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I was asked to predict some of the likely effects of the Grand Central[1] litigation on state and municipal government programs. First, the decision may make us complacent. Second, more aggressive legislation will be enacted to protect landmarks. Third—a warning rather than a prediction—landmark designations should be made with great care because we certainly are going to see more litigation in the area.

As to the first point, we should not be complacent as a result of the *Penn Central* decision. The opinion of the Court is really a fiat rather than an analysis and, although Justice Brennan appears to deal with every argument that was raised against the designation of Grand Central Station as a landmark, most of the time he simply says the railroad's argument has no merit and goes on. The dissent is disquieting.[2] In the judgment of those three justices, the designation was not a zoning restriction, where you would have what Justice Holmes called "an average reciprocity of advantage."[3] Here the restriction was placed, not area-wide where there would be a multiplicity of owners, but on a single owner whose property was deemed valuable to the public at large. In spite of making that determination of the public value which would result from designation, the city government did not propose to compensate the owner for the burden of designation. Let me just read a few sentences from the beginning of the dissent because I think it states, as well as I've seen it, what the problem is and what the problem will be in further cases.

> Of the over one million buildings and structures in the city of New York, appellees [The Landmarks Preservation Commission] have singled out 400 for designation as official landmarks. The owner of the building might initially be pleased that his property has been chosen by a distinguished committee of architects, his-

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> torians, and city planners for such a singular distinction. But he may well discover, as appellant Penn Central Transportation Co. did here, that the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation. The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of "landmarks" within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.[4]

So considered, the restriction imposed by the Landmarks Preservation Commission looks to me very much like a taking; it is akin, if you will, to the taking which occurs from the continued presence of low flying aircraft or from military target practice over an individual's land. In those cases, damages were paid to the owners to compensate for the taking.[5] I don't think that the designation of a particular landmark is that different from the cases in which it has been held that the public must pay for an advantage which it exacts from an individual landowner. I think, however, that most of us in this room, are pleased that the Court did decide otherwise and, of course, it is the decision, not the dissent, which counts.

I think it was fortunate that the Court in this case did not lay stress on the transfer of development rights or on the railroad's ability to make use of the property for the purpose for which the station was originally built. Indeed, it was pointed out that the railroad was not exploiting the existing building to its fullest. There was income and profit from operating the building as it stood. If the Court had relied on the residual profitability of the property notwithstanding its designation as a landmark, we would be in real trouble. There are, for example, landmarks in Boston whose owners acquired them before the existence of the landmark legislation in 1971,[6] and believed they could tear the buildings down and use them for parking lots. Some of those buildings, when designated, had no economic use whatsoever. When that legislation is attacked, as I think it will be, the case will be brought by somebody who can show that he cannot make any use whatsoever of his property. Fortunately, we will be able to say that the *Penn Central* case did not rest on a finding of profitable ownership. The *Penn Central* case, perhaps, stands for the proposition that restrictions can be placed upon the own-

ers of designated landmarks without cost to the public regardless of the adverse effect on the owners.

It is because of this possible interpretation of the *Penn Central* case that I reach my second point: I do believe that we will see a proliferation of protective legislation. So the message is, go to it pell-mell, because the more designations and the more restrictions that have been imposed when the test cases are brought, the more likely we will be to be able to defend these limitations. A court is less likely to listen sympathetically to a buyer who purchased his property after the existence of landmark legislation when he knew that people in the community considered his property to be an important architectural or historic building. He will be less likely to win favor when he comes forward and complains that an unexpected and unreasonable burden has been placed upon him. I think we are going to see more legislation, and I think it is urgent that it be enacted carefully but quickly.

Finally, my third point is that landmark designations in the future should be made with great care. Designations made with care are more likely to be sustained and also are more likely to result in coherent, sensible, and beautiful communities.

I recently had a conversation about Copley Square with the Director of the Boston Landmarks Commission. We have not yet designated the Copley Plaza Hotel; it is not a magnificent nor important historic building, but in the context of Copley Square, it is hard to imagine how a building could be more appropriate than that hotel. It virtually covers one side of the Square. We wondered if designation of the hotel as a landmark would be upheld. I think the chances of its being upheld would be greatly strengthened if, at the time the hotel is designated as a landmark, the Commission has also designated Trinity Church (which nobody is going to tear down), the Boston Public Library, which is on the other side of the Square, and even the sixty-story John Hancock Mirror, which lends a very important dimension. I think with such a comprehensive approach, the chances of upholding the designation of the hotel would be greatly increased. We would also accomplish a great deal more in historic preservation and in the preservation of the environment if we look at the whole setting which a building ornaments. This double-barrelled approach to the problem not only increases the

chances of being legally sustained but gets us closer to our ultimate objective—to improve our whole environment.

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1. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
2. *Id.* at 138 (Rehnquist, J., dissenting).
3. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
4. Penn Cent. Transp. Co. v. New York City, 438 U.S. at 138-39 (footnote omitted).

5. *See, e.g.*, United States v. Causby, 328 U.S. 256 (1946).
6. MASS. GEN. LAWS ANN. ch. 40C, § 3 (West 1979).