January 1979

The Grand Slam Grand Central Terminal Decision: A Euclid for Landmarks, Favorable Notice for TDR and a Resolution of the Regulatory/Taking Impasse

Norman Marcus

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*Norman Marcus*

Historic conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people.¹

I

**INTRODUCTION**

Thirteen years after New York City adopted its Landmarks Preservation Law² and after “all 50 states and over 500 municipalities [had] enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance,”³ a conservative Supreme Court upheld the application of New York City’s ordinance to Grand Central Terminal (Terminal), very much in the spirit and manner in which it sanctioned zoning more than 50 years ago.⁴ The Court rejected a claim that the ordinance’s application resulted in a “taking” of property without due process in violation of the fourteenth amendment. In so doing, the Court explicitly recognized for the first time the

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² New York City Charter and Administration Code ch. 8-A §§ 205-1.0 to 207-21.0 (1976).
³ 98 S. Ct. at 2651.
⁴ A conservative United States Supreme Court sanctioned classic zoning in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1976), by a vote of 6-3, the same margin as in *Penn Central*. The majority in *Penn Central* were Justices Brennan, Stewart, White, Marshall, Powell and Blackmun. Justice Rehnquist was joined in his dissent by Chief Justice Burger and Justice Stevens.
value of transferable development rights (TDR), thus opening the door to a resolution of the regulatory/taking impasse which had inhibited local governments from exercising their police power to preserve threatened resources. These zoning privileges mitigate the harshness of a land use regulation’s impact on a property owner.

The Court also, for the first time, gave broad and explicit encouragement to the accelerating preservation movement in the United States. This encouragement principally took the form of dispelling the inverse condemnation cloud which threatened municipalities with having to buy landmarks in order to preserve them. The decision was hailed as an example of “maturity” on the part of a “country that is finally recognizing its urban assets and the need to protect them for livable cities.” Ironically, preservation—arguably a more conservative municipal objective than separation of uses—took 50 years longer to satisfy concerns stemming from the fifth and fourteenth amendments’ protection of private property from taking without just compensation before assuming its place beside zoning as a valid exercise of the police power.

II
THE CASE: PENN CENTRAL TRANSP. CO. v. NEW YORK CITY

A. Background

In 1965, New York City enacted its Landmarks Preservation

5. Zoning controls define the development potential of a lot. New York City’s Zoning Resolution allows a certain height, bulk, and density for structures on each lot proportionate to the size of the lot and appropriate to its location. Owners are economically encouraged to build to the allowable maximum and will often destroy an existing structure that does not utilize the permitted bulk of a lot in an area zoned for high density. In order to preserve a threatened critical resource, however, it is necessary to divert the development pressure elsewhere. By allowing transfer of development rights from a lot with an important resource to eligible receiving lots within a wider unit of development control, the city achieves its density-infrastructure balance, preserves its “landmark”, and gains the increment to its tax base associated with new development. See Marcus, Air Rights Transfers in New York City, 36 L. CONTEMP. PROB. 372 (1971) [hereinafter cited as Marcus, Air Rights]; Marcus, From Euclid to Ramapo: New Directions in Land Development Controls, 1 Hofstra L. Rev. 56, 72-78 (1973).


Penn Central v. New York City

Law, nine years after the New York State Historic Preservation Enabling Act granted municipalities authority to provide for the protection and preservation of buildings and places of "special historical or aesthetic interest or value." Under New York City's law, the Landmarks Preservation Commission (Commission) identifies and, after public hearings, designates as landmarks and historic districts those properties and areas having "special character or special historical or aesthetic interest or value as a part of the development, heritage or cultural characteristics of the city, state or nation." Following such action, the Board of Estimate, the city's legislative body, may modify or overturn the designation after it considers a report from the City Planning Commission on the relationship of the designated property "to the master plan, the Zoning Resolution, projected public improvements, and any plans for the renewal of the area involved."

After a landmark designation is recorded under the city statute, any alteration, reconstruction, demolition, or construction on a landmark site requires prior approval by the Commission. To assure that the law's objectives will not be defeated by deterioration, the law also requires that the owner keep the exterior features of the building in good repair.

On September 21, 1967, the Board of Estimate confirmed the Landmarks Preservation Commission's designation of the Terminal as a landmark. Shortly thereafter, a private developer obtained from the owner, Penn Central Railroad (Railroad), a renewable 50 year lease of the air rights above the Terminal. The Commission subsequently denied two requests from the developer and the Railroad for permission to construct on the Terminal site a high rise office building which was not precluded by applicable zoning provisions. Justice Brennan

10. New York City Charter and Administrative Code ch. 8-A §§ 205-1.0 to 207-21.0. Justice Brennan's majority opinion noted that the "New York City Law is typical of many urban landmark laws in that its primary method of achieving its goals is not by acquisition of historic properties, but rather by involving public entities in land use decisions affecting these properties and providing services, standards, controls and incentives that will encourage preservation by private owners and users." 98 S. Ct. at 2652. The opinion goes on to make the case for private use as opposed to public administration of most urban landmarks:

The consensus is that widespread public ownership of historical properties in urban settings is neither feasible nor wise. Public ownership reduces the tax base, burdens the public budget with costs of acquisitions and maintenance and results in the preservation of public buildings as museums and similar facilities, rather than as economically productive features of the urban scene.

Id. at 2652 n.6. See photograph of Terminal interior, p. 734 infra.

12. New York City Charter and Administrative Code ch. 8-A § 207-1.0(n) (1976).
13. Id. § 207-2.0(g)(1).
14. Id. § 207-4.0 to -9.0.
15. Id. § 207-10.0.
In contrast to public ownership which results in the preservation of public buildings as museums, preservation by private owners maintains landmarks as economically productive features of the urban scene.
The Chester French Statuary would have been torn down had the second office tower request by the Railroad been approved by the Landmarks Preservation Commission.
quoted the Commission’s rationale for rejecting the more benign of the two office building requests as follows:

The Commission has no fixed rule against making additions to designated buildings—it all depends on how they are done... But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The “addition” would be four times as high as the existing structure and would reduce the landmark itself to the status of a curiosity. Landmarks cannot be divorced from their settings—particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way—with alterations and addition of such character, scale, materials, and mass as will protect, enhance, and perpetuate the original design rather than overwhelm it.

The Railroad did not seek judicial review of either the Terminal’s landmark status or the denial by the Commission of the two requests. Nor did it submit other building plans for the Commission’s consideration. Instead, in October 1969 the Railroad filed for declaratory judgment invalidating the restrictions imposed by the Landmarks Preservation Law. It sought injunctive relief barring the city from using the law to impede construction of any structure otherwise lawful on the Terminal site, and damages for the “temporary taking” between the designation date and the date of granting of relief.

To appreciate the Railroad’s perspective, one must view the Terminal’s status in light of the city’s then landmark-blind zoning policy which encouraged high rise redevelopment in midtown Manhattan. Permissive midtown Manhattan zoning controls, allowing a Floor Area Ratio (FAR) greater than in any other area of the city, invite concen-

17. The second and less benign of the two office building requests called for tearing down a portion of the Terminal that includes the 42nd Street facade. 98 S. Ct. at 2656. See photograph of statuary. p. 735 supra.
18. 98 S. Ct. at 2656. See also, Marcus, Villard Preserv’d Or, Zoning for Landmarks in the Central Business District, 44 Brooklyn L. Rev. 1, 17 (1977).
19. 98 S. Ct. at 2656.
20. Id. at 2657. At the oral argument, Justice Blackmun asked if the Railroad had any interest in building the 20 story beaux-arts office tower designed but never built as part of the Terminal complex in 1913. Counsel for the Railroad indicated that the Railroad had no current interest in the 1913 office tower design. The majority found this significant in examining the effect of the landmarks law on the use of the air rights above the Terminal. Id. at 2666 n.34 and accompanying text.
21. Id. at 2657.
22. See note 5 supra.
23. FAR is a concept which is used to control the amount of building on a lot. The FAR “number” represents the multiple of the lot area which produces the maximum allow-
tration of development in an area containing a dense service infrastructure of shops, theatres, restaurants, and transit facilities. The income potential of a large, new building utilizing the maximum FAR available far exceeds that of a more modestly sized landmark structure.24 Additionally, older specialty buildings like Grand Central Terminal require costly and tender care for the continued preservation and cleaning of elaborate beaux-arts facades and ornamentation. While incentive zoning granted bonus floor area to developers in return for additional open space and circulation amenities, landmark preservation brought no reward. In the context of these development controls, owners were unenthusiastic about midtown Manhattan landmark designations.25

The New York City Planning Commission and the Board of Estimate, at the urging of the Landmarks Preservation Commission, took steps to correct this landmark-blind zoning policy. Chief among these measures was a 1968 amendment to the Zoning Resolution which granted TDR options to all city landmarks.26 In order to allow the owner to capture the full zoning value of his lot without destroying the landmark, TDR options permit the owner to transfer development rights from the landmark site to other lots. Under the 1968 scheme, developers of eligible receiving lots could purchase additional floor area up to 20% over the district FAR maximum. Eligible receiving lots included only lots adjacent to or across a street or street intersection from the landmark.28

In 1969, the Railroad persuaded the city to approve broadened TDR enabling legislation.29 The Railroad desired to transfer at least 50% of its unutilized development rights above Grand Central Terminal to the then unprofitable Biltmore Hotel site—one of many properties owned by the Railroad in the vicinity of the Terminal. The city amended its initial TDR legislation to make possible a greater radius of transferability and to remove, within the Manhattan central business district, the 20% FAR coverage ceiling on an individual receiving lot.30

24. The Terminal has an FAR of 2 in a district where the allowable FAR is 18. Id.
25. Marcus, supra note 18, at 10.
26. See note 5 supra.
27. New York City Zoning Resolution, §§ 74-79 to -793.
28. Marcus, Air Rights, supra note 5, at 374. The rationale of this early TDR provision was to maintain a bowl or saucer of light and air with adjacent properties on its rim and the older landmark at the bottom of the bowl.
29. Id. at 375.
30. New York City Zoning Resolution, 74-79 to -793.
31. Id. Existence of an extensive underground circulation network beneath the rail-
This would permit the Railroad to carry out its massive Biltmore redevelopment scheme for which its architect, Marcel Breuer, developed drawings of equal detail to those worked up for proposals on the Terminal site.

After the legislation was adopted, however, the heretofore booming market for office space in midtown Manhattan produced a glut of unrentable floor space,\(^\text{32}\) and the Railroad ceased work on the Biltmore project. It thereafter placed reliance on lawyers rather than architects and pursued its interest exclusively in the courts.

**B. The Lower Court Decisions**

Grand Central Terminal posed a major test for the City's Landmarks Preservation Law at each level of judicial consideration. If the designation of a relatively small structure in the high-value, high-rise office retail core of the city could be sustained, the Landmarks Preservation Law was probably safe anywhere in the city.

The trial court, impressed by the disparity between the Terminal's existing floor area and the zoning potential for an office building on the site, granted declaratory and injunctive relief against the city. It found that the cost of operating the Terminal exceeded its revenues from tenants and concessionaires and did not regard the transferable development rights either as providing compensation to the Railroad or as minimizing the harm suffered as a result of the landmark designation.\(^\text{33}\)

The Appellate Division reversed, three to two.\(^\text{34}\) It concluded that the Railroad, having shown only that it had been deprived of the property's most profitable use, did not sustain the burden of proof required by its constitutional taking claim—i.e. that the regulation deprived the Railroad of all reasonable beneficial use of its property. The court found support for this conclusion in the Railroad's failure to impute rental value to the vast portions of the Terminal devoted to railroad purposes and in its failure to show that the unused development rights above the Terminal could not have been profitably transferred to nearby sites.\(^\text{35}\)

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\(^{32}\) There was a drastic decline in the number of new office development zoning applications processed by the New York City Planning Commission at this time which the Commission attributed to an overabundance of office space already available on the market.

\(^{33}\) 98 S. Ct. at 2657 n.20.


\(^{35}\) The U.S. Supreme Court majority read the trial record in this regard to "reflect that Penn Central had given serious consideration to transferring some of those [development] rights to either the Biltmore or the Roosevelt Hotel." 98 S. Ct. at 2657 n.22.
The Court of Appeals unanimously affirmed on all the grounds given by the Appellate Division, but viewed the "reasonable beneficial use—reasonable return on the property" question in a new light. The reasonable return to which plaintiffs were entitled in the Court of Appeal's neo-Henry Georgian perspective could only come on the "privately created and privately managed ingredient" of the Terminal's value. Rather than attempt to wrestle with this unwelcome and, in the Supreme Court's view, unnecessary Henry George genie, the Brennan majority in a footnote politely but firmly rebottled the genie with the following procedural flourish:

The Court of Appeals suggested that in calculating the value of the property upon which appellants were entitled to earn a reasonable return, the "publicly-created" components of the value of the property—i.e. those elements of its value attributable to the "efforts of organized society" or to the "social complex" in which the Terminal is located—had to be excluded. However, since the record upon which the Court of Appeals decided the case did not, as that Court recognized, contain a basis for segregating the privately 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 affirmation, see infra, we have no occasion to address the question whether it is permissible or feasible to separate out the "social increments" of value of property.

The Georgian genie of "social increments" of the value of property, while not determining the outcome of the Grand Central Terminal litigation, thus remains prominently on the shelf for a future Aladdin in the judicial process to uncork.

C. The Supreme Court Decision

The questions presented to the Court were: 1) whether the restric-

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37. Henry George, a nineteenth century American economist, developed the "single [social value] tax" theory in his major work, PROGRESS AND POVERTY (1879), where he sought to unravel the paradox of progress accompanied by poverty, and to stop the cycle of economic booms and depressions. In this quasi-Marxist work, he proposed a land value tax which replaced all other forms of taxation in order to permit the public rather than private interests to capture the land value increments. This would provide ample public funds to insure adequate wages and purchasing power for labor and a source of public capital for investment purposes. In essence, land value would be publicly enjoyed, although private title and management would remain nominally intact. George believed this "single tax" would free the economic system from periodic shortages of purchasing power and capital thereby eliminating depressions, in addition to providing for a fairer distribution of wealth. See also H. GEORGE, THE SCIENCE OF POLITICAL ECONOMY (1897); H. GEORGE, JR., THE LIFE OF HENRY GEORGE (1900).
39. 98 S. Ct. at 2658 n.23.
tions imposed by the Landmarks Preservation Law upon the Railroad’s exploitation of the landmarked Terminal site effect a taking of property for a public use within the meaning of the fifth and fourteenth amendments, and 2) if so, whether the transferable development rights afforded the landmark owner constituted just compensation within the meaning of the fifth and fourteenth amendments.\(^4\) The court majority answered the first question in the negative, thereby failing to reach the second.\(^4\) The minority answered the first question affirmatively, and would have remanded the second question to the New York Court of Appeals because of the “relatively slim” record on appeal for a determination of whether these privileges constituted a “full and perfect equivalent for the property taken.”\(^4\)

*Penn Central* presented the Court with its first opportunity to apply prior taking analyses to landmark preservation efforts—an important nationwide concern—in the context of ameliorative TDR privileges. Although the “taking issue” had been before the courts frequently in the 1900’s in the context of federal, state, or local police power measures that caused substantial adverse impact on private property,\(^4\) including state health and safety regulations,\(^4\) local comprehensive zoning ordinances,\(^4\) local environmental protection statutes,\(^4\) and national clean air requirements,\(^4\) landmark preservation regulation presented a *sui generis* public purpose.\(^4\) In assessing the validity of the New York City Law as applied to the Terminal, the Court drew upon all of these precedents before forging what amounts to a landmark decision for landmarks. The decision, a green light for landmark preservation across the nation, clearly shields landmark regulation of similar character to New York City’s from generic taking

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\(^4\) Id. at 2658.

\(^4\) The Court nonetheless found opportunity to note the importance of the Railroad’s TDR privileges in mitigating the economic impact of the Landmarks Preservation Law’s restrictions on the Terminal. 98 S. Ct. at 2666.

\(^4\) Id. at 2673 (Rehnquist, J., dissenting).


\(^4\) Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).


\(^4\) Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).


\(^4\) See J. COSTONIS, SPACE ADrift 5 (1974). Under a photograph of happy citizens appears the following caption: “Why Preserve Old Buildings? The elation of the citizens of Belleville, Ill. at the instant their city council approved an ordinance designating the St. Clair County Courthouse as a landmark offers as persuasive an answer as any. Aside from its architectural distinction, the courthouse was a source of identity, of familiarity, of roots for more than five generations of Bellevilleans. . .” (emphasis added).
challenges, just as *Euclid v. Ambler Realty Corp.* provided a broad umbrella for states and localities to zone their communities in accordance with a comprehensive plan.

Beginning its taking analysis with disarming candor in response to critics, the Court confessed its past inability to develop a set formula to determine when "justice and fairness" require that the government compensate persons for economic injuries caused by public action rather than allow the loss to fall disproportionately on a few persons. The Court admitted engaging in essentially ad hoc factual inquiries in past cases, but was able to identify three tell-tale factors any one of which could convert an apparently valid "public program adjusting the benefits and burdens of economic life to promote the common good" into an unconstitutional taking. Thus:

1) A government restriction on real property "not reasonably necessary to the effectuation of a substantial public purpose" may constitute a "taking" (i.e. arbitrariness).

2) A government restriction may have such "an unduly harsh impact on the owner's use of the property" or "may so frustrate distinct investment-backed expectations as to amount to a 'taking'" (i.e. harshness).

3) "Government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'taking'" (i.e. appropriation).

This comprehensive evaluation framework is responsive to past criticism that the Court conveniently applied police power and eminent domain labels haphazardly to support result-oriented determinations. Even though the challenged measure survives two out of the three evaluative criteria, it may still founder on the third. A critical review of the three elements with specific application to the Grand Central Terminal situation is presented below.

I. *Arbitrariness*

A government police power restriction is arbitrary under the Court's reasoning if there is either an insufficient public purpose being

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49. 272 U.S. 365 (1926).
51. 98 S. Ct. at 2659.
52. *Id.*
53. *Id.* at 2661.
54. *Id.*
55. *Id.*
56. *Id.*
57. This comprehensive test contrasts with the dissent's doctrinaire view that a taking is a taking: "A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some 'reasonable' use of his property." *Id.* at 2672.
pursued or a more reasonable and clearly less restrictive means available to achieve a substantial public purpose.  

Although the Railroad did not contest the legitimacy of landmark preservation as a public objective, it argued that only noxious use prevention could support prohibition of the most beneficial use of property without resulting in a taking. (The Railroad did not consider its proposed office tower over the Terminal to be a noxious use.) In rejecting this view, the Court positioned the public purpose of landmark regulation alongside the long-sanctioned governmental objectives of zoning—even where this results, as it did in *Penn Central*, in the prohibition of the most beneficial use of the land—by invoking as precedents all of the unsuccessful challenges to zoning regulations that resulted in arguably harsh restrictions.

The Railroad’s most incisive thrust at the reasonableness of the landmark law’s means of achieving its objective was leveled at the law’s selective designation methodology as contrasted to uniform zoning classifications which traditionally place all properties in the same general area under common restrictions or burdens. In response to this

58. See text accompanying note 53 *supra*.


60. The necessary presence of a "noxious use"—a harm to be prohibited so as to benefit the public at large, such as the brickyard in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) or the sand and gravel pit in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962)—as a condition precedent to justification of a prohibitory land use regulation is interred in this decision. The "noxious" quality of the prohibited uses under this so-called "harm-benefit" test is exposed once and for all by the Court as a semantic chimera: These cases 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.

98 S. Ct. at 2664 n.30.

61. *Id.* at 2660. The Court stated:

[In instances in which a state tribunal reasonably concluded that “the health, safety, morals or general welfare” would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land use regulations that destroyed or adversely affected recognized real property interests. See *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928). Zoning laws are of course the classic example. See *Euclid v. Ambler Realty Corp.*, 272 U.S. 365 (1926) (prohibition of industrial use); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt); *Welch v. Swasey*, 214 U.S. 91 (1909) (height restriction), which have been viewed as a permissible governmental action even when prohibiting the most beneficial use of the property. See *Goldblatt v. Town of Hempstead*, *supra*, 369 U.S. at 592-93 and cases cited; see also *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 674 n.8 (1976).

62. The Railroad conceded the legitimacy of historic districts under a zoning rationale.
criticism, any urban observer might be quick to point out that excellence may occur at random throughout a city as well as in definable clusters or historic districts. A regulation which, in order to have district-wide form, unnecessarily burdens a multiplicity of indifferent properties to preserve an isolated landmark or two, might be even more vulnerable to an "arbitrariness" challenge on the ground that there is available a more reasonable and clearly less restrictive means of achieving its purpose. The Railroad argued, however, that selective, isolated landmark designations burden only the designee and provide windfalls to neighboring properties. They fail to produce the "average reciprocity of advantage" of zoning restrictions which, while limiting future use of many commonly situated properties and diminishing their individual value in the abstract, give rise to reciprocal collective advantage flowing from the security of common restrictions. In the Court's view, however, the legislative judgment that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole, prevails over the Railroad's contention that it alone was burdened and unbefitted.

Addressing the potential for discriminatory application in spot landmark designation, the Court rejected "taking" as the invariable characterization for laws which single out individual landmark owners for special burdens—a proposition which would "invalidate not just New York City's law, but all comparable landmark legislation in the nation." The New York Court of Appeals had unanimously concluded that restrictions on the alteration on individual landmarks were not designed to further a general community plan. The state court found that New York City landmarks law restrictions were designed to
prevent alteration or demolition of a single piece of property and noted that "such restrictions resemble 'discriminatory' zoning restrictions, properly condemned . . . ."\(^{69}\)

In the Supreme Court's view, however, the Landmarks Preservation Law and its operation to date reflect a comprehensive plan:

In contrast to discriminatory zoning, which is the antithesis of land use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.\(^{70}\)

Since the New York Court of Appeals emphasized that the implementation of the objectives of the Landmarks Preservation Law constituted an "acceptable reason to single out one particular parcel for different and less favorable treatment,"\(^{71}\) the Court majority tactfully did "not understand the New York Court of Appeals to disagree with our characterization of the Act."\(^{72}\)

The Court laid the arbitrary "spot" designation methodology issue to rest in a significant footnote:

"It is of course true that the fact the duties imposed by zoning and historic district legislation apply throughout particular physical communities provides assurances against arbitrariness, but the applicability of the landmarks law to large number of parcels in the city, in our view, provides comparable, if not identical, assurances."\(^{73}\)

The Court's willingness to place local legislative judgment, both as to the widespread benefits of landmark preservation and as to the necessary selective determinations, on the same pedestal enjoyed by zoning determinations\(^{74}\) should embolden hitherto timid communities which have hesitated to embark upon a program of individual landmark regulation because of potentially expensive inverse condemnation consequences. Moreover, the Court's language would seem to

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\(^{69}\) Id.

\(^{70}\) 98 S. Ct. at 2663-64.

\(^{71}\) 42 N.Y.2d at 330, 366 N.E.2d at 1275, 327 N.Y.S.2d at 918. Contrast the U.S. Supreme Court minority's view of such less favorable treatment:

If the cost of preserving Grand Central Terminal were spread evenly across the entire population of the City of New York, the burden per person would be in cents per year—a minor cost appellees would surely concede for the benefit accrued. Instead, however, appellees would impose the entire cost of several million dollars per year on Penn Central. But it is precisely this sort of discrimination that the Fifth Amendment prohibits.

\(^{72}\) 98 S. Ct. at 2672 (Rehnquist, J., dissenting).

\(^{73}\) Id. at 2663-64 n.28.

\(^{74}\) See note 66 and accompanying text supra; see note 73 and accompanying text supra.
encourage communities to think big—in terms of large comprehensive landmark designation programs—not only for their own sake, but also as a fortification against charges of arbitrariness.\textsuperscript{75}

2. \textit{Harshness}

The Railroad sought to qualify its plight as frustration of distinct investment-backed expectations amounting to an unduly harsh impact on the use of its property. It based this claim on the city's rejection of two proposals to exploit the zoning district's remaining usable air space above the Terminal representing 89\% of the allowable FAR on the Terminal lot,\textsuperscript{76} and on the loss of profits under a $3 million, 50 year lease for such air space.

The Railroad sought to enhance its taking claim in this regard by conceptually dividing its parcel into segments—the ground and underground (or Terminal) portion, and the super-adjacent air space. It then argued a deprivation of the gainful use of the "air rights" irrespective of the value of the remainder of the parcel.\textsuperscript{77} The Court refused to countenance the self-serving division of a single parcel into discrete segments in determining whether governmental action effects a taking. Instead, it is the character of the action and the nature and extent of the interference with rights in the parcel as a whole—i.e., here, the city tax block fee estate—that determines the issue.\textsuperscript{78}

Thus, the Court was unwilling to find expectation of full use of air rights on the Terminal site equivalent to the investment-backed expectations of the mining company in \textit{Pennsylvania Coal Co. v. Mahon}.\textsuperscript{79} There it had invalidated a state regulation imposing expensive underground mining precautions (which rendered commercial mining unprofitable) in order to prevent subsidence of dwellings in residential areas over the mines. In \textit{Pennsylvania Coal}, however, the coal company owned only the subsurface mining rights, having sold the property long before the relevant enactment, but having reserved the right to extract subsurface coal. In \textit{Penn Central}, where the Railroad owned the fee including the superadjacent air space, the Court declined an imaginary division of the parcel. If the parcel as a whole retains a reasonable, beneficial use, there is not such a frustration of investment

\textsuperscript{75} See note 8 supra.
\textsuperscript{76} A percentage of zoning underutilization based upon the difference between the present 2 FAR occupied by the Terminal and the 18 FAR allowed in the area.
\textsuperscript{77} 98 S. Ct. at 2662-63.
\textsuperscript{78} Id. at 2663.
\textsuperscript{79} 260 U.S. 393 (1922). In so holding, the \textit{Penn Central} Court stated: [T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore believed was available for development is quite simply untenable.
backed interests as to constitute a “taking”.

If the Court had pursued the comparison further, the question of the value of the parcel “as a whole” might have led to an analogy between the value of the residential house in relation to the subadjacent mine and the value of the Terminal in relation to the superadjacent air space. The Court’s discussion, reverberating with echoes of Justice Brandeis’ dissent in Pennsylvania Coal, contains the potential for eventually overruling that case, sub silentio, a possibility discussed in one important work not long ago.

Examining the landmark law’s impact on the parcel as a whole, the Court found that, on the record below, the Railroad failed to prove an inability to obtain a reasonable return on its investment. The Court noted that the Terminal’s designation as a landmark not only permitted, but contemplated the use of the property precisely as it had been used for the past 65 years: as a railroad terminal containing office space and concessions. It is significant in this regard that the Railroad entered into the $3 million per year air rights lease four months after the city designated the Terminal as a landmark. In the Court’s view, the owner’s primary expectation regarding the Terminal was left undisturbed.

80. See id. 98 S. Ct. at 2663 n.27.
81. If the terminal is a reasonable beneficial use of land in a skyscraper city, then a single family house may be a reasonable beneficial use of land in the anthracite regions of Pennsylvania.

82. 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting):
It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value; and that here the restriction destroys existing rights of property and contract. But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts cannot be greater than the rights in the whole. The estate of an owner in land is grandiloquently described as extending ab orco usque ad coelum. But I suppose no one would contend that by selling his interest above one hundred feet from the surface he could prevent the State from limiting, by the police power, the height of structures in a city. And why should a sale of underground rights bar the State’s power?

83. This assumes that the hurdle of the surface’s alienation by the coal company prior to the imposition of the mining restriction can be surmounted either by Brandeis’ nuisance control arguments in the Pennsylvania Coal dissent or by the legislative imperatives of the current environmental movement. See note 82 supra.
84. See note 43 supra.
85. 98 S. Ct. at 2666. See note 13 supra, regarding the “expectations” of a harmonious office tower over the Terminal. In response to a question by Mr. Justice Powell at the oral argument, the city conceded that “if appellants can demonstrate at some point in the future that circumstances have changed such that the Terminal ceases to be . . . ‘economically viable,’ appellants may obtain relief.” Id. at 2666 n.36.
86. Id. at 2665-66.
87. Id.
Even indulging the Railroad by examining the law's impact on the pre-existing air rights, the Court rejected the inference that the City's denial of the two 50-stories-plus office building proposals "suggests an intention to prohibit any construction above the Terminal." More importantly it found that, in any event, the special TDR privileges accorded the landmark owner rendered the severity of the landmark law's impact insufficient to require a finding that a "taking" had occurred:

[T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied all use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of legislation.

Certainly, the facts proven at the trial, and personally known to the author, supported the Court in these conclusions by demonstrating:

1) that the Railroad initiated, indeed drafted, earlier versions of a city amendment to existing TDR provisions in the Zoning Resolution which widened the radius of transferability and removed percentage of FAR limits on receiving lots in midtown zoning districts;

2) that the lessee of the Terminal's air rights had made an offer comparable to its original proposal to build over the Terminal, for air rights transferable to the nearby Biltmore or Roosevelt Hotel Properties also in the Railroad's ownership; and,

3) that the Railroad and lessee met frequently with the city to refine architectural drawings for an office building on the Biltmore site incorporating approximately half of the unused air rights over the Terminal.

In its first pronouncement on TDR as a technique to resolve the regulatory/taking impasse, the Court accepted New York City's classification of its TDR provisions within the regulatory portion of the public purpose spectrum. It viewed the TDR privileges—far from a guilt-ridden gesture "not to leave the property owner empty-

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88. 98 S. Ct. at 2666 (emphasis added). See also note 20 and accompanying text supra.
89. 98 S. Ct. at 2666 (second emphasis added; footnote omitted).
90. See notes 6 & 50 supra. While the Court failed to employ "Costonis semantics," its decision evidently shares Costonis' view that TDR is a fair means of resolving the regulatory/taking impasse.
handed" as a valuable mitigating factor in considering the impact of landmark regulation. Interest in the Railroad's development rights was not confined to prospective developers of Railroad properties but extended to other owners of eligible receiving lots in the vicinity of the Terminal. This interest could not be manifested until the Court in this decision recognized the legitimacy of the TDR device, thereby quieting persistent speculation that its use could give rise to inverse condemnation or "taking" claims under the rationale of the Rehnquist dissent.

Ten years ago, New York City was among the first local governments to experiment with TDR as a promising regulatory device to aid in the achievement of public objectives such as landmark preservation without sacrificing private property interests. It would be an understatement to say that the device has generated a fair amount of comment in the ensuing decade. In finding the city's legislative judgment contained in its zoning and landmark laws consistent with the fifth and fourteenth amendment requirements, the Court signaled to communities across the nation that they may consider according TDR privileges to property owners singled out to bear special burdens for public purpose land use reasons as a valid means to cushion otherwise harsh regulatory impacts and restore an additional measure of real estate investment expectations.

91. 98 S. Ct. at 2673 (Rehnquist, J., dissenting).
92. The author is aware of at least one substantial offer made to the Railroad during the period immediately preceding oral argument in this case. The Railroad tabled the offer pending determination of the case. Subsequent to the decision, this offer was picked up by the Railroad and is in the process of consummation as this article goes to press. This TDR, however, seeks only 74,655 square feet of floor area—3% of the entire development rights bank available above the Terminal. Certainly, the zoning requirement for TDR approval of a "program for continuing maintenance of the landmark" should be interpreted as embracing considerations of proportionality. That is, the maintenance program required should be proportional to the magnitude and value of the transaction. New York City Zoning Resolution, § 74-792, subd. 5(b).
93. One experiment which failed mandated preservation, for passive recreational uses only, of certain private open space areas in the face of a proposal to build high rise residential towers thereon. Zoning provisions severed the development rights from these parcels and made these rights transferable to commercial areas in midtown Manhattan within an approximate one mile radius. The New York Court of Appeals invalidated this zoning experiment in Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), noting that the severed development rights had an uncertain and contingent market value while the residual use of the open space properties for passive recreation did not amount to a reasonable beneficial use. For a full history of this experiment, and a contra legal view of the matter, see Marcus, Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks, 24 BUFFALO L. REV. 77 (1974).
94. It appears that more has been published about TDR than all other land use techniques combined. See Merriam & Merriam, A Bibliography on the Transfer of Development Rights, EXCHANGE BIBLIOGRAPHY 1338 (1977). (This publication of the Council of Planning Libraries contains 374 entries.)
3. Appropriation

The Railroad viewed the city's action prohibiting it from occupying the adjacent airspace above Grand Central Terminal, like the governmental action in United States v. Causby,\(^{95}\) as tantamount to a public appropriation of a part of its property. Just as the use of Causby's chicken farm was destroyed by the frequent invasion by U.S. Army planes of the airspace above the farm, so also the Railroad alleged harsh reduction in the economic value of the Terminal site, due to the preservation of a public frame of airspace over the landmark.

The Court found the situations in the rural chicken farm and urban railroad terminal cases not to be remotely similar.\(^ {96}\) The Court characterized the government in Causby as having acted in an enterprise capacity to appropriate part of the property for a strictly governmental purpose—a military aircraft flight pattern.\(^ {97}\) In Penn Central, the Court found that the Landmarks Preservation Law simply restricted the Railroad or anyone else from occupying portions of the airspace above the Terminal, while permitting profitable use of the remainder of the parcel and in no way impairing the present use.\(^ {98}\) In sum:

This is no more an appropriation of property by the Government for its own uses than is a zoning law prohibiting, for "aesthetic" reasons, two or more adult theatres within a specified area, see Young v. American Mini Theatres, Inc., supra, or a safety regulation prohibiting excavations below a certain level. See Goldblatt v. City of Hempstead [sic], supra.\(^ {99}\)

III

CONCLUSION: CAUSE FOR TRICENTENNIAL OPTIMISM

The Court’s decision comes not only at a time of taxpayers’ revolt but also at a time when recycled buildings have begun to rival new high

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96. 98 S. Ct. at 2665.
97. Id. The New York Court of Appeals had distinguished government action in an enterprise capacity (condemnation) from action in an arbitral capacity (regulation) in Lutheran Church v. City of New York, 35 N.Y.2d 121, 128, 316 N.E.2d 305, 310, 359 N.Y.S.2d 7, 14 (1974), where it had declared invalid the particular landmark designation at issue as an arbitrary but non-compensable regulation. In Fred F. French Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), appeal dismissed, 429 U.S. 990 (1976), that Court similarly invalidated as arbitrary regulation a zoning restriction limiting private property to open space use. It cautioned that the ‘taking’ metaphor should not be confused with reality. Id. at 595, 350 N.E.2d at 385, 385 N.Y.S.2d at 9. Finally, in the present case the New York Court of Appeals indicated that there could be no taking since the Landmarks Preservation Law had not transferred control of the property to the city but only restricted the Railroad’s exploitation of it (i.e. an exercise of arbitral, not enterprise, functions). Penn Central Transp. Co. v. City of New York 42 N.Y.2d at 334, 366 N.E.2d at 1277, 397 N.Y.S.2d at 920.
98. 98 S. Ct. at 2665.
99. Id.
rises in the conventional wisdom of the inner city marketplace. Its implication will not be lost on municipalities anxious to preserve their aesthetic, historic, and cultural past at minimal cost to the taxpayer.

In the decade preceding the decision and following the Terminal's landmark designation, building recycling and preservation have become sound business decisions in addition to enhancements of the quality of life. Thus, the need for increased taxpayer resources to meet a heightened public preservation consciousness may be obviated by a responsive private market which undertakes to preserve property for reasons of self-interest. The *Penn Central* decision has jostled this private market, thereby promoting building recycling, by removing any lingering expectation that the public purse stands ready to pay just compensation (top dollar) for preserving landmark structures already housing reasonable beneficial uses.

While the burden of shouldering the preservation load under the regulatory approach may fall disproportionately on some (as is the case with many types of regulation), the alternative approach urged by Justice Rehnquist—a minor "burden per person" solution—would risk, in the Proposition 13 era, practical inability on the part of municipalities to designate and preserve their heritage. One may therefore expect new comprehensive municipal landmark preservation activity as a result of the *Penn Central* decision, probably in concert with new recycling initiatives undertaken by a real estate industry shorn of its "taking" expectations. A comprehensive municipal program of landmarking will from now on be treated with all the judicial deference accorded classic zoning in the 50 year wake of *Euclid v. Ambler Realty Corp.*

The Court's recognition of the legitimacy and value of New York City's TDR privileges accorded landmark owners will likely trigger comparable efforts by governmental entities anxious to preserve various areas of critical concern to the human environment without unfairness to the owner. While the TDR solution to landmark preservation in an urban setting may not be easily adapted to beach or swamp preservation in rural areas, the TDR option will nevertheless be explored


101. 98 S. Ct. at 2672 (Rehnquist, J., dissenting). See note 71 supra.


103. See note 8 supra.

104. 272 U.S. 365 (1926).

more seriously in connection with natural or environmental area preservation after the *Penn Central* decision.

To guard against judicial intervention, legislative bodies will pay close attention to the factors present in the *Penn Central* case: 1) continuance of a reasonable, albeit sharply limited, beneficial residual use of the property, 2) existence of sufficient TDR-eligible receiving lots preferably, but not necessarily, in the same ownership as the lot from which the development rights spring, and 3) a TDR technique that minimizes non-reviewable municipal discretion (contingencies) and maximizes private options involving its exercise.106

How wide should the radius of transferability of a landmark’s development rights be? The legal success or failure of the TDR program may depend on the answer to this question. The number and ownership of eligible receiving lots for Grand Central Terminal’s development rights was a significant factor in the Court’s view of the New York City program as affording, at least in the case of the Terminal, “valuable” property rights.107 But an overly wide radius of transferability risks loss of the planning rationale which links the underutilization of the landmark lot with the measure of overbuilding tolerated on lots nearby.108 Pragmatism will continue to shape the precise answer to this question.

Finally, by looking favorably on the TDR privilege as a leavening agent in an otherwise possibly harsh exercise of local police power, the Court has begun to resolve the regulatory/taking impasse by expanding the police power. It has breathed new life into state and local regulations at a time when shrinking local fiscal resources make the municipal eminent domain alternative without the aid of the federal

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106. In this connection a comparison of the *Fred French* decision invalidating a TDR measure in New York City, with the *Penn Central* decision will prove instructive if not fully satisfying. Costonis, in *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402, 420 (1977), continues to tout the municipally-funded development rights “bank” as a feasible TDR option for local governments (in part based on *dictum* in the New York Court of Appeals decision in *Fred French*). Under this approach the municipality condemns the development rights (extant under zoning), compensates the owner therefor, and subsequently sells them to developers interested in building larger structures than zoning allows. Prior to sale, however, the municipality is faced with an unenviable choice between its arbitral and enterprise functions. See note 85 *supra*. Does it bail out its investment at the sacrifice of politically sanctioned zoning standards? No need to tune in tomorrow. The consistent record of rejection of this option by municipalities for fiscal as well as planning reasons is not likely to be turned around by the *Penn Central* decision.

107. 98 S. Ct. at 2666.

108. See Marcus, *Air Rights, supra* note 5, at 378. In the lower court decision in *Fred French*, one of the factors which led the court to invalidate the city’s TDR experiment was the spot zoning impact of overbuilding on a receiving lot of considerable distance from the preserved private park. Judge Waltemade implicitly questioned the benefit enjoyed by a neighboring property owner impacted by the allowable overbuilding on the receiving lot so far from the park. *Fred F. French Investing Co. v. City of New York*, 77 Misc. 2d 199, 352 N.Y.S.2d 762, (1973).
dollar an infrequent possibility. If strong and diverse local government initiatives remain essential in a nation tending towards homogeneity, *Penn Central* should renew national confidence in local government experimentation with creative solutions to vexing land use problems. Two years too late for the Bicentennial, the *Penn Central* decision may well insure the quality of our Tricentennial.