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# Zoning and Police Power Measures for Historic Preservation: Properties of Nonprofit and Public Benefit Corporations

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Landmark preservation zoning is one of the principal tools currently used for preserving historic landmarks. The authority underlying such zoning requires that it apply equally to all landmarks, whether owned by individuals, profit-making corporations, or nonprofit public benefit corporations. Certain issues, however, that arise from the application of historic preservation zoning to specific landmarks must be analyzed somewhat differently depending upon whether the property involved is owned by a public benefit organization or by a profit-making corporation. This paper deals with the following major issue: when does the application of a zoning ordinance in this context constitute an invalid taking in violation of the fifth or fourteenth Amendments?

There is no longer any question as to whether local governments have the power to enact landmark preservation ordinances restricting an owner's right to alter his property. It is now firmly established that the protection of cultural, historical, aesthetic and architectural assets is an aspect of the public welfare that the states are empowered to protect pursuant to the police power.[1] It is equally well established that landmark preservation ordinances that restrict an owner's ability to change the landmark and that require that landmarks be properly maintained are a valid means of exercising this aspect of the police power.[2] Such statutes apply with equal validity both to property owned by nonprofit institutions and to property owned by profit-making corporations.[3] It is also clear that, although the courts are reluctant to invalidate a landmark preservation ordinance in its entirety,[4] the courts are willing to hold that the application of an otherwise valid landmark preservation ordinance to a specific piece of property is invalid if the use of the property

is so restricted as to constitute an uncompensated taking.[5]

There is an inevitable tension between the application of the police power to limit the use an owner may make of his property and the dictates of the fifth and fourteenth amendments that "no person shall . . . be deprived of . . . property without due process of law"[6] nor "shall private property be taken for public use, without just compensation."[7] In a certain sense, any restriction on the use of private property deprives the owner of some aspect of his property and amounts to a partial taking.

The restraints of the fifth and fourteenth amendments, however, have generally been held not to preclude the enactment of regulations which limit the use of private property and thereby decrease the value of that property.[8] Rather, the fifth and fourteenth amendments have been held only to prohibit the application of restrictions upon property which are so onerous that the owner is constructively prevented from beneficially using the property.[9] In that instance, the application of the regulation is held to violate the fifth and fourteenth amendments by being "confiscatory" and by constituting a taking both without due process of law and without payment of just compensation.[10]

The courts have not decided exactly where to draw the line between permissible regulation and regulation that constitutes an invalid taking. The Supreme Court conceded in its recent landmark decision, *Penn Central Transportation Co. v. New York City,* that "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty,"[11] that "th[e] Court has been unable to develop any 'set formula' for determining when [regulation becomes a taking, and that in each instance the question has been resolved by] essentially *ad hoc,* factual inquiries."[12]

Despite the admitted confusion of the law regarding the issue of when the regulation of a landmark becomes a taking and the paucity of decisions on this point involving property owned by nonprofit corporations, the existing decisions can be marshaled to support the following proposition: the standard which should govern ordinances regulating property owned by nonprofit institutions is that the application of such ordinances is valid unless the restrictions prevent or seriously interfere with the nonprofit corporation's carrying out its charitable purpose.

This standard was first announced by the Appellate Division of the New York State Supreme Court in *Trustees of Sailors' Snug Harbor v. Platt.*[13] The standard was later adopted by the New York Court of Appeals in *Lutheran Church in America v. City of New York*[14] and has been acknowledged by the courts of other jurisdictions.[15] Although the Court of Appeals applied the foregoing test very restrictively in *Lutheran Church in America v. City of New York,* other decisions can be used by analogy to argue both that the formulation announced by the New York courts should be applied liberally to uphold landmark designations and that the formulation should control in all jurisdictions.[16]

There is a dearth of authority, however, involving property owned by public benefit corporations. Therefore, in applying a landmark preservation ordinance to property owned by a public benefit corporation, the issue of where the line should be drawn between an application which is a valid exercise of the police power and one which is void as an unconstitutional taking can best be analyzed by examining the decisions dealing with all types of zoning ordinances and property, not just those involving landmark preservation ordinances and property owned by nonprofit corporations.

The courts have taken a liberal approach toward defining the point at which the application of a zoning ordinance, whether it be a landmark preservation or a traditional zoning ordinance, becomes an unconstitutional taking. The test that has developed in the context of commercial property is that an ordinance is invalid as applied only if the owner is precluded from putting his property to any use for which it is reasonably adapted.[17] Although this test is somewhat vague and extremely flexible, it usually has been applied to uphold the implementation of zoning ordinances.

The application of zoning ordinances to commercial property is generally not held to be void merely because the owner is prevented from putting his property to the use that would produce the highest economic return if he is allowed to put the property to some reasonable use.[18] For example, in *Maher v. City of New Orleans,*[19] the United States Court of Appeals for the Fifth Circuit upheld the application of the New Orleans Vieux Carré historic preservation ordinance[20] even though the

effect was to deny a property owner permission to tear down a small cottage on his property and replace the cottage with a larger building containing seven rental apartments. The court specifically noted that "the police power does not become an unconstitutional taking merely because, as a result of its operation, property does not achieve its maximum economic potential."[21] *Goldblatt v. Town of Hempstead*[22] provides an even more dramatic example of the foregoing philosophy. In that case, the Supreme Court upheld the application of an ordinance that prohibited excavating below the water table on land that for many years had been used as a gravel mine even though the result of that application of the ordinance was that the owner was forced to discontinue his gravel business. In this instance also, the Supreme Court reiterated the general rule that "the fact that [an otherwise valid ordinance] deprives the property of its most beneficial use does not render it unconstitutional."[23]

Similarly, the application of zoning ordinances to commercial property has been upheld where the value of the property is significantly decreased, but not completely destroyed.[24] *Hadacheck v. Sebastian*[25] is the classic example of such a case. In *Hadacheck,* the Supreme Court upheld the application of a zoning ordinance which effectively prohibited the continued operation of a brickyard, thereby reducing the value of the property from $800,000 to $60,000. Citing *Hadacheck,* the Supreme Court recently reaffirmed that a reduction in property value does not amount to a taking where the property is left with some reasonable use.[26]

In the case of commercial property, the property's ability to produce a reasonable return on investment provides a readily available test for determining whether the regulation has deprived the owner of all reasonable use of his property. This test has been legislatively adopted in statutes such as the New York City Landmarks Preservation Law which provides that the owner of a designated landmark is entitled to relief if he can establish that his property is incapable of earning a six percent return while complying with the restrictions imposed by the landmark designation.[27] In line with the liberal philosophy that has characterized the analysis of when zoning regulation constitutes a taking, it has been held that the test is whether the landmark could produce a reasonable return if it were put to any use per-

mitted by the applicable regulation, not whether the existing use was producing a reasonable return.[28] Furthermore, if the relevant ordinance provides economic relief for a landmark, such as a reduction in taxes, the court looks to see if the property is capable of producing a reasonable return after any applicable reduction in taxes or the granting of other relief.[29] Such relief is not compensation for a taking pursuant to the fifth and fourteenth amendments, but is a factor which, by allowing the property to produce a reasonable return as regulated, prevents the regulation from becoming a taking requiring compensation.[30]

Both the foregoing liberal policy that has developed in the application of zoning ordinances to commercial property and the general principle that regulation does not constitute a taking if there remains any reasonable use to which property may be put should govern the application of zoning ordinances, including historic preservation ordinances, to property owned by nonprofit corporations.

*Trustees of Sailors' Snug Harbor v. Platt*[31] is an important case addressing the issue of when the application of a preservation ordinance to property owned by a public benefit corporation constitutes a taking in violation of the fifth and fourteenth amendments. In that case the New York State Supreme Court, Appellate Division, announced the rule that the application of a landmark preservation ordinance to property owned by a nonprofit corporation does not constitute a taking unless the application of the ordinance prevents or seriously interferes with the corporation's carrying out its charitable purpose.[32] *Sailors' Snug Harbor* involved the designation of a group of Greek revival dormitories and a chapel as landmarks pursuant to the New York City Landmarks Preservation Law. The buildings in question occupied a small part of an eighty acre site that was owned by Sailors' Snug Harbor, a charitable trust established many years ago to provide a home for retired seamen. Sailors' Snug Harbor challenged the designation because they desired to demolish the landmark structures, which admittedly were outmoded for use as dormitories, and to replace them with a modern facility on the same site. The property owned by Sailors' Snug Harbor was large enough to accommodate both the newly planned facility and the existing landmark structures. The plaintiff's position was merely that the presence of the existing structures would

interfere with the magnificent views of the harbor from the new facility and that the trust could not afford to maintain the landmarks.

The Appellate Division reversed the lower court's voiding of the landmark designation and remanded the matter for further factual findings regarding the use that might be made of the structures and the cost of maintaining them. The task before the court in *Sailors' Snug Harbor* was to assess the application of the New York City Landmarks Preservation Law to property owned by a charitable trust. In doing so, the court adopted the general rule that regulation does not constitute a taking in this context if the property can be used for any reasonable use which meets the needs of the particular nonprofit corporation.

The court noted that the New York City ordinance explicitly utilizes the "reasonable return on investment" test as a guide to determining when commercial property is deprived of all use for which it is suited and, therefore, has been the subject of a taking. The court, however, wisely recognized that such a test is manifestly inappropriate for property used for charitable purposes. Obviously, property would be of no use to a charitable organization if it could not be used in furtherance of the organization's charitable activities even if the property could produce income if used for some entirely extraneous purpose. If the ability of the property to produce income, alone, were sufficient to render constitutional the regulation of charitable property, such regulation could effectively force the charity to sell its property to someone who was interested in its profit-making potential. Arguably, such a constructively forced sale could amount to a taking.[33] The court in *Sailors' Snug Harbor* avoided this dilemma by devising a test that looked only to whether the regulation allowed the public benefit organization to put its property to any use that would reasonably advance the organization's charitable objectives; the test did not look to whether the property could be used for some income-producing purpose regardless of the owner's charitable activities. The Appellate Division expressed the test as whether "maintenance of the landmark [as required by the ordinance] physically or financially prevents or seriously interferes with carrying out the [owner's] charitable purpose."[34]

The Appellate Division's instructions to the lower court on

remand clearly indicate that the court intended the test it devised for property owned by nonprofit organizations to be applied with the same liberal attitude that has characterized the review of the application of zoning ordinances to commercial property. Specifically, the instruction that the lower court determine "whether the buildings are capable of conversion to a useful purpose without excessive cost"[35] establishes that the test is whether the regulation allows the property to be put to any use that advances the owner's charitable purpose, not whether the ordinance interferes with the use to which the property presently is being put or whether the present use furthers the relevant charitable objectives. This approach is completely in accord with the view that commercial property has not been the subject of a taking if the regulation allows the property to be utilized for any purpose that would produce a reasonable return on investment, regardless of whether the property presently produces an adequate return.[36]

The New York State Court of Appeals explicitly adopted the *Sailors' Snug Harbor* test in *Lutheran Church in America v. City of New York*,[37] stating that the rule which would invalidate a landmark designation only when it "would prevent or seriously interfere with the carrying out of the charitable purpose . . . is a simple enough concept and ought to apply . . . ."[38] The Court of Appeals, however, applied the test so restrictively that the result reached was inconsistent both with the spirit of the rule as announced in *Sailors' Snug Harbor* and with the precedents applying the "reasonable use" test to commercial property.

*Lutheran Church in America v. City of New York* involved the landmark designation of the former Morgan mansion in midtown Manhattan. At the time of the designation, the mansion was owned by the Lutheran Church and used for administrative offices, as it had been for twenty years. The Lutheran Church challenged the application of the New York City Landmarks Preservation Law to its property because it intended to demolish the structure and replace it with a larger building on the same site. The Court of Appeals accepted the Lutheran Church's arguments that the application of the New York City Landmarks Preservation Law to the Church's property prevented the Church from continuing to use that site for its administrative offices, that the Landmarks Law seriously inter-

fered with the Church's carrying out of its charitable purposes, and that the application of the Landmarks Law to the Morgan mansion amounted to an uncompensated taking in violation of the fifth and fourteenth amendments.

In reaching this result, the Court of Appeals reiterated the familiar principles that the police power allows the government to impose noncompensable regulations on private property, but that such regulation is invalid if it is so onerous as to be confiscatory, and that the application of a regulation is confiscatory if the owner "is deprived of reasonable use of its land."[39] In spite of the holding, the Court of Appeals reaffirmed the principle that landmark preservation statutes which prohibit the demolition of designated landmarks are not confiscatory on their face and, as stated above, acknowledged that the appropriate test of when the regulation of charitable property constitutes a taking is whether the regulation prevents or seriously interferes with the owner's carrying out its charitable purposes.[40]

The facts before the court, however, were governed, in the view of the Court of Appeals, by precedents such as *Vernon Park Realty, Inc. v. City of Mount Vernon*[41] and *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*,[42] which hold an invalid taking occurs when private property is zoned so that it can be used solely for public purposes. Those cases could easily have been factually distinguished: each involved ordinances that prohibited the relevant property from being put to any private use, while the New York City Landmarks Preservation Law allowed the Lutheran Church to use the Morgan mansion for any purpose it chose. Instead, the court held that the city had invalidly added the Morgan mansion to the city's inventory of tourist attractions through regulation, rather than through condemnation.[43]

The court's restrictive decision was principally influenced by the Lutheran Church's argument that the landmark designation prevented the Church from continuing to use the mansion for administrative offices. Accepting that factual argument, the court held that the case was controlled by a rule that the application of a zoning ordinance is void if it prohibits the "use to which the property is devoted at the time of the enactment of the ordinance."[44] Even if one accepts the court's factual determination, which appears to be strained,[45] the court's analysis

conflicts with the Supreme Court's recent dictum in the *Penn Central* case that the application of a zoning ordinance may be valid even when the ordinance effectively prohibits the use to which the property has been put in the past,[46] and also conflicts with venerable Supreme Court cases, such as *Hadacheck v. Sebastian*[47] and *Goldblatt v. City of Hempstead*,[48] both cited in the *Penn Central* case. The court's analysis also conflicts with both the opinion in *Trustees of Sailors' Snug Harbor v. Platt*[49] and the commercial property cases that look to whether the regulated property may be put to any reasonable use.[50] After all, *Trustees of Sailors' Snug Harbor v. Platt* was remanded for the lower court to determine if the landmarks economically could be converted to any use in furtherance of the owner's charitable functions, not merely to determine whether the buildings could be remodeled to serve as modern dormitories, which they apparently could not.[51] If the same approach had been applied in the *Lutheran Church* case, the court would have looked to see if the Morgan mansion could have been used for any of the Church's charitable activities, not just whether the building could be used for offices.

The landmark designation of the Morgan mansion might have been saved if the City had granted the Lutheran Church economic relief such as transferable development rights approximating the unused air space over the landmark site.[52] Apparently no such relief was offered. The New York City Landmarks Preservation Law has been construed to empower the landmarks commission to provide such relief for charitable properties, notwithstanding the ordinance's silence on the matter.[53] Furthermore, the Supreme Court recently stated that transferable development rights are valuable and held that such rights should be considered when determining whether a landmark preservation ordinance allows an owner to make reasonable use of its property.[54] Conceivably, the transfer or sale of development rights could have enabled the Church to acquire additional office space which, together with the existing offices in the Morgan mansion, would have satisfied the Church's needs.

In contrast to the *Lutheran Church* decision, the Commonwealth Court of Pennsylvania took a very liberal approach in *First Presbyterian Church of York v. City Council of City of York*,[55] one of the few other reported decisions addressing the

issue of when the application of a landmark preservation ordinance to property owned by a charitable organization constitutes a taking. In that case, the court upheld the landmark designation of a Victorian house which the York Presbyterian Church wanted to demolish to make space for additional church parking. It did so by employing the general rule that the application of an ordinance is valid if it permits any reasonable use of the property. The Pennsylvania court acknowledged the existence of the *Sailors' Snug Harbor* test but did not consider it to be a specific formulation of a general rule necessarily applicable to property owned by public benefit organizations. Rather, the Pennsylvania court considered the "reasonable use" test to be a more liberal test that governs the application of landmark preservation ordinances to all property within landmark districts, regardless of whether the property is owned by nonprofit groups or profit-making corporations. The *Sailors' Snug Harbor* test, a more restrictive test, was, in the view of the Pennsylvania court, applicable to individual landmark sites which were not part of historic districts. Since the property in question was located in an historic district, the court looked to see if the ordinance precluded the property from being put to any reasonable use, regardless of whether that use was relevant to the owner's charitable purpose. The court specifically stated that the church could not prevail because it "did not show that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return, or that other potential use of the property was foreclosed."[56] In addition, the court noted that the church had also not satisfied the more restrictive *Sailors' Snug Harbor* test by failing to prove that the building was incapable of being used for church purposes.

The court's decision was based on its factual analysis of two precedents, *Maher v. City of New Orleans*[57] and *Trustees of Sailors' Snug Harbor v. Platt*.[58] The court construed the two cases as imposing two distinct standards, instead of imposing two variations of the same standard. The court then focused on the fact that the property in *Maher* was located in a landmark district and the property in *Sailors' Snug Harbor* was not, rather than on the fact that the *Sailors' Snug Harbor* property was owned by a charitable organization while the *Maher* property was owned by an individual who wished to use it for com-

mercial purposes.

The distinction between landmark districts and individual landmark sites has been invoked in numerous challenges to the designation of individual landmarks. The Supreme Court, however, recently rejected that distinction in *Penn Central Transportation Co. v. New York City* when it upheld the application of the New York City Landmarks Preservation Law to Grand Central Station, an individual landmark.[59] There the Supreme Court held that the designation of individual landmarks was not spot zoning, reasoning that such regulation involves a sharing of burdens and benefits analogous to the operation of traditional zoning ordinances that cover entire districts.[60]

The important distinction between property owned by public benefit organizations and that owned by commercial interests, however, recently was confirmed by a Missouri court in *Dempsey v. Boys' Club of the City of St. Louis, Inc.*,[61] the remaining case dealing, albeit in dictum, with the question of when the application of a landmark preservation ordinance to property owned by a nonprofit organization becomes a taking.[62] In that case, the court implicitly advocated adopting the *Sailors' Snug Harbor* test when it explained how the literal application of the "reasonable use" test to charitable property, as advocated in *First Presbyterian Church of York v. City Council of City of York*,[63] could result in injustice. The court correctly observed that:

> . . . considerations of a commercial nature applicable to investors or others engaged in the rental business may be deemed inappropriate by a benevolent or humanitarian organization seeking a permit to demolish property in order to carry out and promote its chartered objectives and purposes; . . . to deny such a request may effectively deprive such an organization of any practical use or benefit of ownership, and that in conceivable circumstances such a denial might be considered to constitute a taking of private property for public use.[64]

The eminently reasonable test announced in *Trustees of Sailors' Snug Harbor v. Platt* resolves the problem highlighted by the foregoing quote. As demonstrated above, the case law that has developed in the context of commercial property supports the general adoption of that test, as well as its liberal application.

Despite the authorities discussed in this paper, however, the issue of when the application of a landmark preservation ordinance to property owned by a charitable organization becomes an invalid taking remains virtually a question of first impression in most jurisdictions. The answer will be molded by future litigation.

# Zoning and Police Power Measures for Historic Preservation: Properties of Nonprofit and Public Benefit Corporations

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1. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (dictum); Berman v. Parker, 348 U.S. 26, 33 (1954) (dictum). People v. Goodman, 31 N.Y.2d 262, 290 N.E.2d 139, 338 N.Y.S.2d 97 (1972); People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963); Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557 (1955).

2. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104; Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964); Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557 (1955); Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856 (Mo. Ct. App. 1977); Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968). *See* Dempsey v. Boys' Club of City of St. Louis, Inc., 558 S.W.2d 262 (Mo. Ct. App. 1977); First Presbyterian Church of York v. City Council, 25 Pa. Commw. 154, 360 A.2d 257 (Commw. Ct. 1976).

3. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104; Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856; First Presbyterian Church of York v. City Council of City of York, 25 Pa. Commw. 154, 360 A.2d 257; Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 288 N.Y.S.2d 314.

4. Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974); Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856; Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 288 N.Y.S.2d 314.

5. Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7. *See* Opinion of the Justices to the Senate, 333 Mass. 733, 128 N.E.2d 557; Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856; Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 288 N.Y.S.2d 314. *See also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104; Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Maher v. City of New Orleans, 516 F.2d 1051; First Presbyterian Church of York v. City Council of City of York, 25 Pa. Commw. Ct. 154, 360 A.2d 257.

6. U.S. CONST. amend. XIV, § 1.

7. U.S. CONST. amend. V.

8. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104; Goldblatt v. Town of Hempstead, 369 U.S. 590; Maher v. City of New Orleans, 516 F.2d 1051; City of St. Paul v. Chicago, St. P., Minn. and Om. Ry., 413 F.2d 762 (8th Cir.), *cert. denied*, 396 U.S. 985 (1969); Williams v. Town of Oyster Bay, 32 N.Y.2d 78, 295 N.E.2d 788, 343 N.Y.S. 2d 118 (1973); Opinion of the Justices to the Senate, 333 Mass. 733, 128 N.E.2d 557.

9. 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, *appeal dismissed*, 429 U.S. 990 (1976); Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7; Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 439, 121 N.E.2d 517 (1954). *See* Penn Cent.

Transp. Co. v. New York City, 438 U.S. 104; Goldblatt v. Town of Hempstead, 369 U.S. 590.

10. Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7; *See* Maher v. City of New Orleans, 516 F.2d 1051; Dempsey v. Boys' Club of the City of St. Louis, Inc., 558 S.W.2d 262, 267 (Mo. Ct. App. 1977); Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856; First Presbyterian Church of York v. City Council of York, 25 Pa. Commw. 154, 360 A.2d 257.

11. Penn Cent. Transp. Co. v. New York City, 438 U.S. at 125.

12. *Id.* at 124 (footnotes omitted).

13. 29 A.D.2d 376, 288 N.Y.S.2d 314.

14. 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7.

15. *See, e.g.,* First Presbyterian Church of York v. City Council of City of York, 25 Pa. Commw. 154, 360 A.2d 257, 260-61. *See* Dempsey v. Boys' Club of the City of St. Louis, Inc., 558 S.W.2d at 267 (dictum).

16. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590; Maher v. City of New Orleans, 516 F.2d 1051; Williams v. Town of Oyster Bay, 32 N.Y.2d 78, 295 N.E.2d 788, 343 N.Y.S.2d 118 (1973). *See* City of St. Paul v. Chicago, St. P., Minn. and Om. Ry., 413 F.2d 762.

17. Maher v. City of New Orleans, 516 F.2d 1051; Williams v. Town of Oyster Bay, 32 N.Y.2d 78, 295 N.E.2d 788, 343 N.Y.S.2d 118; Marple Gardens, Inc. v. Board of Zoning Adjustment, 8 Pa. Commw. 436, 303 A.2d 239 (Commw. Ct. 1973); 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 (1977), *aff'd,* 438 U.S. 104 (1978); Manhattan Club v. Landmarks Preservation Commission, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Sup. Ct. New York County 1966).

18. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104; Goldblatt v. Town of Hempstead, 369 U.S. 590; Maher v. City of New Orleans, 516 F.2d 1051; Williams v. Town of Oyster Bay, 32 N.Y.2d 78, 295 N.E.2d 788, 343 N.Y.S.2d 118; Marple Gardens, Inc. v. Board of Zoning Adjustment, 8 Pa. Commw. 436, 303 A.2d 239; Manhattan Club v. Landmarks Preservation Commission, 51 Misc. 2d 556, 273 N.Y.S.2d 848.

19. 516 F.2d 1051.

20. NEW ORLEANS, LA., CODE ch. 65, Ordinance No. 14, 538, (1936). The ordinance reads in pertinent part:

> Before the . . . erection of any new building or . . . the alteration . . . or demolishing of any existing building [in the Vieux Carré], application by the owner for a permit, therefore, shall be made to the . . . Commission, accompanied by the full plans and specifications . . . so far as they relate to the proposed appearance . . . of the exterior.

*Id.*

21. Maher v. City of New Orleans, 516 F.2d at 1065 (footnote omitted).

22. 369 U.S. 590.

23. *Id.* at 592.

24. *See, e.g., id.* at 594 (dictum); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104; Hadacheck v. Sebastian, 239 U.S. 394 (1915); City of St. Paul v. Chicago, St. P., Minn. and Om. Ry., 413 F.2d 762; Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856.

25. 239 U.S. 394.

26. Penn Cent. Transp. Co. v. New York City, 438 U.S. at 136.

27. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 8-A, §§ 207-1.0(v), 207-8.0 (Williams 1976).

28. *E.g.,* Penn Cent. Transp. Co. v. City of New York, 50 A.D.2d 265, 377 N.Y.S.2d 20.

29. Penn Cent. Transp. Co. v. New York City, 438 U.S. at 137. *See* Dempsey v. Boys' Club of the City of St. Louis, Inc., 558 S.W.2d at 267-68.

30. Penn Cent. Transp. Co. v. New York City, 438 U.S. at 137. *See* Dempsey v. Boys Club of the City of St. Louis, Inc. 558 S.W.2d at 267-68.

31. 29 A.D.2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968).

32. *Id.* at 378, 288 N.Y.S.2d at 316.

33. The New York City Landmarks Preservation Law lends some support to the above analysis by using a nonprofit corporation's decision to sell or lease its property as a test for determining whether the corporation is entitled to relief from its property being designated a landmark. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 8-A, § 207-8-8.0 (Williams 1976). However, Lafayette Park Baptist Church v. Scott, 553 S.W.2d at 863-64, contains dictum suggesting that the existence of a market for a piece of property as zoned prevents the application of the ordinance from constituting a taking.

34. Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d at 378, 288 N.Y.S.2d at 316.

35. *Id.*

36. *See* Penn Cent. Transp. Co. v. City of New York, 50 A.D.2d 265, 377 N.Y.S.2d 20.

37. 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7.

38. *Id.* at 131, 316 N.E.2d at 311, 359 N.Y.S.2d at 16.

39. *Id.* at 130, 316 N.E.2d at 311, 359 N.Y.S.2d at 15.

40. *Id.* at 131, 316 N.E.2d at 311, 359 N.Y.S.2d at 16.

41. 307 N.Y. 493, 121 N.E.2d 517 (1954) (zoning of property exclusively for parking lot purposes invalid).

42. 40 N.J. 539, 193 A.2d 232 (1963) (zoning of property exclusively for recreational facilities invalid).

43. Lutheran Church in America v. City of New York, 35 N.Y.2d at 130, 316 N.E.2d at 311, 359 N.Y.S.2d at 15.

44. *Id.* at 129, 316 N.E.2d at 310, 359 N.Y.S. at 15.

45. Nothing in the opinion indicates why the building could not continue to be used for administrative offices. It would appear only that the building could not accommodate all of the Church's offices.

46. Penn Cent. Transp. Co. v. New York City, 438 U.S. at 125.

47. 239 U.S. 394 (1915).

48. 369 U.S. 590 (1962).

49. 29 A.D.2d 376, 288 N.Y.S.2d 314 (1st Dept. 1968).

50. *E.g.*, Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557; Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217, *cert. denied*, 350 U.S. 841 (1955); Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856; First Presbyterian Church of York v. City Council, 25 Pa. Commw. 154, 360 A.2d 257. *See* Williams v. Town of Oyster Bay, 32 N.Y.2d 78, 295 N.E.2d 788, 343 N.Y.S.2d 118 (1973); 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 (1977), *aff'd*, 438 U.S. 104 (1978).

51. Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d at 378, 288 N.Y.S.2d at 316.

52. Although nonprofit corporations are not eligible for real estate tax relief since their property (at least where used in direct furtherance of the appropriate charitable goals) is already tax exempt, such corporations can benefit from economic relief in forms such as the right to transfer air rights from their property to other sites in the city.

53. Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d at 378, 288 N.Y.S.2d at 316.

54. Penn Cent. Transp. Co. v. New York City, 438 U.S. at 137.

55. 25 Pa. Commw. 154, 360 A.2d 257.

56. *Id.* at 160, 360 A.2d at 261.

57. 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

58. 29 A.D.2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968).

59. Penn Cent. Transp. Co. v. New York City, 438 U.S. at 131.

60. *Id.*

61. 558 S.W.2d 262 (Mo. Ct. App. 1977).

62. The court noted that, although the plaintiff challenged the application of the landmark preservation ordinance to its property, the plaintiff did not raise the constitutional question of whether an invalid taking had occurred. *Id.* at 268.

63. 25 Pa. Commw. 154, 360 A.2d 257.

64. Dempsey v. Boys' Club of the City of St. Louis, Inc., 558 S.W.2d at 267.