Constitutional Law - Land Use Control - Landmark Preservation

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CONSTITUTIONAL LAW—LAND USE CONTROL—LANDMARK PRESERVATION—The New York Court of Appeals has held that landmark regulation of commercial property is valid provided the landowner is not deprived of all reasonable return from the designated landmark; in determining a reasonable return, the basic value is limited to that worth contributed by the owner's efforts and the return must include any benefit derived from development rights made transferable by the regulation.


On August 2, 1967, the City Landmarks Preservation Commission (Commission) designated New York City's Grand Central Railroad Terminal a landmark in accordance with the provisions of the New York City Administrative Code. Once so designated the landmark was required to be kept in "good repair," and any alteration or construction on the site would be regulated. Any unused development rights resulting from the designation could be transferred to any nearby sites in accordance with the related sections of the City's zoning provisions.

In July of 1968, Penn Central Transportation Company, including a number of its subsidiaries, and UGP Properties, Inc. attempted to obtain permission from the Commission to erect an office building atop the Terminal. All requests submitted were denied.


2. Grand Central Terminal's classification as a landmark was never an issue in the case, although Penn Central Transportation Company had objected to the designation when it was first proposed by the Commission in 1967. The court noted: "along with the Empire State Building and the Statue of Liberty, the image of its facade symbolizes New York City . . . ," id. at 269, 377 N.Y.S.2d at 24-25, and "[t]he historical, aesthetic and cultural significance of Grand Central Terminal is not disputed," id. at 275, 377 N.Y.S.2d at 30 (Lupino, J., dissenting).


4. 42 N.Y.S.2d at 328-29, 366 N.E.2d at 1273, 397 N.Y.S.2d at 916. Penn Central had a three-hundred year lease for the Terminal from the New York and Harlem Railroad Company, owner of the fee interest. The trustees of Penn Central in turn owned 95% of the New York and Harlem Railroad Company. UGP, sub-lessee of the development rights above the
Asserting that the landmark preservation provisions, both on their face and as applied to the Terminal, authorized an unconstitutional "taking" of property under the police power, Penn Central filed suit on October 7, 1968, seeking declaratory relief and an injunction to prevent the Commission from enforcing the provisions against Grand Central Terminal. Trial term of the Supreme Court terminal, was incorporated after the landmark designation was made and was a wholly-owned subsidiary of a British company. 50 App. Div. 2d at 270, 377 N.Y.S.2d at 25-26.

The proposed office building would have been a tower exceeding 50 stories in height. UGP was to pay Penn Central $1,000,000 per year during the construction phase and $3,000,000 annually thereafter. Id., 377 N.Y.S.2d at 26. Hereafter, reference to Penn Central will include all the plaintiffs in the action.

5. 42 N.Y.2d at 329, 366 N.E.2d at 1273, 397 N.Y.S.2d at 917. Complete procedures were available to allow for alterations to the landmark. The owner could seek a "certificate of no exterior effect" or, if there would be an exterior effect, he could seek a "certificate of appropriateness." 50 App. Div. 2d at 268, 377 N.Y.S.2d at 24. Penn Central first sought permission to construct the office building, claiming that the work would have "no exterior effect" on the protected architectural features because the office building would be above the landmark. After that request was denied, additional applications were made to the commission seeking approval based on the fact that the new office building would be "appropriate" to occupy the site atop Grand Central Terminal. 42 N.Y.2d at 329, 366 N.E.2d at 1273, 397 N.Y.S.2d at 916-17.

Penn Central had architect Marcel Breuer and Associates make three different proposals—Breuer I, Breuer II, and Breuer II, revised—in an attempt to gain an approval. 50 App. Div. 2d at 270, 377 N.Y.S.2d at 26. Breuer I would not have effected the main concourse or any other part of the terminal actually used in railroad operations. Also, the facade of the terminal would have remained untouched. The plan "constituted a present-day application of a principle which had been embodied in the original plans for the present Terminal building." The original plans of the terminal had shown an office building over the present facade although it was not built. In contrast, Breuer II and Breuer II, revised would not have preserved the south facade of the terminal. The basic difference between all the Breuer proposals and the "original plans" is that a much taller building of modern design was to be built. Id. at 275-76, 377 N.Y.S.2d at 31 (Lupino, J., dissenting). But cf. Respondent's Brief at 18, Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 344, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977) (the original plans for a twenty-story office tower were "obviously" discarded and the 1911 plan suggested a tower which cannot be compared with that proposed by Penn Central).

Neither the administrative decisions designating the terminal as a landmark nor those rejecting the applications for certificates were judicially challenged. 42 N.Y.2d at 329, 366 N.E.2d at 1273, 397 N.Y.S.2d at 917. Cf. Lutheran Church v. City of New York, 35 N.Y.2d 121, 126-28, 316 N.E.2d 305, 308-09, 359 N.Y.S.2d 7, 11-13 (1974) (the reasonableness of the landmark designation could not be put at issue because the administrative decision to designate the church a landmark was not judicially challenged).

6. 50 App. Div. 2d at 271, 377 N.Y.S.2d at 26. Damages were also sought for the "taking" from the time of landmark designation to the time of the judicial invalidation sought. The question of damages, however, was severed from the proceedings. 42 N.Y.2d at 329, 366 N.E.2d at 1274, 397 N.Y.S.2d at 917.

While an administrative remedy, e.g., tax relief, exists on the grounds of "insufficient return" for taxpaying commercial property or nontax exempt property used for charitable
of New York County, New York granted the relief. It found Penn Central was suffering such economic hardship that it did not receive a reasonable return on the property; therefore, New York City's actions constituted a "taking" of private property without compensation, denying Penn Central due process of law.

The Appellate Division of the Supreme Court, in a 3-2 decision, reversed and granted judgment for defendant City of New York. The court reasoned that prior decisions of the New York Court of Appeals and the Appellate Division of the New York Supreme Court had held that the landmarks preservation law was valid on its face and that the sole issue was whether Penn Central had met its burden of proving that the line between valid and unconstitutional regulation had been crossed in the application of the law. The test applied was the same as that used in zoning cases: whether the regulation deprived the owner of all "reasonable beneficial use" of his property. Although losses were shown in the operation of the terminal, the court ultimately found that Penn Central had not been deprived of all "reasonable beneficial use" of its property.

purposes, the Terminal was commercial property which received a partial real estate tax exemption, thereby making it ineligible to apply for this relief. 50 App. Div. 2d at 268, 271, 377 N.Y.S.2d at 24, 26.

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


10. See 42 N.Y.2d at 328-29, 366 N.E.2d at 1273-74, 397 N.Y.S.2d at 916-17.

11. The intermediate appellate court stated that the lower court had misapplied the court of appeal's recent decision in Lutheran Church v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974), where landmark regulation was found unconstitutional as applied to property owned by a charitable institution: the property was "taken" because the regulation seriously interfered with or prevented the carrying out of the owner's charitable purpose. The trial court mistakenly believed that Lutheran Church stood for the proposition that landmark regulation ipso facto required compensation. 50 App. Div. 2d at 271, 377 N.Y.S.2d at 26-27. In the eyes of the intermediate appellate court, however, Lutheran Church only held the landmark designation unconstitutional when the landowner was deprived of any reasonable use thereof. Id. at 271, 377 N.Y.S.2d at 27.

12. 50 App. Div. 2d at 273-74, 377 N.Y.S.2d at 28-29. The majority considered that several of the costs allocated to the Terminal property were actually operating expenses of the railroad, that it was error not to assign a rental value to the space used by the railroad, and that a full scope analysis by Penn Central must include unused potential to increase the revenues. Id.

In contrast, Judges Lupino and Markewich viewed the burden on Penn Central as massive and concurred with Penn Central's analysis of costs. Id. at 278-84, 377 N.Y.S.2d at 33-38 (Lupino, J., dissenting). The dissent all but announced that any restrictions upon a landmark owner different from those imposed on others in the community would be unconstitutional.
In a unanimous decision the New York Court of Appeals affirmed. Authoring the opinion, Chief Judge Breitel stated that the landmark regulations were constitutionally valid as applied because the commercial property owner was assured a "reasonable return" on his "privately created ingredient of property."

The court first defined landmark regulation as neither zoning regulation nor historic district regulation. Landmark regulation is primarily distinguishable from both because it affects only individual landmarks, and thus resembles "discriminatory" zoning. The cultural, architectural, historical, or social significance of the affected property, however, provides the rational basis for landmark regulation which distinguishes it from discriminatory zoning, and thus permits it to hurdle equal protection objections. Further, landmark regulation did not amount to a "taking" where "just compensation" must be paid because there is no "government displacement of private ownership, occupation or management."

"The Terminal is to be preserved [according to the majority] in its pristine state for the benefit of all and the bill for this is presented solely to Penn Central." Id. at 284, 377 N.Y.S.2d at 38 (Lupino, J., dissenting). The dissenters were in full agreement with the trial court's reading of Lutheran Church, that compensation must come with regulation of a landmark. Id. at 287, 377 N.Y.S.2d at 40 (Lupino, J., dissenting). For a short discussion of other opinions authored by Chief Judge Breitel in land use jurisprudence, see note 34 infra.

In zoning, "[e]ach property owner . . . is both benefited and restricted . . ." Id. However, under landmark regulation the landmark owner is restricted not so much for his own benefit as for the benefit of the greater community. Further, the court stated that zoning's purpose is to advance a comprehensive community plan unlike the purpose of landmark regulation. Id.

Again, the landowner in historic districting is benefited as well as regulated while the landmark owner is arguably only regulated. The "owners within the historic district although burdened by the restrictions also benefit . . . from the furtherance of a general community plan." Id. A district historically regulated is very similar to a zoned area but the restrictions in the historic district concentrate on preventing alterations or demolitions of existing structures, like single landmark regulations, in lieu of controlling the building of new structures. Id.

"Discriminatory" or "spot" zoning is unconstitutional because there is no acceptable reason for the differences in the regulations, thus violating equal protection guarantees. Id.

Id.

noted that "government displacement" or a "taking" requiring just compensation occurs only when a regulation's intent or effect is to impact the land with irreversible "trespassory consequences." 21

The court therefore framed the constitutional issue as whether the regulation of property designated a landmark had, under the police power, gone so far as to deny all the uses of the land that would assure the owner a continuing "reasonable return." 22 In evaluating the return for the purpose of determining if it is reasonable the court examined the difficult conceptual barriers facing such a formulation. 23 It was recognized that this ratio of income to outlay, which to an accountant would be a simple calculation, was an "elusive concept" to courts dealing with these issues. While despairing that the determination of the basic value and the return under the regulation was inherently circular, the court believed that a "fair" approximation of the return was nevertheless possible and would serve as a viable guide to judicial decision making. 24 The court's analysis required that the value of the property be ascertained before the reasonableness of the return could be determined. In formulating this amount, the court discussed the worth of the property and distinguished "society's contribution" from the "privately created" elements of its value. 25 The fact that Grand Central Terminal was


Land use regulation is unconstitutional if it results in the property being unsuitable for any "reasonable income" and thus destroys its economic value, "or all but a . . . residue of its value." The property owner is thereby left with only "bare title." French Investing Co., 39 N.Y.2d at 506-97, 350 N.E.2d at 387, 358 N.Y.S.2d at 10-11.


24. Id. at 331, 366 N.E.2d at 1275, 397 N.Y.S.2d at 918. The value of the land which is the base against which the return is measured to determine reasonableness is a function of the uses to which it can be put. These uses and thus the basic value are restricted by the landmark regulation just as is the value of the return. Id. It should be noted that the landmark ordinance provides for a return of at least 6 percent. See Costonis, The Disparity Issue: A Context for the Grand Central Terminal Decision, 91 HARV. L. REV. 402, 422 (1977) [hereinafter cited as The Disparity Issue].

25. 42 N.Y.2d at 328, 336, 366 N.E.2d at 1272-73, 1278, 397 N.Y.S.2d at 916, 921.
a public utility, had real estate tax exemptions, and enjoyed many other indirect benefits from society lessened the figure which was to be used as the value of the property in distilling the "privately created" elements. As "inseparably joint" as these private and societal interests were, the court felt that they had to be distinguished conceptually.

The court's second step was to determine what quantum of return Penn Central has received under the regulation. Penn Central's primary contention was that the Terminal was operating at a loss. The court rejected this as a controlling factor, and instead, looked beyond the current financial situation to the potential of the property as regulated to produce a reasonable return under efficient management. The court added that a further monetary component needed to be considered in the "reasonable return" analysis: the income from Penn Central's "heavy real estate holding" in the immediate vicinity of Grand Central Terminal. Analogizing Grand Central Terminal to a "flagship store" in a shopping center, Chief Judge Breitel believed that, realistically, some of this income must be "imputed" to the Terminal because of Penn Central's ability to draw potential customers to its other businesses in the immediate vicinity of the terminal.

Moreover, the court explained, Penn Central had not been "wholly" deprived of the right to develop above the terminal but merely had these rights transferred to other property in the area, some of which Penn Central owned. Recognizing the deficiencies that exist in the statutorily provided transfer of rights, the court found, nevertheless, that these transferable rights were valuable and must be included as another factor. The court distinguished

26. Id. at 332, 366 N.E.2d at 1286, 397 N.Y.S.2d at 919. Judge Breitel noted public utilities to be "favored monopolies at public expense" with limited powers of eminent domain. Id.
27. Id.
28. Id. at 331-33, 366 N.E.2d at 1275-76, 397 N.Y.S.2d at 918-19. "Grand Central Terminal is no ordinary landmark. It may be true that no property has economic value in the absence of the society around it, but how much more true it is of a railroad terminal, set amid a metropolitan population . . . " Id. at 331, 366 N.E.2d at 1275, 397 N.Y.S.2d at 918.
29. For a discussion of the "social increment of value theory", see notes 66 and 67 infra.
30. 42 N.Y.2d at 333, 366 N.E.2d at 1276, 397 N.Y.S.2d at 919.
31. Id. The court announced that inadequate management would not be allowed to invalidate land use restrictions.
32. Id. at 333-34, 366 N.E.2d at 1276, 397 N.Y.S.2d at 920.
33. Id. at 334-36, 366 N.E.2d at 1278-79, 397 N.Y.S.2d at 921-22.

Transferable development rights, often called TDRs, increase the worth of the transferee property because these rights significantly raise the limits imposed by the present zoning on
the transferable development rights provided in *Penn Central* from those provided by the zoning regulations in *Fred F. French Investing Co. v. City of New York (Tudor Parks).* Because the restricted landowner in *French Investing Co.* held no other property, unlike *Penn Central* which held property to which the rights could be transferred, the court found them deficient because they were not "readily attachable" and thus unable to provide a "reasonable return."

Exclusive of the transferable development rights discussion, the court considered its rationale consistent with its decision in *Lutheran Church v. City of New York* and the appellate division's decision in *Trustees of the Sailors' Snug Harbor v. Platt.* In both cases the landmark preservation provisions were upheld as facially constitutional. However, economic considerations prevented the tax-exempt charity in *Lutheran Church* from maintaining the landmark building and therefore the regulation was found invalid as applied, and because additional facts were needed, *Sailors'* was

the recipient parcels to allow the expansion of an existing structure or a larger replacement structure, resulting in more income to the property. For a further discussion of development rights, see Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks,* 24 BUFFALO L. REV. 77, 85-94 (1975) [hereinafter cited as *Mandatory Development Rights*].


The author of the unanimous opinion in *French Investing Co.* was also Chief Judge Breitel. *Id.* Cf. *Golden v. Planning Board (Ramapo),* 30 N.Y.2d 359, 383-93, 285 N.E.2d 291, 305-11, 334 N.Y.S.2d 138, 156-65 (Breitel, J., dissenting) (in discussing the zoning ordinance's prohibition on development until supporting facilities are available, in some cases a delay of up to 18 years, he said, "[t]here is little doubt that the compulsion of current interests and conflicts will require a re-examination of much legal and judicial thinking in this area"), appeal dismissed, 409 U.S. 1003 (1972); *Cromwell v. Ferrier,* 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967) (in establishing police power to prohibit nonaccessory billboards to protect a community's aesthetics, Breitel incorporated in his opinion the dissent's view in the case overruled by *Cromwell* that "[c]ircumstances, surrounding conditions, changed social attitudes, newly acquired knowledge, do not alter the Constitution, but they do alter our view of what is reasonable.")

35. 42 N.Y.2d at 336, 366 N.E.2d at 1278, 397 N.Y.S.2d at 921.


38. 42 N.Y.2d at 334, 366 N.E.2d at 1277, 397 N.Y.S.2d at 920. Although the Landmark Preservation Law has withstood constitutional attacks on its facial validity, it has had difficulty in being constitutionally applied. 50 App. Div. 2d at 266, 377 N.Y.S.2d at 22.
inconclusive on the question of the regulation’s constitutionality as applied.\textsuperscript{39}

As a result of weighing the benefits received by Penn Central in the form of transferable development rights\textsuperscript{40} and income imputed from ownership of Grand Central Terminal on the one hand, against the denial of use of the air rights above the Terminal on the other, the court determined that Penn Central was receiving a reasonable return.\textsuperscript{41} The court viewed its evaluation of the landmark regulations as a middle road in land-use control between requiring “just compensation” and requiring no compensation at all.\textsuperscript{42}

**THE PROPERTY RAIN BARREL\textsuperscript{43}**

The issues underlying the constitutionality of land use control for landmark preservation raised by *Penn Central* can be traced to the United States Constitution. The fifth amendment,\textsuperscript{44} a limitation on the federal government, provides that no one shall “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensa-

\textsuperscript{39} See 42 N.Y.2d at 334, 366 N.E.2d at 1277, 397 N.Y.S.2d at 920. The case was remanded because additional facts had to be developed. *Id.*

\textsuperscript{40} *Id.* at 335-36, 366 N.E.2d at 1278-79, N.Y.S.2d at 921-22. The court highlighted the use of these transferable development rights and called them “substitute rights” which provided “fair” compensation for the loss of rights above the terminal itself. This “fair” compensation provided by the transferable development rights insured that the owner was not deprived of due process. *Id.* at 335, 366 N.E.2d at 1278, 397 N.Y.S.2d at 920.

\textsuperscript{41} *Id.* at 336-37, 366 N.E.2d at 1279, 397 N.Y.S.2d at 922.

\textsuperscript{42} *Id.* at 337, 366 N.E.2d at 1279, 397 N.Y.S.2d at 922. Improvement of the statute was suggested in dictum because it protected some property owners inadequately. Further, the court invited Penn Central to present additional evidence to the trial court that addresses the analysis required by the decision. *Id.*

\textsuperscript{43} Real property is not just the metes and bounds of *Blackacre* but it is moreover the “bundle of rights” given the owner. *Restatement of Property* § 95 (1936). See Preface to R. Broughton, *Measures of Property Rights* at vii (1977).

The author will use a “rain barrel” to represent the receptacle of that portion of the “bundle of rights” which permit the landowner to use and develop his land. The size of the conceptual “rain barrel” is fixed; what varies is the volume of water, the magnitude of rights to use the land. The level is never fixed; rather, it changes constantly. “Fair” Compensation, *supra* note 21, at 1026 (citing Professor Philbrick, “the concept of property never has been, is not, and never can be of definite content”). *See French Investing Co.*, 39 N.Y.2d at 597, 350 N.E.2d at 387, 385 N.Y.S.2d at 11 (the value of “property is not a concrete or tangible attribute but an abstraction derived from the economic uses to which the property may be put”).

\textsuperscript{44} For the historical development and background of the fifth amendment, see *Mandatory Development Rights*, *supra* note 33, at 85-89.
tion." The fourteenth amendment has an identical "due process" provision which limits state actions and has been held to incorporate the "just compensation" provision of the fifth amendment. Exactly what limitation, if any, these words place on the power of the state is the heart of the Penn Central land use control controversy.

The leading case interpreting the constitutional language is Pennsylvania Coal Co. v. Mahon. Under the challenged law, the defendant coal company lost its right to mine certain coal deposits because such mining could cause subsidence endangering individual homes. Speaking for the majority, Justice Holmes announced that if the state's regulation goes too far, it is a "taking" and thus invalidated the law and allowed the mining to continue. This resulted in a dichotomy: at one extreme, if land regulation went too far, causing too much "diminution in value," then "just compensation" for the land's "highest and best" use under the eminent domain power was required; at the other extreme, if "diminution in value" is not large enough to be a "taking," no compensation was required for the regulation. This all or nothing approach to compensation for land use regulation has been much criticized, and demonstrates the basic tension in Penn Central.

47. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), classically cited for the diminution in value precept: when regulation goes too far it becomes a "taking" requiring "just compensation."
48. The following four works provide further analysis of many of the issues and arguments involved in the "taking" controversy: Berger, The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis, 76 COLUM. L. REV. 799, passim (1976) [hereinafter cited as Reply to Professor Costonis]; The Disparity Issue, supra note 24, passim; "Fair" Compensation, supra note 21, passim; Mandatory Development Rights, supra note 33, at 86.
49. For an analysis of earlier cases involving the fifth amendment, see Mandatory Development Rights, supra note 33, at 97-98.
50. 260 U.S. 393 (1922).
51. At that time, subsurface rights were recognized as a separate estate in land in Pennsylvania. Id. at 414.
52. Id. at 412-13.
53. Id. at 417.
54. Id. For a discussion of the irony of Justice Holmes writing for the majority in Pennsylvania Coal in light of his dissenting opinions in other police power cases, see Mandatory Development Rights, supra note 33, at 98-100; "Fair" Compensation, supra note 21, at 1033-34.
55. 42 N.Y.2d at 336, 366 N.E.2d at 1278, 397 N.Y.S.2d at 921. See "Fair" Compensation, supra note 21, at 1033-38; Mandatory Development Rights, supra note 33, at 98-105.
While *Pennsylvania Coal* has commonly been cited only for its discussion on the taking element of the fifth amendment, it also indicated that the due process clause of the fourteenth amendment might introduce additional considerations. These "due process" concerns foreshadowed the direction that the law was about to take. The foundation for modern land use control without the payment of any compensation was laid by *Village of Euclid v. Ambler Realty Co.*, in which a zoning ordinance was held valid although the property value was greatly reduced by the regulation. In establishing the limit beyond which regulation cannot go, the Court two years later in *Nectow v. City of Cambridge* analyzed the due process clauses of the Constitution and formulated the test as whether there has been a denial of all adequate return on the property. The test has been further refined and is now stated as whether the owner is denied reasonable beneficial use of his property.

While this test at first appears to give definite guidance in answering what amount of development rights the government may "dip" out of the landowner's property rain barrel, upon closer examination, it becomes painfully clear that the test is not easily applied in close situations because the elements of the test are not yet well defined and the rights of the landowner do not remain constant in the law. This is best demonstrated by *Penn Central* itself wherein over half the opinion is spent in applying the formulation. At the outset, there must be a determination of what will be included in the basic value of the property and what shall be included in the scope of benefits received by the landowner to calculate the amount

56. 260 U.S. at 413, 415.
57. See The Disparity Issue, supra note 24, at 403.
58. 272 U.S. 365 (1926).
59. In *Euclid*, the general scope of the zoning ordinance was challenged, not its specific application, and the Court concluded that it was not arbitrary or unreasonable and, therefore, was a valid exercise of the police power. *Id.*
60. 277 U.S. 183 (1927) (zoning regulation excluded business and industrial uses of the property and residential use would be impractical).
61. *Id.* at 187.
63. 42 N.Y.2d at 331-36, 366 N.E.2d at 1275-78, 397 N.Y.S.2d at 918-21.
of return. Then, with these facts, the court must determine as a matter of law whether the return is "reasonable." Although some commentators view the task as impossible, Judge Breitel considered that it had to be undertaken.

Limiting the basic worth of property to that worth privately created and privately managed was introduced in *Penn Central* as a new factor to be reckoned with in determining the basic value of the land. This so-called "social increment of value" theory in effect made it more difficult for *Penn Central* to demonstrate that the quantum of income received was not reasonable when compared against only the worth of the land contributed exclusive of the "social increment." Whether inclusion of this factor by the court was a unique rule or test for *Penn Central* or was intended to have lasting judicial value as a legal principle is unclear.

The precedential value of *Penn Central* emanates from the novel theory that transferable development rights may be used to assure that the owner receives a "reasonable return." Implicit in this application is the conclusion that if the regulation did deprive the owner of a "reasonable return," these transferable rights could be added or increased by the governing body to restore the rate of return to the constitutionally mandated "reasonable" level. Thus an answer is given to the inquiry as to what level the rain barrel

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64. *Reply to Professor Costonis, supra* note 48, at 818-23. Professor Berger would use a balancing test to determine whether a regulation had been unconstitutionally imposed. If the public benefit derived was greater than the detriment to the private citizen then the regulation would stand even if the landowner lost all "reasonable beneficial use" of his property. Id. at 823. The major difference between Professors Berger and Costonis is that Professor Costonis believes that the legislators and the courts can determine what is reasonable beneficial use, which is really a reflection of the American consensus as to what as a minimum a land owner is entitled. *The Disparity Issue, supra* note 24, at 423 n.74.

65. 42 N.Y.2d at 331, 366 N.E.2d at 1275, 397 N.Y.S.2d at 918. The concept of reasonable return is deemed elusive and the method of defining it circular because "the reasonableness of the return must be based on the value of the property, and the value of the property necessarily depends on the return permitted or available." *Id.* For detailed discussions of the reasonable beneficial use standard within the framework of all possible uses of land, see "Fair" Compensation, *supra* note 21, at 1049-55.

66. 42 N.Y.2d at 327, 331-33, 336, 366 N.E.2d at 1272-73, 1275-76, 1278, 397 N.Y.S.2d at 916, 918-19, 921. Specifically excluded was that portion of the land's value attributable to indirect social and direct governmental investment. *Id.*

67. See *The Disparity Issue, supra* note 24, at 415-17.

68. 42 N.Y.2d at 334-36, 366 N.E.2d at 1277-78, 397 N.Y.S.2d at 920-22. The court emphasized the requirement that the owner of the transferable development rights must also own land in the area into which these rights may be transferred in order to make them valuable. *Id.* at 327, 336, 366 N.E.2d at 1273, 1278, 397 N.Y.S.2d at 916, 921.

69. See generally *The Disparity Issue, supra* note 24, at 418-21.
must be refilled when the unconstitutional level is reached and breached. The "rain barrel" need not be monetarily replenished to compensate the landowner for the "highest and best use"\textsuperscript{70} of his land as would be necessary under eminent domain, the one extreme of the \textit{Pennsylvania Coal} dichotomy. Instead, reasonable beneficial use was announced in \textit{Penn Central} as the standard for both the regulation, as was previously the law, and now the "compensation" which is to be paid.\textsuperscript{71} Further, the "compensation" does not have to be scarce tax dollars, but may be the right to develop other property beyond the present zoning limits, albeit property under the regulated landowner's control.\textsuperscript{72} The court drew a line between those transferable development rights provided for in the zoning scheme considered in \textit{French Investing Co.} and those provided \textit{Penn Central} under the landmark regulation.\textsuperscript{73} In \textit{French Investing Co.}, Chief Judge Breitel, again writing for a unanimous court, found the transfer scheme too "contingency ridden" because the development rights were transferable to no particular parcel but to another detached area of mid-Manhattan in which the holder of the development rights owned no property. It was concluded that these uncertainties undercut the potential value of these rights to the point that they could not be recognized.\textsuperscript{74} These uncertainties were not present in \textit{Penn Central} because the restricted landowner held property in the transfer district.\textsuperscript{75}

\textsuperscript{70} It is important to remember that the New York courts had carefully circumscribed the area in which a "taking" requiring "just compensation" operated. In New York, a "taking," often called reverse or inverse condemnation, will only be found where government has taken over management of the property or has trespassed upon it. See notes 20 and 21 and accompanying text \textit{supra}.

\textsuperscript{71} The compensation, here in the form of transferable development rights, is due only when the property is over-regulated. When the owner is denied all reasonable beneficial use, the government has to make-up the difference.

\textsuperscript{72} 42 N.Y.2d at 336, 366 N.E.2d at 1278, 397 N.Y.S.2d at 921. \textit{See The Disparity Issue, supra} note 24, at 418.

\textsuperscript{73} 42 N.Y.2d at 336, 366 N.E.2d at 1278, 397 N.Y.S.2d at 921. The only substantial difference between the \textit{French Investing Co.} transferable development rights and those in \textit{Penn Central} is the coincidence that \textit{Penn Central} owned property within the area to which the development rights from the Terminal could be transferred. \textit{The Disparity Issue, supra} note 24, at 418-21.

\textsuperscript{74} 39 N.Y.2d at 597-98, 350 N.E.2d at 387-88, 385 N.Y.S.2d at 11-12. \textit{See The Disparity Issue, supra} note 24, at 419-20, for a discussion highlighting the great potential value that these transferable development rights apparently did have and the fine distinction between using transferable development rights as a supplement to an existing return and their use as the only return.

\textsuperscript{75} 42 N.Y.2d at 336, 366 N.E.2d at 1277-78, 397 N.Y.S.2d at 920-21.
In theory, there was no need for the line to be drawn such that transferable development rights are constitutionally valuable only when the owner of the rights and the owner to the transferee property are one and the same. These rights are valuable regardless of who owns the transferee property, because they can be sold by the restricted landowner to anyone in the transfer district who desires to develop beyond the existing zoning or other regulatory limitations. This arguably arbitrary line drawing in *Penn Central*, which ignores the value of transferable development rights unless there is a common ownership of the transferor and transferee property, nullifies to a great extent the implementation of this "middle way" of using transferable development rights to give "fair compensation," particularly where it is most sorely needed—land use provisions to maintain our aesthetic and ecological environment. Consider the use of transferable development rights to allow land use regulation to stand where a municipality attempted to protect the natural character of the land at the edges of lakes and navigable rivers. The whole theoretical scheme would be quashed if the landowner did not own other property or did not own property that was within the transfer district.

76. For a detailed analysis of the theoretical basis for the value of transferable development rights, see Professor Costonis' "Fair" Compensation, *supra* note 21, at 1055-70.

A related issue, but not developed herein, is that to provide areas into which the development rights can be transferred, the receiving property is also necessarily restricted by land use regulations. Therefore, to provide for a continuing proliferation of transferring, the permitted uses on the transferee property may have to be further limited by new zoning restrictions to insure adequate areas for the development rights to be transferred into; all being done within the comprehensive plan. For an analysis of the impact of the social increment of value theory revealed by *Penn Central* on the above considerations, see *The Disparity Issue, supra* note 24, at 417-18.

77. In fairness to Chief Judge Breitel one can conjecture that this was well realized and that the decision had to be written in this manner to make the court unanimous, leaving to a later date the full implementation of the theory into practice.

78. See generally *The Disparity Issue, supra* note 24, at 420-21. Professor Costonis noted that ironically the addition to the statutory scheme allowing the development rights to be transferred regardless of ownership, which was to enhance their value, appears to be the very factor that would invalidate them as being "too contingency ridden" under the court's reasoning. *Id.*

CONCLUSION

The level in the landowner's "rain barrel" must be, as a minimum, that which represents sufficient rights to develop and use his property to provide a reasonable use and return therefrom. The evolution from *Pennsylvania Coal*'s dichotomy—regulation without compensation until reaching too great a diminution in value which springs the expensive "just compensation" trap—to *Penn Central*'s "middle way" has taken 55 years. What was held in *Pennsylvania Coal* as a "taking" requiring "just compensation" would become only invalid over-regulation under *Penn Central*. Further, the statutory scheme validated by *Penn Central* could remedy the defect by providing the landowner with transferable development rights so that the constitutionally mandated modicum of profit could still be realized.

*Penn Central* may be the culmination of a long struggle to properly interpret the interrelationship between substantive "due process" and "just compensation for a taking." The New York courts have, through careful development of their case law and a well reasoned opinion in *Penn Central*, molded constitutional doctrines to deal with the land regulation to meet present day realities. By affirming the work done by New York courts to focus the inquiry

80. See "Fair" Compensation, supra note 21, at 1043 (*Pennsylvania Coal* only invalidated the statute).

It is noted that another possible interpretation of what the defendant coal company suffered is that the statute "displaced" the coal company's private ownership, occupation, or management of the property. If so, then Justice Holmes' conclusion that defendant's property was taken would be correct although the reasoning process in the opinion may have been obscure.

In summary, when over-regulation is at issue, the "just compensation" clause of the fifth amendment does not apply, instead the fourteenth amendment's due process clause requiring "rudimentary" fairness is invoked. *The Disparity Issue*, supra note 24, at 412.


82. During the judicial struggle to define these limitations on the state's police power, the Supreme Court has spoken only sporadically. For example, *Euclid*, 272 U.S. 365 (1926), established police power land use controls, *Nectow*, 277 U.S. 183 (1928), added the adequate return test as to how the controls were applied, *Berman* v. *Parker*, 348 U.S. 26 (1954), spoke tangentially to the issue in broadening the use of eminent domain to include both "public use" and "public purpose," and *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), saw no other limit to the police power except that delineated by the "general welfare."

The many issues as to what is the "general welfare," whether it expands or contracts the police power to regulate, and the constitutional necessity for regional planning in providing for "fair share" housing for all, see, e.g., *National Land and Inv. Co. v. Easttown Township*, 419 Pa. 504, 215 A.2d 597 (1965), do not seem to be issues, at least in this type of landmark regulation case.
on at least "asking the right question," the Supreme Court has assured that landowners receive at least "reasonable beneficial use" of their land while allowing the municipality flexibility to meet their goals without mandating monetary compensation.

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83. "Fair" Compensation, supra note 21, at 1051-55.
84. 98 S. Ct. 2646 (1978) (6-3 decision). The Supreme Court clearly recognized that transferable developments can have value to provide the landowner with a reasonable return on the property. Id. at 2666.