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Consequences for Agencies and Groups Responsible for Historic Preservation Programs

DAVID BONDERMAN*

I would like to make a few remarks about the Supreme Court and its decisions and about what they mean in the context of historic preservation. You may remember that the Supreme Court once had a case in which a property owner filed a lawsuit complaining that a city had applied its ordinances to forbid the owner from building an office tower in place of a small multi-story building; that this had been done for aesthetic purposes, which were not a permissible basis of land use regulation; that, as a result, the city's action was an unconstitutional taking of the owner's property; and that the Court should order that the permit sought be granted. The case I'm referring to was not *Penn Central*,¹ but *Welch v. Swasey*,² decided in 1909.

Thus, *Penn Central* is not the first land use planning case of its kind, nor will it be the last. It thus seems to me that the euphoria which has been rampant in preservation circles as a result of *Penn Central* is misplaced. The case represents only one aspect of a problem that the courts have been dealing with, not very successfully, for the last seventy-five years. And, as far as historic preservation goes, *Penn Central* is only the opening shot in the battle.

What did the Supreme Court do in *Penn Central*? On some points, the result is clear. First, the Court laid to rest the notion that aesthetic considerations are not a proper basis for the use of the police power.³ The Supreme Court had previously implied that aesthetic considerations were a proper foundation for the exercise of regulatory power in *City of New Orleans v. Dukes*,⁴ where New Orleans was successful in keeping a number of hot dog vendors out of the French Quarter because their stands were inconsistent with the character of the Quarter. But *Penn Central* is the first case in which the Supreme Court explicitly held that aesthetic considerations alone were a valid basis for land

use regulation.

Second, *Penn Central* also makes it clear that as far as the law is concerned, historic preservation is just another form of land use regulation. Justice Brennan's decision does that by applying the same concepts that have been used in the zoning cases since the turn of the century, citing the same cases, and so forth.⁵ Accordingly, we can expect the courts to apply the same analytical concepts to preservation cases as to other land use cases.

Third, and perhaps the most significant new wrinkle to emerge from the *Penn Central* case, is that it is now plain that protection can be given to individual landmarks as well as to historic districts. The Court explicitly rejected the claim that designating individual landmarks is akin to spot zoning and, therefore, improper.⁶

But on other points, because *Penn Central* involves peculiar factual circumstances which may limit its use as precedent, the effect of the decision is open to debate. As you may know, the Supreme Court is bound, in the absence of an appeal on the facts, by the factual findings of the courts below. The New York courts⁷ had found as a matter of fact that Penn Central could continue to use Grand Central Station and to earn a reasonable return in the same way it always had. In addition, New York City has an unusual transfer of development rights, or TDR, program which allows an owner to move "development rights" from one site to another.⁸ There was strong argument by Penn Central that these TDRs were not very valuable or, at least, were not as valuable as the fifty-five story office tower that the city rejected. Everyone conceded, however, that the TDRs did have some value.

These factors distinguish *Penn Central* from most preservation cases insofar as the impact of a particular regulation upon an owner is concerned. No one knows what would have happened in *Penn Central* had there not been TDRs or had the factual findings in the New York Court of Appeals and the lower courts been different. What happens, for instance, if the owner can show that his return is only 1% or 2% or that he has no return? Should it make any difference if an owner with no return on his investment has an offer to sell at a profit? These questions are left unresolved, and so the application of *Penn*

Central to particular fact situations that may arise in the future is not clear.

For example, the District of Columbia, where I live, has drafted a new historic preservation statute.⁹ Under the old law, there is no long-term protection for buildings, only the possibility of a short delay in demolition.¹⁰ In drafting the new law to limit demolition of historic buildings, the City Council requested the assistance of people representing diverse points of view, including real estate developers, the Board of Trade, community groups, and an organization that I represent named Don't Tear It Down. Everyone ultimately agreed in principle that it would be appropriate to deny demolition permits for historic buildings if the economic impact was within constitutional bounds—that is, if the hardship resulting from a denial of a permit would not amount to a “taking.” On the other hand, no one could agree as to what that might mean in any particular case. The result is that the statute is specifically written with a provision authorizing issuance of demolition permits where the failure to grant a permit will amount to a “taking,”¹¹ thus adopting the Constitutional test. But it will take more litigation to fully confirm the meaning of the statute.

What can we say about the effect of *Penn Central* in the short term? Certainly by upholding New York City's action denying a permit to build a tower on top of Grand Central Station, *Penn Central* avoided what would have been an architectural and planning disaster had the case come out the other way. Furthermore, there would have been no meaningful landmark programs anywhere, had the Court accepted the view of the landowner, who argued that it had to be paid the full value of its property because the landmark restriction had prevented desired development. Considering the other necessary social services in financially hard-pressed cities, no historic preservation program can realistically expect sufficient municipal funds to buy important buildings and sites from major developers. So *Penn Central* has made it clear that landmark programs can, in principle, go forward.

Penn Central has also provided an impetus for the passage of stronger preservation statutes around the country. Frank Gilbert mentioned that there are more than 600 communities with historic district or landmark statutes or commissions,¹² but at

the moment, most of those are not very strong. They are like the old D.C. statute which says, basically, that if you want to demolish an historic building or a landmark you come in and argue about it for nine months, and then you go ahead and do as you like. The long-term prospects of such statutes for real historic preservation are minimal. So *Penn Central* will have been very useful if it results in stronger statutes, which I think it will.

In addition, *Penn Central* is, in my view, going to result in more frequent future challenges to designations and to denials of demolition permits, with a focus on the particular facts of each case. There will be litigation over the issues of reasonable return and potential use. The situation will be similar to that under the zoning laws in the 1930s and 40s, and to some extent, today. While it has been clear since at least 1926¹³ that zoning laws are constitutional in principle, it has never been clear what that means in any particular case. As a result, there have been thousands of cases in the state courts involving zoning laws.

Another result of *Penn Central* will be that those who participate in the designation process—National Register staff, State Historic Preservation Officers, and city and municipal commissions—will have to be more careful in what they do and how they designate landmarks and historic districts. When the only thing that resulted from having a property designated as an historic landmark was a plaque that said “George Washington slept here,” no one was too concerned about the fact or process of designation. But the position of the owner of a property is quite different when designation limits the ability to use or to develop property. In such cases, care must be exercised to designate only property that ought to be designated and to use appropriate procedures. This will mean greater numbers of hearings and litigated determinations on the issue of what is a landmark.

On the other hand, having said this, I feel compelled to add that there is a sense of déjà vu about all this. Looking back at the Supreme Court opinions in *Welch v. Swasey*¹⁴ and *Gorieb v. Fox*,¹⁵ a 1927 case in which the Court held it permissible to limit a landowner to building on only a small portion of his lot, one cannot escape noticing that the arguments in those old cases are virtually the same as the arguments made in *Penn Central*. Perhaps the truth is that the legal principles really have not

changed in the last 75 years; only the focus has changed, from traditional zoning to historic preservation. And perhaps, thirty years from now, people looking back on *Penn Central* and today's preservation issues will wonder why there was any argument at all, just the way that we now look back on these early zoning cases and think that the results were obvious.

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

2. Welch v. Swasey, 214 U.S. 91 (1909).

3. Penn Cent. Transp. Co. v. New York City, 438 U.S. at 129.

4. 427 U.S. 297 (1976).

5. Penn Cent. Transp. Co. v. New York City, 438 U.S. at 125-28.

6. *Id.* at 131-33.

7. The Appellate Division and Court of Appeals opinions in *Penn Central* are at Penn Cent. Transp. Co. v. City of New York, 50 A.D.2d 265, 377 N.Y.S.2d 20 (1st Dep't 1975), *aff'd*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977).

8. NEW YORK, N.Y., ZONING RESOLUTION, art. 1, ch. 2, § 12-10, & art. VII, ch. 4, §§ 74-79 to 74-793 (1981).

9. The new District of Columbia statute is known as the Historic Landmark and Historic District Protection Act of 1978. D.C. CODE ANN. § 5-821 (Supp. VII 1980).

10. D.C. Mun. Regs. No. 73-25

11. D.C. CODE ANN. 5-822(n) (Supp. VII 1980).

12. See Gilbert, *Current Statutory and Case Law Developments in Historic Preservation*, 1 PACE L. REV. 593, 597 (1981). NATIONAL TRUST FOR HISTORIC PRESERVATION, A GUIDE TO STATE HISTORIC PRESERVATION PROGRAMS (1976); NATIONAL TRUST FOR HISTORIC PRESERVATION, DIRECTORY OF LANDMARK AND HISTORIC DISTRICT COMMISSIONS (1976). See also Penn Cent. Transp. Co. v. New York City, 438 U.S. at 107.

13. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

14. 214 U.S. 91 (1909).

15. 274 U.S. 603 (1927).