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Regulatory Takings Challenges to Historic Preservation Laws After Penn Central

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ARTICLES

REGULATORY TAKINGS CHALLENGES TO HISTORIC PRESERVATION LAWS AFTER *PENN CENTRAL*

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The *Penn Central*[1] decision, in its most immediate concern, provided a legal framework within which local governments could enforce historic landmark restrictions without a regular constitutional requirement to pay "just compensation." The decision amalgamated regulatory takings analysis of historic landmark restrictions to the familiar and tolerant federal standards for reviewing zoning. Affirming the importance of the public interest goals of historic preservation, the Court directed inquiry to whether sufficient economic potential remained in the control of the property owner, given reasonable expectations at the time of her investment in the property. While the broader jurisprudential merits of *Penn Central's* approach to the Taking Clause have been the subject of wide debate, the constitutional question of how much of an economic burden the owner of a landmark may be required to bear has received very little attention. Ironically, it is this question that very well may have been the Court's primary concern.

This essay looks specifically at how *Penn Central* protects historic preservation regulation. The constitutional framework created by the decision has fostered a remarkable blossoming of historic preservation as a major tool of urban land use regulation. Preservation could never have played this role without the insulation from constitutional liability provided by the *Penn Central* Court, likewise, it could not have played this role if property owners had been denied

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1. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

all economic incentives to invest in the renovation and reuse of historic properties. *Penn Central* appears to have crafted a balance between local control and individual rights that has nourished preservation.

I. THE *PENN CENTRAL* DECISION AND ITS WAKE

For this brief essay, only the shortest summary of the decision is necessary. New York City designated Grand Central Station a historic landmark in 1965, pursuant to its Landmarks Preservation Law. The City's Landmarks Preservation Commission subsequently denied as inappropriate the application of the owner, Penn Central, to build a tower more than 50 stories tall above the station. Penn Central sued, claiming that the Commission had "taken" their property in violation of the Takings Clause of the Fourteenth Amendment, by denying such development as was otherwise permitted by New York's zoning laws. Eventually, the U.S. Supreme Court ruled that there was no taking. The Court noted that regulatory takings cases involved "essentially *ad hoc*, factual inquiries," but also identified several factors that have "particular significance." Such factors are: 1) the economic impact of the regulation on the owner; 2) the extent to which the regulation "has interfered with distinct investment backed expectations"; and 3) the "character of the governmental action."[2] The Court found that the denial of the permit did not restrict the owner's property rights by precluding economically beneficial use of the property, did not single out the owner to bear an unfair burden, and promoted the public interest. In reaching this decision, the Court viewed Grand Central Station as an entire property, which included the Transferable Development Rights (TDR's) created by the landmark designation.

Penn Central was understood at all times to be a crucial constitutional test for historic landmark protection laws and for historic preservation as land regulation more generally. The speakers at this conference have captured much of the excitement and apprehension that the case generated.[3] *Penn Central* constituted a great victory for

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2. *Id.* at 124.

3. Not only the preservation activists were energized by the case. Some years ago, I dined with Daniel Gribbon and the late Charles Horsky, who had represented Penn Central, and asked them what

historic preservation. Moreover, it provided courts a basic approach to regulatory takings claims throughout the rise and fall of the constitutional property rights movement that became such a prominent feature of the 1980's and 1990's. After considering various doctrinal alternatives based on *per se* rules, the Supreme Court again endorsed *Penn Central* as the dominant precedent in regulatory takings law in the important *Tahoe Sierra* decision.[4] While this high constitutional drama has been playing out in courts and scholarly writing, largely in cases involving environmental protections, historic preservation law has come of age in many cities, providing a strong and pervasive regulatory system for knitting together existing buildings and new development.[5]

Penn Central not only set the federal constitutional standard for takings challenges to historic preservation, but the states have also uniformly followed it in interpretation of their own constitutions. In 1993, the Supreme Court of Pennsylvania, reversing its initial decision, held that designating the Boyd Theater in Philadelphia as a historic landmark did not amount to a regulatory taking, citing the consensus since *Penn Central.* The court wrote,

> [I]n fifteen years since *Penn Central*, no other state has rejected the notion that no taking occurs when a state designates a building as historic. The decade and a half in which the *Penn Central* decision has en-

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strategic considerations had led them to choose a regulatory takings suit rather than some other legal maneuver to get value from the terminal site. Each replied with warm conviction that Penn Central had sued because the landmark restrictions were unfair and unconstitutional. It is useful to recall that Penn Central had been in bankruptcy reorganization for many years, a heroic endeavor that gave birth to Amtrak.

4. Tahoe Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

5. For example, when *Penn Central* was decided in 1978, Georgetown was the only historic district in Washington D.C. protected by regulations; today there are more than 30, along with other designated landmarks, extending protection to nearly 30% of the structures within the District. 438 U.S. at 104.

> joyed widespread acceptance weighs against our rejecting the *Penn Central* analysis.[6]

Rare, indeed, have been decisions since *Penn Central* where a court has found any aspect of historic preservation law to constitute a taking. Few cases are brought, and very few are successful. My research found only two reported decisions since *Penn Central* (both from Maryland) in which a court found the imposition of a historic preservation restriction to amount to an unconstitutional taking.[7] This is striking, giving how hotly contested *Penn Central* itself was, and the substantial doubt, prior to *Penn Central*, whether landmark preservation without purchase would be upheld.

Penn Central has served to effectively insulate historic preservation from regulatory takings challenges for three principal reasons. First, *Penn Central* eliminated a variety of the concerns about coercive historic preservation regulations. Second, it directed attention to the value remaining in the property, and structures protected by preservation restrictions (as opposed to natural resources protected by environmental controls) nearly always have some economic value that a clever developer can exploit. Third, preservation ordinances have been drafted and administered in the light of *Penn Central* with sufficient flexibility to avoid constitutional confrontations. In general, the market has once again adapted to new land use restrictions.

II. ESSENTIAL LEGITIMACY OF LANDMARK PRESERVATION REGULATION

Prior to *Penn Central*, courts had for some time accepted the idea that state and local historic preservation represented a legitimate exercise of the police power,[8] but the issue was still being litigated.[9]

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6. United Artists Theater Circuit, Inc. v. Philadelphia, 635 A.2d 612, 619 (Pa. 1993).

7. Keeler v. Mayor of Cumberland, 940 F. Supp. 879 (D.Md. 1996); Broadview Apartments Co. v. Comm'n for Historical & Architectural Pres., 433 A.2d 1214 (Md. Ct. Spec. App. 1981).

8. It is sobering to recall that as recently as 1966, the New York Court of Appeals had held that a six-month moratorium on the demolition of the Metropolitan Opera House, to permit purchase of the building by a newly created non-profit, was not within the police

Penn Central settled conclusively that historic preservation advances are an important public interest and thus fall within the police power:

> Because this Court has recognized, in a number of settings, that States and cities may enact land use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city, appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal. They also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law.[10]

As a related matter, the Court's embrace of an essentially *ad hoc*, factual approach ended lingering discussion of whether historic pres-

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power. Old Metro. Opera House Corp. v. City of New York, 224 N.E.2d 700 (1966). Two years later, however, another New York court found it "no longer arguable" that the city had the power "to place restrictions on the use to be made by an owner of his property for the cultural and aesthetic benefit of the community." Sailor's Snug Harbor v. Platt, 288 N.Y.S.2d 314, 315 (1968). By then the authority for the proposition was fairly strong. *See, e.g.*, Rebman v. City of Springfield, 250 N.E.2d 282 (1969); *In re* Opinion of the Justices, 128 N.E.2d 357 (1955). Congress had enacted the National Historic Preservation Act in 1966, which had declared it to be national policy that "the historical and cultural foundations of the Nation should be preserved." 16 U.S.C. 470 (2000). The Supreme Court had found that historic preservation was a "public use" within the meaning of the Takings Clause in United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668 (1896). Berman v. Parker, 348 U.S. 26, 33 (1954), equated the scope of "public use" as a requirement for eminent domain with the scope of the police power, while finding that the latter authorized legislative authority "to determine that the community should be beautiful as well as healthy."

9. Courts still found it necessary to declare that historic preservation was a legitimate purpose of regulation in A-S-P Assoc. v. City of Raleigh, 258 S.E.2d 444 (N.C. 1979), and Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

10. *Penn Cent. Transp.*, 438 U.S. at 129.

ervation restrictions effected a categorical taking because they secured a public benefit rather than prevented a public harm. The harm/benefit distinction had previously been seen as an analytical tool that could help distinguish where the government was acting under its eminent domain power, rather than police power, and therefore owed the property owner compensation. Under this distinction the government was exercising police power, requiring no compensation to a property owner, when it was protecting the public health, safety or welfare from harmful conduct, where a regulation sought to secure a public benefit, however, this was an exercise of eminent domain, requiring compensation.[11] Historic preservation had been thought difficult, or at least awkward, to classify as prevention of palpable harm to the public. *Penn Central*, reflecting contemporary jurisprudential thinking, dismissed the harm/benefit distinction as unimportant.[12] Having found that historic preservation was embraced by the police power, the Court proceeded to examine the effect of the ordinance on the property owner,[13] and developed the rule that historic regulators need pay compensation only when the economic effect on the owner was severe.

Removing a final conceptual hurdle, the Court found that landmark designations should not be subjected to more skeptical takings analysis on the claim that they single out individual properties to

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11. *See, e.g.*, Alison Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 651 (1958).

12. Citing the classic article by Joseph Sax, *Takings and The Police Power*, 74 YALE L.J. 36 (1964), the Court stated that the precedents "are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy - not unlike historic preservation - expected to produce a widespread public benefit and applicable to all similarly situated property." 438 U.S. at 134. *See also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022-23 (1992).

13. Ironically, *Penn Central's* inquiry into the "nature of the government's action," which seems in context only to consider the intrusiveness of the legal instrument chosen by government to achieve its purpose, such as prohibition of demolition rather than physical occupation, has come in later lower court cases to invite a weighing of the importance of the governmental interest. This invites some pragmatic reconstruction of the harm/benefit distinction.

bear unique burdens without any offsetting benefits. This had been thought to be the strongest argument for the landmark owner because it distinguished historic landmark restrictions from zoning or historic district regulations, where each property was simultaneously burdened and benefited by the same regulation. By contrast, the landmark owner is burdened by more onerous restrictions than his neighbors, and receives an uncertain benefit from other landmarks in the city.[14] The Court, however, dismissed this concern, finding that New York's landmark program was a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.[15] While the Court's point does answer concerns about singling out the landmark owner capriciously or invidiously, it fails to address the argument that the owner must bear an economic loss different in kind from other regulated land owners, as Justice Rehnquist tellingly emphasized in his dissent.[16] The real answer to the landmark owner is that the Takings Clause protects him only from the narrow class of losses discerned through the Court's *ad hoc* inquiries.

Penn Central thus barred categorical or qualitative arguments that historic preservation regulations, including those of landmarks, were takings. Rather, it affirmed preservation regulation to be an important governmental function. Future regulatory takings claims against historic regulation must focus on the specific economic conse-

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14. *See* John Costonis, SPACE ADRIFT; LANDMARK PRESERVATION AND THE MARKETPLACE 18-19 (1974).

15. *Penn Cent. Transp.*, 438 U.S. at 132.

16. Rehnquist viewed historic districts as distributing costs and benefits much like zoning: each property in the district is both burdened and specially benefited. *Id.* at 147. By contrast, for a landmark, the cost is "uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other 'landmarks' in New York City." *Id.* An irony of Rehnquist's dissent is that it put challenges to historic districts entirely beyond the pale of constitutional argument. *Id.* Land marking is interestingly referred to as a "nonzoning use of the police power" in the note, *The Police Power, Eminent Domain, and the Preservation of Historic Property,* 63 COLUM. L. REV. 708, 722 (1963). The paradigmatic example of an exercise of the police power outside zoning is nuisance regulation, in which the burden on the owner is justified by the harm the nuisance unjustifiably imposes on others.

quences of specific decisions about an owner's proposed changes in the historic fabric.

III. FOCUS ON REMAINING ECONOMIC POTENTIAL

Penn Central focused analytically on whether the owner of a historic landmark can still put the property to some reasonable economic use. That this standard tends to protect historic preservation is hardly surprising, since it was fashioned in a historic preservation dispute. But it is useful to specify the ways it is helpful.

Landmark protection, particularly in urban cores, will tend to depress the value of a property, at least in the short term, whenever it prohibits a full build-out to the zoning envelope. As in *Penn Central*, this loss can be large, whether measured in dollars or lost FAR. While *Penn Central's* inquiry is articulated broadly in terms of "economic impact," the Court actually looks only to the constitutional sufficiency of what the owner continues to retain. Only the solvency of the investment in the retained rights, and not the magnitude of precluded opportunity, provides a measure of loss. Moreover, the Court makes clear that it weighs the *potential* value of the retained rights, not their current or short-term net income position. This last point is particularly significant for landmarks, because it channels thinking toward creative reuse of the building.

Historic preservation regulations typically do not restrict the uses to which an owner can put her property; rather, they primarily protect original exterior architectural features. Developers have shown themselves increasingly imaginative in fashioning new and profitable uses for historic buildings. Architects have developed convincing approaches to incorporating historic fabric into significant expansions of landmark sites that qualitatively improve on Breuer's justly ridiculed "aesthetic joke."[17] In these circumstances, it is rare

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17. *See generally* Paul Byard, THE ARCHITECTURE OF ADDITIONS (1998). A favorite example of mine is the former Masonic Temple in Washington, which now houses the Gallup Organization, in which a modern tower is joined to an authentically restored three story building by a playful atrium. *Historic Masonic Temple Rehabilitation in Washington, DC Wins Two Prestigious Industry Awards, at* http://www.karchem.com/sections/company/news_awd1.html (last viewed May 1, 2004). The previous owner claimed for years that the

that a historic property will be divested of all economic value or that a developer will be denied the possibility of a reasonable return.[18]

Other cases amplify the nature of the economic showing that the owner must make. A property owner will not be able to prove a regulatory taking if he cannot show that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return, or that other potential use of the property was foreclosed.[19] It will be difficult for a property owner to show that a historic building has no reasonable economic use, since an historic preservation ordinance does not foreclose any use of the historic property. For example, in the District of Columbia a claim brought by the owner of a designated landmark failed where evidence existed that the property could have been rented "as is," with minimal renovation, or with full renovations, which were possible at a lower cost than claimed by the petitioner.[20] In any such case the burden of proof will be on the owner plaintiff.

That the standards for economic hardship have grown more severe over time is illustrated by comparing another pair of cases from the District of Columbia. In the first significant court interpretation of the DCHPA, the Court of Appeals upheld the determination of the "Mayor's Agent," an administrative law judge who determines whether demolition of a landmark is permissible as a "project of special merit," and found that the fabled Rhodes Tavern could be demolished to build a first class office building across from the Treasury.[21] One factor identified by the Mayor's Agent and relied on by the court was the cost to the developer of retaining Rhodes Tavern in the new project. The Court plainly worried that requiring

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building could not be renovated on an economic basis. *See* 900 G St. Assoc. v. DHCD, 430 A.2d 1387, 1392 (D.C. 1981).

18. Historic preservation could generate more takings if there was an aggressive program to preserve through regulation cultural landscape, such as meadows or pastures produced through traditional farming techniques. New York City's preservation law permits designation of landscape features only when found on city-owned property.

19. Maher v. City of New Orleans, 516 F.2d 1051, 1066 (5th Cir. 1975).

20. *900 G St. Assoc.*, 430 A.2d at 1392.

21. Citizens Comm. to Save Historic Rhodes Tavern v. D.C. Dep't of Hous. & Comm. Dev., 432 A.2d 710 (1981).

an owner to bear substantial costs to preserve an historic structure was illegitimate.[22] By contrast, in a more recent case, the court reversed the Mayor's Agent for relying on cost as a factor in permitting demolition without finding that it met the statutory standard for economic hardship.[23] The cost to the developer was essentially brushed aside with the observation that "[w]here the economic burden of maintaining and preserving a historic building is onerous, the Preservation Act provides an owner with the opportunity to seek demolition on the separate ground of 'unreasonable economic hardship.'"[24] The legal development charted here reflects a greater acceptance of the notion that owners should bear the costs of preser-

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22. Consequently, it was entirely proper for the Mayor's Agent to consider evidence offered by interveners showing that preservation of all three structures would cost upward of $7.2 million. Absent public funding, it is apparent that petitioner expects interveners to bear this cost alone and that, if they do, demolition of Rhodes Tavern will not be necessary. However, as one court has stated: 'It is laudable to attempt to preserve a landmark; however, it becomes unconscionable when an unwilling private party is required to bear the expense.'... Requiring private parties to spend substantial sums of money to preserve landmark structures—with little or no public assistance—could rise to the level of an unconstitutional taking. Moreover, development—so vital to a city's growth—could be stymied irreparably. By placing the costs of architectural preservation squarely on the landmark owner, design and demolition controls may actually discourage private citizens from purchasing and maintaining landmark property. Failure to offset the economic burdens of landmark designation will 'create a class of buildings which will be shunned like lepers.'
Id. at 716. (citations omitted).

23. Comm. of 100 on the Fed. City v. D.C. DCRA, 571 A.2d 195 (1990). The court stated, "[t]he issue is not whether a Class "B" building can command the level of rents necessary to justify the expense of renovation, but whether demolition of the Woodward Building and the historic values statutorily ascribed to buildings located within historic districts is justified by the cost of renovation and by the benefits which the new building would bring to the community." *Id.* at 203.

24. *Id.* at 202.

vation, so long as their investment retains a reasonable prospect of profit.

There are a number of reasons why courts and administrators are becoming more comfortable with developers bearing the costs of historic preservation. The scope of the police power and consequent justification for limiting an owner's property rights have always depended on social norms, so that new grounds for restriction raise much greater resistance than familiar ones. *Euclid* itself emphasized that restrictions that may have been objectionable to earlier generations now seem perfectly appropriate.[25] As noted above, aesthetic goals have become an acceptable goal for land development regulation. So, too, historic preservation has become a "normal" feature of urban land regulation, and the real estate market has adjusted to the costs and opportunities that preservation provides. *Penn Central* was the indispensable step in creating the safe harbor within which historic protection could become "normal."

At the same time, there are at least two other legal developments that have inured decision-makers to the complaints of landmark owners. First, tax credits. Beginning with the Tax Reform Act of 1976, the federal government has provided a credit for the costs of rehabilitation and favorable terms for depreciation of the costs of rehabilitation.[26] This provides "compensation," in the very broadest

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25. In its landmark decision upholding comprehensive zoning, the Court stated:

> Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even a half century ago, probably would have been rejected as arbitrary and oppressive.

Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926).

26. Garvin, p. 491. Chicago Landmarks lists the range of current federal and state tax incentives on its website, CityofChicago.com, *at* www.cityofchicago.org/landmarks/Preservation.html (last viewed May 1, 2004).

sense, as well as important incentives, for developers taking on the burdens of rehabilitation. Second, the practice of local governments of requiring developers to pay for infrastructure and amenities in the land development process became ubiquitous and its constitutionality, within broad restraints, is now settled.[27] The pervasiveness of such exactions normalized the notion that development required some kind of bargain between the developer and the regulatory authority, wherein the developer should compensate the public for the costs broadly attributable to new development. When developers must provide the wherewithal for new parks, schools, or affordable housing on the urban perimeter, it seems less onerous to require them to bear the costs of preserving historic fabric within the center.

In considering the elements that have insulated historic protections from successful takings claims, one device notable for its absence is transferable development rights. *Penn Central*'s ability to transfer its unused development air rights to neighboring properties undoubtedly was an important factor in the Court's conclusion that New York's rejection of the addition did not work a taking. Indeed, a major point of disagreement between the majority and Justice Rehnquist in dissent concerned whether TDR's should be seen as retained value in deciding whether a taking had occurred or only as compensation for a taking, a disagreement that has reverberated in subsequent decisions. In any case, TDR's have not proven indispensable, or even common, in practice. TDR's have been used somewhat to mitigate losses to owners caused by severe development restrictions imposed on environmentally sensitive lands, such as at Lake Tahoe in Nevada and in the Pinelands of New Jersey. But there is little evidence of widespread use of TDR's to support historic landmark protections outside New York City.[28]

The difficulty for an owner seeking to prevail in an historic preservation takings case is illustrated by the interesting case of *District Intown Properties v. District of Columbia*.[29] Plaintiff owned a

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27. *See generally* Dolan v. City of Tigard, 512 U.S. 825 (1994); Ehrlich v. City of Culver, 911 P.2d 429 (1996).

28. TDR's were important in the effort to preserve historic theaters in New York and helped protect theater land marking against a takings challenge. *See* Shubert Org. v. Landmarks Pres. Comm'n, 570 N.Y.S.2d 504, 507 (1991).

29. Dist. Intown Props. v. District of Columbia 198 F.3d 874 (D.C. Cir. 1999), *cert. denied*, 531 U.S. 812 (2000).

prominent apartment building, Cathedral Mansions, and wished to build town houses on the extensive lawns between the building and Connecticut Avenue. If it had simply sought a permit and been denied, a subsequent takings claim would easily have been defeated, because the property as a whole retained very substantial value. However, the plaintiff subdivided the property into nine contiguous lots before the city designated the entire property an historic landmark. When the owner sought permits to build on eight of the lots and was denied, it claimed that the application of the regulations denied him all the economic value of those lots in violation of *Lucas v. South Carolina Coastal Commission*.[30] Owners of historic properties rarely have plausible *Lucas* claims because preservation ordinances do not forbid all uses of a property, as compared with environmental regulations of the type involved in *Lucas*, which forbade any permanent structures on vacant lots. Even a historic battlefield can be farmed, although in practice such sites are likely to be purchased to permit public access. The owner in *District Intown* cleverly tried to create a *Lucas* case by breaking off the historic lawns from the apartments, and formally placing them in separate lots, which the Board would not allow to be developed. Thus, after designation there would be parcels of which no economic use could be made. The owner failed, however, when the court concluded that the relevant parcel for takings analysis was the entire original complex, given how long it had held them as one and the notice of new regulation at the time of the subdivision.[31] Owners of historic properties rarely will own buildings of which no economic use can be made.

This difficulty can be understood more fully in considering the two reported cases in which owners prevailed in regulatory takings claims against application of historic preservation restrictions. *Keeler v. Mayor & City Council of Cumberland*[32] involved that city's rejection of a petition by a Roman Catholic church to demolish a historic monastery. The takings finding stood on the fact that the City had stipulated that no economically feasible plan could be formulated for the preservation of the Church buildings.[33] This proba-

30. Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003 (1992).

31. *Dist. Intown Props.*, 198 F.3d at 880-82.

32. 940 F. Supp. 879 (D.Md. 1996).

33. *Id.* at 888. The decision may have been influenced by the additional holding that application of the ordinance violated the church's right to the free exercise of religion. *Id.* at 886-87.

bly was not true in fact, since the church could have sold the monastery, which might have been converted to a hotel or other use. But, in any event, the ill-advised concession by the city led the Court to conclude that *Lucas* applied.

The difficult case is one in which the historical building is so derelict that the cost of renovation for safe use exceeds its market potential. The owner in *Broadview Apartments Co. v. Commission* for Historical and Architectural Preservation[34] prevailed on such a takings claim, when the City of Baltimore did a poor job of contesting the owner's experts' cost and value estimates. Certainly, there may be instances where buildings in undesirable locations cannot generate a rental income that can justify historic renovation, but that lack of demand often will mean that no one wants to do anything at all with the site, which can "mothball" a building. But owners will find it difficult to win such cases; they never would amount to a *per se* taking as in *Lucas*, but would require detailed economic analysis of costs and benefits in a particular factual context. The overwhelming fact is that there is no other reported decision in which a local preservation agency seriously contested the economic viability of restoring a building and lost a subsequent takings claim. Historic preservation staff and lawyers have learned a great deal in the twenty plus years since *Broadview Apartments*. There are many devices for preventing such a conclusion, such as bundling the derelict house with new compatible structures on the same site, so that revenue from the new buildings will support renovation of the old.[35]

Finally, *Penn Central* also brought to frustration of distinct investment backed expectations to the center of attention for economic analysis. The useful and familiar argument here is that the owner bought the designated property subject to historic controls and could have no reasonable expectation that he could build in disregard of

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34. 433 A.2d 1214 (Md. Ct. Spec. App. 1981).

35. This was done to save a magnificent but decrepit townhouse, known as the Louise, that had stood vacant on 7th St. NE, in Washington, D.C., for many years. The developer included restoration of the building as part of a project that included 17 new townhouses, in part to secure neighborhood good will. After the fact, the developer indicated that the restoration had paid for itself and increased the sales value of the entire project. CAPITOL HILL RESTORATION SOC'Y, NOMINATION OF HOLLADAY CORPORATION FOR A MAYOR'S AWARD FOR EXCELLENCE IN HISTORIC PRESERVATION (2003).

them; indeed the price paid should have reflected limits on that use.[36] After *Palazzolo v. Rhode Island*,[37] it is clear that becoming an owner after an ordinance goes into effect will not defeat a takings claim *per se*, but it is highly likely that it will defeat nearly all such claim in which the current owner bought in a normal market transaction after designation. A good example is *Weinberg v. City of Pittsburgh*.[38] There, the Supreme Court of Pennsylvania upheld a finding of no unreasonable hardship, in part because the owner had bought the designated landmark with full knowledge of existing historical controls. The court reversed the contrary finding by the Commonwealth Court, which had held that the purchaser had reasonably underestimated the cost of renovation. But the Pennsylvania Supreme Court placed the burden of that mistake squarely on the shoulders of the purchaser: "The fact that they did not engage the services of an architect or contractor to estimate the cost or feasibility of restoring the Gateway House cannot serve as a basis for their claims of economic hardship after the fact."[39]

On the other hand, purchase before designation may still not give rise to reasonable expectations of development to the limits of existing zoning when the probability of designation is or should be known. In *District Intown*, the owner subdivided the lawn lots in 1979 and sought permits to construct the new buildings before the property was designated a landmark. The court found, however,

> after 1979, D.C.'s historic landmark laws additionally limited expectations of development. Thus, at the time District Intown subdivided the property, it knew, or should have known, that the property was potentially subject to regulation under the landmark laws...Businesses that operate in an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established legislative ends. *See Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993). In this case, District Intown was in the real estate business, with a history of restriction of development for the purpose of preserv-

36. *E.g.*, 900 G St. Assoc. v. DHCD, 430 A.2d 1387, 1390 (D.C. 1981).

37. 533 U. S. 608 (2001).

38. 676 A.2d. 207 (1996).

39. *Id.* at 213.

> ing historic sites....Prior to and after subdivision, this particular property was the subject of increasing public activity devoted to restricting development through landmark designation.[40]

Historic preservation laws actually shape the reasonable expectations of owners of undesignated properties more definitely than do the laws considered in the precedents relied on by the *District Intown* court. In the latter instances, owners found their property regulated to a comparatively mild degree when they made investments, but the regulations were strengthened by subsequent generally applicable legislative amendments. For example, the owner in *Good v. United States*[41] bought his property at a time when he could fill his wetlands for development with only minor regulatory hurdles, but held it while Congress and agencies made it much more difficult to obtain a permit to do so; the court held that he could not claim unfair surprise because he had "watch[ed] as the applicable regulations got more stringent, before taking any steps to obtain the required approval."[42] In a historic preservation case like *District Intown,* the regulatory structure already was in place when the subdivision was made; what had not yet occurred was the landmark designation of the particular property. No owner of a property eligible for designation under an existing preservation ordinance should be seen to have a reasonable expectation to develop free of historic protections. The criteria for and practice of past designations should make it clear whether a petition to designate will succeed.[43]

Moreover, there are specific features of historic preservation law that must shape an owner's reasonable expectations before designation. The National Historic Preservation Act extends its protective consideration of the impact of federal "undertakings" over all properties *eligible* for inclusion in the National Register of Historic

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40. Dist. Intown Props. v. District of Columbia 198 F.3d 874 (D.C. Cir. 1999), *cert. denied*, 531 U.S. 812, 833-34 (2000).

41. 189 F.3d 1355, 1362-63 (Fed. Cir. 1999).

42. *Id.* at 1362.

43. The *District Intown* court, for example, noted that "almost the entire length of Connecticut Avenue from M Street to almost a mile north of District Intown's property is either land marked or within a historic district." 198 F.3d at 884. Expectations would be different, of course, in a benighted jurisdiction that requires the consent of the owner for designation.

Places, whether or not they have been actually designated for inclusion.[44] Also, local ordinances often provide that the filing of a petition for designation stays issuance of a demolition permit to allow the petition to be weighed on the merits,[45] thus continuing the public policy of protecting even undesignated properties by historic preservation laws. Now that every state and nearly every locality has such laws on their books, developers must adjust to the regulatory environment. In some fundamental way the property baseline has moved.

There is an additional argument about the reasonable expectations of the owner of a historic property that complements the point that owners should anticipate now-ubiquitous preservation restrictions. Historical structures embody settled expectations. By definition almost, historic properties are those constructed and long used for particular purposes that more or less fulfilled the original expectations of their creators. When the original owner continues in ownership of the property, as Penn Central did Grand Central Station, a court is likely to conclude, as the *Penn Central* Court did, that the restriction precluding new construction "does not interfere with what must be regarded as [the owner's] primary *expectation* regarding the use of the parcel."[46] The historic structure and use determine the "primary expectation" for the original owner, and new expectations face the hurdle of identifying some new significant investment at a point in time later than the original acquisition. This is an even more serious hurdle for enduring non-profit organizations, such as churches and endowed schools. Not only will such an organization often be an original owner who has long persisted in a particular use, but also the test of economic harm such owner must meet is whether the restriction prevents the organization from carrying out that purpose in its current facilities.[47] *District Intown* indicates that not only original

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44. 16 U.S.C. §§ 470, 470f (2000).

45. *See, e.g.*, D.C. Code, § 6-1102(6).

46. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136 (1978) (emphasis added).

47. *See* Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991); Soc'y for Ethical Culture v. Spatt, 415 N.E. 2d 922, 936 (N.Y. 1980) ("There is no genuine complaint that eleemosynary activities within the landmark are wrongfully disrupted, but rather the complaint is instead that the landmark stands as an effective bar against putting

owners but also purchasers who persist in the original uses face the hurdle of a court concluding that a new development is not a significant part of their investment backed expectations.[48]

IV. INCENTIVE FOR ACCOMMODATION

Penn Central did not leave the property owner defenseless. The fact that there are very few reported cases in which property owners have prevailed in regulatory takings claims against historic protections does not mean that the constitutional provision plays no role. The threat of liability to municipalities plays a much larger role in the land use regulation process than do any actual recoveries.[49] The property owner can argue that some regulation goes too far, and the regulator often will find it difficult to dismiss the likelihood of liability given the vague and sometimes contradictory factors at play. Thus, the regulator nearly always has some incentive to find a compromise that preserves the essentials of a historic resource while permitting adaptation for a remunerative use.

As noted above, historic preservation law is well suited for this kind of negotiated regulation. First, it does not in principle restrict the uses to which a property may be put, but only restricts demoli-

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the property to its most lucrative use."). *See also* Cindy Moy, *Reformulating the New York City Landmarks Preservation Law's Financial Hardship Provision: Preserving the Big Apple*, 14 CARDOZO ARTS & ENT. L. J. 447 (1996).

48. "Here, as in *Penn Central*, the regulation does not interfere with District Intown's "primary expectation" concerning the use of the parcel, because it "not only permits but contemplates that appellants may continue to use the property precisely as it has been used" for the past 28 years." *Dist. Intown Props.*, 198 F.3d at 136.

49. Justice Stevens captured the dilemma in noting how allowing damages actions for overreaching land use regulations can over deter appropriate regulation: "Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damages action. Much important regulation will never be enacted, even perhaps in the health and safety area." First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 340-41 (1987) (Stevens, J., dissenting) (footnote omitted).

tion or alteration of existing designated properties, usually only on the exterior. Indeed, preservationists often seek a relaxation of zoning rules to permit reuse of buildings to serve current market demand. A classic example of this phenomenon is New York City's rezoning of cast iron lofts in SOHO for residential purposes in the 1970's.[50] Secondly, even in preserving exterior fabric, some change is often permissible, as the legal standards for alterations or additional construction are based on notions of "appropriateness" or "compatibility." Since the era of Breuer, architects have progressed impressively in creating imaginative and contextual designs for additions to landmarks or for new construction in historic districts.[51] Finally, historic preservation does not require in principle a single-minded devotion to total domination of land development decisions by preservation values. While there certainly are cases where any significant alterations simply are unacceptable because they seriously diminish an important landmark, there are many more cases where some less critical historic fabric can be sacrificed to achieve broader development goals, or simply to cut a workable deal.[52] One

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50. *See* Garvin, *supra* note 26, at 489-90.

51. Permission for additions may sometimes go beyond compatibility. The D.C. Historic Preservation Act permits demolition of a landmark to permit construction of a "project of special merit," D.C. Code, § 6-1104(e), based on its "exemplary architecture," D.C. Code, § 6-1102(10). The D.C. Mayor's Agent recently approved under this provision demolition of a portion of the landmark Corcoran Gallery to permit construction of a new addition in flamboyant design by Frank Geary. *In re* Corcoran Gallery of Art, HPA 02-284 (Sept. 19, 2002), *available at* http://www.ll.georgetown.edu/histpres/decisions/hpa02-284summ.html

52. An interesting example of this in the District is the final approval of an office tower at 10th and F Streets, NW, adjacent to the landmark St. Patrick's Catholic Church. After an initial proposal to demolish seven nineteenth century stores, except for their facades on F Street was rejected by the Historic Preservation Review Board and the Mayor's Agent, *In re* Archdiocese of Washington, HPA 99-219, et al (Nov. 9, 1999), *available at* http://www.ll.georgetown.edu/histpres/decisions/results.cfm, the Planning Office initiated a mediation process that resulted in approval of a new plan as a project of special merit that preserved four of the stores to a depth of 50 feet, along with the facades of two others and removed the mass of the

must rely on a flexible process involving expert consideration and meaningful public comment to sort out these instances.[53]

The rights of the property owners typically are incorporated into the historic preservation ordinance itself. Many contain an exceptions clause that prohibits enforcement of preservation mandates when doing so would impose severe economic hardship on the owner. New York City provides that an owner may be able to obtain a certificate of appropriateness for demolition or new construction on the ground of "insufficient return," which for a non-tax-exempt property is set legislatively at 6%.[54] Such provisions provide that designated properties that cannot be economically used may be demolished, and create another check on the power of historic preservation agencies.

Some jurisdictions make this exception coterminous with the standard for a regulatory taking.[55] In D.C., the statute itself provides that: "'[u]nreasonable economic hardship' means that the failure to issue a permit would amount to a taking of the owner's property without just compensation."[56] This statute was drafted primarily by David Bonderman, who wrote an important brief for the National Trust and several cities in support of New York in *Penn Central.*[57]

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office building to the corner of the block. In the Matter of the John Akridge Co, and the Archdiocese of Washington, HPA Nos. 01, 219, et al (August 1, 2001) (available at www.ll.georgetwon.edu/histpres/decisions/hpa01-219-224,208209.htm). While some historic stores will be demolished, they individually lack great significance. The regulators were able to preserve a last row of low-rise storefronts in downtown Washington, a notable preservation victory.

53. Carol Rose long ago recognized that historic preservation in an urban context involves a process of community self-definition in which public participation and fair procedures may be more important than substantive criteria. Carol M. Rose, *Preservation and Community: New Directions in the Law Of Historic Preservation*, 33 STAN. L. REV. 473 (1981).

54. N.Y.C. Admin. Code 25-302(v).

55. *E.g.,* Illinois Coll. of Surgeons v. City of Chicago, 153 F.3d 356, 368 (7th Cir. 1998); United Artists Theater Circuit, Inc. v. Philadelphia, 635 A.2d 612, 618 n.3 (Pa. 1993).

56. D.C. Code § 6-1102 (14).

57. *See* Jeremy Dutra, *"You Can't Tear It Down:" the Origins of the D.C. Historic Preservation Act*, 23-24 (2002), *available at* www.

Such an exceptions clause has two effects. First, it permits the owner to demolish a building in the unusual circumstances where there is no alternative use, thereby avoiding constitutional litigation. Officials should be able to assess the owner's case and adjust their requirements to permit adequate return for the owner on his investment. Second, it locates disputes about economic impact within the permitting process, giving initial control over fact-finding about economic harms and alternatives to the local preservation board. Under the Supreme Court's *Williamson County* doctrine, no private litigant would be allowed to pursue a takings claim in court without seeking relief under such a statutory hardship route.[58] Such a scheme usually creates a steeper hill for the takings claimant to mount. In the District of Columbia, no litigant has ever prevailed on a claim of economic hardship.[59]

Given this legal terrain, developers interested in developing landmarks have an incentive to propose developments that have some chance of approval. Bucking the system is costly and unlikely to prove rewarding. Regulators in turn have an incentive to approve responsible proposals, because doing so enhances the political acceptability of preservation review, eases opposition to expansion of the system from additional designations, and allows the municipality to avoid costly and embarrassing takings losses. Since the focus turns to the economic potential of the site under various proposals,

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llgeorgetown.edu/histpres/papers/papers_dutra.pdf (last viewed May 1, 2004).

58. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

59. In *900 G St. Assoc.*, the court stated that "[p]etitioner had the burden of proof in the hearing to establish that no other reasonable economic use for the Building existed. Since the Act assigned the function of taking evidence and making determinations to the Mayor's Agent and she heard the testimony in the instant case and possessed the administrative expertise, the decision of the Mayor's Agent will be upheld by this court in resolving questions of fact unless it appears from the record that there is obvious and egregious error." *900 G St. Assoc.*, 430 A.2d at 1392. New York City Landmark's Preservation Commission's procedures for owners who want to demolish or alter their landmarks has been criticized as burdensome to owners and biased toward the Commission. *Id.* at 390; *see also* Moy; supra note 47, at 486.

both developers and regulators have a self-interest in finding a compromise that retains the visual integrity of the landmark and permits useful adaptation. *Penn Central* seems to have placed us in a pragmatic workable constitutional context for landmark preservation.

V. CONCLUSION

Penn Central nearly always protects historic preservation decisions from takings challenges. Developers rarely bother to contest the constitutionality of preservation restraints, but seek to craft proposals that will be approved. This is not that hard, given some architectural and entrepreneurial imagination. Historic preservation laws do not forbid any uses and most historic buildings can be put to some valuable use. Historic preservation law has matured under these conditions to provide significant control over design and scale for much urban development.