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## The Preservation of Penn Central

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## THE PRESERVATION OF PENN CENTRAL

The Spring Term of the Supreme Court marked a victory for preservation law proponents, when the Court validated New York City's refusal to allow a fifty-five story addition to Grand Central Station. Penn Central Transportation Co. v. New York City, 438 U.S. \_\_\_\_ (opinion No. 77-444, June 26, 1978) (hereinafter, Penn Central). The purpose here is to delineate as a model for municipalities and local governments the provisions found in the first major preservation law to be ratified by the Supreme Court. The New York City Preservation Law of 1965 (hereinafter, the Act), is perhaps most important to preservationists upon the realization that the Act can be administered without a threat of fifth and fourteenth amendment challenges. New York City, N.Y., CHARTER AND ADMINISTRATIVE CODE, ch. 8-A, § 205-1.0 et seq. (1976) (hereinafter, Code § \_\_\_\_).

Grand Central Station is owned by Penn Central Transportation Co. (Penn Central). In an effort to increase revenue, Penn Central negotiated a fifty-year renewable lease to Union General Properties (UGP), a United Kingdom Corporation. UGP was to pay Penn Central one million dollars annually during the construction of a fifty-five story office building over the existing Terminal structure. Upon completion, UGP would pay Penn Central three million dollars a year for the remainder of the term. Since the city had designated Grand Central Station as a designated landmark, two plans were submitted to the Landmarks Preservation Commission pursuant to the Act. The plans essentially called for retaining the station intact (with some facial alterations), while building the tower above the existing structure. The Historic Landmark Commission rejected both proposals. The rejection came in spite of the fact that the Station's original plans called for a twenty-story tower; the terminal itself was designed and constructed with base pillars to accommodate such a structure. Subsequent to the Commission ruling, Penn Central brought suit to enjoin the enforcement of the landmark law and claimed that the restrictions amounted to unconstitutional taking without just compensation.

The trial term of the New York Supreme Court gave Penn Central an injunction and declaratory relief holding that the city had "taken" property without "just compensation" and "arbitrarily" deprived Penn Central of property without due process in violation of the fifth and fourteenth amendments.

The Appeal Term of the New York Supreme Court reversed and found the Landmark Preservation Law essential to the promotion of a legitimate public purpose in the protection of landmarks. The Appeal Court held that Penn Central must show that the restrictions deprived it of all reasonable and beneficial use of the property.

The New York Court of Appeals affirmed the Appeal Term and stated that no "taking" had occurred since control of the property had not been transferred to the city. Further, the Court of Appeals

found that regulation of exploitative uses is not unconstitutional. Finally, the Court of Appeals pointed to Penn Central's failure to show substantial harm, especially in light of the alternative benefits allowed to Penn Central under the Landmark Preservation Law. The United States Supreme Court, on review of the New York Court of Appeals decision, affirmed with a majority opinion written by Justice Brennan.

The Supreme Court noted two issues: whether restrictions placed on the use and development of the property under the New York City Landmark Preservation Law constituted a taking for public use within the fifth amendment (which requires "just compensation" and applies to the states through the fourteenth amendment due process requirements); and if the Commission's restrictions did constitute taking, then, do transferable development rights amount to just compensation. Since the Court decided that there was no taking, the second issue was not considered.

On the basis of an historical analysis of the taking issue, Justice Brennan found no set formula for deciding when a taking occurs. Rather, Brennan notes a case-by-case application. However, several factors for inquiry are discerned: the economic impact; the extent to which regulation interferes with investment considerations; and whether the interference is a physical invasion by a governmental unit--each must be examined. However, Brennan concludes that when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good, the Court has held that the government can enforce laws which would adversely affect recognized economic interests.

Brennan compares zoning cases where state tribunals reasonably concluded that health, safety, morals or general welfare of the public is promoted by prohibiting certain uses of land to rationalize the validation of landmark preservation laws in general. Admitting that landmark laws apply only to selected parcels, Brennan claims that landmark legislation is not spot zoning--which is an arbitrary selec-

tion of particular tracts for a use inconsistent with surrounding uses. Brennan points out that in the case of preservation laws, legitimate historical and aesthetic interests are protected.

Accepting that landmark preservation laws are legitimate, the Court examines the taking question. Penn Central claims that the restrictions deprive it of a valuable property right--that the superadjacent airspace above Grand Central Station has been taken. Further, Penn Central argues that the restrictions diminish the property value of the terminal and that the hardship incurred is selectively and arbitrarily applied to a few property owners. Finally, Penn Central claims that each structure in the area is not subject to the same restrictions.

In approaching Penn Central's arguments, the court inquires whether the interference of the restrictions is of such magnitude that eminent domain proceedings should be instituted and just compensation awarded. The inquiry is limited to the severity of impact on Penn Central. The court found that the present use of Grand Central Station had not been impaired; that a reasonable return has not been precluded; that the restrictions have not prohibited all construction in the airspace above the Terminal. In conclusion, Brennan notes that a substantial relationship between the restrictions and promotion of the general welfare exists to validate preservation laws. Further, not only was there no taking, but the Court found that the New York Landmark legislation permitted Penn Central opportunities to enhance the Terminal and other properties, besides permitting reasonable beneficial use of the landmark site. See Penn Central, Opinion No. 77-444 (June 26, 1978) at 31.

What is important is the law which was upheld. The New York City Landmark Preservation Law of 1965 is authorized under a valid state enabling act. N.Y. GENERAL MUNICIPAL LAW § 96-a (McKinney, 1977). The statute declares it is the public policy of the state of New York to preserve historical structures and authorize local governments to impose reasonable restrictions to do so.

In order to comply with the state preservation objectives, the city passed the 1965 Landmark Preservation Law based on the rationale that the standing of New York City as a world-wide tourist center would be in jeopardy if landmarks were not afforded protection. Code § 205-1.0(a). The Administrative Code lists the benefits which the city hoped would accrue under the Act: fostering civic pride in past accomplishments, protecting the tourist trade; support and stimulation of business and industry; strengthening the economy of the city; and promoting the use of public landmarks for general welfare. Code § 205-1.0(b).

The Act operates to achieve its goals under a method of involving local government in the land-use decisions affecting these properties and provides "services, standards, and incentives" such as will encourage preservation by private owners and users. Penn Central, opinion at 3. In addition, the Act places restrictions on landmark properties to protect the major objectives. Finally, the intent of the Act is to promote a reasonable return to owners on investments and uses consistent with preservation goals.

Primary responsibility for administering the Act lies with the Landmarks Preservation Commission, an eleven-member agency which is assisted by a technical staff. NEW YORK CITY, N.Y. ADM. CODE § 534 (1976). The Commission is composed of three architects, one historian qualified in preservation areas, one city planner or landscape architect, one realtor, and at least one resident of each of the city's five boroughs. Id. The function of the Commission is to identify properties having a "special historical or aesthetic interest or value as part of the development, heritage, or cultural characteristics of the city, state or nation." Code § 205-1.0(n) and see § 205-1.0(h).

If the Commission determines that a building or area meets the criteria of the ordinance; and after all interested parties are rendered the opportunity to comment and to be heard, it can designate the building as a "landmark." Code § 205-1.0(h). The ordinance defines landmark as: "Any improvement, any part of which

is thirty years or older, which has 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 and which has been designated as a landmark pursuant to the provisions of this chapter." Code § 207-1.0(n). The Commission may designate as a "landmark site" the particular land on which the landmark is located. A "landmark site" is: "An improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter." Code § 207-1.0(o). In addition, the Commission can designate a historic district as: "1--any area which contains improvements which: (a) have a special character or special historical or aesthetic interest or value; and (b) represents one or more architectural styles or periods typical of one or more eras in the history of the city; and (c) causes such area by reason of such factors to constitute a distinct section of the city; and 2--has been designated as a historic district pursuant to the provisions of this Chapter." Code § 207-1.0(h). Finally, the Commission may define scenic landmarks and interior landmarks. Code § 207-1.0(w), § 207-1.0(m).

Once the Commission makes a designation, the New York City Board of Estimates considers such factors as the relationship of the designated property to the master plan; the zoning resolution; projected public improvements; and any plans for the renewal of the area involved. Code § 207-2.0(g)(i). At the conclusion of its inquiry, the Board of Estimates makes a Final Designation, which may modify or disapprove the Commission's designation. At this point, the first safeguard device in the ordinance engages: the property owner may seek judicial review of the final designation. Note that Penn Central did not exercise its right to seek judicial review of the designation.

The effect of the final designation is to place restrictions on the property owner's options with regard to the uses of the landmark site. First, the Act imposes

an affirmative duty upon the property owner to keep the exterior features of the structure in good repair to assure that the site is protected and preserved. Code § 207-10.0(a). Second, prior approval by the Commission is necessary for any proposals to change exterior architectural features or to construct exterior improvements on the site. In this manner, all alterations receive due consideration of both the public interest and the landowner's interests in possession and use. Code § 207-4.0 to 207-9.0.

The ordinance provides procedures to obtain administrative approval for altering a landmark site. The landowner might apply for a certificate of no effect on protected architectural features. The Commission, in turn, evaluates the application as to whether any change or affects on architectural features would occur to upset the harmony of the landmark, as well as the ordinance. Code § 207-5.0. Denial of the certificate actuates the second safeguard allowing the landowner the option of judicial review. Penn Central did not exercise this option either.

The landowner may seek a certificate for appropriateness. By focusing on historical, aesthetic, and architectural values, the Commission may grant an application for appropriateness if proposed construction on the landmark site would not unduly hinder the protection, enhancement, perpetration, and use of the landmark. Code § 207-6.0. The third safeguard provides judicial review on denial and the Commission's determinations of appropriateness or no effect. The landowners may also submit an alternative or modified plan for approval. Id. Penn Central, on denial of its plans, did not submit alternative plans or offer to modify. Moreover, the Court did not find that no construction could occur at the Terminal.

The landowner may also apply for a certificate of appropriateness on the ground of insufficient return. Code § 207-8.0. Special mechanisms are employed dependent upon whether or not the landmark has tax exemptions. Code § 207-8.0(c). The Commission must inquire as to whether the landmark designation causes economic hardship. If the parcel is not tax-exempt

and the certificates are denied, yet the owner shows that he, or she, is not earning a reasonable return on the property--in its present state--the Commission and other city agencies assume the task of developing a plan which would assure the owner a reasonable return. The plan may include tax exemptions (partial or complete); remission of taxes; alteration authorizations; and construction and reconstruction appropriate for and not inconsistent with the purposes of the Act. Id. The private owner may accept or reject the plan. However, if he accepts, he must proceed to carry out the plan by its terms. Should the owner reject the plan, then, the Commission will initiate the city's efforts in eminent domain proceedings to acquire protective interests in the landmark. The city must take such measures within a specified time period, otherwise the Commission must issue a notice allowing the owner to alter or to improve the landmark as proposed in the application for a certificate of appropriateness. Id.

Tax exempt structures are eligible for special treatment if four conditions are met. Id. The owner must have previously entered into an agreement to sell contingent upon receiving a certificate of appropriateness. Second, the property must be incapable of earning a reasonable return. Third, the structure is no longer suitable for its past or present uses or purposes. Finally, the buyer intends to alter the landmark. Assuming that the landowner were to show the unlikelihood of a reasonable return, the Commission must find another buyer or allow the sale and subsequent construction to proceed. Additional approaches for the landowner are judicial relief and the special instance where it is possible to show that the landmark as restricted, is totally inadequate for the legitimate needs of the owner. If such a burden is met, a New York court has held restrictions invalid as applied to the parcel. Lutheran Church v. City of New York, 35 N.Y.2d 121 (1974).

Certainly from an economic perspective, the most important sections of the Act deal with the private owners enhanced special position. Upon gaining a landmark designation, the Court noted that the

Transfer Development Rights provide the owner with special grants of privilege to develop property to the fullest extent. The Development rights are transferable to contiguous property on the same city block. NEW YORK CITY, N.Y., ZONING RESOLUTION Art. I. ch. 2 § 12-10 (1978). The advantage is to allow development of the private owner's adjacent lands such that he (and indirectly, the public) can benefit from the landmark he possesses. Recent ordinances increased the development right function--properties across the street became eligible. See Penn Central, footnote 8 at 4, and NEW YORK CITY, N.Y. ZONING RESOLUTION, Art. I. ch. 2 § 74-79 to 74-793.

In obtaining approval for a transfer, the Commission must be presented with plans for the development of the transferee lot to determine whether construction would be compatible with the landmark. Once the Commission has approved the transfer, then the New York City Planning Commission will review the proposed transfer to determine effects on occupants of buildings in the vicinity and whether the landowner will preserve the landmark. Finally, the Board of Estimates has authority to grant or deny the transfer.

The New York City Landmarks Preservation Law of 1965 is not presented as an ideal model to preservationists and municipalities interested in maintaining ties with the past. Rather, it is offered here as a model which has been ratified, and accepted by the Supreme Court as a viable approach to preservation of national, state and local landmarks. However, it might do well to comment on several weaknesses and criticisms of the Act, and consequently, the Penn Central decision. First, in his dissent, Justice Rehnquist pointed to the severe impact of the restrictions in this particular case--literally, a loss of a multimillion dollar revenue opportunity. Further, Rehnquist accepts Penn Central's contention that the private owner should not be made to bear the brunt of preservation, rather, it is a cost which should be spread to the public in the form of taxes. The disparity of the actual loss to the private owner relative to the gains of "enhanced value" is discussed in

other quarters. Costonis, 85 HARV. L. REV. 574 (1972). Costonis advocates a "Chicago Plan" which employs an incentive package to provide owners with recovery of actual losses. While the court makes a strong effort to analyze the current strains of the "taking" issue, highlighting the problem of effective urban and rural land use in today's world may be the real value of Penn Central and New York City's efforts to preserve its historical traditions.