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Historic Preservation Law and Advocacy

PAUL SPENCER BYARD*

There is less trumpet sounding than I might have expected in the presentations today. This is unusual because the implications of *Penn Central*¹ for advocacy are so great that the public perception will shift from seeing preservation as a matter of pleasure to seeing it as a public necessity.

The question of advocacy has two prongs: first, the advocacy that made the decision possible and, second, the advocacy that the *Penn Central* case will reinforce. *Penn Central* is one point in the evolution from enthusiasm to advocacy of the underlying issues in this field. It is a vindication of the almost unreadable but nevertheless very bold New York City Landmarks Preservation Law.² When this law was enacted in 1965, there was nothing like it in the United States. This legislation was a product of civil advocacy prompted in large part by the Municipal Arts Society.³ The law was so far ahead of its time that it was hard for its own Commission⁴ to administer it. One of its early administrators, Frank Gilbert, was extremely effective in its enforcement.

Penn Central is a vindication, also, of two difficult administrative choices; first, whether to designate the building as an historic landmark, and second, whether to deny the owners a certificate of appropriateness and to face the painful consequences. I do not mean to suggest that the distinguished commissioners weighed anything but the merits in their determination to designate Grand Central Station. On the other hand, their choice to designate was, from the point of advocacy, a choice of the ground on which to fight for the law and for the principles that it included. Over the years there has been a significant difference of opinion as to whether this was a good ground to choose. The special facts of the case really limit the applicability of the decision and probably make it unavailable to parcels which lack its particular attributes.

A more subtle piece of advocacy involves the determination

of what buildings a commission will subject to control. A commission must know the public interest in these buildings; a local advocacy group like the Municipal Arts Society can help by taking a position as to what buildings are worthy of designation. Such advocacy is needed in designating a landmark like Grand Central.

Penn Central is an example of a particular advocacy that is outstanding. It is impossible to overstate the merits of the job of argument that was done by the New York City Corporation Counsel's office. The Corporation Counsel's office has always been, in the best of times, one of the nation's great law firms. Even in the worst of times, the City was able to find for its Corporation Counsel's office people like Nina Gershon and Leonard Kerner, who could carry the major burden for the argument of this case.

The City had a battery of friends of the court. This battery at the beginning was very small consisting only of the Municipal Arts Society, which participated in the Supreme Court proceeding⁵ before Justice Saypol. Justice Saypol thought that Grand Central was a faded and rather dirty beauty. Since he did not like it, he thought the regulation was invalid. Unfortunately, our efforts at advocacy in that particular proceeding did not make a material difference to the outcome.

In the Appellate Division,⁶ an effort again was organized by the Municipal Arts Society. The result was a special committee to save Grand Central which brought together local organizations. With the helpful participation of the National Trust for Historic Preservation, we, as amici curiae, made a significant contribution in this proceeding. It was a great moment, as an amicus, to be quoted in the opinion. The Municipal Arts Society was quoted in the form of a single word. My brother counsels and I had argued over whether to use "eviscerate," or "emasculate," or a synonym. We used "eviscerate" and it is in the opinion.⁷ We turned up one more time in the Court of Appeals.⁸ What happened there was beyond the anticipation of any of the advocates.

On the national level, the Municipal Arts Society, as one of several amici before the United States Supreme Court, continued this advocacy, working closely with the National Trust. This National Trust work turned out to be crucial. Frank Gilbert and

David Bonderman devised the theory that Justice Breitel should be dealt with in a footnote. The Supreme Court found the case so difficult that they agreed with that theory.⁹ The Municipal Arts Society, other local groups, and the City of New York can take pride in their roles in the *Penn Central* case.

The *Penn Central* case will not permit a different approach of advocacy because of what the Supreme Court had done for preservation law. The decision represents a substantial endorsement of preservationist activity. For years, preservation advocates had to rely upon dictum from Mr. Justice Douglas in *Berman v. Parker*,¹⁰ even if irrelevant to the case being litigated. Now we have a determination on point that permits action. It is a powerful incentive to go further in similar cases. Local regulating bodies will be less timid when they want to regulate. They have a mandate to regulate in this kind of case. We look forward to some regulation from even reluctant governments who now recognize that to lack a historic preservation ordinance is to be substantially behind the times.

There are some things that *Penn Central* did not do. It did not contribute much to the refinement of the decision-making process. The process still remains a matter of totaling the pluses and minuses and coming out with a feeling that it does not hurt too much to impose regulation in a particular case. Nor does the decision deal with the law of constraints on public action. *Penn Central* is an approval of a local law which regulates private action. It does not enter into the body of law that environmentalists have clearly seen as critical, namely, public actions that are inconsistent with preservation. That issue could have been raised in *Penn Central* because of the enormous public participation in the continued operation of the railroad.

The public interest that was evident in the *Penn Central* case has also led to other developments in the area of historic preservation advocacy. About a year and a half ago, an extraordinary meeting sponsored by the Kaplan Foundation brought together many of the participants in this conference to discuss whether, in the process of advocating these issues, there was something missing. At that time, there were local laws, public support for those laws, public programs, and the National Trust as the central agency of some forms of public action with a wide range of interest and with federal funding. There was,

however, a feeling that what was missing was an organization whose sole interest would be the evolution of the law of preservation. The object of that organization would be to advance understanding of the underlying issues in the preservation cases, to support the activities of local groups, and to be a plaintiff with respect to critical issues, particularly in areas where public action is an issue. Public interest law firms provided the model for this idea.

That meeting was the genesis of the National Center for Preservation Law, the first public interest law firm devoted to issues of law in the built environment. A study was funded by the Kaplan Foundation and the National Endowment for the Arts. A Board of Directors was recruited, which included Whitney North Seymour, Senior, joined by Harry Lord, Lee Adler, Fred Williams, Ken Barwick, and the motivating forces, Tersh Boasberg and me. Because of successful fund raising, the Center is moving out of the study phase and into a three-year trial period of substantial participation in controversies around the country. We are working to make a base of actual achievement and to become like the National Resources Defense Council, the Environmental Defense Fund, and similar institutions, but in the historic preservation part of the environmental law field.

This is a very exciting process. The Center is one of many noncompetitive vehicles for advocacy in the environmental field. Each makes a contribution. Of particular interest to me as a practicing architect and a practicing lawyer will be the degree to which the Center will be able to penetrate issues of mere aesthetics and arrive at the underlying questions of public health.

Penn Central convinces us that we are in the right area; it is a blessing for this whole general undertaking, and we will now try to use it.

Historic Preservation Law and Advocacy

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

2. See NEW YORK, N.Y., ADMIN. CODE ANN. ch. 8-A, §§ 205-1.0 to 207-21.0 (Williams 1976 & Supp. 1981) (enacted pursuant to N.Y. GEN. MUN. LAW § 96-a (McKinney 1977)).

3. This local group was founded in the 1890's by a distinguished architect to pay attention to the fabric of the city. By its agitation, it was responsible for the first zoning ordinance in New York City.

4. The New York City Landmarks Preservation Commission was established pursuant to NEW YORK, N.Y., CHARTER ANN. § 534 (Williams 1976).

5. Penn Cent. Transp. Co. v. City of New York, N.Y.L.J., Jan. 23, 1975, at 16, col. 3 (Sup. Ct. New York County).

6. Penn Cent. Transp. Co. v. City of New York, 50 A.D.2d 265, 377 N.Y.S.2d 20 (1st Dep't 1975).

7. *Id.* at 271, 377 N.Y.S.2d at 27.

8. Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S. 2d 914 (1977).

9. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 121 n. 23 (1978).

10. 348 U.S. 26 (1954) (dictum) ("The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary"). *Id.* at 33 (citation omitted).