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INTRODUCTION

Grand Central Terminal, an "irreplaceable" structure of "inestimable" significance, was designated a landmark by New York City's Landmarks Preservation Commission on August 2, 1967.[1] In its official designation report, the Commission called the terminal "a magnificent example of French Beaux Arts architecture," "unique in quality, distinction and character," a structure that has played "a significant role in the life and development of New York City."[2] Thereafter, the terminal could not be altered unless the Commission found the proposed change would either have no effect on the structure's exterior, or that it would be appropriate in light of the designation's purpose.[3] Five months later, Penn Central Transportation Company (Penn Central) entered into a lease with UGP Properties which provided for UGP to construct an office tower above the terminal.[4] Penn Central had planned the project in order to reduce the losses that had brought the company to insolvency and bankruptcy;[5] it expected to receive after the tower was completed not less than $3 million annually from UGP under the lease.[6] Existing concessions in the terminal that would be

1. The Commission has the power to designate a list of landmarks, NEW YORK CITY, N.Y., ADMIN. CODE, ch. 8-A, § 207-2.0 a(1), j (1976), and, after a public hearing, to designate a landmark site for each landmark, *id.* § 207-2.0 b. *See id.* § 207-1.0 n, o. The Commission must file a copy of the designation with the appropriate city agencies including the Board of Estimate. *Id.* § 207-2.0 f. The Board of Estimate then refers the designation to the City Planning Commission which will file a report with the Board concerning the relation of the designation to current and future land use plans. *Id.* § 207-2.0 g(1). The Board may then modify or disapprove the designation. *Id.* § 207-2.0 g(2). The designation is effective when adopted by the Commission, and any modification becomes effective on the date the Board adopts the modification. *Id.* § 207-2.0 e, g(2).

2. Landmarks Preservation Commission, Official Designation Report, August 2, 1967, Number 2, LP-0286, *reprinted in* Record on Appeal, Exhibit F at 2, 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).

3. NEW YORK CITY, N.Y., ADMIN. CODE, ch. 8-A, § 207-4.0 a(1) (1971).

4. *See* 173 N.Y.L.J. at 16, col. 3 (Jan. 23, 1975) for the report of the special master which outlines the history of this case.

5. Penn Central Transp. Co. v. City of New York, 50 A.D.2d 265, 270, 377 N.Y.S.2d 20, 26 (1975).

6. *Id.*

eliminated by the tower generated approximately $700,000 to $1,000,000 in net rents.[7] After futile attempts to utilize the provisions in the law which would allow alteration of the terminal,[8] Penn Central and UGP brought an action for a judgment declaring New York City's Landmarks Preservation Law[9] unconstitutional as applied to the terminal.

At trial term, Justice Saypol held the law, as applied to plaintiff, an unconstitutional taking of private property without just compensation. He also said the law deprived Penn Central of property without due process and equal protection of the law.[10] The Appellate Division disagreed with Justice Saypol's interpretation of a New York Court of Appeals precedent,[11] and reversed, two judges dissenting.[12] The majority applied the traditional diminution in value test[13] to determine

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7. *Id.*

8. Penn Central applied for a certificate of no effect which was denied in 1968. After new plans were drawn, it applied for a certificate of appropriateness. This was denied in 1969. These certificates are part of the law's attempt to ameliorate the proscription against altering the landmark. NEW YORK CITY, N.Y., ADMIN. CODE, ch. 8A, § 207-4.0 a(1) (1976). If the proposed work would not change any exterior architectural feature and, for a new improvement, if it would be in harmony with the external appearance of neighboring improvements, a certificate of no effect will be issued. *Id.* § 207-5.0 a(1). If the certificate is denied, the applicant may still file a request for a certificate of appropriateness. *Id.* § 207-5.0 a(3).

A certificate of appropriateness will be granted only if the Commission finds that the proposed change to the structure "would be appropriate for and consistent with the effectuation of the purposes" of the Landmarks Preservation Law. *Id.* § 207-6.0a. The Commission will consider the effects of the proposed change on that part of the structure which "cause it to possess a special character or special historical or aesthetic interest or value." *Id.* § 207-6.0 d. A public hearing must be held on each request for a certificate of appropriateness. *Id.* § 207-7.0.

9. NEW YORK CITY, N.Y., ADMIN. CODE, ch. 8-A (1976) (originally enacted as Local Law No. 46 of the City of New York, April 19, 1965). The ordinance was enacted pursuant to a state enabling act. 1956 N.Y. Laws ch. 216, § 1, *as amended by* N.Y. GEN. MUN. LAW § 96-a (McKinney 1977) ("Protection of historical places, buildings and works of art.").

10. 173 N.Y.L.J. at 16, col. 8 (Jan. 23, 1975). *See generally* Comment, *Grand Central Station—Landmark at the End of the Line, or End of the Line for Landmarks? New York City's Landmark Law in the Courts,* 37 U. PITT. L. REV. 81 (1975).

11. Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974). Justice Saypol said *Lutheran Church* "held that landmarks designation generally constitutes a taking for which compensation is mandated." 173 N.Y.L.J. at 16, col. 5 (Jan. 23, 1975). Justice Murphy, in the majority opinion for the Appellate Division, felt that this interpretation "would surely, as the *amicus* brief submitted hereon states, 'eviscerate New York's Landmarks Preservation Law.'" Penn Central Transp. Co. v. City of New York, 50 A.D.2d 265, 271, 377 N.Y.S.2d 20, 27 (1975).

12. 50 A.D.2d 265, 377 N.Y.S.2d 20 (1975).

13. *See, e.g.,* Salamar Bldrs. Corp. v. Tuttle, 29 N.Y.2d 221, 275 N.E.2d 585, 325 N.Y.S.2d 933 (1971).

> Once it is demonstrated that the restriction serves some legitimate public purpose, the property owner, in order to sustain the attack on constitutional

whether the law deprived Penn Central of all reasonable beneficial use of its property. It concluded that plaintiffs had failed to sustain their burden of proof because they did not show an incapacity to earn a reasonable return. According to the court, expense items in Penn Central's revenue statement improperly attributed railroad operating expenses to real estate operations. Moreover, no rental value was imputed to the space in the terminal devoted to railroad purposes.[14] The Court of Appeals affirmed. *Held:* Landmarks preservation is a legitimate police power goal. In exercising this power, government need only assure a reasonable return or an equivalent private use to the property owner. Furthermore, the Constitution does not require government to assure a return on that part of property reflecting attributes derived from the "social complex" in which the property rests. Nor need the guaranteed return on this privately created ingredient of property be in the form of a profit; income may be imputed from nearby and related structures of common ownership. Finally, development rights may be transferred, thus preserving a property owner's economic interest. Penn Central Transportation Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977).

New York City's Landmarks Preservation Law lists among its purposes the protection of prized possessions representing elements of the city's cultural, social, economic, political, and architectural history.[15] Also included as purposes are: safeguarding the city's historic, aesthetic, and cultural heritage; protecting property values; fostering civic pride; enhancing tourism; strengthening the city's economy; and promoting, for the education, pleasure, and welfare of the people, the use of these structures.[16] The law provides the means by which landmarks

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> grounds, must further establish that the resulting hardship is such as to deprive him of any use of the property to which it is reasonably adapted, or serves to destroy the greater part of its value . . . . The question, in this latter regard, is essentially one of degree and where the ordinance goes so far as to preclude the use of the property for any purpose to which it is reasonably adapted, it is confiscatory and must be held unconstitutional.

Id. at 226, 275 N.E.2d at 588, 325 N.Y.S.2d at 938.

14. Penn Central Transp. Co. v. City of New York, 50 A.D.2d 265, 273, 377 N.Y.S.2d 20, 28 (1975).

15. NEW YORK CITY, N.Y., ADMIN. CODE, ch. 8-A, § 205-1.0 b(a) (1976).

16. *Id.* § 205-1.0 b. According to one commentator, these encompass "every reason ever advanced for historic preservation." Comment, *Legal Methods of Historic Preservation,* 19 BUFFALO L. REV. 611, 631 (1970). Aesthetics is now generally accepted as a legitimate zoning goal. Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1968); Note, *The Police Power, Eminent Domain and the Preservation of Historic Property,* 63 COLUM. L. REV. 708 (1963). There are, however, few decisions upholding governmental regulation solely on consideration of aes-

are to be designated,[17] and regulates any changes to the landmark or its declared site.[18] Certain ameliorative provisions are also available for landmark owners who demonstrate that the law has caused them hardship.[19]

In its first test, *Manhattan Club v. Landmarks Preservation Commission,*[20] a lower court held the law constitutional. Later, in *Trustees of Sailors' Snug Harbor v. Platt,*[21] the Appellate Division found that the law provides inadequate relief when an owner is a charitable organization seeking to retain the land and replace the structure.[22] That court would not, however, question the right of government to restrict land use "for the cultural and aesthetic benefit of the commu-

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thetics. *See, e.g.,* Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963); *cf.* Berman v. Parker, 348 U.S. 26 (1954) (urban redevelopment effectuated through exercise of power of eminent domain upheld on aesthetic considerations).

17. NEW YORK CITY, N.Y., ADMIN. CODE, ch. 8-A, § 207-2.0 (1976). *See* note 1 *supra.*

18. NEW YORK CITY, N.Y., ADMIN. CODE, ch. 8-A, § 207-4.0 (1976).

19. Economic hardship may provide sufficient grounds for granting a certificate of appropriateness. NEW YORK CITY, N.Y., ADMIN. CODE, ch. 8-A, § 207-8.0 (1976). When an applicant for a certificate of appropriateness establishes that the parcel is incapable of earning a reasonable return, *id.* § 207-8.0 a(1), the Commission will attempt to devise a plan to improve the return and save the landmark. § 207-8.0 b. The plan may include tax exemptions, tax remissions, and authorization for some alteration. *Id.* § 207-8.0 c. A plan consisting only of tax exemptions or remissions that the Commission finds satisfactory will result in the denial of the certificate. *Id.* § 207-8.0 e(1). The owner may reject a plan consisting of other than tax exemptions or remissions. *Id.* § 207-8.0 f(1), (2). If a plan is neither formulated nor approved by the Commission, or is rejected by the owner, then the Commission may recommend to the Mayor that the City acquire a protective interest in the landmark. *Id.* § 207-8.0 g(1).

These hardship provisions are unavailable to an owner whose parcel has received real estate tax exemptions for three years preceding the application. *Id.* § 207-8.0 a(2). Although there are exceptions to this general exclusion, the partial tax exemption granted to the terminal is not within this list. *Id.* § 207-8.0 a(2); N.Y. REAL PROP. TAX LAW § 489-ff (McKinney Supp. 1977).

20. 51 Misc. 2d 556, 273 N.Y.S.2d 848 (1966). *Manhattan Club* was concerned in part with a challenge to the reasonableness of the designation, *i.e.,* whether the designation was supported by substantial evidence. For a discussion of the standard of reasonableness to be applied in evaluating the propriety of a designation, see Zartman v. Reisem, 59 A.D.2d 237, 240-41, 399 N.Y.S.2d 506, 509-10 (4th Dep't 1977) (concerning a Rochester landmarks preservation statute).

21. 29 A.D.2d 376, 288 N.Y.S.2d 314 (1968).

22. The law provides that a tax exempt organization demonstrating hardship may be relieved of this burden only if it has entered into an agreement to sell the fee or a term of at least twenty years. The requirements for granting a certificate of appropriateness are thus different for taxed and tax exempt owners. The former need not have entered into an agreement to sell. NEW YORK CITY, N.Y., ADMIN. CODE, ch. 8-A, § 207-8.0 a(2) (1976).

nity."[23] In *Lutheran Church in America v. City of New York*,[24] the Court of Appeals agreed with the Appellate Division's interpretation and struck down the designation of a brownstone once owned by J. P. Morgan, Jr. that could no longer adequately house the offices of a charitable organization. Court challenges to Landmark designations have been few, however. The Landmarks Preservation Commission has designated approximately three hundred landmarks and a dozen historic districts containing more than thirty-five hundred buildings.[25]

The instant case presented the courts with a unique situation because Grand Central Terminal is no ordinary landmark. Since Penn Central could neither alter the existing structure[26] nor avail itself of the special hardship provisions of the law,[27] the trial court held the law's application unconstitutional. But this holding ignored a crucial interest which Judge Breitel later identified: society, "by the sweat of its brow and the expenditure of its funds," has contributed to the property's value which the owner sought to convert into profit.[28] And, "[t]o that extent, society is also entitled to its due."[29]

I. Takings: From Pennsylvania Coal to Penn Central

It is apparent from the cases and literature that "our ability to distinguish satisfactorily between 'takings' in the constitutional sense, for which compensation is compelled, and exercises of the police power, for which compensation is not compelled, has advanced only slightly since the Supreme Court began to struggle with the problem."[30] Underlying the recurrent conflict between private land own-

23. 29 A.D.2d at 377, 288 N.Y.S.2d at 315. The Appellate Division remanded for presentation of evidence concerning the charity's inability to carry out its charitable purpose. The case was not retried, however. New York City decided to purchase the buildings. Rankin, *Operation and Interpretation of the New York City Landmarks Preservation Law*, 36 L. and Contemp. Prob. 366, 369-70 (1971). *See also* Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).

24. 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).

25. Schaefer Guide to New York Landmarks, *reprinted in* Record on Appeal at 204, Lutheran Church in America v. City of New York, 42 A.D.2d 547, 345 N.Y.S.2d 24 (1973).

26. *See* note 8 *supra.*

27. 173 N.Y.L.J. at 16, col. 8 (Jan. 23, 1975). The terminal had been the recipient of real estate tax exemptions for three years preceding Penn Central's application for a certificate of appropriateness, thus excluding it from the hardship provisions of the law. *See* note 19 *supra.*

28. 42 N.Y.2d at 328, 366 N.E.2d at 1273, 397 N.Y.S.2d at 916.

29. *Id.*

30. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 149 (1971); *see, e.g.*, Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922); Fred F. French

ers and government is the deceptively simple question of who must pay when regulation diminishes the value of land to its owner. Justification for imposing the cost on the property owner rests on the police power, and courts have proposed various theoretical bases for upholding its exercise.[31] The one suggested most often is the theory that the government is not required to compensate an owner for a diminution in the value of his property that has been caused by a police power regulation so long as the diminution is not excessive.[32] As succinctly stated by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*,[33] "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[34] Yet, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[35] The basic problem, of course, is defining "too far."

To facilitate analysis it is useful to restrict the use of the term "property" in this section to a technical meaning: legally protected expectancies. One buys land to acquire its value; value consists of certain expectancies. For example, the expectancies purchased in farm land are those inhering in the land. One parcel might command a higher price because it is especially fertile. Values of urban land, however, are less dependent on inherent qualities as on intangible attributes. The value of a small site in the heart of a city's commercial district, for example, has little to do with any inherent quality other than location. It may, therefore, be easier to justify denying legal protection

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Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976); Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954). *See generally* F. BOSSELMAN, D. CALLIES, J. BANTA, THE TAKING ISSUE (1973); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165 (1974); Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975); Gerstell, *Needed: A Landmark Decision*, 8 URB. LAW. 213 (1976); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Note, *The Police Power, Eminent Domain and the Preservation of Historic Property*, 63 COLUM. L. REV. 708 (1963). For a bibliography to legal periodicals dealing with historic preservation and aesthetic regulation, see 12 WAKE FOREST L. REV. 275 (1976).

31. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964). For cases discussing the scope of the police power see, *e.g.*, Noble State Bank v. Haskell, 219 U.S. 104 (1911); Commowealth v. Alger, 61 Mass. (7 Cush.) 53 (1951); Barrett v. State, 220 N.Y. 423 (1917).

32. Sax, *supra* note 31, at 50.

33. 260 U.S. 393 (1922).

34. *Id.* at 413.

35. *Id.* at 415.

to the expectancies in urban real estate because of their less tangible quality.[36]

Legal protection may depend on the competing interests of persons against whom the owner demands protection. For example, a dock owner may find himself without legal recourse against a boat owner who has moored his vessel in a storm.[37] In the context of land use regulation, the interests competing with those of the private landowner are often those of the public in general. If expectancies are taken by government, an owner will certainly contend that they are property and that they must be paid for just as if they had been sold to a private purchaser. Nevertheless, it is the law that government may take some expectancies, or, in other words, that not all expectancies are property—at least not as against the government. The rationale is that the law cannot reasonably be relied on to protect all of the owner's expectancies, especially when these conflict with the interests of others who may also be entitled to legal protection.[38] The basic problem may now be rephrased: for which expectancies does the Constitution demand protection when legitimate and conflicting interests exist?[39] A second but perhaps more important question is what remedy is to be awarded to an owner who has been unconstitutionally deprived of expectancies by a governmental act.

In an attempt to clarify these issues, the New York Court of Appeals has distinguished between a taking of property in the constitutional sense, requiring compensation, and an unreasonable "taking" of too many expectancies under the police power, requiring solely an invalidation of the regulation as applied to a particular parcel.[40] A constitutional taking of property occurs when there is "government displacement of private ownership, occupation or management."[41] A regu-

36. Sax, *supra* note 31, at 50-51. Professor Sax has criticized the diminution in value test in that it presupposes a false definition of property. On the one hand, he says, underlying the theory is the notion that all legally acquired existing economic values are property. On the other, the test often permits the total destruction of established values by saying the interest affected was not a property right. *Id.* at 51.

37. Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908).

38. *See* Noble State Bank v. Haskell, 219 U.S. 104 (1911). Justice Holmes wrote:

> [W]e must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. . . . [A]n ulterior public advantage may justify a comparatively insignificant taking of private property . . . . *Id.* at 110.

39. *See generally* Sax, *supra* note 31, at 50-60.

40. *See* Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

41. *Id.* at 595, 350 N.E.2d at 386, 385 N.Y.S.2d at 10.

lation is an unreasonable taking of too many expectancies if it "renders the . . . property unsuitable for any reasonable income productive or other private use for which it is adapted."[42] For instance, denying an owner the opportunity to develop his land when there are no pre-existing income producing improvements is an unreasonable imposition because "it deprives the owner of all his property rights [expectancies], except the bare title and a dubious future reversion of full use."[43] An unreasonable regulation is invalid because it denies the owner due process of law under the fourteenth amendment.

There is a qualitative difference between taking property and a deprivation of property without due process. As Judge Breitel pointed out in *Fred F. French Investing Co. v. City of New York*,[44] however, this distinction is not new. While courts have historically equated taking with regulation that imposes too onerous a burden, its use in the context of police power challenges has been, for the most part, meta-

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42. *Id.* at 597, 350 N.E.2d at 387, 385 N.Y.S.2d at 11. *See also* Lutheran Church in America v. City of New York, 35 N.Y.2d at 130, 316 N.E.2d at 311, 359 N.Y.S.2d at 15; Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 493, 499, 121 N.E.2d 517, 519 (1954).

The Court of Appeals identified two other ways in which an ordinance may be unreasonable. Besides that discussed in the text, an ordinance is unreasonable if its end is illegitimate, *i.e.*, it does not further the public health, safety, morals or general welfare; or, if there is no reasonable relation between the means and end. 39 N.Y.2d at 596, 350 N.E.2d at 386, 385 N.Y.S.2d at 10. "Takings" and "deprivations of due process" do not describe mutually exclusive categories. There are exceptional cases in which purported regulation is in fact a taking. These are where the regulation "is either intended to eventuate in actual public ownership of the land or has already caused government to encroach on the land with trespassory consequences that are largely irreversible." 39 N.Y.2d at 595, 350 N.E.2d at 385, 385 N.Y.S.2d at 9. *See* New York Tel. Co. v. Town of N. Hempstead, 41 N.Y.2d 691, 363 N.E.2d 694, 395 N.Y.S.2d 143.

The fear underlying the distinction was articulated by Judge Breitel in an earlier case:

> [T]here is no provision in precedent or statutory law for compensating owners of property because of the impact of unconstitutional legislation. If there were, the scope of liability would literally be unlimited, when one considers the innumerable areas of emergency legislation, often of doubtful constitutionality at least at the inception, affecting rents, mortgages, legal tender, police power regulation, law enforcement procedures, licensing regulation of every kind and the like.

Keystone Assocs. v. State, 33 N.Y.2d 848, 850, 307 N.E.2d 254, 256, 352 N.Y.S.2d 194, 195 (1973) (dissenting opinion).

43. Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 597, 350 N.E.2d 381, 387, 385 N.Y.S.2d 5, 11 (1976). *But cf.* Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (upholding the constitutionality of an ordinance which limited undeveloped lake shore property to its natural uses). In regard to *Just*, see Costonis, *supra* note 30, at 1047-49.

44. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

phorical.[45] Rarely has compensation been mandated by a court invalidating a police power regulation as applied.[46]

Commentators and courts have attempted to arrive at a formula explaining and solving the problem of competing expectancies and the remedies to be accorded when government exceeds constitutional limits. Professor Joseph Sax has hypothesized that there are public rights in privately owned land distinct from both government and private interests.[47] He refers to these as "diffusely held interests," and suggests that there are more such interests worthy of legal protection than have heretofore been identified. Land uses that have a "spillover or inextricable effect" on other interests, he argues, should be subject to regulation under the police power.[48] This is because, unlike nuisances for example, their effects are not on discrete landowners, but on interests that cannot be protected through nuisance law.[49]

Sax distinguishes three categories of spillover effects. A use of land which results in a physical restriction of the use of other land is one. Mining coal "which results in drainage on lower-lying land" is an example.[50] The second is the use of a "common" that different owners use for different purposes. For instance, a stream and the ambient air are commons. Less obvious, but nonetheless a common, is a visual prospect. "The effects of a vast tower built on a single tract spill over visually onto other lands just as smoke or noise does."[51] Finally, using land so as to affect the well-being of others—for example, "the treatment of land with toxic substances"—or so as to impose obligations on the community—"such as residential development in a remote area that would require the furnishing of police protection"—both amount to spillover effects.[52] In Professor Sax's model the police power may be used to resolve the conflict no matter what the economic consequences to either the landowner or society may be. The resolution, he argues, depends on matters of public policy rather than legal rules.[53] Since the necessity of a solution supports its imposition, none of the competing interests need be compensated if they are overriden.

45. *Id.* at 594, 350 N.E.2d at 385, 385 N.Y.S.2d at 9.
46. *Id.* at 595, 350 N.E.2d at 385, 385 N.Y.S.2d at 9.
47. Sax, *supra* note 30, at 151.
48. *Id.* at 161. A spillover effect occurs when competing resource users seek "to make a use that involves some imposition (spillover) on his neighbors, and those demands are in conflict." *Id.*
49. *Id.* at 155.
50. *Id.* at 161.
51. *Id.* at 162.
52. *Id.*
53. *Id.* at 172.

Professor Sax's analysis appears to have influenced the New York Court of Appeals. Writing for a unanimous court in *Penn Central,* Judge Breitel identified in privately owned landmarks diffusely held public interests deserving of legal protection: "the cultural, architectural, historical, or social significance attached to the affected parcel[s]."[54] But unlike Professor Sax, Judge Breitel apparently does not believe that invoking the police power can justify extinguishing either interest without compensation. Rather, he states that no matter how acceptable the purpose, "the landowner must be allowed a reasonable return or equivalent private use of his property."[55] Thus, regulation complies with due process when it assures a reasonable return.[56] This analysis appears to be consistent with *Pennsylvania Coal,* where Justice Holmes considered due process fulfilled if the regulation did not go too far, essentially leaving the owner with some expectancies. Implicit in Justice Holmes' formulation is that the owner will then be assured a reasonable return on his *property.*

II. Determining the Reasonableness of Return

Once Judge Breitel had resolved the issue of how to justify New York City's taking expectancies, two major questions remained: how to compute return; what compensation may be provided when the return is not reasonable. The second is discussed below.[57] As for the first, the court concluded that government need not assure a return on that part of the value of a parcel created through efforts of society and its government. Once the privately created value has been determined, the court may then impute income of nearby and related structures under common ownership with the landmark. But the court never reached the question of the terminal's precise value and return. Instead, it examined the history of governmental and societal investment in the terminal.

A. The Public Ingredient in Value

Acknowledging the validity of the argument that the terminal has created much of the value of mid-Manhattan which to some extent

54. 42 N.Y.2d at 330, 366 N.E.2d at 1275, 397 N.Y.S.2d at 918.
55. *Id.* at 330-31, 366 N.E.2d at 1275, 397 N.Y.S.2d at 918.
56. For a discussion and criticism of the diminution in value test see Sax, *supra* note 31, at 50-60. *See also* note 36 *supra.*
57. *See* text accompanying notes 81-110 *infra.*

offsets the governmental outlay, Judge Breitel wrote: "it is of little moment which comes first, the terminal or the travelers."[58] He focused instead on the interaction of the terminal and society, the former drawing people, the latter developing the area. The shared role in the development precludes facile separation of interests. The terminal is more than a monument to New York City's architectural heritage; it is also a product of the "interaction of economic influences in the greatest megalopolis of the western hemisphere."[59] The court felt that though it was difficult to extract society's portion of the value of the terminal in precise dollar amounts, it was imperative "to sort out the merged ingredients and to assess the rights and responsibilities of owner and society."[60]

Of primary significance to the court was the special treatment that railroads have received from society. Government-granted monopolies, grants of land, past franchises to use city streets, and the special tax exemption granted to the terminal, all illustrate the pervasive governmental assistance given to Penn Central and its predecessors. The court also relied on less direct government aid as a factor to be considered in determining the value on which return is to be based. The city's transit system, for instance, "is peculiarly concentrated . . . in the area surrounding Grand Central Terminal."[61] Finally, the "massive and indistinguishable public, governmental, and private contributions" that served to make the terminal and the railroads a great financial success in the past were considered in identifying the interests in the property.[62]

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

59. *Id.*

60. *Id.* at 333, 366 N.E.2d at 1276, 397 N.Y.S.2d at 919.

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

62. *Id.* at 333, 366 N.E.2d at 1276, 397 N.Y.S.2d at 919. The concept of public rights in the Terminal was not advanced by the City in either the Appellate Division or Court of Appeals. In its brief to the Court of Appeals, the City first argued that the agreements between Penn Central and the Metropolitan Transportation Authority and the Connecticut Transportation Authority provided massive amounts of aid to Penn Central. It also argued that the plaintiffs did not attempt to show that the terminal was incapable of yielding a reasonable return and that they failed to include imputed rental value of the terminal in their calculations. Finally, the city insisted that the Biltmore site, as a recipient of transferable development rights, was a viable alternative since it has access to subway and bus lines, construction costs would be less because of the special structural problems of building over the terminal, and an office tower on the Biltmore site would have a better view than one on the terminal site because the Pan Am building is directly north of the terminal. Furthermore, the city maintained that even though the Biltmore Hotel would have to be razed, the loss would not be great since the Hotel has had a declining cash flow. In 1971, the Biltmore had a cash flow of only $450,000 while the site was valued at $15 million. Brief for Respondent, 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).

What Judge Breitel has done is to characterize the public input as property. The "privately created and privately managed ingredient . . . is the property on which the reasonable return is to be based. All else is society's . . . ."[63] Penn Central then "owns" but an undetermined fraction of the full value of Grand Central Terminal. Whatever return is owing, it is owing only for that fraction privately "owned."

Apparent upon reading *Penn Central* is the lack of judicial precedent for these conceptions.[64] It would have been helpful if the court had explained the theoretical justification for considering societal investment. A possible underlying principle has been articulated by Professor John J. Costonis, among others,[65] who asks: "If [economic] expectancies are created through no effort of Farmer Brown, why should they be deemed his 'property'?"[66] Support may also be derived from the well established doctrine that government may deduct benefits to land created by the taking of adjacent property.[67] This situation has often arisen in cases where government confiscates part of an owner's land in order to build a road.[68] In determining the just compensation due, government has been allowed to offset the value of benefits accruing to the remaining portion of the land. This principle, although originating in eminent domain, may logically be extended to situations concerning challenges to regulations which do not permit optimal return.

According to the court, many of the attributes of property are the result "of opportunities for the utilization or exploitation which an organized society offers to any private enterprise."[69] Without governmental investment, "private enterprise could neither exist nor prosper."[70] Using this analysis the court perceived railroads as a kind of joint venture engaged in by private industry, the public and govern-

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63. *Id.* at 328, 366 N.E.2d at 1273, 397 N.Y.S.2d at 916.

64. *Id.* at 332-33, 366 N.E.2d at 1275-76, 397 N.Y.S.2d at 918-19.

65. *See, e.g.*, R.W.G. BRYANT, LAND: PRIVATE PROPERTY PUBLIC CONTROL 160 (1972).

66. Costonis, *supra* note 30, at 1033.

67. Bauman v. Ross, 167 U.S. 548 (1897); Celeste v. State, 56 Misc. 2d 951, 290 N.Y.S.2d 64 (Ct. Cl. 1968). In *Bauman*, the Court said:

> when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered.

167 U.S. at 574.

68. *E.g.*, Bauman v. Ross, 167 U.S. 548 (1897).

69. 42 N.Y.2d at 328, 366 N.E.2d at 1273, 397 N.Y.S.2d at 916.

70. *Id.*

ment. Without the latter two, the court said, the terminal property would be worth a fraction of its current value and its owners would not complain of an inability to earn a reasonable return.[71]

The court failed to mention, however, that just as private enterprise often depends on governmental investment, so also does government depend on private enterprise. The opportunities society creates for exploitation are created for society's benefit. While it is true that it is of little moment which came first, the terminal or the travelers, it is a strange bargain where both the developer and investor are unaware of precisely what the latter has paid for. It could be argued that society got its due when the railroads were built, people were employed, and the nation's economy was bolstered.[72] But the court's analysis was not based on the existence of an actual contract; the joint venture was not one entered into for specific and discrete ends. Moreover, though the court spoke of benefits peculiar to railroads, it did little to limit the application of the public ingredient concept. "The historical, cultural, and architectural resource that remains was neither created solely by the private owner nor solely by the society in which it was permitted to evolve."[73] This language suggests a changing conception of property; one that recognizes that many of the values of land are not the property of its holder. As Professor R.W.G. Bryant has written: "In urban areas . . . the values of land are much less obviously due to the proprietor; they are almost wholly created by the community. Therefore, they must be regarded in principle as the property of the community."[74]

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71. 42 N.Y.2d at 333, 366 N.E.2d at 1276, 397 N.Y.S.2d at 919.

72. *See* Ball v. New York Cent. R.R., 229 N.Y. 33, 127 N.E. 493 (1920). The court cites *Ball* as support for the proposition that without governmental support railroads would have had little chance for survival. But note the following language from *Ball*: "The immunity which we have attributed to the [railroad] springs from necessity in the fulfillment of its public functions. The general welfare and prosperity demand its existence. Private convenience and interest must yield to it. . . . The [railroad] must fulfill its duties to the public." 229 N.Y. at 43, 127 N.E. at 497.

In the late 19th and early 20th centuries, railroad were considered vital to society's development.

> The transportation of passengers upon railways is one of the most extensive and important of the material interests of the country. There is no other, perhaps, which affects so large a number of persons, and at the same time is liable to become so essential to life, and health, and comfort, and everything else, which makes up the sum of social happiness and enjoyment.

Redfield, *Railway Passenger Traffic*, 1 AMER. LAW REG. (n.s.) 1, 2 (1861-1862).

73. 42 N.Y.2d at 333, 366 N.E.2d at 1276, 397 N.Y.S.2d at 919.

74. BRYANT, *supra* note 65, at 350. Professor Bryant's book provides an excellent exposition of this view and its consequences. Judge Breitel has suggested that legislatures experiment with statutes that provide formulas for determining the social in-

B. *The Elements of Return*

The Landmarks Preservation Law defines reasonable return as "six percentum of the valuation of an improvement parcel."[75] The valuation is the "current assessed valuation established by the City."[76] According to the court, basing the return on present earnings, which may reflect managerial inadequacy, would "frustrate any land use restrictions."[77] Instead, a court must look to the parcel's capacity to produce a reasonable return. Furthermore, the potential return need not be realized directly by the parcel in question if, as here, the owner also holds neighboring sites that benefit from the landmark's existence. Analogizing the present situation to that of a "flagship store in a regional shopping center,"[78] Judge Breitel pointed to Penn Central's midtown hotels—the Biltmore, the Commodore, the Barclay, and the Roosevelt—and argued that some of the hotels' income must be imputed to the terminal.[79]

The conclusion hat the terminal contributes to the earnings of Penn Central's neighboring holdings is a plausible one, though the court fails to explain the causal connection. Hotels are filled with travelers each year, but how many of these travelers arrive by train? Many workers in Penn Central's office buildings are undoubtedly commuters, but the burden should be on government to show the existence and amount of imputable income.[80]

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gredient. Breitel, *A Judicial View of Transferable Development Rights*, 30 LAND USE L. AND ZONING DIG., No. 2, at 7 (1978).

75. NEW YORK CITY, N.Y., ADMIN. CODE, ch. 8-A, § 207-1.0 v(1) (1976).

76. *Id.* § 207-1.0 v(2). *See generally* Hellerstein v. Assessor of Islip, 37 N.Y.2d 1, 332 N.E.2d 279, 371 N.Y.S.2d 388 (1975).

77. 42 N.Y.2d at 333, 366 N.E.2d at 1278, 397 N.Y.S.2d at 919. The Court of Appeals has yet to pass on the 6% figure. This figure has been criticized as a legislative attempt to usurp the judicial function by arbitrarily fixing the point at which regulation goes too far. Podell, *The Landmarks Act: Preservation or Confiscation?* 165 N.Y.L.J. at 1, col. 4 (June 9, 1971).

78. 42 N.Y.2d at 331, 366 N.E.2d at 1276, 397 N.Y.S.2d at 920.

79. *Id.* The court spoke in the most general language. It did not explain how it arrived at this conclusion; it presented no statistics tending to support the notion that the terminal's presence is economically beneficial to "Penn Central's other, more profitable, enterprises." *Id.* at 334, 366 N.E.2d at 1277, 397 N.Y.S.2d at 920. Instead, the court cited G.R.F., Inc. v. Board of Assessors, *id.*, 366 N.E.2d at 1276-77, 397 N.Y.S.2d at 920 (citing 41 N.Y.2d 512, 362 N.E.2d 597, 393 N.Y.S.2d 965 (1977)), which concerned a challenge to tax assessments. Judge Breitel, writing for the court in that case, said that since the property in question was a flagship store in a shopping center, part of its construction cost "may reflect not value to the flagship store, but value to the remainder of the typical shopping center." 41 N.Y.2d at 514, 362 N.E.2d at 599, 393 N.Y.S.2d at 967.

80. While a land owner in Penn Central's position can argue that it is entitled to a profit on each of its properties, this argument misses the point of Goldblatt v. Town

III. The Measure and Form of Compensation

As noted earlier, New York's diminution in value test requires that a regulation be found unreasonable if it renders the property unsuitable for any reasonable income productive use.[81] The court suggested, however, that providing some compensation for the loss that accompanies regulation may make reasonable an otherwise unreasonable restriction. Thus, if after computing value and return there is still an excessive burden on a particular landowner—meaning, in the context of the New York City Landmark Preservation Law, that the return is less than six percent of the value—government may save its regulation by providing "reasonable" compensation.[82]

A. *"Just" or "Fair"?*

Professor John J. Costonis has identified and expanded on glimmers of judicial recognition of an intermediate power between the eminent domain and police powers.[83] Briefly, what he calls the accommodation power is exercisable by government when private land is not acquired outright and "where fair compensation for burdened landowners would seem an ethical imperative."[84] There is no clear category of situations in which regulation goes too far under the police power yet cannot be deemed a constitutional taking. Suffice it to say that landmarks preservation, given policy imperative and individualized economic burden, is an obvious candidate for the power's invocation.

The accommodation power requires that "fair" rather than "just" compensation be given to affected property owners. Fair compensation differs from just compensation in three ways. First, the amount given under fair compensation is the difference between the parcel's economic return under the challenged restriction and what Professor Costonis calls the "Reasonable Beneficial Use" standard, rather than under what he calls the "Allowable Use" standard.[85] The difference between the two standards is illustrated by the instant situation. Reasonable beneficial use of the terminal property is, by legislative decision, a six percent return on the assessed valuation of the property.[86]

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of Hempstead, 369 U.S. 590 (1962), which allowed a drastic reduction in the value of the land in question to its owner.

81. *See* text accompanying notes 30-46 *supra.*

82. 42 N.Y.2d at 335, 366 N.E.2d at 1278, 397 N.Y.S.2d at 921.

83. Costonis, *supra* note 30, at 1055; Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

84. Costonis, *supra* note 30, at 1049.

85. *Id.* at 1052.

86. New York City, N.Y., Admin. Code, ch. 8-A, § 207-1.0 v (1976).

Any landmark designation causing a property to receive less than a six percent return would require compensation for the difference. The Allowable Use standard, on the other hand, would require compensation for the difference between the maximum return receivable on the terminal property as is and the return receivable if the property were used to the fullest extent under present zoning restrictions. The latter standard is applicable to eminent domain situations.[87]

The two types of compensation also differ with respect to form. "[F]air compensation may take the form of any marketworthy alternative, whether or not monetary" whereas just compensation must be in dollar amounts.[88] Finally, the procedures for determining the amount required for fair compensation would be, according to Costonis, less cumbersome than those of a formal eminent domain proceeding.

B. *Transferable Development Rights*

Although Judge Breitel has criticized Professor Costonis' formulation,[89] he seems to have embraced, at least implicitly, many of its principles. In *Penn Central* he concluded that "reasonable" compensation may be provided in the form of transferable development rights (TDR): "These substitute rights are valuable, and provide significant, perhaps 'fair', compensation for the loss of rights above the terminal itself."[90] While there are defects in New York City's transfer plan, the court said, this recognition does not preclude its justification.[91]

A comparison of *Fred F. French Investing Co. v. City of New York*[92] and *Penn Central,* the two major opinions concerning

87. Costonis, *supra* note 30, at 1051. *See generally* P. NICHOLLS, THE LAW OF EMINENT DOMAIN § 8.2 (3d ed. 1976-1977).

88. Costonis, *supra* note 30, at 1052.

89. Breitel, *A Judicial View of Transferable Development Rights,* 30 LAND USE L. & ZONING DIG., No. 2, at 7 (1978).

90. *Id.* at 336, 366 N.E.2d at 1278, 397 N.Y.S.2d at 922. *See* Costonis, *supra* note 30.

91. 42 N.Y.2d at 335, 366 N.E.2d at 1277, 397 N.Y.S.2d at 920. New York City's transfer plan is embodied in NEW YORK CITY, N.Y., ZONING RES. §§74-79, 74-791 to -793 (1975). *See* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks,* 85 HARV. L. REV. 574 (1972). *See generally* J. COSTONIS, SPACE ADRIFT (1974); THE TRANSFER OF DEVELOPMENT RIGHTS: A NEW TECHNIQUE OF LAND USE REGULATION (J. Rose ed. 1975); Note, *Development Rights Transfer and Landmarks Preservation—Providing a Sense of Orientation,* 9 URBAN L. ANN. 131 (1975); Costonis, *Development Rights Transfer: An Exploratory Essay,* 83 YALE L.J. 75 (1973); Marcus, *Air Rights Transfers in New York City,* 36 L. & CONTEMP. PROB. 372 (1971); Note, *Development Rights Transfer in New York City,* 82 YALE L.J. 338 (1972); Note, *The Unconstitutionality of Transferable Development Rights,* 84 YALE L.J. 1101 (1975).

92. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

TDR, both written by Judge Breitel, provides a tentative, though unsatisfying, answer to the question of when a transfer of development rights is legally successful.

Fred F. French dealt with a challenge to a zoning amendment which created a special park district and rezoned two private parks as public, thereby preventing the owner from constructing proposed towers on the park sites. The amendment permitted transfer of the development rights to any lot within a designated receiving area "zoned to permit development at the maximum commercial density."[93] The court found that the park designation was not conditioned upon the "effective utilization of the transferable development rights."[94]

The court held the transfer unconstitutional. It admitted that the development rights of the park had not been nullified by the city's action. Because the rights had been made transferable to a section of mid-Manhattan rather than a "particular parcel or place,"[95] however, the court concluded that the mandatory transfer plan failed to "assure preservation of the very real economic value of the development rights as they existed when still attached to the underlying property."[96] Judge Breitel wrote:

> [I]t is a tolerable abstraction to consider development rights apart from the solid land from which as a matter of zoning law they derive. But severed, the development rights are a double abstraction until they are actually attached to a receiving parcel, yet to be identified, acquired, and subject to the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action.[97]

The failure stemmed from the fact that the severance rendered the development rights' value so uncertain and contingent as to deprive the landowner of their practical usefulness, "except under rare and perhaps coincidental circumstances."[98] The development rights, "an essential component of the value of the underlying property,"[99] were thus rendered useless to the landowner, and, since there was no income producing structure on the parks, the owner was deprived of all his property rights.[100]

93. *Id.* at 592, 350 N.E.2d at 384, 385 N.Y.S.2d at 8.
94. *Id.* at 594, 350 N.E.2d at 384, 385 N.Y.S.2d at 8.
95. *Id.* at 597, 350 N.E.2d at 387-88, 385 N.Y.S.2d at 11.
96. *Id.* at 598, 350 N.E.2d at 388, 385 N.Y.S.2d at 12.
97. *Id.* at 598, 350 N.E.2d at 388, 385 N.Y.S.2d at 11.
98. *Id.* at 600, 350 N.E.2d at 389, 385 N.Y.S.2d at 13.
99. *Id.* at 597, 350 N.E.2d at 387, 385 N.Y.S.2d at 11.
100. *Id.*

In *Penn Central,* on the other hand, not only did the challenged regulation permit "productive use of the terminal site as it had been used for more than half a century, as a railroad terminal,"[101] but plaintiffs also were not "wholly deprived of the development rights above the terminal."[102] The rights had been made transferable to other sites in the vicinity, some of which were owned by Penn Central. Judge Breitel argued that the TDR were not made worthless by the fact that several of the potential receiving parcels were encumbered by long-term leases or had suitable buildings: "The knowledge that at *some* future time, when the lease term has run out or the improvements have lost their utility, a larger building could be constructed, *should* increase the value of the building plot, at least so long as there is a market demand for new construction."[103]

The two cases are thus distinguishable in two ways. In *Fred F. French,* there was no possibility of earning a reasonable return on the parks once the development rights were severed and there were no sites to which these rights could be immediately attached, whereas in *Penn Central,* not only could the terminal provide a return, but there were sites to which its development rights could attach and thus provide some compensation for their severance. The important distinction, however, lies in the effectiveness of the transfer plan in each case, neither of which discussed what would seem to be the crucial criterion for determining a plan's viability: present value of the severed rights.[104] Had the transferred rights in *Fred F. French* been considered valuable, the forced relinquishment of the parks' development rights would have been upheld, regardless of the nonexistence of any income producing structure.[105]

In *Penn Central* Judge Breitel seems to consider the mere existence of named receiving sites as determinative of the transferred rights' value. While the attachability of TDR is certainly important, it is but one of two factors essential to determining the value of TDR. The other, of course, is the existence of a market. Nevertheless, *Penn Cen-*

101. 42 N.Y.2d at 336, 366 N.E.2d at 1278, 397 N.Y.S.2d at 921.

102. *Id.* at 334, 366 N.E.2d at 1277, 397 N.Y.S.2d at 920.

103. *Id.,* 366 N.E.2d at 1277, 397 N.Y.S.2d at 921. *See* Newport Assocs. v. Solow, 30 N.Y.2d 263, 268, 283 N.E.2d 600, 603, 332 N.Y.S.2d 617, 621 (1972): "Air rights . . . are valuable and transferable, even if only as an adjunct to a reversion or to a long-term leasehold." *Id.* (Breitel, J., concurring).

104. Costonis, *supra* note 30, at 1067-68.

105. However, Norman Marcus, Counsel to the New York City Planning Commission, stated that a substantial offer had been made for the rights. *See* Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks,* 24 BUFFALO L. REV. 77, 84 n.22 (1974).

tral has virtually ignored the latter and seems to have drawn an odd distinction between two kinds of presently unusable TDR—attached and unattached. The former is deemed to preserve the value of severed development rights; the latter is not. But the theoretical difference between attached and unattached TDR, without regard to the present value of those rights, is little consolation to an owner who must accept a deduction of his economic expectancy because of transferred development rights that have been attached to a site upon which their use is economically impractical. Assuming zoning restrictions remain unchanged any added value to the receiving site(s) would be minimal, since it would have to be discounted for the presumed life of the present improvements on the receiving site.[106]

In *Fred F. French,* Judge Breitel said that none of the discussion invalidating the city's transfer plan was intended to invalidate any and all TDR schemes.[107] He cited with approval Professor Costonis' "Chicago Plan,"[108] which proposes the creation of a bank that would fund the acquisition costs of development rights from owners unwilling to accept a transfer plan. The pooled rights could then be sold as necessary to meet costs.[109] This plan avoids any pitfalls—the fluctuations in demand for new construction, for example—that an open market on development rights might bring.[110] *In Penn Central* Judge Breitel indicated approval of another kind of transfer plan: transferring rights between sites owned by the same person. The fear and assumption underlying both opinions would appear to be that TDR are not salable on the open market. But whereas the "Chicago Plan" contemplates a system that treats all property owners equally, *Penn Central* does not. The "Chicago Plan" would at least compensate for the loss of development rights based on their present value; the *Penn Central* approach, however, does not consider present value to be as important as attachability. An owner of multiple sites is thus placed at a disadvantage. Furthermore, it has not been proved that TDR are not marketable. *Penn Central's* scheme eliminates the possibility of attempting to cre-

106. It is not altogether clear that Judge Breitel would disagree that the TDR are of minimal value here. His point is that because the rights are attachable, they have a significant value that may provide enough compensation to uphold the designation. The burden of showing that the TDR provide insufficient compensation, however, is on the landowner, as it would be in any challenge to a valid regulation.

107. 39 N.Y.2d at 598-99, 350 N.E.2d at 388, 385 N.Y.S.2d at 12.

108. Costonis, *The Chicago Plan, Incentive Zoning and the Preservation of Urban Landmarks,* 85 HARV. L. REV. 574 (1972). *See also* note 76 *supra.*

109. Costonis, *supra* note 108, at 590-91.

110. *See* Shlaes, *The Economics of Development Rights Transfers,* 42 APPRAISAL J. 526 (1974); 90 HARV. L. REV. 637, 642 n.51 & accompanying text.

ate a development rights free market, which would, by considering construction demand and administrative contingencies, ascertain the present value of TDR and thereby their usefulness as compensation.

CONCLUSIONS

The New York Court of Appeals has now spoken twice on New York City's Landmarks Preservation Law. In *Lutheran Church in America v. City of New York,*[111] the court invalidated the designation of a residence once owned by J. P. Morgan, Jr., later purchased by the Lutheran Church in America, a religious corporation. Although the court said there were sufficient findings of fact as to plaintiff's hardship, it did not explicate these findings.[112] Economic hardship seems to have been established by the city's failure to challenge plaintiff's contention that the century-old home was inadequate as an office building.[113] There was some discussion of the taking issue,[114] but the decision seems limited to an invalidation of the law's provisions concerning charitable organizations,[115] specifically in instances where the organization wants to replace the structure.[116]

Discussing *Lutheran Church,* Judge Breitel, in *Penn Central,* said the Church "did not and could not reap the same pecuniary benefits of massive governmental investment enjoyed by the railroads and Grand Central Terminal."[117] He did not, however, explain *Lutheran Church's* failure to consider the possibility of transferring development rights,[118] or imputing income from other nearby properties which the Church might have owned. If, as suggested above, *Lutheran Church* is limited to one deficiency in the law, then its discussion is perhaps a gloss on *Penn Central*—an attempt to harmonize the landmarks preservation decisions.

Regardless of Judge Breitel's intention, *Penn Central's* scope is the broader of the two and its rationale may apply in situations outside of landmarks preservation. Although there are certain limiting

111. 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).
112. *Id.* at 133, 316 N.E.2d at 313, 359 N.Y.S.2d at 17-18 (dissenting opinion). Judge Breitel concurred in the dissent in *Lutheran Church.*
113. *Id.* at 128, 316 N.E.2d at 310, 359 N.Y.S.2d at 13.
114. *Id.* at 128-29, 316 N.E.2d at 310, 359 N.Y.S.2d at 14.
115. *See* note 22 *supra.*
116. *Id.* at 131-32, 316 N.E.2d at 312, 359 N.Y.S.2d at 16.
117. 42 N.Y.2d at 334, 366 N.E.2d at 1277, 397 N.Y.S.2d at 920. The Church, however, has "always been entitled" to the benefits of a real estate tax exemption. *Id.*
118. 35 N.Y.2d at 133 n.2, 316 N.E.2d at 313 n.2, 359 N.Y.S.2d at 18 n.2.

words in the opinion,[119] Judge Breitel, in recapitulating the holding, said that "a property owner is not absolutely entitled to receive a return on so much of the property's value as was created by social investment."[120] Thus the court may tentatively have accepted a changing notion of property in value.

The flagship concept also may represent a changing approach to considerations of land use regulation challenges. Its use in *Fred F. French* could have resulted in an affirmance of the City's plan. The Tudor City complex includes hotels, restaurants, shops, and over 3300 apartments, most of which face the parks.[121] Assuming that there is at least as close a relationship between the parks and the complex as there is between the terminal and Penn Central's hotels, *i.e.,* that one of the major attractions of living in Tudor City is the parks,[122] the court could easily have imputed income from the complex to the parks. In his discussion of *Fred F. French,* Judge Breitel indicated that permitting the land to be used only as parks denied to the owners productive use of their property.[123] But these parks might be producing a reasonable return if one considers their drawing power.

It is doubtful that there are many designated landmark owners in Penn Central's position; however, those that are will certainly have a difficult time convincing a court to view their property holdings separately. Imputation of income will become especially important where the landmark uses the maximum floor area ratio[124] permitted under the applicable zoning ordinance, thus rendering TDR an unusable compensatory tool.

As critics of the use of the police power to achieve landmarks preservation point out, though, most landmarks do not use the maximum floor area ratio. By upholding the use of TDR, *Penn Central* has provided for a logical remedy to the problem which arises when landmark owners do not receive a reasonable return on their property.[125] TDR

119. *Id.* at 328, 366 N.E.2d at 1273, 397 N.Y.S.2d at 916.

120. *Id.* at 336, 366 N.E.2d at 1278, 397 N.Y.S.2d at 921.

121. Marcus, *supra* note 105, at 80.

122. "There was immediately an adverse public reaction to the owner's proposals [to build the towers on the parks], especially from Tudor City residents." 39 N.Y.2d at 592, 350 N.E.2d at 383, 385 N.Y.S.2d at 7.

123. 42 N.Y.2d at 336, 366 N.E.2d at 1278, 397 N.Y.S.2d at 921.

124. Floor area ratio "is an index figure which expresses the total allowable floor area of a building as a multiple of the area of its lot. A 10,000 square foot lot, in a district where the FAR was twelve, would thus be limited to a maximum of 120,000 square feet of floor space." Note, *Development Rights Transfer in New York City,* 82 YALE L.J. 338, 346 (1972).

125. Landmarks using the maximum floor area ratio may be the least profitable of all landmarks since they were not constructed in a time of energy consciousness.

may be used in combination with other forms of relief to achieve equity between society's and individuals' desires. But it is important that any TDR program be evaluated in terms of its present economic viability.

Penn Central has been accepted for appeal by the Supreme Court.[126] If upheld, the case will have important implications at least in the landmarks preservation area. In addition *Penn Central* presents the Court with an opportunity to clarify questions left open by *Goldblatt v. Town of Hempstead,*[127] and, more important, an opportunity to embrace a broader view of public rights or property in land value. Judge Breitel's opinion provides a cogent, though not altogether satisfactory, exposition of this view; clarification and acceptance of its theories would make land use regulation an easier task for society.

As stated so eloquently by Judge Breitel in *Fred F. French,* "no property is an economic island, free from contributing to the welfare of the whole of which it is but a dependent part."[128] There are responsibilities owed to society that compel a land owner to sacrifice some of his economic expectancies. The limits to government action are fairness and proportionality, not absolute equality between legitimate goals and private interests.[129] Just as fairness limits exercise of government's regulatory powers, so also does fairness proscribe individual land owners from exploiting the constitutional safeguard against arbitrary takings.[130] *Penn Central* may be merely a waystation on the route to an enlightened law of land use. As Judge Breitel so aptly stated: "The last word has not only not been spoken; it has hardly been envisaged."[131]

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126. 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), *prob. juris. noted,* 46 U.S.L.W. 3373 (U.S. Dec. 6, 1977) (No. 77-444).

127. 369 U.S. 590 (1962). According to Professor Sax, it is unclear whether *Goldblatt* was following or repudiating the diminution in value test. *See* Sax, *supra* note 31, at 42-43.

128. 39 N.Y.2d at 599, 350 N.E.2d 389, 385 N.Y.S.2d at 12.

129. *Id.*

130. *See generally* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135-36; Sax, *supra* note 31, at 57; Marcus, *supra* note 105, at 95.

131. 42 N.Y.2d at 337, 366 N.E.2d at 1279, 397 N.Y.S.2d at 922.

ADDENDUM

The Supreme Court affirmed *Penn Central*,[132] and declined to address the more esoteric and potentially far-reaching aspects of Judge Breitel's opinion. Before reaching the substantive issues, the Court noted that because the record did not

> contain a basis for segregating the privately created from the publically created elements of the value of the Terminal site and since the judgment of the Court of Appeals in any event rests upon bases that support our affirmance . . . we have no occasion to address the question whether it is permissible or feasible to separate out the "social increments" of the value of the property.[133]

The Court thus recognized the legitimacy of the law and of its application to the terminal apart from consideration of modes of computing return.[134]

The Court then addressed the primary question: whether or not the law effected a taking within the meaning of the fifth amendment.[135] From prior cases it culled "the factors that have shaped the jurisprudence of the Fifth Amendment injunction 'nor shall private property be taken for public use without just compensation,' "[136] and concluded that "essentially ad hoc, factual inquiries" into the circumstances of each case constitute the proper "formula" to be applied.[137] Consideration must be given to the economic impact of the regulation "and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations."[138] Also relevant is the character of the governmental action, with a taking more readily found "when the interference . . . can be characterized as a physical invasion by Government."[139]

In response to Penn Central's broad constitutional arguments, the Court stated that the loss of the opportunity to exploit one property interest believed available for development, or mere diminution in the property value, is insufficient to establish a taking.[140] Nor does it

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132. Penn Cent. Transp. Co. v. City of New York, 46 U.S.L.W. 4856 (U.S. June 27, 1978).
133. *Id.* at 4861 n.23.
134. *Id.* at 4861.
135. *Id.* at 4861 & n.24.
136. *Id.* at 4861.
137. *Id.* at 4862.
138. *Id.*
139. *Id.* (citing Causby v. United States, 328 U.S. 256 (1946)).
140. *Id.* at 4863-64.

amount to discriminatory zoning since the law embodies a comprehensive plan, and buildings are not arbitrarily designated. Furthermore, Penn Central is not the only owner affected; in fact, the Court did not challenge the City Council's assertion that the law benefits Penn Central.[141] Finally, the Court rejected the argument that the law represents the City's acting in an enterprisal capacity: "This is no more an appropriation of property by Government for its own use than is a zoning law prohibiting, for 'aesthetic' reasons, two or more adult theatres within a specified area."[142]

The narrow taking question—whether the law so severely burdened the property's use as a terminal—was resolved against Penn Central because the Court found no interference with the present use.[143] Furthermore, the law allows a reasonable return on Penn Central's investment,[144] and the transfer of development rights "undoubtedly mitigate[s] whatever financial burdens the law has imposed . . . ."[145] The Court stressed Penn Central's present ability to use the terminal "for its intended purposes and in a gainful fashion";[146] a future change in circumstances might compel a different result.

The Court's decision is of great import to municipalities engaged in designating landmarks—that regulatory power is now unquestionable. Regulations are to be examined in light of their effects on "distinct investment backed expectations."[147] Thus, institution of

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141. *Id.* at 4864.

142. *Id.* at 4865 (citing Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)). *See generally* Marcus, *Zoning Obscenity: Or, The Moral Politics of Porn*, 27 BUFFALO L. REV. 1 (1977).

143. The Court stated that "the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel." 46 U.S.L.W. at 4865.

144. *Id.* The law assures a reasonable return on the "assessed valuation" of a parcel containing a designated landmark. *See* text accompanying notes 75-76 *supra*. The Court characterized this provision "as permitting Penn Central not only to profit from the Terminal but to obtain a 'reasonable return' on its investment." 46 U.S.L.W. at 4865. *See also id.* at 4858, 4863 n.26. A reasonable return on the assessed valuation may not, therefore, be constitutionally mandated. *See* note 147 & accompanying text *infra*.

145. 46 U.S.L.W. at 4865. The Court agreed with the Court of Appeals that transferable development rights have value and provide a form of compensation. *See* text accompanying notes 89-110 *supra*.

146. 46 U.S.L.W. at 4865 n.36.

147. *Id.* at 4862. Penn Central's "primary expectation" concerning the use of the terminal is, according to the Court, "as a railroad terminal containing office space and concessions." *Id.* at 4865. Limiting the owner to that use and at the same time assuring a reasonable return on Penn Central's investment did not amount to a taking. *Id.* This situation is distinguishable from that in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), because there a statute "frustrate[d] distinct investment backed ex-

the private and public ingredient concept may have been implicitly sanctioned. Perhaps the Supreme Court will eventually rule on the permissibility of distinguishing public and private increments in value. Until then, at least, the last word concerning not only Grand Central Terminal, but all other property, has not been spoken.

D.W.S.

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pectation" to such an extent as to have "the same effect as the complete destruction of rights" purchased in the land. *Id.* at 4862-63. *See* text accompanying notes 30-56 & 144 *supra.*