In the

Supreme Court of the United States

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK AND HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY CORPORATION, UGP PROPERTIES, INC.,

APPELLANTS,

V.

THE CITY OF NEW YORK, ET AL.,

APPELLEES.

No. 77-444

Washington, D. C.
April 17, 1978

Pages 1 thru 68

Hoover Reporting Co., Inc.

Official Reporters
Washington, D. C.
546-6666

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v.	:	
THE CITY OF NEW YORK, et al., Appellees.	:	

Washington, D.C.
Monday, April 17, 1978

The above-entitled matter came on for argument at 10:03 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DANIEL M. GRIBBON, Esq., 888 Sixteenth Street, N.W., Washington, D.C. 20006; for the Appellants.

LEONARD J. KOERNER, Esq., Corporation Counsel of the City of New York, Municipal Building, New York, New York 10007; for the Appellees.

MRS. PATRICIA M. WALD, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, Washington, D.C. 20530; for the United States as amicus curiae.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Penn Central Transportation Company against The City of New York. Mr. Gribbon, you may proceed whenever you are ready.

ORAL ARGUMENT OF DANIEL M. GRIBBON, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GRIBBON: Mr. Chief Justice and Justices of the Court:

Perhaps I should be intimidated legally, if not physically, by the sheer number of governments and organizations on the other side of the question presented on this appeal. There have come to the support of the appellee, the greatest city in the world, three other major cities, the nation's two largest states--

Q When you say greatest, are you referring by population or--[laughter].

MR. GRIBBON: I would prefer to encompass all aspects

Q Or weather?

MR. GRIBBON: I will still stay with greatest.

Q Or total tax. [Laughter]

MR. GRIBBON: Total tax? It may qualify on all those scores.

Q Which city are you referring to? [Laughter]

MR. GRIBBON: Not Chicago. [Laughter]

In addition, 20 civic organizations, all highly respected, and finally the United States has had sufficient interest not only to file a brief but to participate in argument. But I am not so intimidated because the position that I put to you here on behalf of Penn Central rests on the Bill of Rights, that great charter of liberties that serves as a protection against all government, not just venal government but even the best intentioned government.

In addition, I would suggest that the unusual display of public interest here serves to emphasize a principal element in Penn Central's case; that is, the enormous public benefit which, it is claimed, will be brought about by the governmental action that we challenge.

As a result of actions taken by the New York City Landmarks Preservation Commission, pursuant to the city's landmarks law, Penn Central has been prohibited from constructing an office building over the Grand Central Terminal. That prohibition has been imposed by the city not because such a building would be unsafe or uneconomic or in violation of zoning regulations but solely to assure that all who live in New York and all who visit New York will have an unimpeded view and unrestricted enjoyment of the terminal, a structure which the commission found to be a magnificent example of French Beaux Arts architecture.

After the terminal had been designated as a landmark

by a commission of 11 private citizens reporting generally to the Board of Estimate, three separate efforts were made under the guidance of the internationally known architect, Marcel Breuer, to persuade the commission, in accordance with its procedures, that an office building could be constructed without impairing the integrity of the terminal. All three were rejected. And it is now common ground among the parties that Penn Central stands effectively precluded from constructing a building over the terminal.

The record discloses that in return for the use of the air rights over the terminal, Penn Central would receive from a developer, who would bear all the risks of constructing the building, a million dollars a year during construction and thereafter a minimum of $3 million a year, escalating as rental collections increased.

Q Is there in the record anywhere a picture or a drawing, an architect's drawing or a sketch, of what this building would look like?

MR. GRIBBON: There is, Your Honor. At Record 2001. It is in Volume 4.

Q Not in the appendix.

MR. GRIBBON: Not in the appendix, no, Your Honor. It is in the record that came up from the lower court--

Q Thank you.

MR. GRIBBON: --which is lodged, I understand.

I say, therefore, that there can be no doubt that the city's action has deprived Penn Central of something of value. While the city recognizes that Penn Central has been denied the right to construct an office building, which it is entitled to do otherwise under applicable zoning regulations, the city refuses to acknowledge that air rights constitute a form of property. It even suggests that the use of the term is something of a semantic trick. Such rights, however, have been widely used, sold, utilized for 50 years, and the Court of Appeals did not hesitate to describe the controversy as one involving air rights to the terminal.

I do not urge that the decision here should turn on whether Penn Central's loss is characterized as a property right or as a use. As the Solicitor General correctly puts it, it is the substance of the government action that controls rather than the labels that are attached to it.

Q You do not question the right of the City of New York to take this entire property, do you?

MR. GRIBBON: No, Your Honor. The issue raised here is not, as some of the briefs here seem to suggest, whether the City of New York may validly preclude Penn Central from constructing a building. Twenty-five years ago in Berman v. Parker this Court in a unanimous opinion proclaimed for all that it is just as appropriate for government actions to look to things that beautify and enhance the quality of life as it

is to do away with things that are unsanitary. But the issue here, simply stated, is, Who is going to bear the loss or the burden that is occasioned by this substantial public benefit?

Q Is there any doubt about how this case would have come out before the enactment of the Fourteenth Amendment?

MR. GRIBBON: I would think the same considerations are present now, Mr. Justice Rehnquist.

Q What would you have relied on before the enactment of the Fourteenth Amendment?

MR. GRIBBON: We think the Fifth Amendment.

Q But Baron v. Baltimore said the Fifth Amendment applied only to--

MR. GRIBBON: There might have to be a little rewriting of some of the decisions there. But looking at what the Fifth Amendment has been held to do since then, I would have thought that the Fifth Amendment would provide assurance here. If it were to come up today without the Fourteenth Amendment, it is very difficult to imagine those circumstances in today's legal climate.

Q In today's legal climate, I mean, you do not have to be that vague. Has not a case from this Court held that the Fourteenth Amendment does incorporate the Fifth Amendment--

MR. GRIBBON: Yes, Your Honor. I have not dealt with that, and I would not propose to do it on that basis.

I would propose to address the issue that I have stated here first by examining the central premise of the different justifications that have been advanced first by the Court of Appeals and, second, by the city and its friends for imposing the full cost on Penn Central. And that premise is that where the government acts in a regulatory capacity rather than through the exercise of eminent domain, there is no need to inquire whether there has been a compensable taking.

I shall next show that the decisions of this Court interpreting the Taking Clause of the Fifth Amendment, particularly those emphasizing its high content of fairness, support the conclusion that the prohibitions imposed here do constitute a taking for which compensation is constitutionally required.

Q You talk about the full cost. Full cost of what?

MR. GRIBBON: Of not being able to build an office building, the loss that is suffered by being prevented from developing an office building over the terminal.

Q It has been held in a case--Hudson, I think it was, that a municipality could limit the height of all buildings within its borders.

MR. GRIBBON: Your Honor, I think that is true. The height limitation cases I do not believe have application here because--

Q Why not? Why is that not a taking? Excuse me.

Q The Pan Am Building--it is not to show this building. It is not to show this building.

MR. GRIBBON: No, Your Honor, it is there.

Q It is right next door.

MR. GRIBBON: It is right next to it.

Q Why is not--

MR. GRIBBON: It is selective, Your Honor. It does not say--

Q The taking is just the same, selective or non-selective, is it not?

MR. GRIBBON: No. I think under the zoning--

Q There might be discrimination, but from the point of view of the taking, it is just exactly the same if you limit every building in the municipality to no more than 15 stories.

MR. GRIBBON: I think the decisions indicate that the zoning, which is comprehensive and applies substantially equally to all people affected within the area, can be tolerated as a non-compensable taking on the ground that the benefits and the burdens are reasonably dispersed.

Q From the point of view of the property owner, the taking is precisely the same.

MR. GRIBBON: That's right. But I think the fact that other people are similarly burdened and presumably similarly

benefited by the height limitation has served to justify the zoning cases, and I do not think it can serve here to justify this selective, highly particularized taking.

Q I can understand your argument based upon discrimination of some kind. But if it has been established, as I think you concede it has, that a municipal government can limit the height of every building within its borders, why is it not, from the point of view of the property owner, just as much a taking in that case as it is in your case?

MR. GRIBBON: I think in many instances there is just as much of a taking on the property owner when that something is done by regulation as by eminent domain. But in the regulation cases where you are removing offensive uses or where in the zoning cases you are acting broadly to take care of the entire community in distributing the burdens and the benefits, it has been held not to be a taking.

In terms of the English language, yes. In terms of the Constitution, I think it is just that difference.

Q Is not the point, in the situation that you are referring to, as distinguished from that which Mr. Justice Stewart is referring to, the taking of some but not all or the taking of one but not all the others?

MR. GRIBBON: That is right. Selective. It is a height limitation for one building. All of its neighbors, including Pan Am and all of the others, can go much, much

higher.

Q This I fully understand. I still have difficulty understanding why it is not much a taking in one case as in the other, quite apart from any argument based upon discrimination or irrationality or anything else.

MR. GRIBBON: All I can say is that the zoning cases have viewed it as being a permissible use of the regulatory power when it is done in a way--

Q You do not try to justify it rationally. You just say that that is authority, not--

MR. GRIBBON: That is right. I do not know that it is not rational to say, when all the people within the area are similarly treated, nobody can have a residence or nobody can have industry. That is a permissible use of the government's power.

Q Several wrongs do not make a right. They make just several wrongs, do they not?

MR. GRIBBON: Yes, I think that is right. But that depends on whether it is wrong to start with. The Constitution does not prevent the government from effecting necessary regulations. And every action of government has to have some kind of adverse effect on somebody. The question is where the line is going to be drawn on that adverse effect.

Q Is there a matter of equal protection here somewhere?

MR. GRIBBON: Your Honor, we do not argue an equal protection. I think it is a solid case for a taking. The equal protection cases do not give a great deal of comfort. It perhaps is warranted for the government to pick out an historic site and say this should be preserved. We do not think it has to pick out every site, and you cannot argue as to which site is historic. And I think it is sufficient that we simply argue that when they do that, they pay for what they take for the public benefit.

Q And the theory behind the taking--I will avoid the use of the word "taking." The limitation because it is an historic place, historic monument, is that that is for the benefit of everyone?

MR. GRIBBON: Of everybody.

Q Yes. So, you say if it is for the benefit of everybody, everybody should pay for it.

MR. GRIBBON: Everybody should pay for it. And there is no balancing of benefits and burdens as there is the zoning cases where, as Mr. Justice and I have just been discussing, the Court has held that they are not within the taking provision.

Q Is not part of the reasoning for the generalized use of the height regulation the notion that all of the buildings that are subject to that height regulation also derive some benefit from it in that their competitors, so to

speak, cannot build above them, and each of them will have a good view from the top floor and that sort of thing?

MR. GRIBBON: Precisely, Your Honor. There is a fair distribution not only of costs but of burdens, and that therefore there is no taking.

Q The benefits, as my Brother Rehnquist implies in his question--the theory is, I think, that the benefits are accorded to everybody in terms of light and air and so on.

MR. GRIBBON: Yes, which is not true here. We are solely burdened and unbenefited. Everybody else, not just the building but the visitors and the people that do it, are the ones that get the whole benefit out of it.

The first point I wanted to make is that however the government acts, whether by eminent domain or purporting to act by government regulation, there must be an inquiry into whether there is a compensable taking. The Court of Appeals brushed that over. They simply recited this is government regulation and, therefore, there need be no kind of inquiry into taking. Those who support the court's action take the same view, that automatically, once you can say this is regulatory action, then there is no occasion to look to see whether there is compensation. That is the premise that underlies both the Court of Appeals decision and also the position submitted by the city here, and I think it is not supported by the Fifth Amendment itself or by the cases. The Fifth

Amendment does not, by its terms, apply only to cases of eminent domain. It applies broadly. And cases in this Court have held that whatever governmental power is exercised--police power, commerce power--if there is a taking, you look to see whether the Fifth Amendment comes into play.

I suppose Berman v. Parker, which I mentioned earlier, stands for the proposition that the right of government to bring about changes designed, as they put it, to enhance the quality of life all comes within the police power, whether it is done under eminent domain or whether it is done through the exercise of regulatory action. And in most of the cases where there is a problem as to a taking, there has not been an exercise of eminent domain. It is government regulation which has operated in a way which may constitute a taking, even though the exercise of eminent domain has not been tried.

It is claimed here that the Goldblatt decision of this Court establishes a different rule, a rule that says you do not look in a case of regulation to what has been taken. You look, rather, to what is left over. That decision does contain some language with respect to the uses left to the property owner. But I do not believe it establishes anything like what the decision claimed here. The challenged regulation there prevented the sand and gravel company from continuing its operations on property that was originally rural but had become surrounded by the city of Hempstead. Far from saying,

as is urged here, that valid regulatory action cannot result in a compensable taking, the Court, speaking through Mr. Justice Clark, acknowledged at the outset the basic principle on which we rest our case, saying government action in the form of regulation can be so onerous as to constitute a taking, which constitutionally requires compensation. It then found that there had been no diminution in the value of the property involved and, therefore, there was not any taking. It went on to find, despite the owner's claim that sand and gravel operations were utterly benign and unlike the other things that had been barred by the exercise of the government regulation--the Court overruled him and said on safety grounds this would be upheld as a valid exercise of police power. But it did not say that as a substitute for a finding that a taking had not taken place. And I submit that that is the initial inquiry, whether a taking has taken place. And that is the inquiry that the Court of Appeals did not make and which those supporting the city would not make.

Those words, that constitutional guarantee, that property shall not be taken without compensation, incorporate an exceedingly complex constitutional concept. And though it has been with us since the beginning of the Republic, nothing approaching an all-purpose principle has been articulated from which one can discern the specific application of the concept. And this Court has time and again turned down the

opportunity to enunciate any such principle.

A scholar in the area recently wrote: "The judicial efforts to chart a usable test for determining when police power measures impose constitutionally compensable losses have on the whole been notably unsuccessful. With some exceptions, the decisional law is largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric." Those are the scholar's words, not mine. But I hasten to say that I have no all-purpose test to offer the Court. And I acknowledge more than the normal humility with which one must approach such constitutional questions.

I do put to you, however, that a review of the taking clases does disclose two guidelines that may usefully be applied here in determining whether the city's action constitutes a compensable taking. When regulatory action is directed towards the elimination of offensive uses or conditions, it has been held in many cases that the resulting loss to the property owner is non-compensable because it is one that he may be properly called upon to bear for the public good. Such cases began, as you all know, with the elimination of nuisances, common nuisances, and then went on to encompass other properties and uses which, though not nuisances, were offensive to the general tenor of the community such as breweries and beer halls and livery stables.

The construction of a multistory office building in midtown Manhattan, which Penn Central is prohibited from doing, is not only permitted by the zoning laws but is actually encouraged as an efficient use of valuable land. And I submit, therefore, that the principal justification for tolerating some non-compensable diminution in property value as a result of government regulation lends no support to the city's action here.

Q Would you be making the same argument here if all you wanted to do was replace the building with one of the same height, just that the building was inefficient and you wanted to build a new building, but you are quite willing to not go up with it, the same height? And the city said, "No, we want you to keep the old building."

MR. GRIBBON: I think if it caused us loss--and from what you say, it would cause us loss--we would be making the same argument. I think any action that we are forced to take or kept from taking that caused us a monetary loss is compensable.

Q So, it just is not that some air space is being taken.

MR. GRIBBON: In this particular case--

Q I know, but that is not--

MR. GRIBBON: No, that is not the whole thing, no. I think it is any governmental action of this landmark

designation nature.

Q So, this would be a taking because the city would be keeping you from making more profit than you could by using the same size building.

MR. GRIBBON: I would put it because they are taking a part of our property. They are taking a part of our property right.

Q You would make the argument even if it were conceded--which I am sure it is not--even if it were conceded that the old building was profitable in the sense that you were not losing any money on it.

MR. GRIBBON: Yes, Your Honor. If there were--

Q If you could double what at least an accounting would show you could make by using the building, you would say they are taking part of your property?

MR. GRIBBON: I think that is a fair statement, yes.

Q And that is your fundamental argument?

MR. GRIBBON: It is based on the notion that the reason they are doing it is to benefit the general public. And if we can show any loss under the taking cases, whether there is an expectancy of profit here or whether it is a demolition, then it should be compensable. When they take three acres out of a hundred acres of land, they do not look and say, "Well, you can do pretty well on the other 97 acres." They say, "We have taken three acres, and we will give you the value of it."

And that, I submit, is precisely what we are faced with here.

Q Mr. Gribbon, back in 1911, one plan considered was a 20-story tower on the property, was there not?

MR. GRIBBON: Yes. Over the terminal?

Q Yes.

MR. GRIBBON: Yes, Your Honor.

Q Has anything along that line been suggested to the commission here at this point?

MR. GRIBBON: No, Your Honor, nothing that small has been suggested simply because it would be an inefficient utilization of land. There are no other buildings really in that area that have been built in recent days that would build only that much floor space. That is the problem in this highly prized portion of the city, to get as much floor space as is consistent with other needs. So, the answer is no, it has not been. Although I must say there is not any suggestion in the action taken by the Landmarks Commission that even that would satisfy. Nothing is going to satisfy because they want the air to roam freely over Grand Central Station.

Q Has there been a suggestion to the contrary, the other way?

MR. GRIBBON: That 20 stories would not do?

Q Yes.

MR. GRIBBON: No, there has not been, to my knowledge. But there has been no resilience in the Landmarks Commission,

with three efforts to do this under guidance of noted people. And the answer comes back no, no, no. Every indication that what is wanted is the preservation of Penn Central in its pristine state, that that is the only way that the people of New York and its visitors are going to continue to enjoy this architectural monument.

Q Suppose 20 years ago, 30 years ago, before we were as much concerned with the past as we are now, in preserving the past, you had built over Penn Central Station, without using any part of the station but just built over it a 60 or 70 story hotel and the commission now decided that that was marring the appearance, the esthetic value of this landmark and they wanted you to tear it down. I suppose there is not much doubt that you would expect compensation for that.

MR. GRIBBON: Correct, Your Honor. They could condemn it or they could regulate it, and we would be entitled to compensation. But I think the power of the city is there. And that is one of the things to be concerned about, that it is there.

Q Are you suggesting that there is no difference in the taking aspect today in the present situation than in the one I hypothesized?

MR. GRIBBON: I do not think there should be, and I do not perceive a difference. I would have thought that would be a taking--

Q In terms of Fifth Amendment principles.

MR. GRIBBON: I would think that would clearly have been a taking 20 years ago as well as today.

Q Mr. Gribbon, how did Penn Central or Grand Central get that piece of land right in the middle of Park Avenue?

MR. GRIBBON: There is a long history to it.

Q Did they receive it fair and square? [Laughter] Did they steal it fair and square?

MR. GRIBBON: They did not steal it fair and square. They acquired it over a long period of time, and indeed that building there has done a great deal for the middle of New York. And which came first is pretty hard to say.

Q It sure does when you drive and you have to go all the way around it. [Laughter]

MR. GRIBBON: That is what the city wants to maintain.

Q Oh, I see.

MR. GRIBBON: They acquired it over many years from predecessor railroads largely. And it is the Grand Central Terminal now that we are talking about and not Penn Central. That is wrong.

I submit that the most frequently applied consideration in determining when government regulation has resulted in a compensable taking is simply stated one of fairness. As this Court observed in the Cors case, there is a strong element of

ethics in the constitutional requirements that private property not be taken without compensation. And time and again decisions of this Court have reiterated that the overriding purpose of the Fifth Amendment guarantee is to assure fairness in the impact of government upon the owners of private property. Back in 1893, Mr. Justice Brewer, speaking for the Court, said the Fifth Amendment prevents the public from loading upon one individual more than his just share of the burdens of government. Forty years later, Mr. Justice Brandeis, speaking for the Court: "Particular individuals may not be singled out to bear the cost of advancing the public convenience."

In 1960 the Court said the Fifth Amendment is designed to bar the government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole.

And just a few years ago in a decision by Mr. Justice Rehnquist I think the essence of these declarations was captured in a statement that the Fifth Amendment derives as much content from basic equitable principles of fairness as it does from technical concepts of property loss.

These two taking guidelines that I have suggested would appear to be opposite sides of the same coin. Where you are eliminating a use or a condition which is imposing a burden on other people, it is fair to permit the person who is charging that to take some expense, to take some burden, in

order to eliminate the burdens on the rest of the people.

On the other hand, where the government sets out to secure an improvement or a benefit for all society, performing what has been called its entrepreneurial or its resource acquisition function, basic considerations of fairness dictate that a disproportionate share of the cost of securing that benefit not be borne or loaded on a single individual.

Significantly neither the Court of Appeals nor the city and its supporting friends have anything to say about this fairness concept, which has to be the lifeblood of the Fifth Amendment. Nothing they could say would alter the fact that the full burden of the city's action in freezing the terminal falls exclusively on Penn Central. And it is being called upon to bear a public burden which, in all fairness and justice, should be borne by the public as a whole in order to obtain the full and unimpeded enjoyment of the terminal.

I turn now to the justification that the Court of Appeals found for allowing the full cost of the terminal preservation to be borne by Penn Central. It made no inquiry into taking and simply looked to see whether Penn Central had established that it would be impossible--and that is the word of the court--for it to earn a reasonable return on the terminal without utilizing the air rights. It is our contention, of course, that whatever the remaining value of the terminal, we are entitled to compensation for that part that

has been taken. But even if the remaining value of the terminal is to be given the critical significance that has been accorded it by the court, that value was erroneously ascertained. In applying what it acknowledged to be a special rule for landmark statutes, the court divided the value of property into two separate ingredients--that contributed by private efforts and that contributed by the efforts of organized society as a whole. Then without attempting to ascertain how much of the terminal's value had been contributed by private or society efforts, it concluded that Penn Central was not entitled to any compensation because it failed to establish that there was not possibility that it could not earn a reasonable return on the remaining and also unascertained privately contributed value of the terminal.

Q As I read over the briefs filed by your beothers and sisters on the other side, my impression is that none of them really tried to defend the basic reasoning of the--that part of the reasoning of the Court of Appeals; would you agree with that?

MR. GRIBBON: I believe that is a fair statement, Mr. Justice Stewart. That is the way I read those briefs. They all back away to some degree and come forward with a further explanation of why the decision should go against Penn Central.

Q The Court of Appeals really is a statement of

Henry George's single tax, is it not?

MR. GRIBBON: Yes. But I submit it is not a statement of sound constitutional law, as many of Henry James' things were, not necessarily sound--

Q George.

MR. GRIBBON: George. I am sorry. James would be different.

The court then went on, in addition to these two ingredients of value, to impute a great deal of income, which it did not quantify, to the terminal from other buildings in the area. And then, as if to put its position beyond all argument, the court observed that the terminal may be capable of producing a reasonable return for its owners even if it can never operate at a profit. I submit that under no circumstances can the court's view of whether Penn Central is able to earn a reasonable return on this property, absent the development rights, be accepted. I think its effort to divide property into these two segments really has no support in the authorities. And it is a principle that cannot be limited. It cannot be limited to the terminal or the landmarks. It applies to all property. It applies to a residence. It applies to a farm, to an office building. They are all valuable or not valuable, depending upon their location, depending upon social services, protection, and amenities.

If this approach were adopted, the government would

be free to appropriate any property by giving only a pittance of what that property is worth on the open market.

The error in the court's opinion is perhaps further discosed in a passage near the end where it refers to the city's financial distress and then says that in times of easy affluence, preservation of landmarks through eminent domain might be desirable or even required. Surely, however, no constitutional guarantee, particularly one based on the Fifth Amendment, should be granted or denied, depending upon the government's fiscal condition.

Q Mr. Gribbon, down near the White House, across the street from the Hay-Adams Hotel is an historic church. I suppose it goes back well over a hundred years, does it not?

MR. GRIBBON: Saint John's?

Q Saint John's Church. I would assume--and I think you would assume with me--that the land underlying that church is a very valuable piece of property for an office building or another hotel or what not. If that were taken--the church, which presumably has fee title to that property--began negotiations for the sale of it to the Hilton Hotel Corporation or someone to build a hotel there and some effort was made by the Congress to preserve it, would that be a taking, in your view, if they said, "No, you cannot tear that down and build a Hilton Hotel; you cannot do anything with it. You have got to keep it the way it is"?

MR. GRIBBON: I think it would, Your Honor. As you put the case, it seems to me, it would be a taking. And the church would be entitled to compensation on the value of that land and building.

Q What if in that process, in that inquiry, it developed that that church was the result of many, many contributions by people, that the church corporation as such did not ever put a single dollar into it--it was all gift money--would that make any difference?

MR. GRIBBON: I do not think it would. I think whoever held the title at that point would be entitled to the compensation.

Q They would be entitled to get the compensation for the highest and best use of that land as of today?

MR. GRIBBON: That is a phrase that has been bandied in the cases, and I am not too sure of the meaning. I think they would be willing to get what that property is worth, what the Hilton Hotel would pay for it.

Q Presumably at the moment the highest and best use would be a hotel site.

MR. GRIBBON: If that is permitted by the generally applicable zoning law, and I take it it would be because there is a hotel across the street.

Q And they would of course be limited to the height limit--

MR. GRIBBON: Whatever they are.

Q --of Washington, D.C., 800 feet or some such.

MR. GRIBBON: The same as everybody else is limited.

What an owner has invested in a piece of property is really quite immaterial to what he gets when that property is taken. He may have an enormous investment, but he is not going to get it back if the property is not worth that. Or he may have a fully depreciated investment so that the net is zero; and yet it is the value. It is the loss to that owner. It is not really what is acquired or what the investment was but the loss to the owner which is determinative.

As we discussed earlier here in my colloquy with Mr. Justice Stewart, the city and its friends back away from the Court of Appeals' rationale and attempt to salvage this statute as being simply a form of land-use regulation or zoning. In the first place, there is not any general principle that all land use regulation or all zoning is permissible and does not constitute a taking. This Court made that clear in the leading case of Euclid v. Ambler. The basis on which many zoning laws have been upheld is that they represent a comprehensive regulatory program. This Court has used the term "comprehensive" in a number of recent decisions. It has not been defined. But I take it if comprehensive means anything, it means something close to the opposite of selective or highly particularized. And that is the vice of this landmark law.

It is not zoning. It does not purport to be zoning. It is on top of the zoning laws. There are vast, pervasive zoning laws in the City of New York, and this fits on top of them, superimposed, and it permits highly selective and particularized actions. The designation, for example, of the public library or the Brooklyn Bridge or the Statue of Liberty as historic landmarks does not mean anything. The designation of a fine old home as an historic landmark may simply give the owner the satisfaction of putting a brass plaque on the door to that effect.

The recent designation of the Radio City Music Hall interior as a landmark was followed very quickly by efforts by the state and the city to put up about $2 million to keep the show going for another year.

But it is the unpredictable nature and the highly selective nature of what not only has been done but indeed what the law contemplates. And that is why the Court of Appeals looked at this zoning and said, "No, sir, it cannot be zoning." This really resembles discriminatory zoning, which has been condemned, and it declined to condemn it because it was historical.

Q Mr. Gribbon, may I interrupt with a question? When does the taking take place? Supposing, with respect to the Chief Justice's example of the church, they had had no negotiations with Hilton but the Congress decided that they

would designate it as an historic landmark today; they had no deal on the fire or anything like that. Would there be a taking then, or would it only take place when they could show that they had a better offer?

MR. GRIBBON: I would think it would take place at the former time.

Q Then why do you say that putting a plaque on the door of a home is just a ceremonial act? Why would not that also be a taking?

MR. GRIBBON: I do not think it imposes any burden or loss. Indeed, it is a net gain for the owner. He does not have to do anything. He is permitted to put it on.

Q Is he not equally forbidden to tear down the house and sell it for something else?

MR. GRIBBON: That depends on what he can later work out with the Landmarks Commission, whether he can have additions to it which will not impair the integrity of the house, just as Penn Central attempted to do things that would not impair the terminal. The newer designation is just the start of the game.

Q Oh, I see.

Q And you assuming that the house is in a single-family occupancy zone.

MR. GRIBBON: Yes.

Q So, it could never be anything more than

basically what it is.

MR. GRIBBON: It is not burdened the way Penn Central has been burdened.

Q Which is in a commercial zone.

MR. GRIBBON: In a commercial zone where it is precluded from doing what is permitted under the zoning law.

Under any zoning law, the people who are affected do have to deal with some restriction. But those restrictions are uniformly applied, and the affected person can move around. It can develop. It can do things within those zoning restrictions. Penn Central has no such freedom. The terminal has in effect been selected out and frozen in place. I submit that the landmarks law has thus operated as a compensable taking of its property rights which require compensation.

MR. CHIEF JUSTICE BURGER: Mr. Koerner.

ORAL ARGUMENT OF LEONARD J. KOERNER, ESQ.,

ON BEHALF OF THE APPELLEES

MR. KOERNER: Mr. Chief Justice Burger, may it please the Court:

Appellants' argument has proceeded from the approach that the only method to regulate private property is by and through the principles of eminent domain.

Q I do not think so. I think counsel very clearly conceded the complete validity of all the zoning legislation in New York City, at least for the purposes of this case.

MR. KOERNER: Let me just establish the perimeter of the appellants' argument.

Q You do not contend this is a zoning case, do you?

MR. KOERNER: No. What we contend is this is another type of land-use regulation, with the very same tests enunciated by this Court for all other land-use cases, what is applied here.

Q As applied to one particular unit?

MR. KOERNER: No. This is the nub of the case. The appellant has proceeded with the assumption that Grand Central Terminal has been singled out. That analysis might be correct if there had never been a landmarks preservation law and in response to an announcement by Penn Central that they were going to build a building on top of Grand Central Terminal, that the public reacted to it and passed a law that distinctively impacted on Penn Central.

Q Do you contend it would be different from the case you have now?

MR. KOERNER: That is correct. That is not what is before the Court.

Q How would it be different constitutionally?

MR. KOERNER: In this particular case we have a comprehensive land-use plan which sets out in advance the criteria for determining whether or not a building is

architecturally or historically significant. The intention of the plan is to preserve all historical buildings, whether by accident they are a part of historic districts or whether they are single and outside the district.

Q What if the five boroughs got together and said that there just is not much open space in the five boroughs, and so we are going to preserve all the open space just as it is even though it may be in private ownership: Do you think that would be constitutional?

MR. KOERNER: It would depend on the strength--you are saying without any--

Q No, finding that there is a tremendous--

MR. KOERNER: The answer would be no, because the individual who was affected by the regulation would not be getting any return on his property, nor would he be permitted to use his property for any purpose.

Q Supposing he was allowed to use it as open space. He could raise cattle there or have dairy farming. [Laughter]

MR. KOERNER: No, because that would not be economically productive. And we do not contend that if the appellant in this case had been able to establish that his property as restricted was not economically viable, that he would not be entitled to relief.

Q Suppose, in my Brother Rehnquist's example, he

was permitted to put a fence around it and that people, when they come and sit in the sunshine, they could pay a little fee. And he would raise enough to pay his taxes and maybe a one percent profit.

MR. KOERNER: No, that would be insufficient. The test is whether or not the property, as restricted, is economically viable. It is the same test that has been applied by this Court in other land-use cases.

Q And it would not be enough for the landowner to say, "I may be able to make a profit here the way it is, but I could make two or three times as much if you permitted another use"?

MR. KOERNER: That is correct, that the test is not whether or not he can receive the highest and best use. There has been no taking in this case. The appellant has not had any out-of-pocket expense incurred. What he has lost is the potential to develop his property in the highest and best use.

Q Do you not think that is a valuable right?

MR. KOERNER: Yes, but it must be balanced against the validity of the land-use regulation.

Q Which is for the benefit of whom?

MR. KOERNER: The entire community of which the appellant is a part.

Q But you do not think that the entire community should bear the cost of the benefits for the entire community?

MR. KOERNER: What I am saying is that the entire community should pay the appellant if the restriction denies him the right to earn a reasonable rate of return. The problem here is that everybody is trying to analogize this case to zoning. But it is a different type of land-use regulation, the promotion of which has the same effect on the community as does zoning, and that is to make the community more attractive.

Q When you say reasonable rate of return, you sound like it is a public utility.

MR. KOERNER: No, it has traditionally been--we have not quantified it except to the extent that it has been suggested, that six percent would be reasonable. But we never got to a point in this litigation because there was a total failure of proof. The appellant was unable to show that he could not make a profit. That is precisely why we had the trial in the state court.

Q Suppose, instead of this being owned by the Penn Central, this had been a private residence of great historic importance--Commodore Vanderbilt's house or some such thing--and the Landmarks Commission wanted to take it.

MR. KOERNER: Designate it.

Q What kind of return do you have on a private residence, to use the measurement that you are suggesting here?

MR. KOERNER: In that case, the question is whether

or not a designation would interfere with the existing use. To the extent that the owner wanted to convert the private residence to a commercial residence, then he would be entitled to show whether the property was economically viable.

Q How about my hypothetical question to Mr. Gribbon on Saint John's Church over by the White House, by Lafayette Park: Do you think Saint John's Church could get the reasonable market value of the land, less the cost of demolition?

MR. KOERNER: No, if the designation did not interfere with the use of the church as a church. Since it is a non-profit association, it would be our position that that church could be maintained as part of an overall scheme to preserve landmarks--

Q Even if they wanted to do what the National Presbyterian Church did, sell its downtown church for a very large office building site and move out to the outskirts where the parishioners could get to church more readily?

MR. KOERNER: If there was justification and they could apply to the Landmarks Commission, and that would be in a condition that would be considered by the commission.

Q In fixing value?

MR. KOERNER: Yes. That is not involved in this particular case.

Q Is the Landmarks Commission qualified to deal with due process?

MR. KOERNER: No. The Landmarks--

Q Are you not giving it that business?

MR. KOERNER: No. What I am saying is that they have set up a procedure to determine which properties are historically significant. They have set up criteria--

Q You say it is not a zoning commission.

MR. KOERNER: It is like a zoning commission to the extent that--

Q But a minute ago you said, "Oh, no," you were not going to get into the zoning business. I thought that is what you said.

MR. KOERNER: No. What I said--

Q Now are you going into zoning?

MR. KOERNER: No. What I am saying, that in both zoning and landmarks you have expert commissions charged with the responsibility of developing a comprehensive land-use scheme, the purpose of the scheme to benefit the community. What I am saying is that with respect to--

Q And I assume that that commission knows how to operate a railroad terminal?

MR. KOERNER: No. The commission determines whether the railroad terminal fits under the criteria before it, that is, whether it is architecturally and historically significant. Once it is designated, if it imposes a hardship--that is, if it denies the appellant a reasonable rate of return or makes--

Q Who makes that determination?

MR. KOERNER: The court in this case made that determination after a lengthy trial.

Q I am talking about the commission by itself. Do they make that determination?

MR. KOERNER: There is a procedure within--

Q I understood that two or three times Penn Central went there, trying to work this out. Am I right?

MR. KOERNER: No. Penn Central--

Q They did not go to it?

MR. KOERNER: No. They had applied to the commission for the right to knock down Grand Central Terminal and put up an office building. The question was whether or not that application was appropriate for the purpose of effectuating the chapter, the statute. And the Landmarks Commission properly determined that it would not be appropriate. Penn Central did not choose to litigate that issue in a court proceeding. Indeed, they have not chosen to litigate the question of whether Grand Central Terminal is a landmark. It must be assumed.

With respect to the analogy to zoning, in zoning it is reasonable to divide up areas into geographical areas. That is the reasonableness of a zoning plan. With a landmark regulation, the reasonableness depends upon the preservation purpose, and that purpose is only achieved by preserving the

landmark wherever they may be in the City of New York. And it is that distinction. It is a different type of land-use regulation.

Q The Landmark Commission can do this at any time it sees fit?

MR. KOERNER: No. There is a procedure set up where they have to have a hearing. They have to make--

Q Timewise, they could do it on a building that was 80 years old?

MR. KOERNER: Yes, that is correct. But the built-in safeguard is that if the owner of the subject property is unhappy with the designation, he can bring a special proceeding in the Supreme Court and challenge the designation on the basis of arbitrariness and capriciousness. One of the factors in considering whether there has been a deprivation of due process--

Q I assume that is true of all state commissions.

MR. KOERNER: That is correct.

Q So, it is nothing new, especially for this commission.

MR. KOERNER: That is precisely our point, that this is a land-use regulation that has the same effect as any other land-use regulation.

Q What if in that proceeding the court decides that the commission was absolutely right, no one can dispute

that this is a historical landmark; is that the end of it?

MR. KOERNER: No, because all that says is that the designation is proper. Whether or not the designation makes the property economically unviable is the type of issue that was reviewed by all the state courts and this Court. That is the due process claim.

Q What standard do they use?

MR. KOERNER: Whether or not the property as restricted is being precluded of all reasonable beneficial use. I want to point out that--

Q You mean not of all economic use but some profitable--

MR. KOERNER: That is correct. But what they do determine is what this Court has constantly reiterated, that when the police power is properly exercised--and, by the way, there is no dispute that this is a proper subject for the exercise of the police power--that the highest and maximum use is not a necessary goal, that it is presumed that that goal can be withdrawn when you exercise the police power. That is a necessary by-product.

Q Did they set a percentage of return on initial investment like a public utility?

MR. KOERNER: No, they did not do that because in this particular case there was such a failure of proof they did not have to quantify it.

Q You say as this case comes to us, we must judge it on the basis that Grand Central in its present use is profitable?

MR. KOERNER: Must be. And that, Your Honor, is the essence of this case, and that the appellant has ignored the lengthy trial and the two findings of the appellate court.

Q Mr. Koerner, Grand Central is still used by the railroads for passenger service.

MR. KOERNER: That is correct.

Q Let us assume that the Interstate Commerce Commission allowed the station to be closed for rail service on the ground that not enough people use it for that purpose and assume further that no other use of the building in its present condition is deemed feasible.

MR. KOERNER: Right.

Q What would your position be with respect to that situation?

MR. KOERNER: Penn Central would be entitled to relief because the property as restricted was not economically viable.

Q Is that clear from the New York law?

MR. KOERNER: Yes, it is. Yes. And I again want to emphasize the attempt by the appellant to ignore the substantial factual data presented during the trial.

Q Is there a specific section of the New York law

that deals with that situation?

MR. KOERNER: In this particular case it came under the guise of a challenge to the application as a deprivation of due process. To answer your question, it was framed in response to a due process issue raised in court. With respect to other challenges internally through the administrative process, we allow for an application for a certificate of appropriateness. That is, even to the extent of demolishing the landmark parcel if it is not economically viable.

Q That is not in the statute--

MR. KOERNER: No, it is in the statute.

Q It is?

MR. KOERNER: But Penn Central was a tax-exempt property, and the statute did not have this exception applicable to a tax-exempt property. So, Penn Central sued in court, and it attempted to prove in court what they could not prove before the commission.

Q In any event--

MR. KOERNER: It is the same test.

Q --similar to the question that my Brother Powell--if the company at any time in the future, next year or the year after that, any time it can prove that the situation has changed and that the property is no longer economically viable, it will get relief.

MR. KOERNER: That is precisely the answer. That is

right.

Q What again is the definition of being economically viable?

MR. KOERNER: It was not required to be quantified in this case. But it has traditionally meant that on his investment, he would be able to earn approximately a six percent--

Q Like a public utility.

MR. KOERNER: Correct.

Q Supposing that the New York Central Railroad is applying to the Railroad Rate Commission in New York for an intrastate fare change and the commission decides that you can make six percent, which we consider a reasonable rate, without a spur track of three miles, which you presently own. So, we are just going to take that three-mile spur track away from you. You will still make six percent on the total investment you have. Do you think you could do that?

MR. KOERNER: No, because I do not see the strength of the public purpose in that particular case.

Q Supposing they want the spur track as a railroad museum to show how the 20th century used to look.

MR. KOERNER: Then again the answer to Your Honor's question is that in your application, you are singling out that particular railroad and restricting its development of its property. The entire concept of this scheme is that we are not

singling out Penn Central. We are treating it like every other landmark within the City of New York. We have designated over 500 properties. Indeed, before a designation is completed, that designation has to be approved by the City Planning Commission, which must determine whether it is consistent with the zoning plan and the master plan and whether or not any urban renewal development might interfere.

Q Mr. Koerner, could I return for a moment to Justice Powell's question about economic viability of a demolition or something like that?

MR. KOERNER: Yes.

Q As I understood the statute, the statutory test of whether to grant a certificate of appropriateness does not say anything at all about economic viability. Am I wrong on that?

MR. KOERNER: There are two bases for certificate of appropriateness. With respect to Penn Central, because of the tax-exempt property, you are correct, that they could not have gotten a certificate of appropriateness administratively because the economic viability question is not allowed since they were tax exempt. With respect to other commercial properties, a certificate of appropriateness can be granted.

Q On the ground of economic--

MR. KOERNER: That is correct.

Q What section of the statute authorizes that?

MR. KOERNER: 207--

Q 2076.0? I do not see anything in there about economic viability.

MR. KOERNER: Can I--I just want to use my time--

Q All right. But you do agree that with respect to the--

MR. KOERNER: Section 207-8.0.

Q Oh, 8.0. I see. But with respect to the Grand Central, economics are totally irrelevant?

MR. KOERNER: No, because while he could not get administrative relief, we agree that if he has established his case in court that the property was not economically viable, he would have been entitled to judicial relief under the--

Q But not under subsection--

MR. KOERNER: No, that is correct; under due process.

Q Oh, under the Constitution. In other words, you are admitting that as applied in that situation the statute would be unconstitutional?

MR. KOERNER: If we had not had the added step that whatever deficiency was in the landmark law was corrected at trial.

Q The landmark law, as it reads, is unconstitutional if it does not allow for some kind of remedy when there is an economic--

MR. KOERNER: That is correct. But it is not the

issue in this case because Penn Central had the opportunity to establish under the very same test and failed.

Q Mr. Koerner, I am a little confused about your references to tax exemption. What specifically is tax exempted?

MR. KOERNER: The railroad does not have to pay full city real estate taxes on the terminal. There is an exemption under the railroad law for that portion of the terminal that is used for railroad purposes so that they only pay approximately one-third the assessed valuation.

Q Would the theory be that they are taxed in other ways or--

MR. KOERNER: It was intended to encourage them to keep up the railroad system.

Q Does it make any difference to the constitutional issues in this case whether they were totally tax exempt or paid the full tax that everyone else pays?

MR. KOERNER: No.

Q So, in this respect they are in the same posture as Saint John's Church?

MR. KOERNER: That is correct, with the exception that here though you can equate their business with whether or not they can make a reasonable rate of return. And one thing we have left out--my time is running out, but I want to emphasize one other factor that is quite important. We have concentrated on the restriction of Grand Central Terminal and

whether that restriction imposes on them an extraordinary burden not present when other land-use regulation impacts on a parcel. What we have left out and the appellant has not commented on are the air rights. We have never contended that the transfer development rights were equal in value to what the person lost. But that is not the test. The test is whether the transfer development rights constituted a valuable asset to the appellant, that when added to his return on the railroad, which he was unable to establish, whether that satisfied even the appellant's test of fairness. And I want to briefly mention the evidence that was upheld by the two appellate courts.

Q Mr. Koerner, before you do that, let me just understand your theory. If there is no taking here, you would not even have to give them the--

MR. KOERNER: That is correct.

Q Then why do we have to consider?

MR. KOERNER: Because the air rights are part of the comprehensive scheme and an attempt to at least recognize that we are going to try to do everything we can--

Q Maybe you have been more generous than the Constitution compels you to be. Why does that have any relevance at all to what we have to decide?

MR. KOERNER: Because Judge Breitel felt that the air rights--

Q But nobody is defending his rationale.

MR. KOERNER: No. [Laughter]

To the extent that he relied on the air rights, it was appropriate to consider the air rights in the context of the whole package to determine exactly whether we have been fair.

Q What difference does it make whether you have been fair? I do not understand your angle.

MR. KOERNER: Because the fairness concept, advocated by the the appellant, goes to the concept of due process in determining value. Our plan contemplates giving the indiv'dual designee this.

Q But your legal position is you do not have to be fair.

MR. KOERNER: No, that is not our legal position.

Q Your position, as I understand it, is there can be a taking sometimes under this--

MR. KOERNER: That is correct. But there has not been in this particular case.

Q That is right.

MR. KOERNER: And that the facts and circumstances of this particular case show there had not been. I will only take one more minute.

With respect to the air rights, the testimony at trial showed that the proposed builder, UPG, had offered Penn Central $3.8 million a year for the right to develop air rights over

the Biltmore Hotel, an eligible receiving site under the transfer development rule. Penn Central's representative testified that 3.8 was insufficient because it wanted five million. It computed the five million as follows. It was guaranteed three million if it developed the air rights above the terminal. In addition, its profit from the Biltmore was two million. So, to get the same deal that it would have had with respect to building over Grand Central Terminal, it concluded that it had to receive five million.

I urge that this is not the issue before the Court. The issue is not whether or not Penn Central was entitled to the highest and best use, the five million. The issue is whether or not the $3.8 million return, by using the Biltmore site, together with their failure to establish that the property as restricted cannot earn a reasonable rate of return, is so unfair as to really in all effects totally emasculate the land use regulation that is now under attack because in a city like New York it is unusual for all of the landmarks to be clustered in historic districts; and for the preservation purpose to be accomplished, it is necessary that the Landmarks Commission be able to act wherever it finds a building of historical and architectural significance. The total plan here is a reasonable one. It is a different type of land-use regulation. But all the courts have applied the traditional rules and have properly concluded that this regulation should be sustained.

Q Let me ask just one more question. I know you are concerned about your time. But if the transfer rights are of equal value, or substantial equal value, could we not hold that there was a taking and then on retrial they find that there was just compensation?

MR. KOERNER: No.

Q You could go ahead with your program without any interference.

MR. KOERNER: No, because I do not think the transfer rights were of equivalent value.

Q Oh, you concede they were not?

MR. KOERNER: It was not litigated in court. All that was litigated--

Q For purposes of our decision, we should assume they are not?

MR. KOERNER: That is correct.

MR. CHIEF JUSTICE BURGER: Mrs. Wald.

ORAL ARGUMENT OF MRS. PATRICIA M. WALD

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MRS. WALD: Mr. Chief Justice, and may it please the Court:

The United States has a vital interest in these proceedings today. Congress and the Executive have declared in many statutes that it is a national policy that, quote, "historical and cultural foundations of the nation should be

preserved as a living part of our community life and development in order to give our people a sense of orientation."

The Federal Government is deeply involved in historical preservation in many ways, and I will allude to them only briefly. Number one, it designates and preserves historic landmarks on its own public land. Two, it sometimes utilizes the power of eminent domain to acquire sites of national historic significance. Number three, since 1966, it maintains a National Registry of Historic Buildings which have local, state, city, and national significance, and now contains 15,000 such buildings.

Fourth, it provides financial aid to states and cities so that they can survey their historic preservation problems, formulate plans, and embark on preservation projects to preserve their treasures.

And, fifth, all federal agencies, pursuant to the 1966 act and to an Executive order, who license projects or spend money on projects in any state, must take account of the need to preserve historic sites which are registered or which are eligible for registration.

Finally, there are several very specific enactments, including the National Environmental Protection Act, which requires NEPA impact statements to assess the impact of historic sites that might be affected by proposed projects.

Q Mrs. Wald, may I just interrupt because it goes

to what you are reciting now?

MRS. WALD: Yes.

Q Has the United States ever imposed a regulation on private use of private property for historic purposes without compensating the owner?

MRS. WALD: I do not believe it has directly done so.

Q So, it has never done anything comparable to what we have before us?

MRS. WALD: Not to my knowledge. But may I add that it does provide subsidization to local groups who embark upon some of their projects, pursuant to laws like the New York City landmark law which use a regulatory framework for preservation--

Q Is it fair to say that the federal policy has always been that where there is a public benefit, the public shall pay?

MRS. WALD: I believe that that is an overstatement, for the following reason. Naturally the Federal Government has relied primarily upon state and local governments and their police power and their particular historic preservation laws to bring about the preservation of buildings except where those buildings are on public land.

However, we do have several instances, not for historic preservation but for other uses, which raise a similar question where the Federal Government through its regulatory powers does in fact impose restrictions upon land use which it

does not compensate for by eminent domain. In the area of historic preservation, to my knowledge, you are correct, Justice Stevens, but we do not do it directly.

Q Suppose a farmer up near Manassas is suddenly informed that the records now discover that an important part of the Battle of Manassas was fought on his farm and, therefore, they will let him graze his cows and raise some grain but that he cannot sell it. It is just going to be preserved for the benefit of the whole people. Do you mean to suggest that they do not have to pay him the going rate per acre for that farm?

MRS. WALD: If we are referring now, as I believe you are, to the national government--

Q Yes.

MRS. WALD: --taking such action, then right now the national government would either have to do it through eminent domain or through a state or a local government which had jurisdiction. We do not have any statutes on the books, to my knowledge, which allow us to have a national historic preservation regulatory framework such as the states and cities. That is not to say, Your Honor, and certainly we do not have the question before us today, that it would not be possible for Congress to enact such--

Q Yes. The Chief Justice's question was a constitutional question because that is what we have in this case, not whether or not you happen to have at the moment a

federal statute.

MRS. WALD: That is right. It is always very hazardous to pass on constitutional questions ahead of time.

Q That is what we have to do in this case. [Laughter]

MRS. WALD: You are passing on a statute of course that is on the books in New York City. If the Federal Government, pursuant to a federal jurisdiction, passed such a statute, I believe that it is possible it would be constitutional.

Q Without compensation?

MRS. WALD: Without compensation in the sense that it would be subject to the same test which we suggest constitutionally applies to state and local government. If it became so onerous to the landholder, if he could not take any beneficial uses out of his property, then it would become a taking, and it would be unconstitutional.

Q The beneficial uses that my farmer friend up at Manassas has in mind is to leave it to his children or to sell it, as the case may be. And he can get $1,500 an acre for it in some places now. Are you suggesting the United States Government or any government could take that property without paying him the going rate?

MRS. WALD: I am not suggesting that they take it, Mr. Chief Justice. I am suggesting that a valid historical landmark statute could allow them to restrict its usage so that

a particular historic framework, a particular historic use, would not be violated.

Q If he had had an offer to sell it to the supermarket, Landmark Supermarket, would that be the price? [Laughter] The Grand Central Supermarket. Would that be the price he would have to be paid?

MRS. WALD: I am sorry, I am not sure I understand your question, Justice Marshall.

Q I am putting just one little point into the Chief Justice's plot. Now they have got the cattle and the hogs there. The Grand Central Supermarket has come to him, and they want to build a huge landmall there, and they will give him $2,500 an acre. Is that the price?

MRS. WALD: Is that the price you suggest that the government would have to pay?

Q Yes. Yes.

MRS. WALD: I believe that the Federal Government could indeed enact a statute which would not require them to pay the price you suggest, the going rate on the market for the land, simply because they had restricted uses so as to prevent him from selling it to the supermarket.

Q I want to get back to the hypothetical that I gave Mr. Gribbon and see what your answer is. The National Presbyterian Church, which is surely an historic place on Connecticut Avenue. Out in front of the building was the

statute of John Witherspoon, one of the signers of the Declaration, I think. And they contracted to sell it for three or four million dollars. Suppose after they contracted to sell it in order to build a new church further out and had this three or four million dollar contract, the District of Columbia had said, "No, that is going to be a landmark. You cannot sell it." Now you have got the going market value fixed by a contract, an arm's length contract, with the, I think, National Broadcasters Association to put the building up there. Do you suggest the District of Columbia, under any statute, could have taken that property without paying them for it?

MRS. WALD: I do suggest that the District of Columbia could have passed a regulation which required, after designation, through a reasonable mechanism of that church as an historical site, that indeed either that site must be maintained, the church must be maintained, or if it were sold, the successor must maintain it in the church form. And I believe that a somewhat similar case--

Q You would not say that if it were sold for $10 or whatever the buyer would pay and then he just closed down the church. You could not make him operate the church. You would not suggest that, would you?

MRS. WALD: No, I would not suggest--

Q And the city here would indicate that if they ceased operating as a church, it would no longer be appropriate

to restrict the use without compensation.

MRS. WALD: I would suggest that since the property was originally--its original use, its present use at the time it was designated, was as a church--that indeed nobody can be made obviously to operate a church if they do not want to. But I think what can be done is to restrict other uses of the property.

Q In the Grand Central case, are you differing with your colleague that if Penn Central just shut the terminal down, that it would still be required to leave the building as it is?

MRS. WALD: Certainly I believe that the statute is valid and under the statute, if it wished to shut down the station, to cease operating, to demolish the--

Q They cease operating and then they go in before the commission and say, "We are not making a nickel on this. Unless we can do something with it, we cannot even pay our taxes on it, reduced as they are." I thought your colleague indicated that then they could tear it down or at least if they were going to have to leave it standing, they would have to be paid for it.

MRS. WALD: I believe that the courts--although it is not in the statute in Granc Central's case--but I believe that thr courts, the New York courts, in that situation, if they did not want to operate it at all, would indeed permit them to

cease operating it. But I am not sure that it would permit them to go ahead and make another use of the property.

Q The point is, in the event hypothesized by my Brother White, would the Constitution then require that compensation be paid?

MRS. WALD: I do not believe that the Constitution requires compensation be paid simply because they decided they did not want to operate it anymore as a railroad station. I believe that they would be--before a taking and compensation would be required, under existing law they would be required to find some beneficial use, to attempt to find some beneficial use that did not violate the nature of the preservation law. And I believe in fact that is what most of the cases this Court has held in the past would suggest.

For instance, in the Goldblatt case, the case that candidly the ordinance completely prohibited the use, the excavation pit use, to which the property had been put before. That was completely ruled out. Yet the Court held that was not a taking because the plaintiff might well find some other uses for the property, or there had not been any showing that he could not.

There have been cases in which--the South Terminal case in Boston where the EPA simply said in its regulations, in its transportation plan, "You may not use x-percentage of parking space because, if you do, it will affect the air,"

Clean Air Act. And the Court there held, first, that that was not a taking because, even though you could not use those spaces for parking spaces, for which they had originally been intended, you had to look around and find some other uses, less valuable--

Q Mrs. Wald, is your test then, just applying it to the historic landmark area, if the landmark designation causes the property owner to actually lose money on the property, then at the taking, if he can still make a reasonable return, it is not taking? Is that your test?

MRS. WALD: That is pretty much the test. I think it is a test of the past cases here. I think it is more if there is a profitable use to the property. There has been a taking--and there have been innumerable takings--

Q Is it just one penny of profit or a reasonable return?

MRS. WALD: Certainly the cases do not tell us in the past. They leave the formula--in fact, I think--

Q We have to decide.

MRS. WALD: --they set no set formula as a reasonable return or a beneficial use.

So, you just say just a marginal profit would not be enough. It has to be a reasonable return.

MRS. WALD: I would say a reasonable return is a beneficial use.

Q A reasonable return--how does one measure that?

If it is a lot less than could be obtained by putting it to some other use, is it still reasonable?

MRS. WALD: I believe so. I believe that is exactly what all the cases have said. We do not take the test of the most profitable use. Most recently--

Q But you do not think the test is the least profitable use either?

MRS. WALD: I certainly believe the Constitution would require the owner, if he could not use it for a particular purpose, to be able to go out and find the most profitable use consistent with the point of the regulation, namely, the preservation of the landmark.

Q You mean you are going to make him do something with it?

MRS. WALD: No, we are going to permit him to do something with it if he wants to.

Q What if he just wants to board it up?

MRS. WALD: If he wants to board it up and that does not in some way infringe upon the historical preservation aspect of the property, then he could do that. If the historical preservation simply says it is a beautiful church to look at from the outside and we do not care what happens, whether anybody goes in it or anything else, then he can just leave it stand there if he wants to. On the other hand, if he wants to continue to run it as a church--

Q Who should pay the $10,000 a year insurance premiums on it and public liability in the meantime?

MRS. WALD: Well, the church may be the wrong example. But the owner continues with all of both the liabilities and the profits of ownership. But any owner has certain options about how to use his property.

Q What profit have you got on a boarded up building?

MRS. WALD: If you boarded it up by your own choice, then--

Q No, boarded it up because the government, from your point of view, would not let him sell it, not let them sell it.

MRS. WALD: In most of these cases, the sale--indeed, in the case instance here in the New York law, they do not forbid the sale per se. They only forbid the sale for a use which is restricted. So, indeed, many of the cases in which the courts have held there is no taking at a reasonable regulatory use, they point out that it leaves the option with the owner as to whether or not he wants to sell or lease it or use it for other purposes. All of these cases, if I may finish the one sentence, all of the land-use cases have pointed out that it is almost inevitable, starting with Justice Holmes back in the Kohl case, that when the government pursues a police power for a legitimate end, it will likely end up with

a diminution of value of land and the restriction of use. And unless that becomes so onerous as to move over into a taking--and where that line is drawn the courts have over the years said is very difficult--that it is a reasonable use of the police power. And I think the rule which appellant would suggest, that any time there is a loss in value of property due to a reasonably valid regulation, use of the police power, that the owner must be cmopensated, is indeed a radical, revolutionary rule which just simply has no foundation in the past cases of the police power or indeed in the taking cases themselves.

MR. JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Gribbon?

REBUTTAL ARGUMENT OF DANIEL M. GRIBBON, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GRIBBON: If I may briefly, Mr. Chief Justice, I should like to answer Mr. Justice Marshall's inquiry and make clear that Penn Central did make an effort with the Landmarks Commission to obtain a certificate of appropriateness and no exterior effect. And in the Landmarks Commission there was never any attention paid to dollars. That was strictly an esthetic determination. The only time economic loss came into the picture was when the case went into court. And then instead of inquiring as to whether there was a taking and making a determination, which is not terribly complex in this case as to the value of what was taken, the courts went off on this

economic inquiry into reasonable return which, as you read the Court of Appeals' opinion, we were bound to lose. There was no way to win under the way the Court of Appeals analyzed this economic problem.

Q Mr. Gribbon, what if in passing this ordinance--was it an ordinance? What was it?

MR. GRIBBON: The landmarks law, yes, Your Honor.

Q What if they had done their homework before they passed the ordinance and said the following landmarks are hereby designated right in the ordinance, and they did 30 of them or 40, so that you were not singled out at all. They thought they had spotted all the landmarks in town.

MR. GRIBBON: I think if the economic impact on us was the same ultimately, as it is here, the fact that they were designated in the law rather than designated by the commission would be immaterial.

Q But you would not be singled out.

MR. GRIBBON: Well, singled out--certainly we are singled out--

Q At least you would be one of 30.

MR. GRIBBON: Yes. But you understand that they do not operate the same way. Among these 30 are the Statue of Liberty. And the landmarks law does not operate on it with nearly the impact it operates on us. Another one is a tree in Brooklyn. It is the way it operates to take property that we

complain of here.

Q As I heard this argument it is now the issue--as I understand your opponent, he concedes that there might be occasions and circumstances under which the operation of this ordinance did operate so as to be a taking in the constitutional sense. And you concede, with respect to the Statue of Liberty or the tree in Brooklyn, that there might be occasions when it did not so operate. And the question then is, Does it in this particular case?

MR. GRIBBON: Does it operate here?

Q Yes.

MR. GRIBBON: And--

Q Do you agree that we have got the case on the assumption that the station is a sustainable economic operation?

MR. GRIBBON: No, I do not think so, Your Honor, because--

Q Did you disprove it? I thought there was the finding that it was, as they say, economically viable.

MR. GRIBBON: I say the Court of Appeals finding to that effect is totally erroneous because it is based on this concept that we need only earn a return on the privately contributed ingredients. That destroys the entire finding.

Q Let us assume for the moment that we accept it, that it is economically viable, but nevertheless it is

perfectly obvious you could make more if you built a big building on it.

MR. GRIBBON: I still say even if you accept it, the decision is wrong, and we are entitled to compensation. I do not think the fact that what we have left over is atonement for what has been taken from us.

Q In your brief at page 17 you cite this Court's opinion in Fuller where you say that the government in a condemnation case cannot exclude from consideration of the jury the value that may be added by the fact that the government built a post office near the site 80 years ago. Is that substantially your argument here.

MR. GRIBBON: I think it is. I think that is a very important part of our argument. And I think that this highest and best use is something that has to be looked at very carefully, and I would ask the Court o look at the Causby decision here in 328, which is cited, which illustrates a number of things. In the first place, property was not taken by the government. Yet there was a loss to the property owner, and he was compensated for it. Second, his entire property was not taken. He was compensated because he was no longer able to operate a chicken farm. And it was clear that he could have operated a vegetable patch. The Court noted that. But the compensation was because he was prevented from doing that. The Court also said that an expected use of a property is

properly to be taken into account in making a valuation for taking purposes.

Q The expected use, is that what you said?

MR. GRIBBON: That is what I said, an expected use.

Q How is that different from the highest and best potential use?

MR. GRIBBON: I am not sure how it is different. I think it makes more sense because an expected use is clearly an element of value. That is why people buy it, for what they expect to do. I think the highest and beneficial use is a term that has really outlived its usefulness, if it ever had any, because I think the cases stand for the proposition that you get compensation for what has been taken, whatever the value.

Q Is that term obsolete when a church could show that it has a contract to sell the church and the site for $4-1/2 million? Does that not give some evidence of the highest and best use?

MR. GRIBBON: I would put it under terms of expected use.

Q The highest and best use might be to sell it as a slaughterhouse for $8,000, which the zoning would prevent.

MR. GRIBBON: The zoning would prohibit, but for a legitimate use.

Q The highest and best use always is restrained

by municipal use.

MR. GRIBBON: The Solicitor General recognizes that a statute such as this landmarks law creates unusual opportunities for arbitrary action. And the remedy is not in judicial review of the landmarks designation. Those who own property that is coveted for public use are rarely, if ever, going to be a majority at the polls or in law-making bodies. And the only effective discipline on government acquisition of private resources is that provided by the pocketbook. Only if the elected representatives and their designees are required to make a cost-benefit analysis and pay through the taxes what they are going to acquire from private people for public use is there any protection for private property against ever-expanding government acquisition of private resources.

Q What if you have a regulation put down by OSHA that puts down a number of safety standards, and the owner says, "I simply cannot run the business with all these safety standards"; does that mean he has a claim of taking or is that simply a question of a regulation that forces an individual out of business like Brandeis's dissent in Mayheimer?

MR. GRIBBON: It may be. If the representatives have decided that those OSHA requirements are necessary to do away with harm, that may be a price that the individual owner has to pay. But I suggest a difference between that when the government goes out in a resource acquisition capacity, as it

is doing here, as it did in the case of the Gettysburg Battlefield many years ago, and where the government did pay eminent domain for it.

Thank you, Your Honor.

Q In the Causby case the air space above a minimum safe altitude was not deemed compensable, was it?

MR. GRIBBON: Above--yes, that is right, Your Honor. It would be interference with the use. And, as I said, they could take into account an expected use, and that is actually what we are doing here, a recognizable expected use of a small building--

Q But there it was impact on the use of the land below, on the surface.

MR. GRIBBON: On the surface. Well, yes, but I do not know that that would distinguish it. This is a recognized property use. You have to begin from the bottom and go up.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

[The case was submitted at 11:27 o'clock a.m.]

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