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Important Victory Won for Historic Preservation

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NOTES

IMPORTANT VICTORY WON FOR HISTORIC PRESERVATION

CONSTITUTIONAL LAW–HISTORIC PRESERVATION: The United States Supreme Court upholds New York City's Landmarks Preservation Law as applied to the Penn Central Transportation Company, thus denying the construction of an office tower over Grand Central Terminal. *Penn Central Transp. Co. v. City of New York,* 98 S. Ct. 2646 (1978).

As early as 1906, with the passage of the Antiquities Preservation Act,[1] Congress expressed its concern for historic landmarks and structures. The Act gave the President the authority to designate as national monuments, landmarks, structures, and other objects of historic interest on lands owned or controlled by the government.

In 1935 President Franklin Delano Roosevelt encouraged the passage of additional, more powerful legislation:

> I wish to make known my deep interest in the Antiquities Act, the general purpose of which is to enable the Federal Government, with the cooperation of the States and other public and private agencies, to lay a broad legal foundation for, and to develop and carry on, a national program for the preservation and interpretation of the physical and cultural remains of our history.
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> At the present time when so many priceless historical buildings, sites, and remains are in grave danger of destruction through the natural progress of modern industrial conditions, the necessity for this legislation becomes apparent.[2]

Harold L. Ickes, then Secretary of the Interior, expressed similar concern in his reports to the House and Senate,[3] and this interest culminated in Congress passing the Historic Sites, Buildings, and Antiquities Act of 1935.[4] This Act required the Secretary of the Interior to make a survey of historic sites, buildings and objects for

1. Antiquities Preservation Act of 1906, 34 Stat. 225, (codified at 16 U.S.C. §431 *et seq.* (1976)).
2. H.R. REP. NO. 848, 74th Cong. 1st Sess. 2 (1935); S. REP. NO. 828, 74th Cong. 1st Sess. 2 (1935).
3. H.R. REP. NO. 848, 74th Cong. 1st Sess. 2 (1935); S. REP. NO. 828, 74th Cong. 1st Sess. 2 (1935).
4. Historic Sites, Buildings, Objects and Antiquities Act of 1935, 49 Stat. 666 (codified at 16 U.S.C. §461 *et seq.* (1976)).

the purpose of determining which possessed exceptional value in light of the history of the United States. The Secretary was further charged with restoring, and maintaining such properties either through acquisition by the United States or by cooperative arrangement with states, municipalities, corporations, associations and individuals.[5]

By 1966 Congress had become aware of the need to expand the 1935 Antiquities Act, which addressed itself only to properties determined to be "nationally significant."[6] In its report the House found that a limited number of properties met this criteria, while many others, worthy of protection because of their historical, cultural, or architectural significance in their communities, had little or no protection.[7] The White House too felt the need for further legislation as expressed in a letter to the Senate from Lady Bird Johnson:

> We must preserve and we must preserve wisely. As the report emphasizes, in its best sense preservation does not merely mean the setting aside of thousands of old buildings as museum pieces. It means retaining the culturally valuable structures as useful objects, a home in which human beings live, a building in the service of some commercial or community purpose. Such preservation insures structural integrity, relates the preserved object to the life of the people around it, and not least, it makes preservation a source of positive financial gain rather than another expense.[8]

With such favorable backing, Congress passed the National Historic Preservation Act of 1966.[9] The Senate viewed the Act as "a fresh beginning in the continuing effort to turn the tide in favor of historic preservation."[10] It provided for a greatly expanded national register, for grants to the states to conduct statewide historic surveys and prepare preservation plans, and for grants to the states and the National Trust for Historic Preservation to aid in preservation. The Act also established a National Advisory Council on Historic Preservation to advise the President, Congress and Federal Agencies on matters of historic preservation.[11]

The same climate of concern for historic preservation which led to

5. *Id.* §462.
6. *Id.* §461.
7. H.R. REP. NO. 1916, 89th Cong. 2nd Sess. 3 (1966), *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 3306, 3310.
8. 112 CONG. REC. 15167 (1966).
9. National Historic Preservation Act of 1966, 16 U.S.C. §470(b) *et seq.* (1976).
The Congressional Record shows that no roll call vote was taken in either house on this bill, and it apparently passed both houses unanimously.
10. S. REP. NO. 1363, 89th Cong. 2nd Sess. 6 (1966).
11. National Historic Preservation Act of 1966, 16 U.S.C. §470(a), §470(i) (1976).

the passage of the Historic Preservation Act had resulted in every state enacting some form of legislation to protect historic buildings and sites by 1965.[12] In addition many cities, towns, and counties had individually acted to preserve historic buildings and sites.[13]

A typical example of such action was New York City's Landmarks Preservation Law of 1965,[14] enacted for the purpose of establishing a city-wide program for the identification and preservation of historic structures and sites. The Act set up a commission which identifies possible historic landmark structures and sites and may designate them as such after a public hearing.[15] As part of the program outlined in this law the Landmarks Preservation Commission of the City of New York designated Grand Central Terminal as a landmark and landmark site respectively.[16] This designation barred any construction or alteration of the terminal's exterior appearance without the approval of the Landmarks Commission.[17] It is interesting to note that Penn Central Transportation Company, which owns Grand Central, did not seek judicial review of this designation when it was made,[18] and yet it was this designation which caused Penn Central to later sue the City of New York.

In 1968 Penn Central submitted two plans for construction of an office tower over the terminal to the Landmarks Commission,[19] both of which were rejected.[20] In its report the Commission stated that it

> [h]as no fixed rule against making additions to designated buildings—it all depends on how they are done. . . . But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke.[21]

Having no further administrative remedies, because the terminal already enjoyed the partial real estate tax exemptions given to railroads under New York law,[22] Penn Central instituted proceedings. They asked for equitable relief, as well as money damages, on the

12. J. MORRISON, HISTORIC PRESERVATION LAW, 61 *passim* (Supp. 1972).
13. *Id.*
14. N.Y.C. Landmarks Preservation Law, N.Y.C. Charter and Administrative Code h. 8-A 205-1.0 *et seq.* (1976).
15. *Id.* The 11 member Landmarks Preservation Commission includes at least three architects, one qualified historian, one realtor, and one city planner or landscape architect.
16. 50 App. Div. 2d at ____, 377 N.Y.S. 2d at 25 (1975).
17. 98 S.Ct. at 2649 (1978).
18. *Id.* at 2649.
19. Both plans were designed by Marcel Breuer and involved towers over the building of 55 and 53 stories.
20. 98 S.Ct. at 2655 (1978).
21. *Id.* at 2656.
22. *See* N.Y. REAL PROP. TAX 489-aa *et seq.* (McKinney Supp. 1978).

grounds that the Commission's actions constituted a taking of private property without just compensation in violation of due process and equal protection of the law. The trial term of the New York Supreme Court agreed and declared the Landmarks Law as applied to Grand Central unconstitutional.[23]

The City of New York and the Landmarks Commission appealed[24] and the Appellate Division of the New York Supreme Court reversed, finding the Landmarks Law constitutional.[25] The Court further stated that the plaintiffs had failed to establish that the Landmarks Law as applied to them constituted a taking.[26] The standard the court used was that the regulation must deprive the petitioner of *all* reasonable beneficial use of its property,[27] and not that it deprives the property of its most beneficial use.[28] Further the court found that Penn Central had imputed a considerable amount of railroad operating expenses to their terminal real estate operations, and thus did not show a lack of reasonable return.[29]

The New York Court of Appeals affirmed,[30] holding that while often in landmark regulation a single owner must bear the burden of limitation, making it similar to discriminatory zoning, it is not unconstitutional if there is an acceptable reason for less favorable treatment.[31] If the reason is cultural, architectural, historical, or due to the social significance of the property, the standard to be applied is reasonable return on the property.[32] Penn Central had failed to establish lack of reasonable return.[33] Further the court thought that Penn Central's assertion of an unconstitutional taking by the state showed impropriety, because much of the present value of Grand Central could be imputed to substantial government investment in it.[34]

The United States Supreme Court also affirmed,[35] although they found that implementation of New York City's law did place certain

23. 50 App. Div. 2d at ____, 377 N.Y.S. 2d at 22.
24. Penn Central Transportation Co. v. City of N.Y., 50 App. Div. 2d 265, 377 N.Y.S. 2d 20 (1975).
25. *Id.* at ____, 377 N.Y.S. 2d at 30.
26. *Id.* at ____, 377 N.Y.S. 2d at 28.
27. Williams v. Town of Oyster Bay, 32 N.Y. 2d 78, 295 N.E. 2d 788, 343 N.Y.S. 2d 118 (1973).
28. Goldblatt v. Town Hempstead, 369 U.S. 590 (1962).
29. 50 App. Div. 2d at ____, 277 N.Y.S. 2d at 28.
30. Penn Central Transp. Co. v. City of New York, 42 N.Y. 2d 324, 366 N.E. 2d 1271, 397 N.Y.S. 2d 914 (1977).
31. *Id.* at ____, 366 N.E. 2d at 1274, 397 N.Y.S. 2d at 918 (1977).
32. *Id.* at ____, 366 N.E. 2d at 1275, 397 N.Y.S. 2d at 918 (1977).
33. *Id.* at ____, 366 N.E. 2d at 1277, 397 N.Y.S. 2d at 920 (1977).
34. *Id.* at ____, 366 N.E. 2d at 1276, 397 N.Y.S. 2d at 919 (1977).
35. Penn Central Transp. Co. v. City of New York, 98 S.Ct. 2646 (1978).

restrictions on the use of the terminal. But these restrictions were found to be a feature necessary to the attainment of the larger goals of the law which still insured the owners of a reasonable return on their property.[36] Further the air rights over Grand Central were not lost to Penn Central because they were able to transfer these rights to adjoining properties.[37] In fact, New York City's Transfer of Development Rights[38] zoning regulations were amended in 1969 primarily for the benefit of Penn Central and the amended regulations extended the transfer possibilities to an even greater area.[39]

The Supreme Court dealt only with what it considered to be the issue; namely, whether or not the application of New York City's Landmarks Preservation Law had taken Penn Central's property in violation of the 5th and 14th amendments.[40] The Court did not deal with related issues not contested by Penn Central such as whether "states and cities may enact land use restriction that enhances the quality of life by preserving the character and desirable aesthetic features of a city;"[41] whether "preserving structures and areas with specific historic, architectural or cultural significance is an entirely permissible governmental goal;"[42] whether the restrictions imposed on the terminal were an appropriate means of attaining these goals;[43] or whether the fact findings of the Appeals Court that Grand Central in its present state is capable of earning a reasonable return were correct.[44]

The question of what constitutes an unconstitutional taking of property by a state has been considered previously by the Supreme Court. In *Euclid v. Ambler Realty Co.*[45] it held that as long as a local ordinance has a relationship to health, safety, public convenience, public comfort, public prosperity, or general welfare it is not unconstitutional per se.[46] However, if the ordinance imposes such restrictions that the property is not capable of a reasonable

36. *Id.* at 2664.
37. *Id.* at 2666.
38. In New York City development rights (air rights) go with all property. These are limited by formulas enumerated in the zoning code. For historic properties, on which the development rights may not be used, the owner of the property may transfer the rights to other of his properties with certain restrictions.
39. Marcus, *Air Rights Transfers in New York City*, 36 LAW AND CONTEMP. PROB. 372, 375 (1971).
40. 98 S.Ct. at 2651 (1978).
41. *Id.* at 2662.
42. *Id.* at 2662.
43. *Id.* at 2662.
44. *Id.* at 2662.
45. 272 U.S. 365 (1926).
46. *Id.* at 395.

use[47] or a beneficial use,[48] then the ordinance is unconstitutional as applied to that property. *Goldblatt* and *Euclid* specifically held that the property need not be accorded the most beneficial use; any beneficial use is sufficient to sustain constitutionality.[49]

The New York Courts had previously dealt with cases involving the designation of buildings as historic landmarks by the New York City Landmarks Commission. In all of these it applied the standards set out by the United States Supreme Court in *Goldblatt* and *Euclid.* In *Manhattan Club v. Landmarks Preservation Commission of City of New York*[50] petitioner asked that the designation of its building as a landmark be annulled as an unconstitutional taking. The petition was denied because the Club was free to remodel the interior as it pleased and had not shown an inability to earn a reasonable return on the building. Later when the Club showed that it was unable to reasonably use the building, and neither the Club nor the Landmarks Commission could find a buyer, the building was permitted to be demolished so that the land could be used for other purposes.[51]

Trustees of Sailors Snug Harbor v. Platt[52] held that the designation of the buildings involved was proper. The case was remanded, however, for determination as to whether or not maintenance of the property interfered either physically or financially with the carrying out of the Trustee's charitable purposes—providing housing for aged seamen—and thus constituted an unconstitutional taking. The court equated this test with the reasonable use test applied to commercial property.[53]

In *Lutheran Church in America v. City of New York*[54] the court found a designation to exceed the limits of zoning power. The building was totally inadequate for the plaintiffs' needs and the Landmark designation so interfered with the plaintiffs' ability to freely and economically use the property as to constitute an unconstitutional taking.[55]

The Supreme Court's Penn Central holding followed the reasoning of these three cases and applied the standards set out in *Goldblatt*

47. *Id.* at 397.
48. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).
49. *Id.* at 592, 272 U.S. at 397.
50. 51 Misc. 2d 556, 273 N.Y.S. 2d 848 (1966).
51. Rankin, *Operation & Interpretation of the New York City Landmarks Preservation Law,* 36 LAW AND CONTEMP. PROB. 366, 371 (1971).
52. 29 App. Div. 2d 376, 288 N.Y.S. 2d 314 (1968).
53. *Id.* at 378, 288 N.Y.S. 2d at 316.
54. 35 N.Y. 2d 121, 316 N.E. 2d 305, 359 N.Y.S. 2d 7 (1974).
55. *Id.* at 128, N.E. 2d at 312, 359 N.Y.S. 2d at 14 (1974).

and *Euclid.* Penn Central did not prove that they could not earn a reasonable return on Grand Central, and thus the Court could not find an unconstitutional taking and still follow precedent. Had Penn Central shown the inability to earn a reasonable return, the result would undoubtedly have been different.

The Supreme Court's affirmation of historic preservation legislation and the standard of reasonable use as applied to properties is an important victory for historic conservation which is "but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people."[56] The Supreme Court has shown that our historical environment is a valid consideration in zoning. Historic preservation laws will not be held to be unconstitutional per se. The laws can only be unconstitutional as applied, if the application deprives the owner of a reasonable return on the property. As long as the return is reasonable it need not be the best possible return.

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56. Gilbert, *Precedents for the Future,* 36 LAW AND CONTEMP. PROB. 311, 312 (1971) (Quoting address by Robert Stipe, Conference on Preservation Law, Washington, D.C. unpublished text 6-7, May 1, 1971).