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ZONING AND LAND USE PLANNING

Case Law and Statutes Govern Landmark Designations

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Landmark preservation law is now well-established throughout New York City and the state of New York, as well as across the country. That is due, in no small measure, to a significant U.S. Supreme Court ruling that is about to celebrate an important milestone. The court's decision in *Penn Central v. New York City*,[1] now nearly 40 years old, found that application of New York City's Landmarks Preservation Law (the Landmarks Law)[2] to the parcel of land occupied by Grand Central Terminal had not effected a "taking" of its owners' property in violation of the Fifth and Fourteenth Amendments.

The city's Landmarks Law, of course, preceded the Penn Central case—by about a decade. In fact, the New York City Landmarks Preservation Commission (the New York Commission) has just celebrated its 50th anniversary, and it has a lot to crow about. Almost 33,000 city buildings are protected as individual landmarks, interior landmarks, or as part of 114 historic districts.[3]

Numerous governments in New York have passed landmarks laws. New York State has a State Historic Preservation Act,[4] which passed the Legislature in 1980 and which established the State Register of Historic Places. By now, over 175 local governments throughout the state have enacted local historic preservation laws or ordinances, since the first one became law in 1962 in the city of Schenectady, intended to protect the Stockade Historic District.[5]

Despite these laws, the rate of landmark designations seems to have slowed down across the state in recent years. Of course, local governments have been, and still are, facing significant financial and other pressures and have many important goals to accomplish. It may, however, be worth a moment in this year of landmark anniversaries (or near anniversaries) for local officials to consider whether any particular properties under their jurisdiction are worthy of preservation, before it is too late.

The Specific Laws

Statutory authority for local municipalities to enact historic preservation laws in New York is found in Section 96-a of the General Municipal Law, entitled "Protection of historical places, buildings and works of art." Section 96-a provides, in part:

> ...any county, city, town or village is empowered to provide by regulations, special conditions and restrictions for the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value....

In addition, Section 10[1](a)(11) of the Municipal Home Rule Law empowers counties, cities, towns, and villages to adopt local laws for "protection of its physical and visual environment." This includes historic preservation.[6]

Local governments also may use their zoning powers to limit the types of uses available in historic districts.

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Grand Central Terminal

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'Penn Central'

The Penn Central case is worth recalling as it serves as a reminder of the values underlying landmark designations as well as a clear statement of the law regarding what some consider one of the key obstacles to designations—whether landmarking a property amounts to an unconstitutional taking of private property without just compensation.

The court's decision in *Penn Central*, written by Justice William J. Brennan, Jr., began by setting forth two concerns that, it said, have led state and local governments to encourage or require the preservation of buildings and areas with historic or aesthetic importance. The first concern was the destruction of "large numbers of historic structures, landmarks, and areas… without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways." The second was the "widely shared belief" that structures with special historic, cultural, or architectural significance "enhance the quality of life for all."

The decision then observed that the dispute in the case involved the application of the city's Landmarks Law to Grand Central Terminal, which it described as "one of New York City's most famous buildings." The terminal opened in 1913 and, as the court noted, has been "regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style."

On Aug. 2, 1967, following a public hearing, the New York Commission designated the terminal a "landmark" and designated the "city tax block" it occupied as a "landmark site."[7]

Several months later, the owner of the terminal entered into a contract that provided, among other things, for the construction of a multistory office building above the terminal. It asked the commission for permission to construct the office building. The commission denied the application.

The owner sued, claiming that the application of the Landmarks Law had "taken" its property without just compensation in violation of the Fifth and Fourteenth Amendments. It sought a declaratory judgment, injunctive relief barring the city from using the law to impede the construction of any structure that might otherwise lawfully be constructed on the terminal site, and damages for the "temporary taking" that occurred between the date the terminal had been designated a landmark and the date when the restrictions arising from the landmarks law would be lifted.

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The trial court granted the injunctive and declaratory relief, but severed the question of damages for a "temporary taking. The Appellate Division reversed, holding that the restrictions on the development of the terminal site were necessary to promote the legitimate public purpose of protecting landmarks and, therefore, that the owner could sustain its constitutional claims only by proof that the regulation deprived it of all reasonable beneficial use of the property.

The New York Court of Appeals affirmed, summarily rejecting any claim that the Landmarks Law had "taken" property without "just compensation."

The case reached the Supreme Court, which affirmed and ruled that the restrictions imposed by New York City's law on the owner's exploitation of the terminal site did not effect a "taking" of its property for a public use.

The court found that, notwithstanding the landmark designation, the terminal was "capable of earning a reasonable return." The court rejected the owner's argument that the Landmarks Law had deprived it of any gainful use of the "air rights" above the terminal, declaring that the argument that it could establish a "taking" simply by showing that it had been denied the ability to exploit a property interest that it had believed was available for development was "quite simply untenable." Moreover, the court noted that under the city's transferable development rights program, the "air rights" were transferable to other parcels in the vicinity of the terminal.

Accordingly, the court held that the restrictions imposed on the owner of the terminal by the Landmarks Law were "substantially related to the promotion of the general welfare" and not only permitted "reasonable beneficial use of the landmark site" but also afforded it "opportunities further to enhance not only the terminal site proper but also other properties." It concluded, therefore, that the application of the law had not effected a "taking" of the owner's property.

Cases Since 'Penn Central'

Over the years, a number of courts in New York—including the New York Court of Appeals—have issued decisions involving disputes over landmarking that help further define the legal framework in which local governments may designate landmarks and the extent of the burdens and obligations that can be placed upon property owners.

For example, *Matter of Society for Ethical Culture in the City of New York v. Spatt*[8] involved application of the Landmarks Law to a religious organization. In this case, the court upheld the New York Commission's decision to designate as a landmark the Meeting House of the Society of Ethical Culture of the City of New York. The court explained that it has "long been accepted that a government may reasonably restrict an owner in the use of his property for the cultural and aesthetic benefit of the community." Citing *Penn Central*, the court pointed out that landmark designations, if not unreasonable, were "not an undue imposition under proper circumstances."

Because this case involved the Society—"a religious, educational and charitable organization"—and because charitable organizations were not created for financial return in the same sense as private businesses, the court said that the standard had to be refined to permit a landmark designation restriction "only so long as it does not physically or financially prevent, or seriously interfere with the carrying out of the charitable purpose." The court concluded that the designation in this case met that test and, therefore, withstood constitutional scrutiny.[9]

Nearly a decade later, in *Seawall Associates v. City of New York*,[10] the court determined that a New York City law prohibiting the demolition, alteration, or conversion of single-room occupancy properties and obligating owners to restore all units to habitable condition and to lease them at controlled rents for an indefinite period was facially invalid as both a physical and regulatory taking. Compared with the situation in *Penn Central,* the court said, the city law here went too far.[11]

Then, in *Matter of Teachers Ins. and Annuity Ass'n of America v. City of New York*,[12] the court for the first time upheld the New York Commission's statutory authority to landmark the interior of a building (in this case, the Four Seasons restaurant), provided that the interior space was one that was "customarily open and accessible to the public, or to which the public is customarily invited."[13] The court concluded that a restaurant by the very nature of its business invites the public to enter and, therefore, the commission's designation of the Four Seasons restaurant was not arbitrary and capricious.

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Finally, it is worth noting the decision by the Supreme Court, New York County, in *City of New York v. 10-12 Cooper Square*,[14] which requires that landmarks laws may impose an affirmative obligation on property owners to keep a building or property in good repair. The court there rejected a challenge to the New York Commission's decision to compel the owners of a landmarked building to restore it to "good repair," finding the evidence to be "quite persuasive" that since the defendants had acquired the property they had made "minimal repairs" and that the landmark building was "in a dismal state of disrepair."

Conclusion

Certainly there are limits on landmark designations in addition to the takings issue considered in *Penn Central*. For instance, in *Matter of Ithaca School District v. City of Ithaca*,[15] the Appellate Division, Third Department, decided that the city of Ithaca did not have landmark authority to regulate property owned by a public school district.

Nevertheless, it is clear that local governments have substantial authority to landmark important properties. However, as a result of the burdens that landmark designation places on property owners, such designations are susceptible to legal challenge. To minimize the risk of a challenge, the authority to designate a landmark should be exercised only after a careful evaluation of the historical significance of the building or site, and with strict adherence to the rules set forth in the applicable statutes and case law.

1. *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978).

2. See, N. Y. C. Admin. Code, Title 25, §205-1.0.

3. See, New York City Landmarks Preservation Commission website, http://www.landmarks.nyc/. Numerous other cities have landmark preservation laws, including the District of Columbia. See, e.g., *Weinberg v. Barry*, 634 F. Supp. 86 (D. D.C. 1986) (finding that District of Columbia Historic Landmark and Historic District Preservation Act, D.C. Code §§5-1001-1015, enacted in 1978, was not unconstitutional on its face).

4. L. 1980, c. 354. It should be noted that the National Historic Preservation Act of 1966, 16 U.S.C. §470 et seq., which created the National Register of Historic Places, is 50 years old this year.

5. See, New York State Department of State, "Legal Aspects of Municipal Historic Preservation," available at http://www.dos.ny.gov/lg/publications/Legal_Aspects_of_the_Municipal_Historic_Preservation.pdf.

6. See, New York State Department of State, Office of General Counsel, "Historic Preservation: Not Just a Façade," Legal Memorandum LU08, available at http://www.dos.ny.gov/cnsl/lu08.htm.

7. The New York Commission's report stated: "Grand Central Station, one of the great buildings of America, evokes a spirit that is unique in this City. It combines distinguished architecture with a brilliant engineering solution, wedded to one of the most fabulous railroad terminals of our time. Monumental in scale, this great building functions as well today as it did when built. In style, it represents the best of the French Beaux Arts."

8. *Matter of Society for Ethical Culture in the City of New York v. Spatt*, 51 N.Y.2d 449 (1980).

9. See, also, *Matter of Canisius College v. City of Buffalo*, 217 A.D.2d 985 (4th Dept. 1995) (upholding designation where college failed to present evidence that it physically or financially prevented or seriously interfered with the carrying out of its charitable purpose).

10. *Seawall Associates v. City of New York*, 74 N.Y.2d 92 (1989).

11. Cf. *Stahl York Avenue Co. v. New York City Landmarks Commission,* 2016 N.Y. Slip Op. 50011(U)(Jan. 8, 2016)(upholding the commission's decision to deny a hardship application by an owner who sought permission to demolish a designated building on the basis that it was incapable of earning a reasonable return).

12. *Matter of Teachers Ins. and Annuity Ass'n of America v. City of New York*, 82 N.Y.2d 35 (1993).

13. See, N.YC. Admin. Code, Title 25, §205-302(m).

14. *City of New York v. 10-12 Cooper Square*, Inc., 7 Misc. 3d 253 (Sup.Ct. N.Y. Co. 2004).

15. *Matter of Ithaca School District v. City of Ithaca*, 82 A.D.3d 1316 (3d Dept. 2011).