarce municipal resources, thereby conserving those resources, the state action plausibly accomplishes the legitimate state goal. Therefore, the creation of a negative special assessment district satisfies the minimum scrutiny review for discrimination on a non-suspect basis.

IV. Conclusion

Municipalities seeking to maintain their rural character, control growth and preserve a high quality of life for their inhabitants, while at the same time not foreclosing possibilities for revenue growth can achieve all of these objectives by implementing a

negative special assessment district policy for undeveloped residential tracts of land.

The negative special assessment district provides flexibility not only by allowing for growth at a rate that does not inhibit the provision of municipal services, but also by the fact that this growth control solution is flexible enough to withstand legal challenge to its validity. Therefore, rural municipalities on the suburban fringe wishing to preserve the charm and quaintness of their small town ought to give serious consideration to the creation of negative special assessment districts as a legal and effective means of growth control.

¹ See generally, *National Land & Inv. Co. v. Kohn*, 215 A.2d 597 (Pa. 1965) (Court struck an ordinance establishing a minimum lot size for residential developments is invalid as an exclusionary use of zoning beyond the police powers of the state).

² The concept of the negative special assessment district, if not the phrase itself, originated in the California Court of Appeals. See *Wilson v. Hidden Valley Municipal Water Dist.*, 63 Cal. Rptr. 889, 897-98 (Cal. Ct. App. 1967).

³ See *Wilson*, 63 Cal. Rptr. at 897-98.

⁴ See *id.* at 891.

⁵ Indeed, the District did “not own and . . . made no attempt to obtain any water facilities and has no assets except a bank account. . . .” See *id.*

⁶ The desires of the two property owners/plaintiffs in the action – to gain access to the large water supplies of the surrounding water districts which supplied the City of Los Angeles – was exactly the scenario that the municipality of Hidden Valley sought to limit. As the court noted:

Practically all of the people owning land or living within the Valley thought [at the time of the creation of the district] and apparently still think that if any part of the Valley becomes part of these [larger, neighboring] districts and a supplemental water supply is thereby made available to the Valley, it will be impossible to maintain their present agricultural way of life and subdivision and urbanization will inevitably follow.

Id. at 890.

⁷ See *id.* at 897.

⁸ *Id.*

⁹ Indeed, given the subsequent developments of California case law, it is unlikely that the rationale given for passing the *Wilson* ordinance would pass muster today. See *Swanson v. Marin Municipal Water Dist.*, 128 Cal. Rptr. 485, 492-93 (Cal. Ct. App. 1975) (A rational basis must be stated to support an ordinance denying municipal services to a particular area of the municipality, however, “growth control” is not a legitimate basis for denying these services.)

¹⁰ Although focusing solely on denial of water services may be an effective method of indirectly controlling growth in the water poor western states, it is less effective in many Midwestern states where alternative water supply sources such as wells and lakes are abundant. Cf. Herman, Dennis, J., *Sometimes There’s Nothing Left to Give: The Justification for Denying Water Service to New Customers to Control Growth*, 44 Stan. L. Rev. 429, 431 (1992).

¹¹ As is explained *infra* in section III-A of this paper, the stated purpose of the ordinance must be the conservation of municipal resources and not the limitation of growth.

¹² The unstated premise in the ordinance is that while the negative special assessment district will not receive any municipal services, residents therein will continue to be taxed at the same rate as other residents in the municipality. *See Rose v. Plymouth Town*, 173 P.2d 285, 286 (Utah, 1946) (Payment of taxes to the municipality does not entitle one to receive municipally provided services).

¹³ Contrary to the idealistic Jeffersonian view of an agrarian-local democracy, present-day municipalities are as much in the business of marketing themselves to potential future residents and businesses as they are in governing their citizens. This proposed ordinance is no more than a new strategy in a municipality's marketing plan – targeting wealthy suburbanites willing to pay a premium for living undisturbed in the countryside. The marketing strategy also offers security in the fact that these suburbanites can live in the quiet countryside away from the sprawling sameness of the suburbs.

¹⁴ Typically the market for high-density residential dwellings are a lower to middle income individuals and families. Luring these individuals to a community with a negative special assessment district by shifting the price of the provision of municipal services on to these residents and forcing them to pay a premium for the solitude of the countryside is unlikely to be effective.

¹⁵ *Swanson*, 128 Cal. Rptr. at 493 (upholding local ordinance placing a moratoria on the extension of municipal water service).

¹⁶ *Reid Development Corp. v. Township of Parsippany-Troy*, 107 A.2d 20, 23 (N.J. Super. Ct. App. Div. 1954) (upholding an ordinance requiring developers to pay for all infrastructure costs associated with the extension of municipal water services to their development).

¹⁷ This direct challenge would likely come from a developer who would specifically seek equitable or mandamus relief forcing the municipality to extend its services to the developer. Indeed, the court may review the actions of a municipality to determine whether they are beyond those powers that the state has granted to the municipality. *Accord. Wilson*, 63 Cal. Rptr. at 892

¹⁸ “[N]or shall private property be taken for public use without just compensation.” U.S. CONST. amend. V.

¹⁹ “[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend XIV § 1.

²⁰ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389-90 (1926).

²¹ The test implied by the Court in *Village of Euclid* was whether the ordinance “passes the bounds of reason and assumes the character of a merely arbitrary fiat.” *Village of Euclid*, 272 U.S. at 389 (quoting *Purity Extract Co. v. Lynch*, 226 U.S. 192, 204).

²² *See id.*

²³ But the Court has not always blanketly approved to the zoning decisions of local municipalities. Indeed, the Court stated that “governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited” *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1927) (invalidating an ordinance extending residential zoning to a plot of land adjacent to an existing industrial zone without citing how that zoning improves the health, safety and welfare of the municipal inhabitants).

²⁴ *See generally, Fassano v. Board of County Commissioners of Washington County*, 507 P.2d 23 (Or. 1973) (Legislative decision to change the use zone for one parcel of property without factually justifying the reasons for the change was a decision not entitled to “legislative deference.”); *see also Chrobuck v. Snohomish County*, 480 P.2d 489, 495-96 (Wash. 1971)

²⁵ *Fassano*, 507 P.2d at 26.

²⁶ *See id.* (Ultimately, the court justified this distinction by stating that after “having weighed the dangers of making desirable change more difficult against the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government we believe that the latter dangers are more to be feared.” *Id.* at 30).

²⁷ *See id.* (“By treating the exercise of authority by the commission in this case as the exercise of judicial rather than of legislative authority . . . [the court thereby] . . . enlarg[es] the scope of review on appeal. . . .” *Id.*

²⁸ *See id.* (Indeed, the court noted that identifying the distinction between judicial and legislative actions, while necessary, would be highly fact-sensitive and was unlikely to produce “absolute standards and mechanical tests.” *Id.*)

²⁹ See *id.*

³⁰ See *Wilson*, 63 Cal. Rptr. at 894 (“Legislative bodies often act in response to specific petitions and with regard to specific parties.” *Id.*)

³¹ *Goffinet v. County of Christian*, 357 N.E.2d 442, 449 (Ill. 1976) (Denying a direct challenge to the grant of special use permit affecting only one interest.)

³² See *Goffinet*, 357 N.E.2d at 449 (The court upheld the legislative body’s decision in this case because it was “in harmony with the comprehensive plan . . . emphasiz[ing] the importance of shifting from agriculture to industry in the future.” *Id.*)

³³ If the review occasioned is the traditional legislative review, the court will only facially inquire as to the legitimacy of the stated goal and the rational relationship between that goal and the means employed to achieve the goal. See *Fassano*, 507 P.2d at 28. Alternatively, if the court determines that the action was judicial in nature, it will conduct a more extensive inquiry into the sufficiency of the facts supporting the legislative body’s decision to enact the particular ordinance or decision. See *id.*

³⁴ In fact, the legislative body acting in *Wilson* was a “Municipal Water District”, a sub-municipal body created and empowered to act under California law. *Wilson*, 63 Cal. Rptr. at 890. The distinction between the municipal and sub-municipal authority, however, is irrelevant in this analysis.

³⁵ See *id.* at 893.

³⁶ See *id.*

³⁷ See *id.* at 893-94.

³⁸ See *id.* at 894.

³⁹ *Id.* (emphasis in original); accord. *Goffinet* 357 N.E.2d at 449.

⁴⁰ See *Wilson*, 63 Cal. Rptr. at 894.

⁴¹ See *id.*

⁴² See *id.* at 895.

⁴³ See *id.*

⁴⁴ *Goffinet*, 357 N.E.2d at 449.

⁴⁵ Cf. *Wilson*, 63 Cal. Rptr. at 894-95 (“[T]he District was not hearing [the individual petitions] as a disinterested tribunal deciding merely the question of whether the lands directly and immediately affected, should in whole or in part, be excluded from the District. . . .” *Id.* at 894)

⁴⁶ Cf. *Wilson*, 63 Cal. Rptr. at 894-95 (The Board’s “dominant concern had to be the effect its actions would have not merely upon the interests of those owning or living upon the land immediately affected by the petitions, but also upon the interests of the people owning or living upon the land within the remainder of the District.” *Id.* at 894); accord. *Goffinet*, 357 N.E.2d at 449 (“[T]he construction and operation of this proposed gasification plant are in harmony with the comprehensive plan for the use of property in Christian County. As stated above, the plan has emphasized the importance of shifting from agriculture to industry in the future.” *Id.*)

⁴⁷ See *Fasano*, 507 P.2d at 580-81 (“Ordinances laying down general policies . . . are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an abuse of authority.” *Id.*)

⁴⁸ See *id.*

⁴⁹ See *Village of Euclid*, 272 U.S. at 387.

⁵⁰ See *id.*

⁵¹ Cf. *Swanson*, 128 Cal. Rptr. at 489 (A municipality “is empowered to anticipate a future water shortage and to impose appropriate regulations and restrictions where, lacking such control, its water supply will become depleted and it will be unable to meet the needs of its customers.” *Id.*)

⁵² See *City of Boca Raton v. Boca Villas Corp.*, 371 So.2d 154, 157 (Fla. Ct. App. 1979) (The court invalidated various ordinances to cap utility permits pursuant to an amendment in the City Charter – approved by voter initiative and referendum – capping the city structures at 40,000. The court stated that the goal of so arbitrarily limiting growth within a city was beyond the police power delegated to the municipality. See *id.*)

⁵³ See *Village of Euclid*, 272 U.S. at 388-89

⁵⁴ *Id.*

⁵⁵ “[N]or shall private property be taken for public use without just compensation.” U.S. CONST. amend. V.

⁵⁶ See generally, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)

⁵⁷ See generally, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The *Loretto* rule requiring compensation for physical invasions of property is inapplicable in the evaluation of negative special assessment districts because nothing associated with the creation of the districts involves a physical entry onto a person's property.

⁵⁸ *Lucas*, 505 U.S. at 1019.

⁵⁹ *Id.* (emphasis in original).

⁶⁰ See *id.* at 1016, n.7 (“Regrettably, the rhetorical force of our ‘deprivation of all economically feasible use’ rule is greater than its precision, since the rule does not make clear the ‘property interest’ against which the loss of value is to be measured.” *Id.*)

⁶¹ *Id.* As noted, this attempted clarification of the problem of “segmentation” or partial takings analysis was proposed in dictum because, as the court noted, it was “able to avoid th[e] difficulty in the present case.” *Id.* Consequently, the reasonable expectations test amounts to little more than judicial conjecture and fails to provide meaningful guidance for future takings cases.

⁶² *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Co.*, 260 U.S. at 415).

⁶³ 438 U.S. at 124.

⁶⁴ See *Penn Cent. Transp. Co.*, 438 U.S. at 124 (Stated otherwise, these factors examine whether the nature of the government action is more akin to a physical appropriation, or more akin to a regulatory limitation on the use of land. The more the regulation is akin to a physical appropriation of property, the more the court will look to the permanency of the effect of the regulation. Correspondingly, the more a regulation is akin to an economic interference with the value of the land to the landowner, the court will focus more on the economic impacts on the owner. See *id.*

⁶⁵ No party may seriously contend that the *per se* rule of *Lucas* should apply. Certainly, a parcel of property zoned for residential use included in a negative special assessment district would suffer some diminution of its economic value because it will have to either go without municipal services or somehow provide or contract for those services on its own. But it will not suffer a loss of all economically viable use of the property because an owner could still practically build a home on the land, it will only be more costly. Consequently, although the loss in value to the affected property in the negative special assessment district may be serious enough to deter major planned development, it is not serious enough to render the property “valueless.”

⁶⁶ See *supra* n. 64.

⁶⁷ See *Penn Cent. Transp. Co.*, 438 U.S. at 124.

⁶⁸ Of course, determining the total property interest at issue is a necessary first step so that the actual interference with the economic value of the property may be measured against the value of the property interest in the absence of this interference. See *Lucas*, 505 U.S. at 1016 fn. 7. This comparison allows the court to determine whether the regulation has gone “too far” and has become a taking. See *Penn Cent. Transp. Co.*, 438 U.S. at 124.

⁶⁹ See *Lucas*, 505 U.S. at 1016 fn. 7.

⁷⁰ See *id.* (“The answer to this difficult question might lie in how the owner’s reasonable expectations have been shaped by the state’s law of property. . . .” *Id.*)

⁷¹ *Id.*

⁷² See *Avco Community Developers, Inc. v. South Coast Reg’l Comm’n*, 553 P.2d 546, 554 (Cal. 1976) (“It is beyond question that a landowner has no vested right in existing or anticipated zoning”) An extensive survey of the law of vested rights for developers is beyond the scope of this paper. But the key concept, for purposes of this paper, is that vesting of rights does not occur until the developer, in reliance on the zoning or building permit, (I) makes substantial expenditures on the development and (II) either (a) has received a building permit or (b) has received that last discretionary approval from the authorizing governmental unit. See *Avco Community Developers*, 553 P.2d at 550 (vesting occurs when developer has incurred substantial expenditures and has received final permit approval from the municipality); see also *County of Kauai v. Pacific Standard Life Ins. Co.*, 653 P.2d 766, 776 (Haw. 1982) (vesting occurs when developer has made substantial expenditures and the government has taken its last discretionary action).

⁷³ See *Rose*, 173 P.2d at 286 (Municipality has no duty to provide its residents with water service); see also *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984) (Municipality has no duty to provide fire protection); *Pleasure Bay Apartments v. City of Long Branch*, 328 A.2d 593, 599 (N.J. 1974) (Municipality has no duty to provide garbage collection services); *Chidester v. City of Hobart*, 631 N.E.2d 908, 913 (Ind. 1991) (Municipality has no duty to provide sewer service to its residents); *Warner/Elektra/Atlantic Group v. County of DuPage*, 762 F. Supp. 784, 788 (N.D. Ill. 1991) (Municipality has no duty to provide roads and road maintenance to its residents). The issue of whether citizens have a right to the provision of municipal services is discussed in greater detail in Section III-C-1, *infra*.

⁷⁴ “[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend XIV § 1.

⁷⁵ The Due Process Clause also guarantees a right to “procedural due process” including a right to notice and opportunity to be heard before the state may deprive the individual of a constitutionally protected interest. See generally, *Mathews v. Eldridge*, 425 U.S. 319 (1976). However, a challenge based on this “procedural” right would involve the fact sensitive inquiry into whether the ordinance was passed and enforced properly and is beyond the scope of the hypothetical proposed in this paper.

⁷⁶ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)

⁷⁷ See, e.g., *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1965).

⁷⁸ See generally, *Griswold*, 381 U.S. 479 (Right to use artificial birth control methods); *Roe v. Wade*, 410 U.S. 113 (Right to abortion); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to direct education and upbringing of one’s children); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (Right to marry); *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957) (Right to pursue the occupation of one’s choosing); *Harper*, 383 U.S. 663 (Right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (Right to interstate travel)

⁷⁹ See *Rose*, 173 P.2d at 286 (Municipality has no duty to provide its residents with water service); see also *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984) (Municipality has no duty to provide fire protection); *Pleasure Bay Apartments*, 328 A.2d at 599 (Municipality has no duty to provide garbage collection services); *Chidester*, 631 N.E.2d at 913 (Municipality has no duty to provide sewer service to its residents); *Warner/Elektra/Atlantic Group v. County of DuPage*, 762 F. Supp. 784, 788 (N.D. Ill. 1991) (Municipality has no duty to provide roads and road maintenance to its residents).

⁸⁰ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (The “importance” or “relative societal significance” of the service is unimportant for determination of whether the right to that service is “fundamental.” Rather, a right is not fundamental unless it is “explicitly or implicitly guaranteed by the Constitution.” *Rodriguez*, 411 U.S. at 35)

⁸¹ See Herman, Dennis, J., *Sometimes There’s Nothing Left to Give: The Justification for Denying Water Service to New Customers to Control Growth*, 44 Stan. L. Rev. 429, 457-58 (Proposing, and ultimately rejecting as untenable, the notion that a fundamental right to travel could be impinged by a municipality creating a water service moratoria).

⁸² See *id.*; cf. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 259 (Invalidating a state law that required one year’s residency within the state for indigents to have access to the state’s free, non-emergency medical service. The Court stated that because this requirement was a “penalty” on interstate migration, it violated the fundamental right to interstate travel. See *Memorial Hosp.*, 415 U.S. at 263-64.)

⁸³ Compare *id.* at 269 (establishing residency requirement for indigent reception of medical care); *Shapiro*, 394 U.S. at 638 (establishing residency requirement for reception of welfare benefits).

⁸⁴ Of course, if the ordinance creating the special assessment district contained some clause exempting intra-municipality or intrastate transitions, then a fundamental right to travel may be implicated and protected by the substantive Due Process Clause.

⁸⁵ See generally, *Strauder v. West Virginia*, 100 U.S. 303 (1880)(striking state statute that explicitly prohibited blacks from serving on juries); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)(striking state statute which, although neutral on its face, was administered in a discriminatory fashion because non-Chinese applicants were almost always given permit approval while Chinese applicants were never given permit approval)

⁸⁶ See generally, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911)(even if the state discriminated in the application of its laws, this discrimination is allowable if it bears a rational relation to a legitimate state goal and is not merely arbitrary).

⁸⁷ See generally, *Yick Wo*, 118 U.S. 356 (strict scrutiny review for race-based classifications); *Craig v. Boren*, 429 U.S. 190 (1976)(mid-level scrutiny review of state actions making classifications based on gender); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (low-level scrutiny for state actions which make classifications for business tax purposes based on the corporation’s primary place of business).

⁸⁸ See *id.*

⁸⁹ See *Yick Wo*, 118 U.S. at 373-74 (strict scrutiny review for race-based classifications); see also *Hernandez v. Texas*, 347 U.S. 475, 477-78 (1954)(strict scrutiny review is appropriate for national origin based distinctions); *Craig*, 429 U.S. at 197-98 (mid-level scrutiny is required for distinctions based on gender); *Plyer v. Doe*, 457 U.S. 202, 217-18 (1982)(distinctions based on status as an alien are subject to mid-level scrutiny review); *Clark v. Jeter*, 486 U.S. 456 (1988)(distinctions based on the illegitimacy of a child are afforded mid-level scrutiny review by the court). Any classification other than those enumerated in this note are subject to a low level or rational relation scrutiny.

⁹⁰ See *Yick Wo*, 118 U.S. at 373-74 (strict scrutiny mandates that a state action be narrowly tailored to advance a compelling state interest); see also *Craig*, 429 U.S. at 197-98 (mid-level scrutiny requires that a state action be substantially related to an important state interest); *Lindsley*, 220 U.S. at 63 (low level scrutiny requires that a state action bear some rational relation to a legitimate state interest).

⁹¹ See generally, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (Developer sued the municipality claiming that the municipality’s decision to deny a rezoning request was motivated by racial bias because the developer wanted to create low income housing, likely attracting minority residents to the predominantly white municipality).

⁹² See generally, *National Land & Inv. Co. v. Kohn*, 215 A.2d 597 (Pa. 1965) (Property owner sued municipality claiming that minimum lot size requirement discriminated against developers because they could not maximize the earning potential on the property by subdividing it).

⁹³ See *Arlington Heights*, 429 U.S. at 264 (The suspect class must be defined such that a member of a minority group traditionally discriminated against has had his or her land use desires “thwarted by official action that is racially discriminatory.” *Id.*).

⁹⁴ See *id.* at 264-65.

⁹⁵ See *id.*, at 265-68 (This intent to discriminate may be inferred from the culmination of the following four factors: (I) “A clear pattern, [of discrimination] unexplainable on grounds other than race”; (II) “[t]he historical background of the decision”; (III) “[t]he legislative or administrative history” of the action; and (IV) statements by the enacting legislators. *Id.*)

⁹⁶ See *id.*

⁹⁷ See *id.* at 265.

⁹⁸ See *National Land*, 215 A.2d at 607.

⁹⁹ See *id.*

¹⁰⁰ See, e.g., *id.*, 215 A.2d 597 (Striking local ordinance mandating four acre residential minimum lot size); accord. *Aaronson v. Town of Sharon*, 195 N.E.2d 341, 345 (Mass. 1964) (striking two-and-a-half acre minimum lot size). But cf. *Caspersen v. Town of Lyme*, 661 A.2d 759, 764 (N.H. 1995) (Upholding 50 acre minimum lot size requirement in area designated for forest preservation).

¹⁰¹ Compare *Wilson*, 63 Cal. Rptr. at 897-98 (upholding the creation of a negative special assessment district for the supply of residential drinking water because of the important conservation elements involved) with *National Land*, 215 A.2d at 612 (Striking an ordinance creating a minimum lot size based on environmental factors, because the minimum lot size requirement did nothing to advance the stated legislative goals. See *id.*)

¹⁰² See *National Land*, 215 A.2d at 612 (Minimum lot size requirements have little impact on the ability of a municipality to provide adequate services, because the rate of growth of most smaller communities - where such requirements are effective when implemented - is so small that the minimum lot size requirement does nothing to alter the growth rate. Of course, if the community growth rate remains constant with or without the minimum lot size requirement, then municipal services are no more or less threatened than had the requirement not been passed. See *id.*)

¹⁰³ But see cf. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (It must be plausible that the mechanism proposed by the state will rationally achieve the legitimate state goal articulated by the legislative body)

¹⁰⁴ See *Wilson*, 63 Cal. Rptr. at 898 (the conservation of scarce municipal resources is a legitimate state goal.)

¹⁰⁵ Compare *Caspersen*, 661 A.2d at 643-44 (50-acre lot minimum in the midst of a densely covered forest was permissible because not only would it plausibly advance the legitimate state goal of forest preservation, it would have an immediate impact in doing so).