

# The Grand Central Case: The Preservation of Individual Historic Landmarks

by Frank B. Gilbert

A major court decision in June, 1977 about Grand Central Terminal has strengthened the position of persons working to preserve a city's historic buildings, especially those located on valuable land. In a unanimous opinion, New York State's highest court, the Court of Appeals, said that the owner of an individual landmark structure may be regulated in the use of his property and that a reasonable return on it will satisfy constitutional requirements. In addition, the opinion by Chief Judge Charles Breitel recognized the tangible contributions by the government to the present value of the landmark and its site and said that the owner "is not absolutely entitled to receive a return on so much of the property's value as was created by social investment."

*Penn Central Transportation Company v. The City of New York* (case number 273, decided June 23, 1977), involves a proposal to construct a 2,000,000 square foot office building on the site of Grand Central at Park Avenue and 42nd Street, just south of the Pan Am Building. In its decision the court upheld the New York City landmarks preservation law and the landmark status of Grand Central. It sustained the denial of permission to build the 55-story office tower and commented favorably on the transfer of development rights as a way to give an owner a reasonable return on his property.

Coming at this time, the decision will encourage efforts to find some alternative to the demolition of landmarks and buildings in historic districts, when sites are assembled for new construction. Today there are 500 local ordinances whose purposes are the identification and protection of historic buildings and areas, in 1965 there were less than 100 such laws. Matching the effort by municipal governments, federal tax laws now encourage the rehabilitation of commercial buildings that are certified historic structures (section 2124 of the Tax Reform Act of 1976).

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Public appreciation of older buildings has increased in recent years, and the Court of Appeals opinion reflects an acceptance of intervention to prevent demolitions that would have been inevitable a few years ago: "In times of easy affluence, preservation of historic landmarks through use of the eminent domain power might be desirable, or even required. But when a less expensive alternative is available, especially when a city is in financial distress, it should not be forced to choose between witnessing the demolition of its glorious past and mortgaging its hopes for the future." The court concludes that New York City landmarks preservation law "represents an effort to take a middle way."

## BACKGROUND OF THE CASE

It has been ten years since plans for a skyscraper at Grand Central were first announced. In 1967 at the height of the office building boom in Manhattan, the premerger New York Central said that it would negotiate with a builder for the redevelopment of the railroad station site. In 1968 an English developer, Morris Saady, was selected, and his company, UGP Properties, picked Marcel Breuer as its architect for the project. Because Grand Central is a designated New York City landmark, any change to its exterior required the approval of the New York City Landmarks Preservation Commission.

After some preliminary proceedings in 1968, Breuer and the developer eventually presented for consideration alternative designs—one would have placed the office tower on top of the terminal and its Beaux Arts facade by means of massive cantilevers, while the second proposal would have destroyed the exterior of the landmark so that the outside of the new building would have a completely modern appearance. The two designs contained the train facilities which continued on the site, and both attempted to preserve much of the station's main concourse, an interior feature of the building over which the landmarks commission had no jurisdiction.

From the start the Grand Central office building was a controversial project. One interesting element of the discussion was the feeling of inevitability about the loss of the terminal in its present form. Nothing could be done, and perhaps a good new building by Breuer was all that could be hoped for, because the landmark was located on such a valuable site. After extensive public hearings the New York landmarks commission in August, 1969 turned down the developer's and the railroad's application for a certificate of appropriateness, giving its reasons in a 14-page opinion.

In the period after this decision, other parts of the city government worked with the railroad and the developer on possible projects that would have transferred the allowable floor space from the Grand Central site to proposed new construction on adjacent property owned by Penn Central. Preliminary architectural drawings were prepared for a large new office building on the site of the Biltmore Hotel. The provisions in the city's zoning ordinance were expanded to facilitate a transfer of development rights, but the weakening of the market for office space apparently kept any new buildings from being started.

## DECISION BY THE COURT OF APPEALS

In 1972 the developer and the railroad activated their pending suit to overturn the rejection of their plans by the landmarks commission. The Court of Appeals decision is the third one in this litigation; it follows a trial court decision for the developer and the railroad that was reversed on appeal by the Appellate Division of the Supreme Court (377 N.Y.S. 2d 20, 1975). In analyzing the problem before it, the Court of Appeals spoke in broad terms about "determining the scope of governmental power" to save "irreplaceable landmarks deemed to be of inestimable social or cultural significance." Since historic preservation laws are enacted as an exercise of the government's police power, payments to owners are not provided for in these statutes. Thousands of buildings are now covered by these laws, and so the use of eminent domain will rarely be the way to save a threatened historic property.

Writing for the court, Judge Breitel distinguishes this case from a zoning regulation because "the purposes are different." He also treats it differently from the regulation of a historic district where owners "benefit, to some extent, from the furtherance of a general community plan." The opinion then gives significant support to laws protecting individual historic landmarks:

"Discriminatory zoning is condemned because there is no acceptable reason for singling out one particular parcel for different and less favorable treatment. When landmark regulation is involved, there is such a reason: the cultural, architectural, historical, or social significance attached to the affected parcel. Even when regulation is designed to achieve such an acceptable purpose, however, the landowner must be allowed a reasonable return or equivalent private use of his property."

Owners of landmark buildings have often opposed regulation of their property with arguments about large new structures they might want to develop there. According to the Court of Appeals, the test for the regulation of a landmark building and its site is whether it is capable "in its economic context of producing a reasonable return, even if its development is limited." The court also says:

"Plaintiffs contend that the Terminal currently operates at a loss. Even if that be true, it is not of critical importance. What is significant, instead, is whether the property, managed efficiently, is capable of producing a reasonable return. If the courts were forced to look to the property as it is, rather than as it could be, any inadequacy of managers of property could frustrate any land use restrictions."

Turning to the question of what value the regulators must consider, the opinion goes beyond previous analyses in cases about landmarks:

"Of primary significance, however, is that society as an organized entity, especially through its government, rather than as a mere conglomerate of individuals, has created much of the value of the terminal property. . . . Absent this heavy public governmental investment in the Terminal, the railroads, and connecting transportation, it is indisputable that the Terminal property would be worth but a fraction of its current economic value. Plaintiffs may not now frustrate legitimate and important social objectives by complaining, in essence, that government regulation deprives them of a return on so much of the investment made not by private interests but by the people of the city and state through their government.

Instead, to prevail, plaintiffs must establish that there was no possibility of earning a reasonable return on the privately contributed ingredient of the property's value."

The court goes on to say that it will be "exceedingly difficult but imperative, nevertheless, to sort out the merged ingredients and to assess the rights and responsibilities of owner and society." To help with this problem, the court invites further submissions of briefs by the parties at the trial court level.

### **THE TRANSFER OF DEVELOPMENT RIGHTS**

In the opinion Judge Breitel calls attention to the land and buildings owned by the railroad in the Grand Central area because they "would lose considerable value and deprive plaintiffs of much income, were the Terminal not in operation. Some of this income must, realistically, be imputed to the Terminal." In addition, these adjacent properties make viable the zoning provisions permitting the transfer of unused floor area from a landmark site to a new building proposed for construction.

Discussing problems about a possible transfer of development rights, the court says that long-term leases or existing buildings on receiving parcels do not make development rights worthless. It points out that when "the improvements have lost their utility, a larger building could be constructed." The opinion describes as "significant" the "permitted splitting of the development rights among several receiving parcels, to allow optimal use of the rights."

Summarizing its views on this point, the court concludes:

"Development rights, once transferred, may not be equivalent in value to development rights on the original site. But that, alone, does not mean that the substitution of rights amounts to a deprivation of property without due process of law. Land use regulation often diminishes the value of the property to the landowner. Constitutional standards, however, are offended only when that diminution leaves the owner with no reasonable use of the property. The situation with transferable development rights is analogous. If the substitute rights received provide reasonable compensation for a landowner forced to relinquish development rights on a landmark site, there has been no deprivation of due process."

### **THE IMPORTANCE OF THE DECISION**

The opinion then notes that in this situation: "The compensation need not be the 'just' compensation required in eminent domain, for there has been no attempt to take property." The court continues its analysis and adopts another position that is important to the preservation of landmarks. The designation of Grand Central as a landmark and its subsequent regulation by a city commission "permitted productive use of the Terminal site as it had been used for more than half a century, as a railroad terminal. In addition, the development rights were made transferable to numerous sites. . . . Since this regulation and substitution was reasonable, no due process violation resulted." The court goes on to say that the landmarks law is a reasonable land use regulation. To stop the application of the law to them, the developer and

the railroad have the burden of demonstrating affirmatively that the regulation has eliminated "all reasonable return" on their property. On the facts of this case, the court holds that they "have failed to meet that burden."

At the end of the opinion, the court recognizes that its decision is not supported "by ample precedent or wholly developed principles." It adds: "The last word has not only not been spoken; it has hardly been envisaged." The railroad and the developer may ask the U. S. Supreme Court to review the case. The Supreme Court has discretion whether or not to hear this appeal.

At this point the Court of Appeals has provided an additional legal foundation for growing preservation activities around the country. Its support for the preservation of a major commercial landmark matches the feelings of many private individuals. With the necessary support from municipal governments, more communities will now have a fair opportunity to preserve their city's historic landmarks.