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WHERE LEFT MEETS RIGHT: A CASE STUDY OF CLASS-BASED ECONOMIC DISCRIMINATION THROUGH ZONING IN SALISBURY, MARYLAND

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To most of the outside world, the Eastern Shore community of Salisbury, Maryland is known as the home of Frank Perdue and the "land of pleasant living" touted by National Bohemian beer commercials. Few would consider Salisbury a breeding ground for economic discrimination against disadvantaged classes of people. Recently, however, the town has been the stage for a political and legal drama marked by a unique coming together of unlikely legal alliances.

Salisbury could fairly be labeled a college town, considering that Salisbury University is one of the largest employers in the area.[1] The University draws several thousand students into the community every year.[2] Many students are housed off campus, mostly in rental properties clustered in the Camden and Pinehurst neighborhoods adjoining the University campus.[3] In the spring of 2002, when the annual cycle of fraternity, sorority, graduation, and miscellaneous parties reached its apogee, single–family home owners in Camden and Pinehurst rose in protest, petitioning the city government to pass legislation reducing the number of students who could reside in city

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1. During Fiscal Year (FY) 2003, Salisbury University received state funding for 8,275 full-time employees and 2,143 contractual employees. 3 OFFICE OF BUDGET ANALYSIS, MARYLAND DEPARTMENT OF BUDGET AND MANAGEMENT, MARYLAND OPERATING BUDGET: FISCAL YEAR 2004, at III-246 (2003), *available at* http://www.dbm.state.md.us/operbudget04/volume3/PublicEducation/UniversitySystem.pdf.

2. *See* Salisbury University statistics on student enrollment, *at* http://www.salisbury.edu/iara/Factbook/FB02Total.pdf (last visited Mar. 31, 2003).

3. Based on a FY2002 survey, Salisbury University currently houses 1,700 students of its 5,280 undergraduate population in on-campus housing. The University estimates that approximately thirty-one percent of its commuter students rent detached houses. SALISBURY UNIVERSITY, SALISBURY UNIVERSITY STATUS REPORT ON STUDENT HOUSING (July 26, 2002), *available at* http://www.salisbury.edu/students/housingnews/SUReportToComm.pdf.

neighborhoods.[4] Soon, their demands crystallized into a proposal that would significantly reduce the number of unrelated residents permitted to live in a dwelling.

To their surprise, these neighborhood activists found themselves up against a strikingly bipolar alliance of landlords and property rights advocates at one end of the political spectrum, and economically disadvantaged classes at the other. The proposed ordinance would not only restrict the ability of students to settle in neighborhoods where these activists lived, but would also make affordable rental housing less available to other classes of disadvantaged Salisbury residents, including the poor, minorities, and the disabled.[5] Consequently, the neighborhood activists served as a catalyst for an alliance between the traditionally right-wing class of property owners, and the traditionally left-wing, disadvantaged classes of the poor, minorities, students, and the disabled. A case study of the activists' unintended success in unifying opposition from natural political and legal adversaries presents a cautionary tale for urban planners, municipal attorneys, university officials and others grappling with the distinctive difficulties of a "college town."

I. THE GROVES OF ACADEME: SALISBURY AS MARKET TOWN, SALISBURY AS COLLEGE TOWN

Similar to most Eastern Shore communities, Salisbury began as a "landing" to which planters delivered tobacco and other crops shipside along the Wicomico River.[6] In 1732, the Maryland Assembly chartered "Salisbury Town" on the land formerly known as "Handy's Landing."[7] Salisbury's importance as a market town grew with the

4. Letter from Mark and Susan Tilghman to David G. Nutter, Director, Department of Planning, Zoning and Community Development (May 16, 2002) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

5. *See* discussion *infra* Part III. *See also* Daniel Valentine, *Land Lord, Part Two,* DAILY TIMES, June 11, 2002, at 1. Valentine notes the zoning change could, "cause more problems by affecting blue-collar workers who share homes in the city." *Id.*

6. MARYLAND, A NEW GUIDE TO THE OLD LINE STATE 450 (Edward Papenfuse et al. eds., 1976).

7. *Id.* at 450. *See also* Maria Ellegood, *A Sketch of the Early History of Wicomico County,* 1 MORE FROM THE SHORE (Lower Delmarva Genealogical Soc'y, Salisbury, Md.), Fall 1982, *available at* http://www.rootsweb.com/~mdwicomi/history/salisbhx.htm.

coming of the railroad, as Eastern Shore farmers brought their produce to Salisbury for transport to other parts of the country.[8] In the mid-nineteenth century, Salisbury's commercial, maritime, and agricultural importance dictated it serve as the new county seat of Wicomico County.[9] With the advent of the automobile, Salisbury found itself at the hub of two intersecting major highways, U.S. Route 13, a north-south artery, and U.S. Route 50, an east-west artery.[10]

Salisbury's success arose almost entirely from the traditional Eastern Shore pursuits of fishing and farming.[11] Salisbury's economic development relied upon food transportation and processing, a dependency heightened by the exponential growth of the poultry business after World War II.[12] Several food-processing companies came, and sometimes went, including Campbell's Soup, Purity Bacon, Mount Aire Farms, and Perdue.[13] Businesses drew upon a largely unskilled and poorly paid work force. As a consequence, median income figures for the area have lagged behind national averages.[14]

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8. MARYLAND, A NEW GUIDE TO THE OLD LINE STATE, *supra* note 6, at 450. *See also* Salisbury City website *at* http://www.ci.salisbury.md.us/cityhistory.html (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class) (last visited Feb. 1, 2003).

9. Wicomico County was carved out of then existing Somerset and Worcester Counties in 1867. *See* Maryland State Archives *at* http://www.mdarchives.state.md.us/msa/refserv/html/counties.html (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class) (last visited Feb. 1, 2003).

10. *See* Salisbury City website *at* http://www.ci.salisbury.md.us/cityhistory.html (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class) (last visited Feb. 1, 2003).

11. For a general discussion of the Eastern Shore's early economic development, see SUZANNE ELLERY GREENE CHAPELLE, ET AL. MARYLAND, A HISTORY OF ITS PEOPLE 109-10, 200-01 (1986). The authors make specific reference to Wicomico County's abundance of wheat farmers throughout the 19th century. *Id.*

12. MARYLAND, A NEW GUIDE TO THE OLD LINE STATE, *supra* note 6, at 449-50.

13. *See generally* Salisbury-Wicomico Economic Development homepage *at* http://www.swed.org/industry1.asp (last visited Apr. 3, 2003).

14. In 2000, the median household income for Wicomico County was $39,035. CONTINUOUS MEASUREMENT OFFICE, U.S. CENSUS BUREAU, COUNTY HOUSEHOLD INCOME (May 29, 2002), *available at* http://www.swed.org/DemWicHHInc.asp (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class) (last updated Nov. 6, 2002). However, the corresponding national median household income in 2000 was $41,486. *See* U.S. CENSUS BUREAU, SUPPLEMENTARY SURVEY PROFILE (2000), *available at* http://www.census.gov/acs/www/Products/Profiles/Single/2000/C2SS/Tabular/010/01000US3.htm (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class) (last visited Feb. 1, 2003).

The standout exception to the rural character of Salisbury's economic development was the growth of Salisbury University. Founded as a state teachers college during the 1920's, Salisbury University grew by leaps and bounds, and began to rival Perdue as a major employer and defining feature of Salisbury.[15] The evolution of Salisbury University created an odd town-gown dichotomy: College professors, administrators, and an increasing student population mixed uneasily with unskilled farm workers, partially skilled food processors, and trades people.[16]

The influx of college students into a relatively poor community resulted in an increasing predominance of rental housing within the City of Salisbury. A housing task force commissioned by the city government during the mid-1980's found that approximately fifty percent of the city's housing stock consisted of rentals; more recent estimates place the figure as high as seventy percent.[17] The high number of rental units in Salisbury is partially attributed to the large number of students who cannot be housed on Salisbury University's rather small campus.[18] This influx is also due to Salisbury's working poor, who cannot qualify for home mortgages.[19] Salisbury's strange brew of fraternity members, migrant workers and other low-skilled labor populations produced a growing demand for rental housing. This demand spawned urban problems, which worsened as property

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15. *See* Salisbury University website *at* http://www.salisbury.edu/Info/History.html. "The college started as a two-year state normal school in 1925. It now offers . . . a four-year course that includes two years of intensive teacher training and leads to the degree of Bachelor of Science." MARYLAND, A NEW GUIDE TO THE OLD LINE STATE, *supra* note 6, at 452. *See also* sources cited *supra* note 2 (contains statistical information regarding employees of Salisbury University).

16. Only one percent of the Wicomico County regional workforce has only a Bachelors degree. Another five percent of the workforce has a graduate degree in addition to their Bachelors degree. This represents only 15,366 of the 104,867 residents twenty-five years and older in Wicomico County. *See* http://www.swed.org/DemRegEdLev.asp (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class) (last visited Apr. 4, 2003).

17. According to calendar year 2000 estimates from the U.S. Census Bureau, 62.18% of Salisbury's housing units are renter-occupied. *See* http://salisburymd.areaconnect.com/statistics.htm (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class) (last visited Feb. 1, 2003).

18. Sixty-eight percent of Salisbury University students live off campus. *See* sources cited *supra* note 3.

19. *See* Valentine, *supra* note 5, at 1 (noting the existence of "blue-collar workers who share homes in [Salisbury]").

owners converted once stately mansions into rooming houses, single-family houses into duplexes, and owner-occupied residences into rentals.[20] Salisbury's steady increase of rental properties prompted residents to form neighborhood associations to foster single–family home ownership.[21]

Salisbury's government responded to the lobbying neighborhood associations with miscellaneous legislation, including "clean it or lien it" ordinances, "knock and enter" inspection ordinances, and habitability codes, all directed at improving the quality of Salisbury's housing stock.[22] During the early 1990's, the city, in league with local bankers, sponsored the creation of a neighborhood housing service that made home mortgages available to residents who could not qualify for commercial lending.[23] Meanwhile, the predominantly rural core of the city's economy persisted, as did the growth of Salisbury University's enrollment.[24] The consequence of these continued trends was that, despite some success in fostering home ownership and improving the general quality of housing, the escalation of city rental housing continued largely unabated.[25]

Frustrated by the city's inability to slow the growth of rental housing, and perhaps stunned by an unusually raucous round of student activities, residents of the neighborhoods most directly impacted by the University, Camden and Pinehurst, petitioned the City of Salisbury to adopt legislation reducing the number of student rentals

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20. *See* Letter from Mark and Susan Tilghman, *supra* note 4, at 2-3. Mr. Tilghman comments on some of the "problems" they have observed in their neighborhood including congested parking, increased noise pollution and increased litter. *Id.*

21. *Id.*

22. SALISBURY, MD. MUNICIPAL CODE §15.24.1320 – 15.24.170 (1997) (Salisbury's "clean it or lien it" ordinance); SALISBURY, MD. MUNICIPAL CODE, §§15.24.090, 15.24.110, 15.24.130, 15.24.210 (1997) (Salisbury's "knock and enter" ordinances).

23. For further information on this initiative and evidence of its success, *see* Salisbury Neighborhood Housing Service website *at* http://www.salisburynhs.org (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class) (last visited Apr. 4, 2003).

24. According to the Salisbury University Office of Admissions, student enrollment grew from 6,022 in 1992 to 6,851 in 2002, a 13.8% increase. *See* http://www.salisbury.edu/iara/Profile2001/Profile2001.htm (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class) (last visited Feb. 1, 2003).

25. Letter from Mark and Susan Tilghman, *supra* note 4, at 2. "Landlords have seized upon [the large number of students seeking shared living arrangements] and have been converting single-family homes to rental properties at an alarming rate." *Id.*

in their neighborhoods.[26] Though their objective was clear, the means employed by these neighborhood activists were oddly circuitous, and ultimately landed them in political and legal difficulties.

II. "VOTE FOUR TO TWO"

In 1990, Salisbury amended its zoning code by altering the definition of "family" to include not merely persons "related by blood, marriage, or adoption," but also unrelated persons, up to a prescribed maximum, living together under a single roof.[27] The altered definition of family read:

> Not more than three persons in an attached or apartment dwelling unit or four persons in a detached dwelling unit, who need not be related by blood, marriage or adoption, living together as a single house keeping unit.[28]

Under this definition, four unrelated people were permitted to share a home and be considered a "family" for purposes of the housing code.

Because the city's housing code limited residential occupancy density by making reference to the definition of a "family," Salisbury's neighborhood reformers advocated reducing the maximum number of unrelated persons allowed in the definition of a "family" from four to two. The reformers demanded that the "family" definition be downsized, and that any non-conforming uses grandfathered by the new law be subject to a "sunset," or a deadline by which grandfathered uses would have to conform to the new standard. The reformers' demands were encrypted in strange jingles and slogans. Thus, motorists passing through Salisbury during the summer of 2002 must have been sorely puzzled by the city's crop of road-side lawn signs demanding "4 - 2 with a sunset."

The politics of "four to two" were straightforward: reformers were home owning, tax-paying city residents; their opponents were

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26. *Id.*
27. SALISBURY, MD. ZONING ORD. §17.04.120 (1990).
28. §17.04.120.

students and tenants, notoriously apolitical. Although landlords and charitable organizations orchestrated the opposition to four to two, Salisbury's landlords generally live outside of the city and cannot vote in municipal elections. In addition, charities are precluded from engaging in overtly political activity because of their tax-exempt status.[29] Thus, those most active in the political opposition to the ordinance were handicapped in seeking to preempt the amendment. After six months of debates that dominated Salisbury, the City Council adopted the measure and the Mayor signed it into law December 23, 2002.[30] By Christmas Eve, four to two seemed destined for a legal challenge whose underpinnings were drawn equally from the left and right.

III. FAIR HOUSING ADVOCATES ATTACK FROM THE LEFT

The intent of the ordinance's proponents, to restrict economically disadvantaged classes from their neighborhoods, was never in doubt. Throughout the long debate over four to two, the rhetoric of its supporters was replete with declarations of NIMBYism.[31] One outspoken advocate declared, "It really didn't matter until it started coming into my neighborhood."[32] More disturbingly, proponents did not heed reminders that many of the tenants impacted by four to two were not students, but rather disabled persons living in unlicensed group homes, Hispanic migrant workers, and members of Salisbury's largely African-American work force.[33] Opponents from the left repeatedly reminded the City Council of the

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29. Charities formed under I.R.C. § 501(c)(3) are prohibited from engaging in overly political activities (such as political campaigning). *See* I.R.C. §§501(c)(3), 501(h) (West 2003).

30. *See infra*, text accompanying note 36-37.

31. From "NIMBY," an acronym long favored by urban planners, meaning "not in my back yard."

32. Daniel Valentine, DAILY TIMES, May 17, 2002.

33. Daniel Valentine, *4-2 Final Vote,* DAILY TIMES, Dec. 17, 2002. Justiano Leon, a migrant laborer and an opponent of four to two said:

> I've been a taxpayer for six years, and I have been a citizen for a few months. I have to beg you to reconsider your position. We cannot afford a lot of lawyers, and it's going to affect a lot of migrant workers. I lived with a group for four years before I could buy a home.

Id.

harshness with which the legislation would impact Salisbury's economically disadvantaged classes, and urged the Council either to reject the proposal or to adopt it in a "compromise" version that would take effect only in Camden and Pinehurst. These calls for compromise failed, but the persistent concerns raised by these critics persuaded two of the five Salisbury City Council members to vote against the ordinance.[34] Because the ordinance passed without the super-majority of four votes necessary to override a mayoral veto,[35] public attention turned to Mayor Barrie Tilghman.

In a press conference called by Mayor Tilghman, she acknowledged that, "[this ordinance] cannot speak to how the rental market will redistribute to accommodate the dramatic change. The most serious question is what effect the ordinance will have on poor and low income individuals, a sector of the community that has not found adequate representation and voice on this issue."[36] But Mayor Tilghman, recently re-elected on the slenderest of margins, signed four to two into effect on December 23, 2002.[37]

The politicians' failure to investigate avowed concerns about the new law's impact on disadvantaged people, particularly the disabled, left them vulnerable to legal challenge on the left. The interaction of the new law with existing provisions of the Salisbury Code and provisions of state law went largely unexplored by city leaders.[38] Before the enactment of four to two, the Salisbury City Code provided that "group domiciliary care facilities" would be permitted by special exception in residential districts.[39] However, the code defined "group domiciliary care facilities" to limit its entitlements to disabled residents of a home either licensed by state or federal government or directly regulated by a governmental agency.[40]

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34. *Id.*

35. SALISBURY, MD. MUNICIPAL CODE § SC2-12 (1959), *amended* Mar. 11, 2002 *by* Res. No. 823; June 27, 2002 *by* Res. No. 853, *available at* http://www.ci.salisbury.md.us/salisbury-charter.html.

36. Daniel Valentine, *Despite Concerns, Mayor Signs 4-2*, DAILY TIMES, Dec. 24, 2002, at 3.

37. *Id.*

38. The legislative record is strikingly silent on these issues. The author could not find any evidence in the legislative record that the Salisbury City Council or the Mayor investigated these issues.

39. *See* SALISBURY, MD. ZONING ORD. §17.156.030D (2001).

40. *See* SALISBURY, MD. ZONING ORD. §17.04.120 (2001).

Many of Salisbury's half-way houses and group homes for the disabled are neither licensed nor directly regulated by any governmental agency. Rather, they are operated informally by charitable organizations or permitted by sufferance as family units combining up to four unrelated persons, pursuant to the previous ordinance's definition of a family.[41] The new legislation's prohibition on homes with more than two unrelated persons would essentially prevent the operation of unlicensed group homes, thus putting the disabled at a severe disadvantage in finding charities able to operate and provide group housing.

IV. POSSIBLE LEGAL CHALLENGES TO FOUR TO TWO UNDER THE FAIR HOUSING ACT

Under the Federal Fair Housing Act (FHA),[42] it is illegal to discriminate in housing against members of traditional suspect classifications including race, color, religion, sex, handicap, familial status and national origin.[43] As previously explained, disabled persons living in unlicensed group homes would be adversely impacted by four to two and could bring suit under the FHA.[44] Moreover, because of the statute's disparate impact on Hispanics and African Americans, they could join in such a challenge.[45] In the ensuing litigation, four to

41. §17.04.120.

42. 42 U.S.C. §3601 (1978).

43. §§3602(h); 3604(f)(1)(A).

44. § 3613(a)(1)(A).

45. Statistics available from the Maryland Department of Planning demonstrate the disproportionate impact a restrictive rental ordinance would have on Salisbury minorities. According to the Department of Planning, only twenty-six percent of white householders in Wicomico County rent. The rental rate is, however, much higher for minorities. Fifty-seven percent of black householders rent, and fifty-one percent of Asian householders rent. *See* CENSUS 2000 SUMMARY FILE 1, GENERAL PROFILE 1: PERSONS BY RACE, AGE AND SEX; HOUSEHOLDS AND FAMILIES BY RACE AND BY TYPE, WICOMICO COUNTY, MD, PLANNING DATA SERVICES, MARYLAND DEPARTMENT OF PLANNING (June 2001), *available at* http://www.op.state.md.us/MSDC/census/cen2000/sf1/cnty/wico_sf1.pdf. Consequently, because minorities comprise a disproportionate percentage of renters in Salisbury, they would feel the effects of four to two more keenly than would the largely home-owning white residents. Readers should also note that a challenge under the Fair Housing Act could be filed directly in State or Federal Court, since there is no requirement under the Fair Housing Act for exhaustion of local administrative remedies. *See generally* Gladstone Realtors v. Vill. of

two opponents pursuing a disparate impact claim would have the burden of showing: (1) plaintiff's rights are protected under the FHA; and (2) as a result of the defendant's discriminatory conduct, plaintiff has suffered a distinct and palpable injury.[46]

In carrying their burdens of proof under the Fair Housing Act, four to two's left-wing opponents could draw heavily upon the extensive public record of the debates leading to the enactment of the legislation, including, most significantly, the Mayor's extraordinarily candid remarks in approving the ordinance.[47] Advocates of four to two and members of city government acknowledged the likelihood that it would harshly impact minorities and disabled persons living in Salisbury.[48] These concerns were dismissed not as unfounded, but as outweighed by the ideals of gentrification and a head count of four to two supporters at council meetings. The history of the legislation discloses, not that members of city government were oblivious to its impact on disabled persons and minorities, but rather that they intentionally disregarded that impact.[49]

Four to two opponents from the left would be aided in their challenge by the Supreme Court's decision in *City of Edmonds v. Oxford House, Inc.*[50] In *City of Edmonds*, the Supreme Court recognized two distinct categories of local governmental restrictions in this area of the law. According to the Court, "maximum occupancy restrictions," which "are intended to protect health and safety by preventing growing overcrowding," are not subject to scrutiny under the Fair Housing Act.[51] However, local "land use restrictions" that "seek to preserve the character of neighborhoods" are subject to scrutiny under the Fair Housing Act.[52] The Court held that family definition provisions are more appropriately classified as land use restrictions, because they "are an essential component of sing-family residential use restrictions" and "represent attempts to preserve the

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Bellwood, 441 U.S. 91, 103-06 (1979); Knutzen v. Eben Ezer Lutheran House Ctr., 617 F. Supp. 977 (D.Colo. 1985), *aff'd* 815 F.2d 1343 (10th Cir. 1987).

46. See Harris v. Itzhaki, 183 F.3d 1043, 1051 (9th Cir. 1999).
47. *See supra* text accompanying note 36-37.
48. *See supra* text accompanying note 36-37.
49. *See supra* text accompanying note 36-37.
50. 514 U.S. 725 (1995).
51. *See id.* at 733-34.
52. *See id.* at 732.

character of certain neighborhoods."[53] This is true even though the provision may have the effect of creating maximum occupancy restrictions.[54] In the wake of the Court's decision, Maryland's Attorney General released an advisory opinion noting that, "*City of Edmonds* means that all [family composition] provisions . . . are subject to scrutiny under the Fair Housing Act. None is exempt."[55]

An attack under the Fair Housing Act on Salisbury's four to two ordinance could also develop under a "reasonable accommodations" theory based on language in the federal Fair Housing Act, which provides that renters or buyers cannot be discriminated against in housing based on their handicaps.[56] The Fair Housing Act notes that it is unlawful to "refus[e] to *make reasonable accommodations* in rules, policies, practices, or services, when such accommodations may be necessary to afford [people with disabilities] an equal opportunity to use and enjoy a dwelling."[57] A recent Joint Statement issued by the United States Department of Justice and Department of Housing and Urban Development advises that "local zoning and land use laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities violate the Fair Housing Act."[58]

The exceptions contained in the Salisbury ordinance also do not provide reasonable accommodations for local residents who provide live-in charitable services to unrelated disadvantaged people.[59] If the cohabitants do not satisfy the requirements of a "functional

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53. *Id.* at 733.

54. *Id.*

55. 80 Op. Att'y Gen. 21 (1995).

56. 42 U.S.C. §3604(f)(1)(A) (1978). *See also* §3602(h) (providing further discussion of the term "handicap," which, according to both litigants in *City of Edmonds* includes recovering alcoholics and drug users). United States v. Southern Management Corp., 955 F.2d 914, 921 (4th Cir. 1992) (finding that the Fair Housing Act protects recovering and former addicts, but not individuals currently abusing or addicted to illegal substances).

57. 42 U.S.C. § 3604(f)(3)(B) (emphasis added).

58. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF HOUS. & URBAN DEV., GROUP HOMES, LOCAL LAND USE, AND THE FAIR HOUSING ACT 3 (Aug. 1999), *available at* www.usdoj.gov/crt/housing/final8_1.htm.

59. For a complete listing of the exceptions to Ordinance No. 1868 as approved by the Salisbury City Council, see the official minutes of the December 9, 2002 Salisbury City Council Meeting at which the ordinance was approved. These minutes are available at http://www.ci.salisbury.md.us/CityClerk/02dec9.html. Note, as of the date of publication of this article, the official text of the Salisbury Zoning Code has not yet been updated to reflect the changes approved at this meeting.

family," or if the unrelated cohabitants do not provide the landlord with at least eight hours of living assistance or personal services per day, the living situation would be unlawful.[60] Moreover, the definition specifically excludes some live-in situations when the unrelated people are living together "as a result of criminal conduct."[61] Indeed, some residents may choose to allow former convicts to live with them because they knew them before they were sent to prison, and would now like to help them reintegrate themselves into society. However, under this ordinance, such a living situation would be unlawful.

VI. POTENTIAL EQUAL PROTECTION CHALLENGE

In addition to a statutory challenge under the Fair Housing Act, four to two's supporters also left themselves open to a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.[62] Four to two's supporters explicitly targeted students,[63] and made it abundantly clear that they were aware of, but did not care about, the ordinance's negative effect on disabled persons and minorities.[64]

In a future constitutional challenge, even if the Court applied the more lenient "rational basis" analysis, four to two's future would be questionable. Courts applying the rational basis analysis to local zoning legislation have repeatedly invalidated laws targeting particular groups.[65] In *Kirsch v. Prince George's County*,[66] the Prince George's

60. *See id.*

61. *See id.*

62. The Fourteenth Amendment to the U.S. Constitution provides that, "nor shall any State deprive any person . . . within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

63. *See supra* notes 5, 5, 26 and accompanying text.

64. *See supra* notes 33-34, 36, 47-49 and accompanying text. *See also* John Vandiver, *Spanish TV,* DAILY TIMES, Jan. 29, 2003, at 2. The author notes, "Many people involved with the immigrant and migrant communities have expressed concern about the impact of rental legislation, which restricts the number of non-related people permitted to rent a home together from four to two." *Id.*

65. *See, e.g.,* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (local government targeted mentally retarded residents); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (Food Stamp Act targeted "hippies"); Romer v. Evans, 517 U.S. 620 (1996) (state constitutional amendment targeted homosexuals).

66. 626 A.2d 372 (Md. 1993).

County government adopted a zoning ordinance restricting the location of mini dormitories and mandated certain design characteristics for mini dormitories in residential neighborhoods.[67] Mini dormitories were defined as:

> [O]ff campus residences located in a building that is, or was originally constructed as a one, two or three family dwelling which houses at least three, but not more that five individuals, all or part of whom are unrelated to one another by blood, adoption, or marriage, and who are registered full–time or part–time students at an institution of higher learning.[68]

Local government claimed that the legislation was needed to prevent congested parking, increased litter on the streets, and noise pollution resulting from residential overcrowding.[69]

However, the court of appeals held that the ordinance did not rationally relate to those alleged public goals.[70] The court noted that, under the Prince George County ordinance, a landlord of a building originally constructed as a one, two, or three family dwelling was permitted to rent to three, four, or five unrelated persons as long as they were not pursuing higher education.[71] In essence, the court observed that congestion is equally problematic whether created by students or non-students, because "such occupancy would equally add motor vehicles to a congested parking situation and pose the threat of increased noise and litter."[72] Accordingly, the court found that targeting students bore no rational relationship to achieving the asserted public goals.[73]

The Salisbury ordinance's susceptibility to invalidation on *Kirsch* principles is related to its many exceptions. For example, the ordinance includes a "convent exception," which exempts members of a "functional family" who share a permanent personal bond and

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67. *Id.* at 373-74.
68. *Id.*
69. *Id.* at 380.
70. *Id.*
71. *Id.* at 381.
72. *Id.*
73. *Id.*

commitment to one another from the new, more restrictive standard, and permits them to combine up to four unrelated persons.[74] The ordinance further provides that "domestic servants" and providers of "health care and assisted living services" are not included in the computation of permitted unrelated persons, provided they are on the job at least eight hours each day.[75]

Finally, the ordinance's most revelatory exception provides that a household with "two or more persons who are related by blood, marriage, adoption, guardianship or other duly authorized custodial relationship" can add one person who is not a core member of the family, if a member of the "family" owned the dwelling unit.[76] Thus, a family that merely rents their home cannot house an unrelated person, while no such restriction exists for families that own their home.[77] Moreover, while a married couple can have an unrelated person reside with them, a couple that cohabitates cannot, a provision of some significance since Maryland does not recognize common law marriages, even for long-standing, monogamous unions.[78]

The matrix of acceptable congestion versus unacceptable congestion under the four to two ordinance makes it particularly vulnerable to invalidation on *Kirsch* grounds. Though congestion caused by nuns, household servants and the supernumeraries of home-owning married couples may be more palatable to the gentrifiers who backed four to two, its ill effects are indistinguishable from the ill effects of congestion caused by students, unmarried couples, and the inhabitants of group homes. In short, the regulatory scheme created by four to two does not rationally relate to the avowed governmental objective of reducing congestion, and therefore a *Kirsch*-based challenge would likely succeed.

As an example of how the four to two ordinance would discriminate against economically disadvantaged classes of residents

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74. *See* source cited *supra* note 59. This exception is of practical importance in Salisbury, which boasts one of the very few convents on the Eastern Shore.

75. *See* source cited *supra* note 59.

76. *See* source cited *supra* note 59.

77. *See* source cited *supra* note 59.

78. *See generally* Henderson v. Henderson, 87 A.2d 403, 406 (Md. 1952). Similarly, gay couples, whose unions cannot receive matrimonial sanction under Maryland law, would be excluded from the exception. *See* MD. CODE ANN., FAM. LAW §2-201 (West 2002) (providing that "only a marriage between a man and a woman is valid in this State").

like minorities, students and others, consider the following hypothetical. Picture two adjacent, identical homes. In the first, lives the Smith family, consisting of Mr. and Mrs. Smith, and their two children. The Smiths are affluent, middle-class professionals, and own their home. Next door lives the Jones family, consisting of Mr. and Mrs. Jones and their two children. Each family has a grandparent living with them. The Smith's are able to pay a live-in nurse to care for Granny Smith. In addition to their live-in nurse, the Smith's have a maid/cook/nanny who lives in their furnished basement. The Joneses are not so fortunate. They must care for Mr. Jones' severely disabled grandmother themselves. Obviously, the Joneses, who have little disposable income, cannot afford domestic servants.

To complete the scenario, imagine that Mr. Smith's old college buddy, Ted, finds himself temporarily "between jobs" and needs a place to stay. Who better than his old buddy Mr. Smith, who agrees, perhaps over his family's protests, to allow Ted to stay indefinitely. Through a strange coincidence, Mr. Jones' childhood friend, Ed, finding himself in a dead end job in Baltimore, calls the Joneses and asks if he could stay with them while he finds a job in Salisbury. The Joneses decide to help Ed, and begin to make plans for his arrival.

How does four to two impact the two families? It affects them differently by virtue of their economic differences, the very essence of economic discrimination. Because the Smiths can afford to maintain a live-in nurse and domestic servant, they are permitted, under the ordinance, to increase the occupancy of their home by two persons. Moreover, because the Smiths can afford to own their home, they are permitted to house Mr. Smith's fraternity brother, while the Joneses, who merely rent, are not allowed to take advantage of the exception for owner-occupied families. Thus, by virtue of the operation of the housing ordinance, the Smith home is permitted a lawful occupancy of eight persons, while the Jones home is only permitted five persons. This distinction between "good" congestion and "bad" congestion, based largely on wealth, is what may ultimately render four to two discriminatory on economic grounds. Moreover, because a disproportionate percentage of Salisbury's African-American and Hispanic populations are less wealthy than whites and accordingly,

more likely to be renters, the ordinance's discriminatory impact is intensified along racial lines.[79]

The group originally targeted by this ordinance, University students living in single-family neighborhoods, also presents a class of economically marginalized and disadvantaged people to which housing is less available.[80] Students, as a group, are not considered a "suspect class" under equal protection analysis. Moreover, the Supreme Court has explicitly declared that the poor do not qualify as a "suspect class."[81] However, government actions that target poor, economically marginalized people are popularly seen as the epitome of class-based discrimination.

Consider the case of "Emily Student," an economically disadvantaged student working her way through school. Emily has attended Salisbury University for two years. She moved to Salisbury from Trenton, New Jersey where her mother and sister still reside. Last school year, Emily lived with three of her girlfriends, all unrelated, in a single-family home close to the University, which is owned by one of the area landlords. Because they can all split the rent, Emily only has to pay $300 a month, which is a large amount of money for a person whose only income comes from student loans, a part-time minimum wage job, and the occasional handout from her mother. In addition to this housing expense, Emily still faces her

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79. According to year 2000 data from the U.S. Census Bureau, the two-year average median household income for whites (non-Hispanic) was $46,601. However, the same median income for black households was only $29,983, and for Hispanic households, $33,829. CARMEN DENAVAS-WALT & ROBERT W. CLEVELAND, U.S. DEP'T OF COMMERCE, MONEY INCOME IN THE UNITED STATES: 2001 at 6 (2002), *available at* http://www.census.gov/prod/2002pubs/p60-218.pdf. Consequently, blacks and Hispanics remain behind whites in household income statistical trackings.

80. There can be no clearer demonstration of the economic disparity faced by young people than the most recent statistical data available from the U.S. Census Bureau, which has noted that the 2001 median income for men, ages fifteen to twenty-four, is $21,120. Compare this figure to $34,521 for men age twenty-five to thirty-four. HOUSING AND HOUSEHOLD ECONOMIC STATISTICS DIVISION, U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, MARCH 2000, 2001, AND 2002, at 5-6, *available at* http://www.census.gov/hhes/income/income01/inctab7.html. For women age fifteen to twenty-four, the 2001 median income was $19,859. Compare that statistic to $29,721 for women twenty-five to thirty-four years of age. *Id.* at 13. Although students will unquestionably receive some assistance from their parents or guardians (assuming they have parents or guardians), these statistics strongly suggest that young people face economic disadvantages not faced on the same scale as older people.

81. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973).

tuition bill, student fees, book expenses, and food expenses. Under the ordinance, Emily's already precarious financial situation is made even worse. Next year, the ordinance will force Emily to leave the affordable apartment near the University. She will have to wait, like other similarly situated displaced students, to land an opening in one of Salisbury's already heavily used apartment complexes. If Emily is fortunate enough to find such an opening, she would still likely face an increase in rent of anywhere between fifty to one hundred dollars.[82]

Both the Jones family and Emily Student demonstrate the ordinance's selectively harsh impact on economically marginalized classes. Under this new restrictive zoning scheme, people living in non-traditional living situations, generally those people who cannot afford to do otherwise, are forced to bear the burden of finding new housing, or limiting whom they house in their rented homes. Meanwhile, wealthier, single-family homeowners can continue to live uninterrupted by "undesirables" in their neighborhoods. Thus, on Christmas Eve, 2002, Salisbury's proposed ordinance seemed destined for legal attack under the provisions of the Fair Housing Act and the Fourteenth Amendment.

V. PROPERTY RIGHTS ADVOCATES ATTACK FROM THE RIGHT

In addition to opponents attacking four to two from the left, the ordinance also had opponents on the right wing of the political spectrum. Indeed, another economic class of people, Salisbury's landowners, some of whom owned several dozen rental properties throughout Salisbury, objected to this newfound threat to their rental businesses.

To avoid any claims of unconstitutional "taking" that might come from landowners, Salisbury's zoning code, like those of virtually all municipalities, includes provisions "grandfathering" non-

82. *See* Darian Tisinger, *Developing Student Housing*, DAILY TIMES, Oct. 6, 2002. The author notes that the demand for student housing is on the rise and the current rate for apartment complexes is approximately $400 per month. Consequently, apartment complex developers who may be salivating at the development potential may have reason to calm down because, as one student commented, "none of us would ever want to live there." As the author observed, most students in a student housing survey reported that $400 a month was too expensive. *Id.*

conforming uses and structures. However, in an act unprecedented in Salisbury's history, the city government yielded to lawn sign rhetoric and subjected the four to two ordinance to a two-and-one-half-year sunset.[83] This meant that, within two-and-one-half-years, all rental properties would have to comply with the new law, regardless of what their status had been when the law was enacted. Under the new ordinance:

> [A]ny existing lawful occupancy by more than 2 unrelated persons that is made non-conforming by this subpart make continue until June 30, 2005, when it shall cease to be permitted. Before that date, if a dwelling or dwelling unit is or shall become unlawfully occupied by unrelated persons, then any and all non-conforming occupancy thereof by unrelated persons will no longer be permitted.[84]

The effect on Salisbury's landlords was electric. Investors who bought rental properties on the strength of rent calculations based on the number of projected renters, and then balanced against the cost of serving a mortgage with a fifteen or thirty year life span, were hit with an unanticipated shortfall. Real estate entrepreneurs and developers who purchased investment properties whose value was predicated upon suddenly obsolete rental projections found that their holdings were radically devalued overnight.

Despite the furor over four to two, some landlords were caught unaware. Many found themselves left with rentals that became vacant during the University's winter break, which now could only be re-let for half of the rent previously charged.[85] When four to two supporters foiled an attempt at compromise, real estate agents, developers, and landlords began to consider legal action to vindicate the property rights

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83. *See* source cited *supra* note 59.

84. *See* source cited *supra* note 59.

85. If the units were accepted by fewer than four persons at the time the new law was enacted, they were not grand-fathered as legal non-conforming uses, and had to immediately comply with the new law. *See* source cited *supra* note 59.

"taken" by the ordinances sunset feature, and by the City Council's failure to grandfather the existing temporarily vacant rentals.[86]

VI. PROBABILITY OF SUCCESS OF A TAKINGS CLAIMS

Any takings claim must be based on a government action in order to be ripe for review in a state court. Government action is deemed final if the court can determine the economic impact of the regulation on the property.[87] A final decision concerns how a claimant's own land may be used. Additionally, it responds to the high degree of discretion characteristically possessed by land use boards in softening the strictures of the general regulations they administer.[88] By December 23, 2002, the City of Salisbury had reached a final decision regarding the economic impact of the ordinance on rental properties.

In a takings case, there is little analysis to be done where the government physically invades private property,[89] or where the government deprives the landowner of all economically viable use of the property.[90] However, four to two did not call for physical invasions of rental properties, and even its harshest critics had to concede that the factor by which it devalued rental properties was fifty percent, not one hundred percent.[91] Accordingly, the standard applied to any takings challenge mounted by the ordinance's opponents would be the ad hoc analysis prescribed by the Supreme Court in

86. Although no official press reports documented such considerations, the author was intimately involved in the development of legal action on behalf of some of four to two's opponents.

87. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 187 (1985).

88. *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 738 (1997).

89. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 430 n.7 (1982) (noting that "early commentators viewed a physical occupation of real property as the quintessential deprivation of property").

90. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015-16 (1992).

91. If the rental property owner could rent to four tenants prior to the ordinance, a reduction in the definition of family to only two unrelated tenants now meant that the property owner could collect rent from only two tenants. If the property owner was to retain the same per person rent (for example $300), then the property owner would now only collect $600 a month instead of $1200 a month – a fifty percent reduction.

Pennsylvania Central Transportation Co. v. City of New York.[92] In *Penn Central*, the Court set forth three factors by which the government action must be evaluated. First, the court must measure the diminution in value of the claimant's property.[93] Second, the court must consider how the government action interferes with the property owner's reasonable expectations.[94] Third, the court must consider the character of the government action under attack.[95]

A. Diminution in Value of Property

The first *Penn Central* factor, the diminution in value of the property, does not warrant deep analysis in this case. Dividing the number of permitted renters in half seems likely to halve the amount of rent collected, and hence the underlying value of the rental property itself. Thus, while a sophisticated economic analysis of this issue remains to be done, it seems facially evident the effect of four to two upon rental properties must be to devalue it somewhere in the range of fifty percent.

B. Interference with Reasonable, Investment-Backed Expectations

The second *Penn Central* factor, interference with reasonable, investment-backed expectations, also seems on its face to bolster a takings claim. Salisbury's landlords purchased, financed and leased rental properties based upon assumptions about permissible occupancy density that are now obsolete. It would have been difficult to predict four to two's coming, particularly with a sunset. Salisbury's previous attempts at housing reform were all directed at improving the quality of housing stock and not at mandated reductions in density.[96] Moreover, in Salisbury's history, the local government never had attempted to limit the grandfathering of non-conforming uses. Salisbury's landlords were reasonable in acting upon their assumptions about the future of the housing market in purchasing the properties.

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92. 438 U.S. 104 (1978); *see also* Palazzolo v. R.I., 533 U.S. 606 (2001)
93. *Penn Central*, 438 U.S. at 124.
94. *Id.*
95. *Id.*
96. *See supra* text accompanying note 22.

Salisbury's bankers, who lent money to landlords under an economic analysis that did not anticipate four to two's enactment, further validated the landlords' actions.

C. The Character of Governmental Action Under Attack

The third *Penn Central* factor, the character of governmental action under attack, is the least tangible factor, and the hardest to apply. Had the City Council enacted the ordinance under exigent circumstances, the ordinance's property rights critics would have a hard road to travel. In other words, if four to two's critics from the left did not have such a strong case, the ordinance's critics from the right would have a difficult time convincing a court that, under *Penn Central*, the ordinance should be invalidated on takings grounds. Because the ordinance explicitly targets two groups, students and unmarried couples, and implicitly targets other groups including African Americans, Hispanics, and disabled persons, it is discriminatory both in intent and in impact.

Moreover, the evolution of the ordinance departed dramatically from the procedure mandated by the city's zoning code.[97] Finally, the most strident advocates of four to two could not show a sudden emergent crisis that might justify their deviations from procedural guidelines. Rather, four to two supporters depicted the encroachment of rental properties into their neighborhoods as a stealthy, sub clinical process that worked itself out during the course of many years.[98] Thus, the government action subject to a takings challenge in this case is an indisputably discriminatory, procedurally suspect ordinance adopted in response, not to an imminent dilemma, but to a slowly evolving trend.

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97. *See* discussion *infra* Part VII.

98. *See, e.g., Letter to the Editor: Dialogue Won't Help City Neighborhoods,* DAILY TIMES, June 15, 2002, at 6. Consider the comments of Kathrine Manizade, a Salisbury resident in favor of four to two: "Property-owning residents all over Pinehurst...are irate with the rape of our neighborhood by landlords who really couldn't care less what they are doing to our quality of life." *Id.* She continues, "The truth is families are being discriminated against inside Salisbury's city limits." *Id.* These comments reflect the larger opinion among four to two proponents that a deep, long-running anti-single-family effort has been in operation for some time, whereby landlords and their tenants have robbed single-family homeowners of their way of life.

The probable result of the *Penn Central* calculus in a four to two challenge is invalidation of the ordinance on takings grounds. Therefore, as Fair Housing and tenants rights advocates sharpened their knives for a Christmas assault on the ordinance, they were joined by a legion of angry landlords.

VII. THE PROCEDURALISTS JOIN THE FRAY

In many a legal battle, the laurels go to the dry proceduralists whose claims, by long and accepted practice, are heard first. Procedural critics of the four to two ordinance might well bring down the ordinance before its opponents either from the left or the right. In Maryland, all local zoning is governed by and subject to state enabling legislation.[99] Article 66B provides that, before the City Council may act upon a rezoning of property, the proposal must first be analyzed in detail by the municipal Planning and Zoning Commission.[100] State law has no corresponding provision for a text amendment of the zoning code, and the Maryland Attorney General opined that no such requirement is implicit in state law.[101]

The Salisbury Zoning Code, however, though in no way inconsistent with Article 66B, imposes an additional requirement upon zoning text amendments that goes beyond the requirements of state law:

> If there is any change in the [Zoning Code text amendment or district bounding change] request, such as enlargement of land area or change of zoning classification requested, after review and recommendation by the planning commission, the request shall be resubmitted to the planning

99. MD. CODE ANN. art. 66B (1957).

100. Article 66B §4.05(a).

101. Maryland law provides considerable discretion to local governments to establish their own procedures for the adoption of zoning changes. Free State Recycling Sys. Corp. v. Bd. of County Comm'rs for Frederick County, 885 F.Supp. 798, 800 (D.Md. 1994). Maryland law does require that appropriate notice be afforded to local residents of any substantial modifications to the proposed amendment to local zoning codes. *See* Von Lusch v. Bd. of County Comm'rs of Queen Anne's County, 330 A.2d 738, 744 (Md. 1975).

> commission for further review and recommendation prior to the city council's formal action on the request.[102]

Thus, in Salisbury, in the event of a zoning text amendment, as with rezoning a particular property, any significant change in the amendment after it leaves the Planning and Zoning Commission must be referred to that agency before the City Council takes action. It was this distinct feature of the zoning process in Salisbury that the adoption of four to two transgressed.

In a presentation before the Planning and Zoning Commission, the four to two proponents simply requested that the number "four" in the definition of a family in the Zoning Code be stricken, and the number "two" be substituted.[103] The Planning and Zoning Commission recommended this version of the definition to the City Council. Only after the proposed ordinance reached the City Council did it acquire its most controversial features, namely the exceptions for "functional families" and household servants.[104] During the second reading of the ordinance, the Salisbury City Solicitor urged the City Council to return the proposal to the Planning and Zoning Commission prior to taking final action, in order to avoid procedural challenges.[105] The Council decided not to take the Solicitor's advice, though the Mayor explicitly acknowledged her reservations about the ordinance, and the ordinance was adopted without any referral back to the Planning and Zoning Commission.

For those who might regard this as a purely technical foul, it should be noted that the Salisbury Zoning Code requires that a zoning text amendment be advertised in "sufficient detail to inform public of the nature of the proceeding."[106] Because the "functional family" and other exceptions to four to two were added into the ordinance after it was advertised, the public was denied adequate notice of those

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102. SALISBURY, MD. ZONING ORD. § 17.228.020(A)(2) (1997).

103. City of Salisbury-Wicomico County Department of Planning, Zoning and Community Development, Case No. SP-0206, Sept. 19, 2002 Staff Report at 4 [hereinafter Staff Report].

104. *See* source cited *supra* note 59.

105. *See* Minutes of Salisbury City Council Meeting, Dec. 16, 2002, *available at* http://www.ci.salisbury.md.us/CityClerk/02dec16.html.

106. *See* SALISBURY, MD. ZONING ORD. § 17.04.150(B)(3)(b) (2001).

provisional changes. Thus, the procedural problems in the adoption of four to two were not slight, and it is highly unlikely that a judge would dismiss those problems as *de minimis*.

The critics of the ordinance in Salisbury most offended by the ordinance's procedural flaws were not dry theorists, but advocates for a good and efficient government.[107] To these moderate few, the adoption of four to two came through a heedless, headlong rush to have legislation enacted, and as a result, fairness and rationality were sacrificed for temporary political considerations. These critics were the most vindicated by four to two's odd denouement.

VIII. FOUR TO TWO ENDS NOT WITH A BANG BUT A WHIMPER

Through six months of noisy debate over four to two, it seemed to Salisburians that the ordinance's adoption must bode some apocalyptic struggle between the ordinance's proponents and its opponents. The neighborhood activists who lobbied for enactment of the ordinance decided that by simply changing the definition of a "family," they could in one stroke reduce the number of unrelated people permitted to live in a dwelling unit. Though their approach could claim the virtue of simplicity, it ignored the inter-relationship between Salisbury's zoning code and other provisions of local law.

In Salisbury, the zoning code does not purport to regulate the allowable occupancy in a building. Instead, the zoning code focuses on external density, or the number of dwelling units allowed on a parcel of a certain size. In Salisbury, as elsewhere, allowable occupancy levels, or if you will, internal density, is regulated, not by the zoning code, but by the housing code. What four to two's advocates overlooked was that the number of persons, unrelated or otherwise, permitted to occupy a dwelling unit, was specified, not in the zoning code, but in the housing code. In the wake of four to two's adoption, it was discovered that the city housing code stated: "A detached dwelling unit (single house) may be occupied by: (a) one

107. Staff Report, *supra* note 103, at 4 (City Solicitor and members of the Planning and Zoning Commission advised in favor of allowing the Commission an opportunity to review the legislative amendments).

family allowing for visiting guest, or (b) not over four unrelated occupants."[108]

Had the backers of four to two taken a closer look at the city housing code, they would have discovered that amending the definition of a "family" has no effect because the housing code permitted four unrelated persons, in lieu of a family, to occupy a dwelling unit. When the debris from the four to two dispute was cleared away, an unclouded vision of the city code disclosed that six months of debate achieved nothing but the creation of a "family" definition of strange complexity but with no practical significance. Not surprisingly, this discovery prompted little public comment. Landlords and advocates of the Fair Housing Act were loathe to do or say anything that would prompt corrective action, and four to two's supporters were understandably reticent on the subject. Quietly, City Council members instructed the City Solicitor to draft an ordinance amending the Housing Code to bring it into conformity with four to two.[109] As of this writing, four to two remains at a standstill.

IX. ALTERNATIVES TO DISCRIMINATION

Throughout the debate over four to two, students, landlords, civic leaders, and others advocated policy alternatives in lieu of outright economic discrimination against renters and non-traditional cohabitants. The leading policy alternatives included landlord licensing, more restrictive lease agreements, and strict enforcement of existing city ordinances governing noise, littering and parking.

When four to two made its appearance before the Salisbury Planning and Zoning Commission, the staff urged rejection of four to two in favor of a landlord licensing ordinance.[110] Landlord licensing is not a revolutionary concept.[111] Licensure is a simple regulatory

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108. *See* SALISBURY, MD. HOUSING CODE §15.24.950(D)(1) (1997).

109. This fact comes not from any published news account, but from the author's professional involvement in on-going litigation discussions between private parties and the City.

110. Staff Report, *supra* note 103, at 4.

111. Lawrence R. McDonough, *Wait a Minute! Residential Eviction Defense is Much More than "Did You Pay the Rent?"*, 28 WM. MITCHELL L. REV. 65, 93 (2001) (discussing landlord licensing and referencing statutory law).

approach, in that each rental property is registered and periodically inspected. Rental properties that do not meet city code requirements lose their license and cannot be rented. Municipal planners disturbed by urban problems such as those that prompted Salisbury's four to two initiative would do well to eschew such ordinances in favor of landlord licensing, which tackles the problems in an effective, non-discriminatory way.

Another policy alternative to discriminatory zoning includes more restrictive terms in rental lease agreements. Contract law provides an ideal tool by which a local government can control atmosphere in residential neighborhoods. When tenants sign a lease drafted by the landlord, the tenants have entered into a legally binding contract with the landlord.[112] Consequently, the landlord can privately enforce a violation of the contract consistent with the provisions of the contract without the need of local government law enforcement. The government is spared the expense of time and money in ensuring compliance with local public ordinances. Recommended terms for more restrictive lease agreements include conferring upon the landlord the authority to terminate the lease with all or some of the current residents if there is a violation of a local public ordinance. In addition, lease agreements can restrict the number of guests each tenant may have in the house at any point in time, or the number of cars permitted in neighborhood roadways due to visitors to the house, to name a few.[113]

Aside from the few restrictions imposed by Maryland statutory law,[114] the possibilities of additional lease terms are endless and, in fact, could be based on a list developed from collaboration between landlords and the neighborhood associations. Through such a negotiation, the neighborhoods could in essence "contract around" the problems they believe college students bring to their neighborhoods. There is little evidence to suggest that transaction costs are so high that such an approach would not be beneficial. Again, urban planners should pursue mandatory lease-term ordinances as a more effective

112. Progressive Friendship Sav. & Loan Ass'n v. Rose, 201 A.2d 8, 11 (Md. 1964).

113. *See* MD. CODE ANN., REAL PROP. §§ 8-105, 8-208 (1974) (listing terms that *cannot* be included in a lease).

114. §§ 8-105, 8-208.

alternative to the discriminatory approach reflected in Salisbury's 4-2 ordinance.

X. QUO VADIS FOUR TO TWO?

What is the future of four to two in Salisbury? What lessons can be drawn from Salisbury's four to two 4-2 debate? As for the future of four to two in Salisbury, it seems inevitable that it will be revived through an amendment of the Housing Code.[115] The deferred legal battle will then begin, and the substantial body of Maryland zoning opinions will be enriched. The lessons drawn from Salisbury's problems with four to two have more to do with matters of process than of substance. Zoning codes can and already do limit the number of unrelated people who may reside together without legal or constitutional challenge.[116] That regulatory bar may perhaps be lowered without legal or constitutional peril, though, the lower the bar, the greater the incentive to challenge. Where the neighborhood reformers of Salisbury's ordinance made a mistake was in weighing down the ordinance with exceptions designed to exempt politically favored groups, and in pushing to implement the ordinance in disregard of vested property rights. Economic discrimination, whether targeting classes of people on the political right or the political left, is indefensible. Legislation, particularly zoning legislation, is best produced by a process that allows political heat to dissipate, and cooler heads to have their say. Had the Salisbury City Council returned the ordinance to the Planning and Zoning Commission for technical analysis before rendering a formal decision, some of four to two's more egregious blunders would surely have been avoided. In the end, however, it seems the four to two ordinance was just a bad idea and the moral for its long, peculiar story was best supplied by a Salisbury lawn sign: "4-to-2 just won't do!"

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115. *See* Salisbury City website *at* http://www.ci.salisbury.md.us/ CityClerk/Ord1871.html (for the current proposed amendment) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

116. Vill. of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1974).