ESSEX LEASING: SPECIFIC PERIOD OF NONUSE IS ENOUGH

I. INTRODUCTION

The rapid growth of America's urban areas has increased reliance on governments' regulation of the urban environment. Governments manage urban development primarily through comprehensive zoning ordinances.[1] Comprehensive zoning, which requires future use of developed lands to conform with urban planning goals, is generally presumed to be constitutional.[2] Municipalities historically could enact zoning ordinances retroactively to extinguish a present use.[3] Recently, courts have been less willing to apply zoning ordinances retroactively.[4] Recent cases also indicate another reversal in policy, a return to a less burdensome method of extinguishing nonconforming uses.[5]

Nonconforming uses are created by prospective application of zoning ordinances. An existing use may generally continue after the effective date of a new zoning ordinance prohibiting the existing use. Because this lingering use does not conform to the newly enacted zoning measure, it is allowed under an exception for nonconforming uses. This Recent Development examines the history, restraints, and attempts to terminate nonconforming uses. Specifically, this paper fo-

1. Comprehensive zoning is the division of an entire municipality into districts for the purpose of restricting land use by geographical area. R. ANDERSON, AMERICAN LAW OF ZONING § 1.12 (1968). New York City enacted the first comprehensive zoning plan in 1916. *See* Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834 (1924).

2. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

3. D. MANDELKER, LAND USE LAW, § 2.15 and § 5.60 (1988).

4. *See e.g.*, Thomson v. Village of Tequesta Board of Adjustment, 546 So. 2d 457 (Fla. Dist. Ct. App. 1989); Sheston Oil Co., Inc. v. Borough of Avalon Planning Board, 214 N.J. Super. 593, 520 A.2d 802 (N.J. Super. Ct. App. Div. 1987). *But cf.* City of Portland v. Fisherman's Wharf Associates II, 541 A.2d 160 (Me. 1988).

5. *Id.* at § 5.60.

cuses on *Essex Leasing v. Zoning Bd. of Appeals*,[6] a recent decision by the Supreme Court of Connecticut that liberalizes a municipality's ability to extinguish nonconforming uses.

II. ZONING AND THE NONCONFORMING USE

A. *The Zoning Power Base*

Local governments enact zoning ordinances pursuant to police powers.[7] States, through enabling legislation, confer these powers on local governments.[8] Zoning ordinances enacted pursuant to this power usually divide a territory into districts designated for certain defined uses.[9]

Advocates of zoning ordinances advance many justifications for such regulations. One justification is the classic view that zoning ordinances are a legislative refinement of common law nuisance.[10] Other explanations include the separation of industrial and residential neighborhoods, reducing traffic congestion and enhancement of fire protection capabilities.[11] Zoning ordinances ideally achieve strict separation of land uses while minimizing the negative impact of designated uses on adjoining land values.[12]

The Supreme Court declared in *Village of Euclid v. Amber Realty*

6. 206 Conn. 595, 539 A.2d 101 (Conn. 1988).

7. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926); Jones v. City of Los Angeles, 211 Cal. 304, 307, 295 P. 14, 16 (1930). The United States Supreme Court has defined the police power broadly: "[The police] power is not confined . . . to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people." Bacon v. Walker, 204 U.S. 311, 318 (1907). *See also* Commonwealth v. Barnes & Tucker Co., 472 Pa. 115, 126-27, 371 A.2d 461, 467, *appeal dismissed*, 434 U.S. 807 (1977) (recent expression of the same police power theory).

8. All states have delegated some zoning authority to municipalities. R. ANDERSON, *supra* note 1, at § 3.08. The delegation must be specific. A general grant of police power is insufficient to authorize zoning. Poulos v. Caparrelli, 25 Conn. Supp. 370, 378, 205 A.2d 382, 386 (Conn. Supr. Ct. 1964); Ellison v. City of Fort Lauderdale, 183 So. 2d 193, 195 (Fla. 1966).

9. R. ANDERSON, *supra* note 1, at § 1.12.

10. *Id.* at § 6.02.

11. Galanes v. Town of Brattleboro, 136 Vt. 235, 388 A.2d 406 (1978).

12. Achieving such a result was the primary goal of the earliest zoners. *See* S. Toll, *Zoned America* 183 (1969); Norton, *Elimination of Incompatible Uses and Structures*, 20 LAW & CONTEMP. PROB. 305, 407 n.8 (1955) (protecting property values on Fifth Avenue in New York).

Co.[13] that zoning ordinances restricting the use of an owner's land did not result in a taking violation under the fifth or fourteenth amendments of the United States Constitution.[14] The Court upheld the ordinance as a constitutional exercise of the village's police power.[15] In reaching this conclusion, the Court acknowledged the municipality's need for flexible police power in light of changing circumstances and conditions.[16] However, the Court stated that the exercise of the power must bear a rational relationship to the health, safety, morals, and general welfare of the community.[17] In addition, the Court cautioned that ordinances applied arbitrarily would be unenforceable.[18] Since *Euclid*, courts have greatly expanded the objectives of the zoning power.[19]

B. *The Nonconforming Use*

A nonconforming use is a lawful, continued use of land, building, or premises which lawfully existed prior to the effective date of a zoning

13. 272 U.S. 365 (1926). The property in question was situated near a developing industrial district. *Id.* at 371.

14. *Id.* at 384. The plaintiff attacked a zoning ordinance that allegedly reduced the value of his land from $10,000 to $2,500 per acre. The landowner also asserted that the ordinance violated the fifth amendment of the United States Constitution in that it deprived him of his life, liberty, and property without due process of law. *Id.* For a discussion of the application of the due process clause to the substantive content of government actions, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 553-86, 1302-1435 (1988).

Courts have recognized that the right to make future use of land is a "property" interest for due process purposes. For example, in *Euclid* the court explicitly assumed the presence of a property interest in order to reach the issue of whether due process was afforded in the invasion of the landowner's property rights. 272 U.S. at 386. For additional discussion of this principle, see City of Akron v. Chapman, 160 Ohio St. 382, 388, 116 N.E.2d 697, 700 (1953), in which the court defined property as "not merely the ownership and possession of lands or chattels but the unrestricted right of their use, enjoyment and disposal." *See also* Spann v. City of Dallas, 111 Tex. 350, 356, 235 S.W. 513, 515 (1921) (police power is subject to an inferred constitutional limitation).

15. 272 U.S. at 397.

16. *Id.* at 387.

17. *Id.* at 395. The means were reasonably designed to meet the objectives of insuring the safety of children, facilitating fire protection and minimizing municipal expenses. *Id.*

18. *Id.* at 395; *See also* Nectow v. City of Cambridge, 277 U.S. 183, 188-89 (1928) (Supreme Court struck down a zoning ordinance as unreasonable as applied).

19. Courts have upheld zoning ordinances with the following purposes: Forde v. City of Miami Beach, 146 Fla. 676, 685, 1 So. 2d 642, 647 (1941) (maintenance of property values); Leis v. District of Columbia, 190 F.2d 25 (D.C. Cir. 1951) (stabilization of land use).

ordinance. This continued use, however, does not comply with the use restrictions of the zoning ordinance.[20] The nature of activities required to establish a nonconforming use varies among the courts. Some jurisdictions find that the use must be generally apparent to the neighborhood.[21] Other jurisdictions hold that the use must be lawful,[22] in existence on the enactment date of the ordinance,[23] and more than an occasional use.[24]

Many state statutes expressly protect the nonconforming use.[25] Early zoning ordinances exempted nonconforming uses.[26] A few critics argue that the need to eliminate the nonconforming use is overemphasized because a nonconforming use would not significantly impair effective zoning, and the occupant or owner of a property would give up the nonconforming use over time.[27] To encourage the gradual elimination of nonconforming uses, local authorities have enacted ordinances which hamper its continued exercise.[28]

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20. 6 P. ROHAN, ZONING AND LAND USE CONTROLS § 41.01 (1978).

21. *See* Fairlawns Cemetery Ass'n v. Zoning Comm'n, 138 Conn. 434, 445, 86 A.2d 74, 80 (1952).

22. Ralston Purina Co. v. Acrey, 220 Ga. 788, 791, 142 S.E.2d 66, 69 (1965) (burden of proof is on person seeking to establish legality of nonconforming use); Eggert v. Board of Appeals, 29 Ill. 2d 591, 599, 195 N.E.2d 164, 169 (1963) (building code plaintiff violated upheld as constitutional); In Re Besthoff v. Zoning Bd. of Appeals, 34 A.D.2d 782, 311 N.Y.S.2d 58, 59 (1970) (property with nonconforming use prior to present zoning ordinance governed by prior zoning ordinance); Larson v. Howland, 108 N.Y.S.2d 231, 233 (Sup. Ct. 1951) (violation of restrictive covenant by constructing a gas station).

23. *See, e.g.*, Fairlawns Cemetery Ass'n v. Zoning Comm'n, 138 Conn. 434, 443-45, 86 A.2d 74, 79-80 (1952); Whitpain Township v. Bodine, 372 Pa. 509, 511-13, 94 A.2d 737, 739-40 (1953).

24. *See* Durning v. Summerfield, 314 Ky. 318, 321-22, 235 S.W.2d 761, 763 (1951) (occasional use as a carnival was not a nonconforming use).

25. *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-462.02 (1977 & Supp. 1988); CONN. GEN. STAT. § 8-2 (1989); HAWAII REV. STAT. § 205-8 (1985).

26. Bettman, *supra* note 1, at 853. A typical early clause provided: "The lawful use of a building or premises existing at the time of the adoption of this ordinance may be continued, although such use does not conform with the provisions hereof, and such use may be extended throughout the building." Waukegan, Ill. Zoning Ord. 29 (1924) *quoted in* Note, *Amortization of Property Uses Not Conforming to Zoning Regulations*, 9 U. CHI. L. REV. 477, 478, n.5 (1942). *See also* ordinance cited in Comment, *The Abatement of Preexisting Nonconforming Uses Under Zoning Laws: Amortization*, 57 NW. U.L. REV. 323, 323 n.1-2 (1962).

27. Comment, *Conforming The Nonconforming Use: Proposed Legislative Relief For A Zoning Dilemma*, 33 SW. L.J. 855 (1979).

28. *See infra* notes 29-52 and accompanying text.

III. RESTRAINTS ON NONCONFORMING USES

A. *Restraints on Nonconforming Use Modification*

A majority of zoning ordinances limit the modification of nonconforming uses.[29] Commonly, ordinances state that a nonconforming use "shall not change except to a use permitted in the district in which it is located."[30] Other ordinances provide that the use must remain identical or at least substantially similar to the original use.[31] Still others allow modification of the use, but only those that bring the use into stricter compliance with the zoning requirements.[32]

B. *Restraints on Nonconforming Use Expansion*

Nonconforming use status does not constitute an unlimited right to expand.[33] A landowner wishing to expand must generally allege that he contemplated the intensification of the use when the use became nonconforming.[34] In addition, courts may permit expansion if the nature of the nonconforming use at the time of enactment of the zoning ordinance has not changed.[35] For example, in *Stuckman v. Kosciusko County Bd. of Appeals*,[36] the court held that a small nonconforming business cannot change so as to effect a change in kind on the neighborhood. The nonconforming business can, however, cause a change that would result in an increase in business.[37] In *Stuckman*, the court per-

29. 6 P. ROHAN, *supra* note 20, at § 41.03[3][a].

30. D. MANDELKER, *supra* note 3, at § 5.61.

31. 6 P. ROHAN, *supra* note 20 at 41.03[2][a]. For an example of such an ordinance, see Everpure Ice Mfg. Co. v. Bd. of Appeals, 324 Mass. 433, 86 N.E.2d 906 (1949).

32. *See*, e.g., Stern v. Zoning Bd. of Appeals, 140 Conn. 241, 244-46, 99 A.2d 130, 132 (1953); City of Hagerstown v. Wood, 257 Md. 558, 263 A.2d 532 (1970); Redford Moving & Storage Co. v. City of Detroit, 336 Mich. 702, 58 N.W.2d 812 (1953).

In Belleville v. Parrillo's, Inc., 416 A.2d 388 (N.J. 1980), the court held that a modification in use from a nonconforming restaurant to a discotheque was impermissible. After reviewing the applicable rules for modification of nonconforming uses, the court concluded: "Defendant's conversion of the premises from a restaurant to a discotheque resulted in a substantial, and therefore impermissible change. The entire character of the business has been altered . . . . Measured by the zoning ordinance the general welfare of the neighborhood has been demonstrably affected adversely. . . ." *Id.* at 393.

33. 6 P. ROHAN, *supra* note 20, at § 41.03[3][a].

34. D. MANDELKER, *supra* note 3, at § 5.61.

35. *Id.*

36. 495 N.E.2d 775 (Ind. App. 1986).

37. *Id.* at 776. In this case, the plaintiffs, owners of a nonconforming junkyard, increased their inventory of cars by making more area available on their existing lots. *Id.*

mitted the expansion because the plaintiff merely increased the productivity of the land. In addition, the business purpose and its effect on adjacent landowners had not changed.[38]

Though Connecticut has adopted a liberal view of "natural expansion and growth,"[39] courts nevertheless have applied this doctrine conservatively. In *Connecticut Sand & Stone Corp. v. Zoning Board of Appeals of The Town of Avon*,[40] for example, a Connecticut court held that an excavating and extracting venture could not manufacture ready-mix concrete because this expanded its operation of a sand and gravel plant and thus violated local zoning regulations.[41] The court, however, held that the sand and gravel plant could adopt a more efficient method or instrument of production if it were reasonably adapted to the original use of the property.[42]

Courts may also limit an expansion if such extension has a reasonable probability of devaluing neighboring land.[43] Some courts, however, permit expansion despite prohibitive ordinances if the expansion does not substantially affect the health, safety, morals, or general welfare.[44] Courts may also allow expansion upon a showing of hardship.[45]

C. *Restraints on the Resumption of a Nonconforming Use After Abandonment or Discontinuance*

Zoning ordinances usually grant municipalities the power to termi-

38. *Id.*

39. Comment, *Zoning and the Nonconforming Use in Connecticut*, 45 CONN. B.J. 427 (1971).

40. Connecticut Sand and Stone Corp. v. Zoning Bd. of Appeals of Avon, 150 Conn. 439, 190 A.2d 594 (1963).

41. *Id.* at 440, 190 A.2d at 595.

42. *Id.* at 442, 190 A.2d at 596.

43. Jobert v. Morant, 150 Conn. 584, 588, 192 A.2d 553, 555 (1963).

44. *See* Hoffarth v. County of St. Clair, 51 Ill. App. 3d 763, 366 N.E.2d 365 (1977) (court denied expansion of archery range in rural area based on a substantial effect on health, safety, morals and general welfare).

45. *See, e.g.*, Home Fuel Oil Co. v. Board of Adjustment, 5 N.J. Super. 63, 66, 68 A.2d 412, 413, (N.J. Super. Ct. App. Div. 1949) (property in question needed a street for its use where the property was in a non-industrial zone); Crudeli v. Zoning Bd. of Review, 73 R.I. 301, 55 A.2d 284 (1947) (hardship to disallow construction of a driveway providing access to a building lawfully under construction); *cf.* Snyder v. Zoning Hearing Bd., 20 Pa. Commw. 139, 141-42, 341 A.2d 546, 548 (1975) (applicant seeking variance for expansion of nonconforming use must show same hardship as any other applicant for variance).

nate an abandoned nonconforming use.[46] Constitutional issues may arise, however, if a municipality applies its abandonment provision to terminate an abandoned nonconforming use.[47] A court may conclude that the termination is unconstitutional if the owner's abandonment was involuntary.[48] Courts generally avoid these constitutional issues by requiring that the abandonment be voluntary.[49] Some courts hold that voluntary abandonment occurs if two essential elements are present: (1) an overt act of abandonment, and (2) the intent to abandon.[50] Other courts consider discontinued use sufficient evidence of the intent to abandon while others insist on a clear showing of intent.[51] Many courts have adopted the two elements of the abandonment rule even if the zoning ordinance used "discontinuance" instead of "abandonment."[52]

IV. *ESSEX LEASING V. ZONING BD. OF APPEALS*

In *Essex Leasing v. Zoning Bd. of Appeals*,[53] a building owner challenged a zoning regulation terminating a nonconforming use solely as a result of nonuse for one year. The regulation[54] followed Connecticut's

46. *See* Hill v. City of Manhattan Beach, 6 Cal. 3d 279, 286, 491 P.2d 369, 373, 98 Cal Rptr. 785, 789 (1971); City of Lima v. Hempker, 118 Ohio App. 321, 194 N.E.2d 585 (1962). Change in ownership is not an abandonment. Instead, the new owner may continue the nonconforming use. People v. Smith, 38 Ill. App. 3d 798, 799, 349 N.E.2d 91, 92 (1976).

47. D. MANDELKER, *supra* note 3, at § 5.60.

48. *Id.*

49. D. MANDELKER, *supra* note 3, at § 5.63.

50. Grushkin v. Zoning Bd. of Appeals of Norwalk, 26 Conn. Sup. Ct. 457, 460, 227 A.2d 98, 100 (1967).

51. Mifflin v. Zoning Hearing Bd., 3 Pa. Commw. 485, 284 A.2d 320 (1971); Borough of Saddle River v. Bobinski, 108 N.J. Super. 6, 259 A.2d 727 (N.J. Super. Ct. Ch. Div. 1969) (nonuse after 27 years did not constitute abandonment).

52. Some courts have interpreted discontinuance as synonymous with abandonment requiring the intent element. Dubitzky v. Liquor Control Comm'n, 160 Conn. 120, 127, 273 A.2d 876, 880 (1970); Smith v. Howard, 407 S.W.2d 139, 141 (Ky. 1966).

53. 206 Conn. 595, 539 A.2d 101 (1988).

54. *Id.* at 606-07, 539 A.2d at 107. The regulation provides:

> 50E. *TERMINATION.* Except as provided in 50F., no use of any land or improvement having a non-conforming characteristic and no non-conforming use or characteristic of land or improvement shall be resumed or restored;
>
> 50E.1 *CESSATION.* If such use or characteristic has not existed for a period of one year from the date of cessation or from the effective date of the applicable regulation, whichever is later; or
>
> 50E.2. *ABANDONMENT.* If it is abandoned. [U]nless such use conforms to

long-standing policy of eliminating nonconforming uses as quickly as the fair interest of the parties would permit.[55] Under the regulation, the court interpreted the term "cessation" as not requiring intent to abandon the use,[56] and therefore refused to look to the owner's motive to see whether he had intended to abandon the nonconforming use.

In *Essex Leasing*, a portion of the building was a legal nonconforming commercial use.[57] The portion in question was vacant for approximately two years but the tenant continued to pay rent and to maintain that portion of the building.[58] Essex Leasing filed an application to continue its nonconforming use in conjunction with its impending purchase of the building.[59] The zoning officer denied the permit and the zoning board upheld the officer's decision.[60] The Superior Court, Judicial District of Middlesex, reversed the zoning board.[61] The Appellate Court of Connecticut agreed with the zoning board's determination and set aside the judgment.[62] The Supreme Court of Connecticut agreed with the zoning board as well.[63]

The plaintiff advanced three grounds on which the appellate court

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these Regulations or such use or characteristic has been authorized by the grant of the Zoning Bd. of Appeals of a variance in the application of the pertinent regulation.

55. *Id.* at 599, 539 A.2d at 104.

56. *Id.*

57. *Id.* at 596, 539 A.2d at 102.

58. The plaintiff's immediate predecessor in title leased the building to a commercial tenant. 206 Conn. 595, 596, 539 A.2d 101, 102. In 1981, the tenant ceased operations but paid rent and occupied the premises until March 1983. *Id.* at 597, 539 A.2d at 102.

59. *Id.*

60. *Id.* at 597, 539 A.2d at 102-03.

61. The plaintiff appealed to the trial court on three grounds: (1) The Board had no authority under the zoning enabling act to terminate the nonconforming use solely on nonuse. (2) The Board misconstrued 50E.1 as requiring no showing of intent to discontinue the nonconforming use. (3) The record did not show that a one year period of nonuse occurred. *Id.* The trial court ruled on the plaintiff's second ground that the term "cessation" in 50E.1 in its ordinary meaning was synonymous with "discontinuance" which has been interpreted to require a showing of intent. Therefore, the trial court sustained the appeal since the board had not considered intent. *Id.* at 598, 539 A.2d at 103.

62. *Id.* at 598, 539 A.2d at 103. The appellate court ruled that the trial court's construction of 50E.1 was erroneous. The court held the general statutes permit local zoning regulations to terminate a nonconforming use solely in a period of nonuse and that the town of Essex had adopted such a regulation. *Id.*

63. *Id.* at 595, 539 A.2d at 101. The Supreme Court of Connecticut remanded the case to the trial court to determine whether the record factually supports the board's

was in error. First, the owner argued that the term "cessation"[64] in the Town's zoning ordinance was synonymous with discontinuance and therefore required proof of intent. The court found that the ordinance as a whole manifests a clear intent to terminate nonconforming uses by two distinct and independent means.[65] The court reasoned that because the section governing abandonment terminates nonconforming uses that owners have intentionally abandoned, the section governing abandonment must represent a different standard.[66] The court found that the Town of Essex had adopted a bifurcated system to extinguish the nonconforming uses. In that system the traditional standard of abandonment coexists with an alternative standard of nonuse for a specified period of time.[67]

Second, the owner argued that the cessation ordinance created no more than a rebuttable presumption of relinquishment of a nonconforming use.[68] Because the Essex ordinance's "cessation" standard allowed the termination of a nonconforming use without regard to intent, the court found the ordinance avoided the unconstitutional, arbitrary deprivation of property that would result if the ordinance required a showing of intent.[69] Thus, the court distinguished cases in other jurisdictions that were interpreted as creating a rebuttable presumption to avoid unconstitutionality.[70]

Finally, the court dismissed plaintiff's claim that Essex exceeded its

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contention that the plaintiff did not use the property for one year. *Id.* at 608, 539 A.2d at 108.

64. The court noted the potential harsh effects of 50E.1 are mitigated by Essex Zoning regulation 50F which provides: "[a] nonconforming use or characteristic of an improvement which is damaged by fire or other casualty to any extent may be restored or resumed subject to certain restrictions." *Id.* at 602 n.2, 539 A.2d at 105 n.2.

65. *Id.* at 601, 539 A.2d at 104. In *Bartlett v. Bd. of Appeals*, the court upheld a zoning ordinance which terminated nonconforming uses after a period of two years. 23 Mass. App. Ct. 664, 505 N.E.2d 193 (1987). The court reasoned that the legislature had decided to adopt an objective standard. *Id.* at 670, 505 N.E.2d at 197.

66. The court also supported the policy of diminishing nonconforming uses as quickly as the fair interest of the parties will permit. *Id.* at 601, 539 A.2d at 105 (quoting Weyls v. Zoning Bd. of Appeals, 290 A.2d 350 (1971)).

67. *Essex* at 601, 539 A.2d at 104.

68. *Id.* Plaintiff cited two cases which found a rebuttable presumption of nonconforming use. Minot v. Fisher, 212 N.W.2d 837, 841 (N.D. 1973) ("discontinuance" standard); California Car Wash, Inc. v. Zoning Hearing Board, 98 Pa. Commw. 209, 510 A.2d 931, 933 n.1 (1986) ("abandonment" standard).

69. *Essex* at 601, 539 A2d at 104.

70. *Id. See supra* note 68 and accompanying text (discussing cases finding a rebuttable presumption of intent).

authority under the state zoning enabling act.[71] The court found the ordinance did not "prohibit the continuance" of a nonconforming use, as proscribed by the enabling act, but merely enabled the Town to seize upon the owners *lack* of "continuance."[72]

V. CONCLUSION

Zoning regulations stabilize land use in order to promote the general welfare of each community. Courts agree that nonconforming uses should be extinguished as soon as justice permits. In *Essex Leasing* the court upheld a municipality's power to terminate a nonconforming use solely because of nonuse for a specified time period. This decision follows a growing trend of cases which adopt an objective standard for terminating nonconforming uses.

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71. *Id.* at 605, 539 A.2d at 106.

72. *Id.* at 607, 539 A.2d at 107.

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