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# LANDMARKS PRESERVATION AFTER PENN CENTRAL

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## I. INTRODUCTION

Within the past half century all 50 states and more than 600 municipalities, including 23 of the nation's 25 largest cities, have enacted laws designed to encourage the preservation of buildings and areas of historic or aesthetic importance.[1] With these laws has come concern over whether the legislation will withstand attack on constitutional grounds. The concern, however, has been allayed to a large extent by Penn Central Transportation Co. v. City of New York,[2] the first Supreme Court review of landmarks preservation legislation.

Penn Central, in fact, has done more than calm apprehension over the constitutionality of landmarks preservation law. As a result of the decision preservationists and government officials have gained new confidence in enforcing landmarks ordinances and in pushing for the adoption of landmarks regulation. As noted by Frank Gilbert, former executive director of the New York City Landmarks Preservation Commission and presently Assistant General Counsel for the National Trust for Historic Preservation in Washington, strong landmarks preservation ordinances have been enacted in Washington, D. C. and Louisville, Kentucky as a result of the case and "mayors and city council members all over the nation are looking at their local laws and are realizing that now they have Supreme Court backing."[3]

Is this confidence justified? Often overlooked in the aftermath of Penn Central is the fact that a number of landmarks preservation issues were not resolved in the case. Opponents of landmarks preservation law will be able to

raise these issues in attempting to distinguish Penn Central in future landmarks preservation cases. The purpose of this article, after a brief summary of the Penn Central litigation, is to survey these unresolved issues.

## II. LANDMARKS PRESERVATION LAW IN NEW YORK CITY

### A. New York City Legislation

It is generally agreed that public ownership of landmarks is no longer realistic because of the cost of landmark acquisition and maintenance, as well as the resulting reduction in the tax base.[4] In addition to these problems, public ownership often results in the use of buildings for purposes which are not economically viable. Consequently two methods which shift the burden of preservation from government to private owners have become popular. The first method, historic district regulation (HDR), differs from traditional zoning regulation in that under the traditional approach the construction of new buildings is regulated, while under HDR the alteration or demolition of existing structures in a particular area is prevented or regulated. However, there are also similarities between HDR and traditional zoning in that the owners within the designated area,[5] while burdened with certain restricions, also benefit from the general community plan.[6] HDR has been held constitutional in a number of cases.[7] The other method, individual landmark designation, involves regulation on the basis of historic or aesthetic interest of selected structures which might be scattered throughout a municipality.

In 1965, New York City enacted its Landmarks Preservation Law (LPL),[8] having concluded that the destruction or alteration of historic landmarks would threaten its standing as "...a world-wide tourist center and world capital of business, culture and government... ."[9] The Supreme Court considered the law to be a typical urban landmark law "in that its primary method

of achieving its goals is not by acquisitions of historic properties, but rather by involving public entities in land-use decisions affecting these properties and providing services, standards, controls, and incentives that will encourage preservation by private owners and users."[10]

This public involvement includes both HDR and individual landmarks preservation, although only the latter was at issue in Penn Central. The law provides that an 11-member agency, the Landmarks Preservation Commission (Commission), is responsible for administration of the law. The Commission first identifies properties which are "thirty years old or older" that have "a special character or special historical, aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation"[11] and then, after giving notice to the owner and conducting hearings, may designate the properties as landmarks.[12]

The landmark designation results in two types of restrictions on the owner's use of the property. First, the owner must maintain the exterior features of the building in a state of good repair.[13] Second, the owner must obtain the Commission's approval before altering the exterior architectural features of the landmark. Approval is given through the issuance by the Commission of (1) a "certificate of no effect on protected architectural features,"[14] (2) a "Permit for Minor Work," which is issued when the alteration involves only minor work,[15] or (3) a certificate of "appropriateness," which will be granted if the alteration will not unduly interfere with the landmark.[16] If the landmark designation is causing an "insufficient return" from the property and the Commission is unable to alleviate the hardship, the owner is entitled to a "Notice to Proceed" with demolition or inappropriate alteration.[17] The New York City Zoning Resolution includes a number of

other provisions which benefit the owner, including a provision allowing owners of landmarks to transfer development rights to other properties.[18]

B. The Penn Central Decision

Grand Central Terminal was designated a landmark in 1967. In making the designation the Commission's report was lavish in its praise of the Terminal. For instance, in one three-sentence paragraph of the report quoted by the Supreme Court, the following terminology was used: "great" (twice), "unique," "distinguished," "brilliant," and "most fabulous." The paragraph concluded that "In style, it represents the best of the French Beaux Arts."[19]

After designation of the Terminal as a landmark by the Commission, the owner, Penn Central Transportation Co., entered into an agreement with a lessee, UGP Properties, Inc., under which UGP was to build an office building above the Terminal and pay Penn Central a minimum of $3 million annually after construction was completed. Two plans, both designed by architect Marcel Breuer, were submitted to the Commission. Under one proposal, a 55-story office building would be constructed on the roof of the Terminal, while the other proposal called for the construction of a 53-story office building after part of the Terminal's facade had been torn down or stripped.

Both proposals were rejected by the Commission following public hearings. The Commission concluded that, with regard to the first plan, balancing "a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke."[20] The Commission's reasons for rejecting the second plan are summarized by the statement: "To protect a Landmark, one does not tear it down."[21] Penn Central thereupon filed suit seeking injunctive relief to prevent the city from using the LPL to prevent construction of an otherwise lawful structure on the Terminal site. The trial court granted the

injunction but on appeal the New York Supreme Court, Appellate Division, by a divided court (3-2), reversed.[22] Upon further appeal the New York Court of Appeals unanimously affirmed the decision of the Appellate Division[23] and this was, in turn, affirmed by the U.S. Supreme Court by a 6-3 vote.

The broad issue addressed by the Supreme Court was whether, in applying the LPL to Grand Central Terminal, New York City had "taken" Penn Central's property in violation of the Fifth and Fourteenth Amendments.[24] The Court initially rejected a series of arguments raised by Penn Central which, in effect, urged that "any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation if it is to be constitutional."[25] For instance, Penn Central argued that the airspace above the Terminal constituted a valuable property interest that had been "taken" by New York, thus entitling the company to compensation. The Court responded to this argument by observing that "taking" jurisprudence focuses on interference with rights in a parcel as a whole, rather than on segments of rights.[26]

The Court then considered whether the restrictions imposed in this case were so severe that compensation was required but concluded that the restrictions did not justify compensation for three reasons. First, the law allowed Penn Central to continue using the property in the same manner as in the past. Second, the Commission had not prohibited all construction above the Terminal but, instead, had only rejected two specific plans. Third, Penn Central's air rights were transferable to other parcels suitable for the construction of office buildings.[27]

## III. UNRESOLVED ISSUES

In Penn Central the Supreme Court decided that the provisions of the LPL as applied to Grand Central Terminal did not result in a taking of Penn

Central's property. The decision, however, left a number of questions unresolved. We now turn to these questions.

A. The Terminal's Tax-Exempt Status

Grand Central Terminal enjoys tax exemption under New York law, which means that it is subject to special treatment under the LPL. The LPL provides that if the owner of non-exempt property has been denied a certificate of appropriateness and proves that a reasonable return is not being earned on the property, the Commission must either (1) develop a plan acceptable to the owner which allows a reasonable return, (2) grant tax exemption to the extent necessary to allow a reasonable return or (3) acquire a protective interest in the property by eminent domain. If none of these steps are taken, the owner is entitled to the issuance of a Notice to Proceed with demolition or inappropriate alteration.[28]

Tax-exempt structures, however, do not receive similar treatment unless four conditions have been met: (1) The owner has entered into a contract to sell the parcel contingent upon issuance of a certificate of approval; (2) The property in its present state is not capable of earning a reasonable return (were it not tax-exempt); (3) The structure is not suitable for its past or present purposes; and (4) The buyer intends to alter the structure. If these conditions are met the Commission must allow the sale and construction, unless another buyer can be found.[29]

The distinction in the LPL between tax-exempt and non-exempt properties and the provision allowing the Commission to grant tax exemptions might be important in future litigation, for the failure of other jurisdictions to incorporate such provisions into their laws could lead to a decision that it

is not possible for owners of regulated property to earn a reasonable rate of return. For instance, the Court of Appeals in Penn Central, in arriving at the value of the property upon which the return was to be calculated, held that elements of value attributable to the investment of society should be excluded. This investment by society has traditionally been quite high in the case of railroads, which the court considered to be "favored monopolies at public expense, subsidy, and with limited powers of eminent domain...."[30] And today, the court concluded, "government influence is even more pervasive, extending even to the real estate tax exemption enjoyed by Grand Central Terminal itself...."[31] Although the Supreme Court did not address the question of whether it is permissable to separate out the social increments of the value of property, it may well be that a future court, in deciding whether a landmarks law allows a fair return, will hold that the validity of a statute turns on the degree of regulation coupled with the owner's receipt of a tax exemption or other social benefits. As Chief Judge Breitel, who wrote the Court of Appeals opinion, noted in an address: "What we did in Penn Central is solve the problem for this case, even though it doesn't tell you, and we don't know, how we would decide the same case if it had involved Pennsylvania Station....[which] doesn't have quite the same historical, governmental subsidy contribution that Grand Central Terminal had."[32]

B. Ability to Use Property

Even legislation similar to the LPL, which distinguishes between tax-exempt and non-exempt property, might be considered too restrictive in certain situations. In Penn Central, the Supreme Court concluded that the LPL did

not interfere with Penn Central's investment expectations concerning the use of the property, and that Penn Central's further development of the Terminal might be allowed if an acceptable plan were to be submitted.[33] In other cases, especially when the designated property is owned by a charitable organization, it might be shown that a landmark designation has caused greater hardship and might thereby justify a court in holding otherwise.

This is illustrated by Lutheran Church v. City of New York,[34] a decision involving the LPL which was cited by the Supreme Court in Penn Central.[35] The plaintiff, Lutheran Church in America, owned a Madison Avenue residential building which at one time had been the home of J. P. Morgan, Jr. Although the building had been converted to offices, plaintiff's space requirements had increased to such an extent that the building was inadequate for its needs. The plaintiff wanted to demolish the structure and construct a new building but was prevented from doing so because the building had been designated a landmark under the LPL. In making the designation, the Commission concluded that the property was important because, in addition to being the former Morgan residence, "the house is significant as an early example of Anglo-Italiante architecture,...it is one of the few free standing Brownstones remaining in the City,...it displays an impressive amount of fine architectural detail and...it is a handsome building of great dignity."[36] The plaintiff brought suit seeking a judgment declaring the LPL unconstitutional on its face or, at least, insofar as it applied to the plaintiff.

The issue in the case, as framed by the Court of Appeals, was whether the LPL as applied to the Morgan residence constituted a valid exercise of the city's police power. In deciding that it did not, the Court made reference to two concepts of governmental interference developed by Professor Sax:[37]

"(E)ither the government is acting in its enterprise capacity, where it takes unto itself private resources in use for the common good, or in its arbitral capacity, where it intervenes to straighten out situations in which the citizenry is in conflict over land use or where one person's use of his land is injurious to others."[38] In the former case there is a compensable taking, whereas in the latter case (for example, zoning) there is non-compensable regulation.

The dilemma, according to the court, was that in landmark preservation cases the government regulation does not fall neatly into either category. In deciding the Lutheran Church case, however, the court made frequent reference to zoning laws, pointing out that they are void if confiscatory and that the LPL, as applied to the Morgan house, was confiscatory: "What has occurred here, however, where the commission is attempting to force the plaintiff to retain its property as is, without any sort of relief or adequate compensation, is nothing short of a naked taking."[39] As a result, the landmark designation was declared unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution.

In reaching this decision the court relied upon earlier New York authority to the effect that an ordinance, to be considered confiscatory, "precludes the use of the property for any purpose for which it is reasonably adapted."[40] However, in deciding that the landmark designation in Lutheran Church was confiscatory, the court focused primarily on the plaintiff's inability to use the property as its centralized headquarters, rather than on the possibility that the property might be reasonably adapted to other uses. This would seem to indicate that a court, although stating a traditional rule, might be more willing to decide that a taking has occurred in landmarks litigation than in other land use cases.[41]

The Lutheran Church opinion cited Trustees of the Sailor's Snug Harbor v. Platt, a leading New York case, in which the constitutionality of the LPL as applied to charitable organizations was considered.[42] In Snug Harbor, decided by the Appellate Division, the plaintiffs were trustees for a charitable organization whose function was to provide a home for retired seamen. The plaintiffs owned five buildings on the north shore of Staten Island, four of which were used as dormitories for seamen. The plaintiffs found the buildings no longer suitable to accommodate the elderly men and sought to replace them with modern structures. They were prevented from doing so, however, because the buildings had been designated as landmarks. In the words of the court: "The proof showed that as a group these buildings were one of the two best examples of Greek Revival architecture in the country and, as such, part of the aesthetic heritage of the nation."[43]

The plaintiffs brought suit to revoke the designation. The court recognized the right of the state to restrict the use of private property on the basis of the cultural or aesthetic benefit to the community. The court also, in considering the issue of whether the regulation constituted a taking, stated that the test to be applied was whether maintenance of the landmark prevents or seriously interferes with the charitable purpose. Because this test depends on a number of facts which were unavailable to the court the case was remanded for further proceedings.[44]

The Lutheran Church decision was distinguished recently by the New York Court of Appeals in Society for Ethical Culture v. Spatt.[45] The Landmark Preservation Commission designated the Meeting House of the Society of Ethical Culture as a landmark. The Meeting House was constructed by the Society on a valuable parcel of real estate with 200 feet of frontage on Central Park West. The Commission designated the building as a landmark because it has the first

facade of art nouveau style, which was pioneered in the United States by Robert D. Kohn, who served as President of the Society. The Commission concluded that the Meeting House is "a tangible symbol of the Society's permanent social contribution and a rich architectural element of the fabric of our city."[46]

The Society challenged the designation on the ground that the designation (and the resulting restrictions) constituted a taking of the property without due compensation. The Supreme Court decided that the designation was unreasonable, confiscatory and unconstitutional. The Appellate Division unanimously reversed the lower court decision, concluding that the trial court had substituted its subjective judgment for that of the Commission. The Court of Appeals affirmed the Appellate Division decision.

The Court of Appeals cited Lutheran Church in noting that the specific issue to be resolved was whether the impact of the restrictions on the Society and its activities was severe enough to constitute confiscation of the property. In Luthern Church, the court observed, the structure was so inadequate that enforcement of the landmark restriction would result in cessation of the church's charitable activities. The court stressed the fact that attempts by the church to modify the structure were unsuccessful and that the only choices remaining were demolition and rebuilding. In short, "the landmark restrictions were so debilitating, the impediment to the charitable use so complete, that sustaining the landmark designation without compensation was, in reality, a 'naked taking'...."[47]

The facts presented in Ethical Culture were quite different from Lutheran Church. The Society did not argue that the Meeting House was inadequate to serve its present needs but, instead, complained that the property could not be put to its most lucrative use. Consequently, the court concluded that the landmark designation did not amount to an unconstitutional taking of the property.

In future litigation involving property owned by a charity an important question will be whether the facts are more closely aligned to Lutheran Church or to Ethical Culture. If the facts are similar to those in Lutheran Church, it is probable that courts will void the landmark designation, even where the owner has received the benefits of a tax exemption, on the ground that the landmark designation seriously interferes with the charitable purpose. In Penn Central, by contrast, the Court of Appeals found that "there has been no showing that the property, owned not by a charitable enterprise but by an entity existing to make a profit, is incapable in its economic context of producing a reasonable return, even if its development is limited."[48]

C. Transferable Development Rights (TDR)

One reason for the Supreme Court's conclusion that there was no interference with property rights justifying compensation was that Penn Central's air rights were transferable to other parcels which were suitable for the construction of an office building. Penn Central owned several properties in nearby midtown Manhattan, including a number of hotels and office buildings. An amendment to the New York City law was apparently designed to ensure that the LPL would not unduly restrict Penn Central's development options[49] and, in fact, at least eight of the properties were eligible to receive TDR.

In arguing the case before the Supreme Court, Penn Central accepted the factual premise "that the transferable development rights afforded appellants by virtue of the Terminal's designation as a landmark are valuable...."[50] In future cases, if the landmarks regulation in question does not provide for TDR at all or does not provide the same type of TDR as in Penn Central or, even if TDR are available, the landowners challenging the regulation do not have the development options which were available to Penn Central, it is

likely that questions relating to TDR will be raised. The owners in such cases may well rely upon the argument that in some circumstances TDR do not enable the owner to realize a reasonable return--with the result that the regulation constitutes a taking. Even the Court of Appeals in Penn Central, for instance, summarized some of the "many defects" in the New York law: "The area to which transfer is permitted is severely limited, complex procedures are required to obtain a transfer permit, and the program, it has been said, has the unfortunate consequence of encouraging large, bulky buildings around landmarks which are dwarfed by comparison."[51] Despite these defects, however, the court concluded that the program did not result in a deprivation of property without due process of law because Penn Central owned parcels to which the rights could be transferred.

The Court of Appeals contrasted Penn Central with French Investing Co. v. City of New York,[52] a New York Court of Appeals decision in which the constitutionality of another New York City TDR scheme was considered. As a result of a provision in the New York City zoning law, two buildable private parks located in the Tudor City development in Manhattan were rezoned exclusively as parks open to the public. In return the owner of the parks was granted the right to transfer the development rights available to the parks to another site. The issue in the case was whether the rezoning, which prohibited all reasonable income-producing use of the parks, constituted an unconstitutional deprivation of property rights without due process of law. The court concluded that the New York law was unconstitutional because the rezoning had deprived the owner of property rights. The granting of TDR did not alter this result because the "floating" rights, although transferable to a section of mid-Manhattan, were not transferable to a particular parcel. Thus the value of the TDR was dependent on the availability of another parcel

and also subject to the approval of administrative agencies. "In such case, the development rights, disembodied abstractions of man's ingenuity, float in a limbo until restored to reality by reattachment to tangible real property."[53]

As French illustrates, it would be relatively simple for property owners in future landmarks litigation to distinguish Penn Central on the ground that Penn Central, unlike many owners, had properties available which were capable of receiving the development rights. Furthermore, in French the rezoning prevented the owner from generating a return other than from the TDR, while in Penn Central the owner was not deprived of a reasonable return. The TDR law in Penn Central might also be distinguished as being more liberal than laws in other jurisdictions. The Court of Appeals, for instance, considered it "significant" that the New York law allowed the owner to split development rights among several receiving parcels,[54] a feature that might not be present in those other laws.

In order to meet this type of challenge, municipalities might consider structuring their laws along the lines of the New York City law or, alternatively, utilizing a "development bank" or "Chicago Plan."[55] Under these latter schemes, the owner is entitled to an immediate cash payment from the municipality for the rights, which are then placed in a "bank" and made available for ultimate sale to other developers. While not deciding the constitutionality of such plans, the French court contrasted them favorably with the type of regulation contained in the New York law.[56]

D. The Concept of Reasonable Return

The unresolved issues discussed above relate mainly to fact-oriented distinctions based on the existence of a tax exemption, the ability of the

owner to use the regulated property, and the nature of the TDR's given to an owner. Each of these issues is related to a question of law, the meaning of reasonable return, that was not resolved in Penn Central. The LPL contains a reasonable return provision which permits an owner to obtain at least a 6% return on the assessed valuation of the property (subject to certain modifications contained in Section 207-1.o.v) and if the return is not realized the owner is entitled to the remedies provided by Section 207-8.0 which can culminate in a Certificate of Appropriateness permitting alteration or demolition. The Supreme Court in Penn Central did not have to deal with this provision because, on the basis of the findings of fact by the Appellate Division, the Court had to "regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment."[57]

The Court of Appeals did, however, deal with the concept of reasonable return. The court initially observed that the concept is illusive because "the reasonableness of the return must be based on the value of the property, and the value of the property necessarily depends on the return permitted or available."[58] Despite this circular reasoning,[59] the court noted that in most landmark cases, alternative bases of valuation, such as assessed value, can be used as a basis for decision.[60]

Furthermore the court observed that even if the Terminal was operated at a loss, as Penn Central contended, the significant question is whether the property is capable of producing a reasonable return when efficiently managed. And even if operated at a loss when efficiently managed, in some cases the property might produce a reasonable return by benefitting the owner's other holdings in the same area. An example used by the court is the flagship store in a shopping center. Although the flagship store might lose money, its

operation is often justified because the store attracts customers to smaller stores in the center. This was an especially telling analogy in Penn Central because Penn Central owned many properties in the area of the Terminal (the "flagship") which could be said to benefit from the Terminal's operation.[61] Finally, as noted above,[62] the Court of Appeals concluded that a property owner is not entitled to a return on that portion of the property value attributable to social investment.[63]

It may be anticipated that the reasonableness of the return allowed designated properties will be litigated frequently in the future.[64] This will be particularly true where the statute sets the return at 6% of the assessed valuation as specified in the New York law,[65] especially in the present era of double-digit inflation and unrealistic assessments. As noted by Justice Rehnquist, who was joined in dissent by the Chief Justice and Justice Stevens, the concept of reasonable return in these cases will be difficult to resolve because of the variety in types of property and property units.[66] Justice Rehnquist also observed[67] that the majority opinion in Penn Central provides little guidance in defining the concept as the Court used the following terminology in phrasing the question: "unduly harsh impact" on the property,[68] reasonable return,[69] and economic viability.[70]

E. Existence of A Comprehensive Plan

The Court of Appeals in Penn Central noted that landmark restrictions are designed to prevent alteration or demolition of single parcels of property rather than to further a general community plan. The court concluded that "such restrictions resemble 'discriminatory' zoning restrictions, properly condemned, affecting properties singled out in a zoning district for more restrictive or more liberal zoning limitations."[71] The court,

however, noted that discriminatory zoning is significantly different in that with landmark regulation there is an acceptable reason for singling out individual parcels, namely "the cultural, architectural, historical, or social significance attached to the affected parcel."[72]

When the argument that landmark laws are discriminatory and result in reverse spot zoning was raised before the Supreme Court, a somewhat different analysis was used. The Court defined reverse spot zoning as "a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones."[73] The court rejected the reverse spot zoning argument on the ground that the New York City plan was not discriminatory but, instead, represented a comprehensive plan to preserve structures of historic or aesthetic interest. The Court placed special emphasis on the fact that over 400 landmarks and 31 historic districts have been designated pursuant to the plan.[74] The court also noted that, although "some of the designated landmarks are publicly owned, the vast majority are, like Grand Central Terminal, privately owned structures."[75]

Justice Rehnquist, in dissent, presented the facts in a different light. He observed that the 400 buildings subject to landmark restrictions constituted less than one-tenth of one percent of the buildings in New York City[76] and he considered a "large percentage" of the designated landmarks to be public structures. Justice Rehnquist was also critical of the LPL in that so little guidance was given to the Commission in the selection of landmarks.[77]

It is clear that in future litigation a municipality might encounter difficulty in proving the existence of a comprehensive plan, especially in cases where only a few structures have received the landmark designation. Significantly, three justices in Penn Central concluded that even the designation of over 400 landmarks was insufficient, at least in a city the size of

New York. On the other hand, municipalities may well find consolation in the majority's apparent willingness to uphold laws with relatively vague standards. In this regard, the decision is consistent with prior law.[78]

F. Landmarks Legislation in Relation to Objectives

In its brief, Penn Central conceded that New York City's objective of preserving buildings of historic or aesthetic importance is a permissible one.[79] The Court of Appeals had concluded that the cultural, architectural, historical and social significance of a parcel are acceptable reasons for subjecting the property to special treatment[80] and, had the issue not been conceded, the Supreme Court inevitably would have reached the same conclusion: "(T)his Court has recognized, in a number of settings, that states and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city...."[81]

Despite the difficulty in successfully challenging the objectives of landmarks legislation, owners might succeed in questioning whether specific legislation actually serves the objectives. This is illustrated by a New York Court of Appeals decision, Keystone Associates v. Moerdler.[82] A developer, Keystone Associates, made plans to demolish the Metropolitan Opera Association building (the "Old Met") which was vacated when the Association was moved to a new building in Lincoln Center for the Performing Arts. The New York Legislature responded to these plans by enacting a special statute which declared that the Old Met was an historic landmark and that its preservation would serve the recreational and cultural needs of New York citizens. The legislation created a private corporation which was vested with the power to condemn the structure. Furthermore, the New York City Superintendent of Buildings was given authority to refuse Keystone a demolition permit for 180

days upon request of the corporation (after the corporation desposited $200,000 as security), presumably to give the corporation time in which to raise money to pay for the building.

The city subsequently delayed in issuing a permit and Keystone brought suit to compel its issuance. The New York Court of Appeals, in a 4-3 decision, concluded that the statute was not a proper exercise of the police power and was not intended to protect the public health, safety and welfare. Although the court noted that the public may suffer as a result of the limited number of auditoriums available for large scale cultural programs such as opera, the statute did not contain legislative findings relating to the shortage and the necessity for the continued operation of the Old Met. Moreover, the statute did not provide just compensation for the time period in which a building permit could be delayed.

Chief Judge Desmond, in dissent, disagreed with the majority's determination that the legislation was unconstitutional: "The majority is giving no weight whatever to the ancient presumption of constitutionality of statutes and little credit to the proper legislative purpose of protecting a part of our cultural heritage and of the structures which enshrine those traditions. The making of statutes like this should be encouraged by the courts and not frowned upon because of the comparative novelty of the method used."[83]

The majority in Keystone refused to be drawn into a consideration of the constitutionality of the LPL,[84] which was not relevant since the case involved only the special New York State legislation. However, the case does illustrate an issue that might be raised in future landmarks cases. Even if an owner makes the concession, as Penn Central did, that the preservation of structures with special historic, architectural or cultural significance is a permissible governmental goal, the question remains whether a specific

statute is drafted to meet that goal. As Judge Keating concluded in his majority opinion in Keystone, a landmarks law must be more than "an attempt by the Legislature to indulge those citizens--among whom is included the writer of this opinion--who desire the preservation of this grand old building for the staging of opera."[85]

G. Investment in Landmark Property

Another unresolved issue is actually a policy question that arises from one of the legal issues considered in Penn Central. The legal issue is whether a landmarks law is unconstitutional because, unlike zoning, it does not equitably distribute the benefits and burdens of governmental regulation. The Supreme Court in Penn Central held that no taking occurs when a landmarks law "has a more severe impact on some landowners than on others."[86] The Court reasoned that zoning laws and other legislation designed to promote the general welfare often have the effect of burdening some property owners more than others. The Court also observed that Penn Central was not uniquely burdened because the law applied to over 400 structures in the city. This resolution, however, provides little aid in dealing with a related policy dilemma. The purpose of the LPL and many other landmark laws, according to the Court, is to provide "services, standards, controls, and incentives that will encourage [landmarks] preservation by private owners and users."[87] But will LPL-style legislation encourage investment by private owners? The question can be answered in two ways.

On the one hand, the argument can be made that a law modeled on the LPL in fact discourages the purchase of landmarks because the law restricts future development of the property. The acquisition of parcels adjoining the landmark property would be preferred over the purchase of the landmark property

itself because the adjoining parcel receives the aesthetic benefits of the landmark designation without the burdens. As Justice Rehnquist, in dissent, characterized the New York law: "While neighboring landowners are free to use their land and 'air rights' in any way consistent with the broad boundaries of New York zoning, Penn Central, absent the permission of appellees, must forever maintain its property in its present state."[88] Furthermore, the adjoining property might be developed in a way that could destroy the beauty of the area surrounding the landmark. This has already occurred in some cities which have adopted historic district ordinances; if the district is successful, developers and speculators rush in to take advantage of the proximity to the protected area and thereby destroy the charm and character of the adjacent districts.[89]

On the other hand, it can be argued that a landmarks law will have a ripple effect in that designation of a landmark might lead to investment in and preservation of less distinguished structures in the same area, as the landmark sets the architectural and aesthetic tone for the neighborhood. The landmark, if its designation is justified, will attract people to the area and owners of surrounding property, as a matter of common sense, will seek to develop their property in a manner which highlights, rather than cheapens the landmark. The ripple effect can be seen in Philadelphia, where the renewal of Society Hill (which was designated as an historic district) has resulted in urban renewal and preservation in other areas of the city.[90]

A rebound effect is also possible. The designation of a landmark might encourage the development of the surrounding area and thereby benefit neighboring landowners. The development of the neighborhood could in turn, redound to the benefit of the owner of the landmark as a result of the increased interest in and use of the area, leading to a more profitable use of the landmark.[91]

As can be seen from this discussion, there are contradictory answers to the policy question of whether landmark laws encourage investment in landmark properties. The contradiction does not necessarily mean that one answer is correct and the other wrong, for the propriety of either answer will depend upon the nature of the particular urban environment which is being considered for regulation. It is hoped that difficulties in selecting an answer will not preclude those involved in urban planning from at least raising the question, especially in weighing the merits of individual landmarks regulation against other measures.

## IV. CONCLUSION

There is a widely acknowledged need for landmark and historic district preservation. For instance, it has been estimated that over half of the buildings listed in the Historic American Buildings Survey have been destroyed.[92] In response to this need, states and municipalities have been active nationwide in adopting legislation designed to preserve buildings and areas of historic or aesthetic importance. The Penn Central decision gives preservationists cause for optimism with regard to the constitutionality of landmarks legislation, for the Supreme Court did uphold, on constitutional grounds, the validity of the New York statute as it applied to Grand Central Terminal. However, the decision leaves for future determination the question of whether landmarks legislation in other jurisdictions, as applied to other landmarks, will be upheld, much as Village of Euclid v. Ambler Realty Co.[93] did for zoning in 1926. Euclid gave rise to literally thousands of cases challenging individual zoning decisions but the fundamental concept of zoning as approved by the Supreme Court was never again challenged. Equally in Penn Central it is doubtful that the basic concept of landmarks and historic

district preservation will again be challenged but, as set forth in this article, it may be anticipated that in future landmarks cases designations will be challenged on the basis of, inter alia, a number of factors. Foremost among these factors is the definition and existence of a reasonable return and related issues such as whether or not the regulated property is tax-exempt, the owner's ability to use the property as regulated, and the nature and quality of the owner's transferable development rights. Other important factors include consideration of whether the landmarks regulation represents a comprehensive plan, and the relationship between landmarks legislation and legislative objectives.

The attempt to preserve landmarks often results in conflict between the rights of society and the rights of individual property owners, a conflict that frequently leads to litigation. By recognizing the limitations inherent in the Penn Central decision and by incorporating into the law measures similar to those available under New York City legislation, such as the tax relief and TDR provisions, those involved in landmarks regulation may minimize both future conflict and litigation.

FOOTNOTES

1. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 107 (1978); Cahan, 6 BARRISTER 47, 48 (1979).

2. 438 U.S. 104 (1978).

3. See Cahan, supra note 1, at 47.

4. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 109 n. 6 (1978).

5. See id. at 111 n. 11 for the definition of an historic district under the New York City Landmarks Preservation Law.

6. Penn Central Transp. Co. v. City of New York, 42 N.Y. 2d 324, 330, 366 N.E. 2d 1271, 1274, 397 N.Y.S.2d 914, 917 (1977).

7. See Figarsky v. Historic District Commission, 171 Conn. 198, 368 A.2d 163 (1976); First Presbyterian Church of York v. City Council of York, 25 Pa.C. 154, 360 A.2d 257 (1976); Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976); Bohannon v. City of San Diego, 30 Cal. App.3d 416, 106 Cal. Rptr. 333 (Ct. App. 4th Dist. 1973); Rebman v. City of Springfield, 111 Ill. App.2d 444, 250 N.E. 2d 289 (1969); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964); Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557 (1955).

8. NEW YORK CITY CHARTER § 2004 AND AD. CODE ch.8-A, § 205-1.0 et. seq. (1965 as amended 1976).

9. NEW YORK CITY AD. CODE ch.8-A, § 205-1.0 (a).

10. 438 U.S. at 109, 110.

11. NEW YORK CITY CHARTER § 2004 AND AD. CODE ch.8-A, § 205-1.0 et. seq. (1965 as amended 1976).

12. Id. § 207-1.0(n).

13. Id. § 207-10.0(a).

14. Id. § 207-5.0.

15. Id. § 207-9.0.

16. Id. § 207-6.0.

17. Id. § 207-8.0.

18. NEW YORK CITY ZONING RESOLUTION Art. I, ch. 2, § 12-10 (1978); NEW YORK CITY ZONING RESOLUTIONS 74-79 to 74-793.

19. 438 U.S. at 116 n. 16.

20. Id. at 117, 118.

21. Id. at 117.

22. 50 A.D.2d 265, 377 N.Y.S.2d 20 (1975).

23. 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977).

24. 438 U.S. at 107.

25. Id. at 129.

26. Id. at 130. Other arguments raised by Penn Central will be discussed below.

27. Id. at 136, 137. Justice Rehnquist, in dissent, viewed the action of the Commission as constituting the taking of substantial property rights of Penn Central which, in the words of Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416, could not be accomplished "by a shorter cut than the constitutional way of paying for the damage." 438 U.S. at 153.

28. Id. at 112 n. 13.

29. Id.

30. 42 N.Y.2d at 332, 366 N.E.2d at 1275, 397 N.Y.S.2d at 919.

31. Id. at 332, 366 N.E.2d at 1276, 397 N.Y.S.2d at 919.

32. URBAN LAND INSTITUTE, ENVIRONMENTAL COMMENT 8 (April, 1978).

33. 438 U.S. at 136, 137.

34. 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).

35. 438 U.S. at 112 n. 13.

36. 35 N.Y.2d at 125, 316 N.E.2d at 308, 359 N.Y.S.2d at 11.

37. Sax, Takings and the Police Power, 74 YALE L. J. 36, 62, 63 (1964).

38. 35 N.Y.2d at 128-29, 316 N.E.2d at 310, 359 N.Y.S.2d at 14.

39. Id. at 132, 316 N.E.2d at 312, 359 N.Y.S.2d at 16.

40. Vernon Park Realty v. City of Mount Vernon, 307 N.Y. 493, 499, 121 N.E.2d 517, 520 (1954).

41. Note, Urban Landmarks: Preserving Our Cities' Aesthetic and Cultural Resources, 39 ALB. L. REV. 521, 533 (1975).

42. 29 A.D.2d 376, 288 N.Y.S.2d 314 (1968).

43. Id. at 378, 288 N.Y.S.2d at 316.

44. There was no further proceedings, since the city purchased the property.

45. 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980).

46. Id. at 452, 415 N.E.2d at 924, 434 N.Y.S.2d at 934.

47. Id. at 455, 415 N.E.2d at 926, 434 N.Y.S.2d at 936.

48. 42 N.Y.2d at 334, 366 N.E.2d at 1277, 397 N.Y.S.2d at 920.

49. 438 U.S. at 114.

50. 430 U.S. at 129.

51. 42 N.Y.2d at 334-35, 366 N.E.2d at 1277, 397 N.Y.S.2d at 920. The procedure is described in greater detail by the Supreme Court; see 438 U.S. at 144 n. 14.

52. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5.

53. Id. at 598, 350 N.E.2d at 388, 385 N.Y.S.2d at 11.

54. 42 N.Y.2d at 334, 366 N.E.2d at 1277, 397 N.Y.S.2d at 920.

55. See Costonis, The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, 85 HARV. L.R. 574 (1972).

56. 39 N.Y.2d at 598-99, 350 N.E.2d at 388, 385 N.Y.S.2d at 12.

57. 438 U.S. at 136.

58. 42 N.Y.2d at 331, 366 N.E.2d at 1275, 397 N.Y.S.2d at 918.

59. See Berger, The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis, 76 COL. L. R. 799 (1976).

60. 42 N.Y.2d at 331, 366 N.E.2d at 1275, 397 N.Y.S.2d at 918.

61. Id. at 333, 366 N.E.2d at 1276, 397 N.Y.S.2d at 920.

62. See notes 30, 31 supra.

63. 42 N.Y.2d at 336, 366 N.E.2d at 1278, 397 N.Y.S.2d at 921.

64. This question might be raised in determining whether an unconstitutional taking has occurred, as in the Supreme Court decision in Penn Central, or in deciding whether an owner has been denied due process of law, as in the Court of Appeals decision in Penn Central. See Ely, The Supreme Court 1977 Term, 92 HARV. L.R. 5, 224 n. 10 (1978).

65. NEW YORK CITY CHARTER AND AD. CODE, Ch. 8-A § 207-1.0 (v) (1965 as amended 1976); see Scott, supra note 44, at 337.

66. 438 U.S. at 149 n. 13.

67. Id.

68. Id. at 127.

69. Id. at 136.

70. Id. at 138 n. 36.

71. 42 N.Y.2d at 330, 366 N.E.2d at 1274, 397 N.Y.S.2d at 918.

72. Id., 366 N.E.2d at 1275, 397 N.Y.S.2d at 918.

73. 438 U.S. at 132. Spot zoning has been defined as the process of "singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners...." Rodgers v. Village of Tarrytown, 302 N.Y. 115, 123, 96 N.E.2d 731, 734.

74. Id.

75. Id. at 111 n. 12.

76. Id. at 147.

77. Id. at 138 n. 1. The law requires only that the landmark be at least 30 years old and possess "a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation." NEW YORK CITY CHARTER AND AD. CODE ch. 8-A, § 207-1.0 (n).

78. See City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964); Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557 (1955); City of New Orleans v. Levy, 223 La. 14, 64 So.2d 798 (1953).

79. 438 U.S. at 129, 147 n. 10.

80. 438 U.S. at 129.

81. Id. Among the cases cited by the Court in support of this conclusion are New Orleans v. Dukes, 427 U.S. 297 (1976); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); and Berman v. Parker, 348 U.S. 26 (1954).

82. 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966).

83. Id. at 192.

84. Id. at 190.

85. Id.

86. 438 U.S. at 133.

87. Id. at 110. This stated purpose, of course, raises other policy questions as well. For instance, experience with historic district ordinances indicates that regulation of historic district property makes the property more attractive to middle and upper class persons, with the result that the poor are forced to move elsewhere. As one commentator has observed, the poor are familiar with the notion that the "more fixed up things were, the higher the rents would be." E. BANFIELD, THE UNHEAVENLY CITY REVISITED 36 (1974), cited in Beckwith, Developments in the Law of Historic Preservation and A Reflection on Liberty, 12 WAKE FOREST L. R. 93, 114 (1976). Thus a policy question that should be addressed is whether "public welfare" is better served by preserving landmarks or by declining to designate landmarks if to do so would make housing unaffordable for the poor.

88. Id. at 143.

89. See A. HUXTABLE, KICKED A GOOD BUILDING LATELY? 166-170 (1976), cited in Day, Federal Income Tax Reform: An Important Tool for Historic Preservation, 16 WAKE FOREST L. R. 315, 320 n. 33 (1980).

90. See Day, supra note 87, at 320, 321 n. 38.

91. This result, of course, is not automatic. As the Court of Appeals in Penn Central admitted, the flagship store in a regional shopping center may lose money while drawing enough customers into smaller stores in the area to make them popular. 42 N.Y.2d at 333-34, 366 N.E.2d at 1276, 397 N.Y.S.2d at 920.

92. 438 U.S. at 108 n. 2.

93. 272 U.S. 365 (1926).