The New York City Landmarks Preservation Law As Applied To Radio City Music Hall*

I. INTRODUCTION

The preservation of historic and architectural landmarks is a valid and necessary governmental function. As Justice Douglas wrote in *Berman v. Parker*,[1] "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[2] It is an equally proper legislative determination that a community's cultural heritage must be protected. In the Historic Sites, Buildings and Antiquities Act of 1935,[3] Congress declared that there exists "a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."[4] Similarly, a state or municipality clearly has the power to enact laws in order to preserve architectural masterpieces and structures of historic or aesthetic importance and thus to protect the general public's cultural welfare.

The two major approaches to landmarks preservation, eminent domain[5] and government regulation, have significantly different

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1. 348 U.S. 26 (1954).
2. *Id.* at 33.
3. 16 U.S.C. §§ 461-467 (1970).
4. *Id.* § 461.
5. The power of eminent domain is the power of government to appropriate private property for public use.

economic effects on the private landmark owner. When a federal, state, or municipal government wishes to exercise its power of eminent domain, it simply appropriates the landmark on behalf of the public and compensates the owner for the property's full value.[6] In certain jurisdictions such as New York City,[7] however, landmarks can be preserved by regulation under the government's police power.[8] Under this approach, the property owner remains in possession of the landmark in question, but faces restrictions on alterations of its physical appearance.[9] Since he is not forced to relinquish ownership, he does not receive monetary compensation for his property,[10] although he will, in most instances, be entitled to

> All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities or the exigencies of the occasion demand . . . . [B]ut the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation.

United States v. Lynah, 188 U. S. 445, 465 (1903).

In Barnidge v. United States, 101 F.2d 295 (8th Cir. 1939), it was conclusively determined that the federal government could acquire real property for purposes of the Historic Sites, Buildings and Antiquities Act, note 3, *supra*: "We have no doubt of the power of the United States, under the Constitution, to acquire by eminent domain, or otherwise, sites of national historic significance for the purpose as declared in the Historic Sites Act and preserving them to commemorate and illustrate the nation's history." 101 F.2d at 299.

6. The mandate of the Fifth Amendment of the United States Constitution—"nor shall private property be taken for public use, without just compensation," U.S. CONST. amend. V—is made applicable to the states through the Fourteenth Amendment. Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897).

7. *See* N.Y.C. ADMIN. CODE ch. 8-A, §§ 205-1.0 to 207-21.0 (Williams 1976).

8. By police power is meant the power of government to enact laws and enforce them for the benefit and protection of society. This power is by no means absolute. "The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests." Goldblatt v. Hemptstead, 369 U.S. 590, 594 (1962). "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." Lawton v. Steele, 152 U.S. 133, 137 (1894), *quoted in Goldblatt*, 369 U.S. at 594-95. The police power extends to regulating the uses of private property:

> In every ordered society the State must act as umpire to the extent of preventing one man from so using his property or rights as to prevent others from making a correspondingly full and free use of their property and rights. . . . [T]he so-called police power is an inherent right on the part of the public umpire to prevent misuses of property or rights which impair the health, safety, or morals of others, or affect prejudicially the general public welfare.

Euclid v. Ambler Realty Co., 272 U.S. 365, 375 (1926).

9. *See* N.Y.C. ADMIN. CODE ch. 8-A, § 207-4.0(a)(1) (Williams 1976).

10. Regulation of the uses of private property under the police power, unlike ap-

substantial if not total tax exemption for the landmark.[11] In addition, he may be able to transfer certain unused development rights from the landmark site to other properties.[12]

While economically attractive to the government involved,[13] landmarks preservation by regulation is troublesome in that it places on the shoulders of a single landowner the major if not the full financial burden of providing a significant benefit for the enjoyment and welfare of the entire community. This landowner, often a private individual or corporation, may be most unwilling to become a philanthropist by governmental fiat. If the burden is sufficiently great, a landowner subject to the New York City Landmarks Preservation Law[14] may argue that there has been a "taking" in viola-

propriation of private property for public use under the eminent domain power, does not require compensation under the Fifth and Fourteenth Amendments of the United States Constitution.

> Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgement by the State of rights in property without making compensation. But restrictions imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious—as it may because of further change in local or social conditions—the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting).

11. *See* N.Y. GEN. MUN. LAW § 96-a (McKinney 1977); N.Y.C. ADMIN. CODE ch. 8-A § 207-8.0(c) (Williams 1976). *See also* Note, *Encouraging Historic Preservation Through the Federal Tax System: The Tax Reform Act of 1976*, 4 COLUM. J. ENVT'L L. 221 (1978) for a description of the income tax benefits allowable under I.R.C. §§ 167(o), 191 to rehabilitators of historic commercial buildings.

12. *See* N.Y.C. ZONING RESOLUTION §§ 74-79 to 74-793 (1975). *See generally* note 122 *infra*. Note that the landmark designation may render certain development rights unusable at the landmark site.

13. The rationale behind regulatory landmarks preservation—as opposed to the eminent domain approach—has been cogently set forth by Chief Judge Breitel, writing for a unanimous New York Court of Appeals, in *Penn Central Transportation Co. v. City of New York*, the case involving Penn Central's plan to build an office tower atop Grand Central Terminal in New York City:

> In times of easy affluence, preservation of historic landmarks through the use of the eminent domain power might be desirable, or even required. But when a less expensive alternative is available, especially when a city is in financial distress, it should not be forced to choose between witnessing the demolition of its glorious past and mortgaging its hopes for the future.

Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 337 (1977), *aff'd*, 438 U.S. 104 (1978).

14. *See* note 7 *supra*.

tion of the Fifth and Fourteenth Amendments of the United States Constitution,[15] as well as a violation of either Article 1, section 6 or Article 1, section 7 of the New York State Constitution.[16] It is more than likely that this issue will be thoroughly litigated in the controversy which presently surrounds the efforts to save Radio City Music Hall from demolition,[17] unless a compromise acceptable to both New York City and Rockefeller Center, Inc. [hereinafter, R.C.I.], the owner of the Music Hall, can be reached.

The Radio City controversy does not call into question the intrinsic constitutionality of New York City's Landmarks Preservation Law, since that was affirmed by the United States Supreme Court in its June, 1978 decision in *Penn Central Transportation Co. v. City of New York*.[18] In that case, the Court upheld the power of New York City to prohibit the construction of a multi-story office building above Grand Central Terminal, which had been designated a landmark, without having to pay monetary compensation to the Penn Central Transportation Company [hereinafter, Penn Central], the terminal's owner. The circumstances of the case were unusual, however, in that (1) the landmark designation of Grand Central Terminal was unchallenged in the litigation;[19] (2) Penn Central

15. *See* note 6 *supra*.

16. Article 1, sections 6 and 7 of the New York State Constitution provide, respectively, that no one may be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation. N.Y. CONST. art. 1, §§ 6, 7. In Fred F. French Inv. Co., Inc. v. City of New York, 39 N.Y. 2d 587 (1976), Chief Judge Breitel held that mere regulation of the uses of private property did not amount to a taking for which compensation must be paid under the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, § 7 of the New York State Constitution, but, if overly onerous, would constitute a violation of the due process clauses of the Fourteenth Amendment of the United States Constitution and Article 1, § 6 of the New York State Constitution. *Id.* at 594-95. He reiterated this point in Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 335-36 (1977), *aff'd*, 438 U.S. 104 (1978). The United States Supreme Court, however, explicitly rejected this premise in its *Penn Central* opinion: "As is implicit in our opinion, we do not embrace the proposition that a 'taking' can never occur unless Government has transferred physical control over a portion of a parcel." 438 U.S. at 123 n.25. Presumably, the New York courts will also reject the Breitel line of reasoning with regard to the New York constitutional provisions. They are bound, however, to do so with regard to the federal constitutional provisions.

17. *See* N.Y. Times, Jan. 5, 1978, at A1, col 4; *id.*, Jan. 7, 1978, at 1, col. 5; *id.*, Jan. 8, 1978, § 4, at 20, col. 1; *id.*, Jan. 9, 1978, at A1, col. 1; *id.*, Jan. 11, 1978, at B3, col. 1; *id.*, Mar. 6, 1978, at C18, col. 5; *id.*, Mar. 14, 1978, at 28, col. 6; *id.*, Mar. 29, 1978, at B3, col. 1; *id.*, Apr. 12, 1978, at B2, col. 2; *id.*, Apr. 13, 1978, at B4, col. 3; *id.*, Dec. 26, 1978, at B10, col. 1.

18. 438 U.S.104 (1978).

19. *Id.* at 116, 132.

was not planning to cease using the property as a railroad terminal, and the Court found that the designation did not "interfere in any way" with such a use;[20] and (3) Penn Central conceded that the terminal could earn a profit "in its present state,"[21] and consequently the company could not claim that construction of the office building was necessary in order to maintain the site's profitability. Thus, application of the Landmarks Preservation Law to Grand Central Terminal was constitutionally permissible because "[t]he restrictions imposed [by the landmark designation] are substantially related to the promotion of the general welfare,"[22] *and* because Penn Central was able to use the terminal "for its intended purpose"[23] while obtaining "a 'reasonable return' on its investment."[24]

The Radio City controversy raises the different question of whether the regulatory landmarks preservation law can be applied to a private landowner in a situation where the landmark designation (1) virtually destroys the economic viability of the affected property; and (2) so severely limits the business potential of a commercial property as to prevent its owner from utilizing it for any purpose other than the one for which it had been used prior to the designation. In the case of Radio City, this means forcing R.C.I. against its will to remain the operator of an enormous theater. In essence, the question is whether the designation of Radio City Music Hall as a landmark under existing circumstances must be regarded as "governmental action in the form of regulation. . . so onerous as to constitute a taking which constitutionally requires compensation."[25]

This article explores the implications of R.C.I.'s challenge to the New York City Landmarks Preservation Law. First, it outlines the relevant provisions of the law and describes the sequence of events in the Radio City controversy. The various factors that could cause a court to find an unconstitutional "taking" in the Radio City case are then examined, and some suggestions are made for amendments to the Landmarks Preservation Law. Finally, the article determines that the statute may well be unconstitutional as applied to Radio City.

20. *Id.* at 136.
21. *Id.* at 129.
22. *Id.* at 138.
23. *Id.* at 138 n.36.
24. *Id.* at 136. For the N.Y.C. Landmarks Preservation Law's definition of "reasonable return," *see* note 41 and accompanying text *infra*.
25. Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

II. THE NEW YORK CITY LANDMARKS PRESERVATION LAW

A. *The Relevant Provisions*

Before discussing the Radio City controversy, it is essential to examine briefly the New York City Landmarks Preservation Law. Under section 96-a of the New York State General Municipal Law,[26] municipalities are "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."[27] Accordingly, section 205-1.0(b) of chapter 8-A of the New York City Administrative Code declares it to be "a matter of public policy that the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people."[28]

In pursuance of this policy, a Landmarks Preservation Commission [hereinafter, Landmarks Commission][29] has the power to designate and regulate "landmarks, portions of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts."[30] Once a property has been designated a landmark by the Landmarks Commission following a public hearing,[31] and approved as

26. N.Y. GEN. MUN. LAW § 96-a (McKinney 1977). This statute, enacted in 1956, is the enabling law for all New York State and municipal landmarks preservation laws. It should not be confused with *the other* N.Y. GEN. MUN. LAW § 96-a (McKinney 1977) which deals with the use of lands for neighborhood youth centers.

27. The statute further provides:

> Such regulations, special conditions and restrictions may include appropriate and reasonable control of the use or appearance of neighboring private property within public view, or both. In any such instance such measures, if adopted in the exercise of the police power, shall be reasonable and appropriate to the purpose, or if constituting a taking of private property shall provide for due compensation, which may include the limitation or remission of taxes.

N.Y. GEN. MUN. LAW § 96-a (McKinney 1977).

28. N.Y.C. ADMIN. CODE ch. 8-A, § 205-1.0(b) (Williams 1976).

29. Created under N.Y.C. CHARTER § 2004(1) (Williams 1976). The Landmarks Commission consists of eleven members, including "at least three architects, one historian qualified in the field, one city planner or landscape architect, and one realtor. The membership shall include at least one resident from each of the five boroughs." *Id.*

30. N.Y.C. CHARTER § 2004(6) (Williams 1976).

31. N.Y.C. ADMIN. CODE ch. 8-A, § 207-2.0(a) (Williams Supp. 1978-1979).

such by the Board of Estimates and the City Planning Commission,[32] its owner is under an affirmative duty to maintain the landmark in good repair.[33] The owner can alter or demolish it only if the Landmarks Commission authorizes him to do so,[34] or after a judicial determination.[35] Violations of these provisions constitute misdemeanors and are punishable by fines, imprisonment, or both.[36]

Thus, it is clear that landmark designation places a substantial economic burden on the property owner. It is true that this burden can be alleviated by tax relief.[37] Also, certain unused development rights of the landmark site may be transferred to "adjacent" properties.[38] However, this last option is only valuable to the landowner if there in fact exists an adjacent property to which these development rights *can* practically be transferred.

On the other hand, presumably in order to comply with constitutional requirements,[39] the statute provides that a landmark designation cannot be outrageously oppressive. The owner of a landmark must be able to obtain a "reasonable return" from his property.[40] For purposes of the Landmarks Preservation Law, "reasonable return" is defined as "[a] net annual return of six per centum of the valuation of an improvement parcel."[41] If the landowner can establish "to the satisfaction of the [Landmarks] commission" that his landmark "is *not capable* of earning a reasonable return,"[42] *and* if he:

32. *Id.* § 207-2.0(f), (g).

33. N.Y.C. ADMIN. CODE ch. 8-A, § 207-10.0 (Williams 1976).

34. *Id.* 207-4.0(a)(1).

35. Landmark designations are reviewable as to violations of procedure, errors of law, arbitrariness, capriciousness, or abuse of discretion under N.Y. CIV. PRAC. § 7803(3) (McKinney 1963). *See* Lutheran Church v. City of New York, 35 N.Y.2d 121, 128 n.2 (1974). In addition, a landowner can seek a declaratory judgment that a designation is unconstitutional as applied under N.Y. CIV. PRAC. § 3001 (McKinney 1963).

36. N.Y.C. ADMIN. CODE ch. 8-A, § 207-16.0 (Williams 1976).

37. *Id.* § 207-8.0(c).

38. N.Y.C. ZONING RESOLUTION §§ 74-79 to 74-793 (1975). *See generally* note 122 *infra*.

39. If a regulation of land uses is unduly onerous, it may become a taking requiring compensation under the Fifth and Fourteenth Amendments of the United States Constitution. *See* Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962). *See also* note 6 *supra*.

40. N.Y.C. ADMIN. CODE ch. 8-A, § 207-8.0(a)(1)(a) (Williams 1976).

41. *Id.* § 207-1.0(v)(1).

42. *Id.* § 207-8.0(a)(1)(a) (emphasis added). *See* notes 131-36 and accompanying text *infra*.

> (1) in the case of an application for a permit to demolish, seeks in good faith to demolish such [landmark] immediately (a) for the purpose of constructing on the site thereof with reasonable promptness a new building or other income-producing facility, or (b) for the purpose of terminating the operation of the [landmark] at a loss; or
>
> (2) in the case of an application for a permit to make alterations or reconstruct, seeks in good faith to alter or reconstruct such [landmark], with reasonable promptness, for the purpose of increasing the return therefrom . . .[43]

the statute enables him to obtain a certificate of appropriateness authorizing demolition, alterations or reconstruction of the landmark.

Even for a landowner who *can* prove that his landmark is not capable of earning a reasonable return, such a certificate of appropriateness is not easily obtainable. First, the Landmarks Commission has ninety days from the date of the filing of the request for the certificate to make a preliminary determination as to its merits.[44] Then, if it finds the landmark owner's proof persuasive, it must "endeavor to devise, in consultation with the applicant, a plan whereby the [landmark] may be (1) preserved or perpetuated in such manner or form as to effectuate the purposes of this chapter, and (2) also rendered capable of earning a reasonable return."[45] According to the Landmarks Preservation Law, "[a]ny such plan may include, but shall not be limited to, (1) granting of partial or complete tax exemption, (2) remission of taxes and (3) authorization for alterations, construction or reconstruction appropriate for and not inconsistent with the effectuation of the purposes of this chapter."[46]

If the Landmarks Commission is able to formulate such a plan,[47] it must mail a copy of it to the landmark owner within sixty days after the date of the preliminary determination.[48] In case such a plan consists "in whole or in part of any proposal other than tax exemption and/or remittance of taxes," the landowner has the option

43. N.Y.C. ADMIN. CODE ch. 8-A, § 207-8.0(a)(1)(b) (Williams 1976).
44. *Id.*
45. *Id.* § 207-8.0(b).
46. *Id.* § 207-8.0(c).
47. Failure on the part of the Landmarks Commission to devise such a plan within the specified time will not give rise to the Commission's obligation to issue a notice to proceed for at least another 90 days. *Id.* § 207-8.0(g)(2).
48. *Id.* § 207-8.0(d).

to accept or reject it.[49] If he rejects the plan, the Landmarks Commission then has ten days to recommend to the mayor in writing "that the city acquire a specified appropriate protective interest" in the landmark,[50] without the nature of such an interest being defined. Only if the city chooses not to act upon such recommendation within ninety days after is has been transmitted to the mayor is the Landmarks Commission obligated to issue promptly to the landowner a notice to proceed with the demolition or alteration of the landmark.[51]

Thus, even in the most meritorious of cases, there could well be a lapse of 250 days—*i.e.*, more than eight months—between the date the landmark owner files his application for a certificate of appropriateness and the date he receives the Landmark Commission's authorization to proceed.[52] During this time, he is obligated to maintain the landmark in good repair at his own expense.[53]

B. *An Initial Evaluation*

Before considering the facts of the Radio City controversy, it is worthwhile to focus briefly on the impact the Landmarks Preservation Law can have on the landmark owner if it is enforced in the manner described above. The Counsel for the New York City Planning Commission has recently observed that:

> the City's landmarks statute, far from imposing an absolute bar to alteration, merely imposes mandatory delays and public relations hurdles to be surmounted by the owner before the wrecker's ball is allowed to swing. As a last resort, the City always has the right, if preservation is deemed imperative and cannot otherwise be achieved, to exercise its eminent domain option and pay for the landmark site.[54]

49. *Id.* § 207-8.0(f).

50. *Id.* § 207-8.0(g)(1).

51. *Id.* § 207-8.0(g)(2).

52. It should be noted that this scenario, notes 44-51 *supra*, applies only to a landowner who has not received tax benefits for his landmark property prior to the application for a certificate of appropriateness. The owner of a wholly or partly tax exempt landmark must meet more exacting criteria in order to obtain authorization to alter or demolish it, and for him the time span between the initial application for the certificate and the receipt of a notice to proceed could be as long as 380 days. *See* N.Y.C. ADMIN. CODE ch. 8-A, § 207-8.0(a)(1), (a)(2), (i)(1), (i)(4)(a), (i)(4)(b) (Williams 1976).

53. N.Y.C. ADMIN. CODE ch. 8-A, § 207-10.0 (Williams 1976).

54. Marcus, *Villard Preserv'd: or Zoning for Landmarks in the Central Business District*, 44 BROOKLYN L. REV. 1, 9 (1977).

A more realistic conclusion, however, is that the statute does in fact impose an absolute bar to the alteration or demolition of privately owned landmarks under many if not most circumstances.

One problem arises if the Landmarks Commission devises a plan consisting entirely of tax relief which, in its consideration, would be sufficient to guarantee a "reasonable return" on the property,[55] since the statute does not give the landmark owner the option to reject such a plan. The Landmarks Commission may halt the process at an even earlier stage by rejecting the application if it does not accept the validity of the landowner's grounds for requesting a certificate of appropriateness, or if it believes that the landmark, "under reasonably efficient and prudent management,"[56] *would be* "capable of earning a reasonable return."[57] In these situations, the landmark owner is left with the alternatives of either accepting the Landmark Commission's determination and utilizing the property as best he can, or challenging the determination in what is certain to be costly and time-consuming litigation.

Furthermore, to say that "[*a*]*s a last resort* the city always has the right" to purchase a particular landmark[58] is to ignore the reality. Landmarks preservation by eminent domain is both prohibitively expensive and politically unpopular.[59] Especially "when a city is in financial distress,"[60] it is difficult to justify spending millions of dollars on a parcel of real estate rather than allocating the money for such fundamental necessities as health services, education, housing and public transportation. Regardless of how essential the preservation of a landmark is deemed to be, no municipality is likely to exercise its eminent domain prerogative as long as there exists *any* hope of achieving the desired purpose by means that do not require the outlay of public funds. Thus, a landmarks preservation statute such as New York City's could be

55. *See* notes 40-41 and accompanying text *supra*.

56. "Capable of earning a reasonable return" is defined in the New York City Landmarks Preservation Law as "[h]aving the capacity, under reasonably efficient and prudent management, of earning a reasonable return." N.Y.C. ADMIN. CODE Ch. 8-A, § 207-1.0(c) (Williams 1976).

57. *See* note 42 *supra*, notes 131-136 and accompanying text *infra*.

58. Emphasis added. Marcus, *Villard Preserv'd*, *supra* note 54, at 9.

59. *See* J. COSTONIS, SPACE ADRIFT 11-12 (1974); Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799, 803 (1976).

60. Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 337 (1977), *aff'd*, 438 U.S. 104 (1978). *See* note 13 *supra*.

abused by the authorities in order to avoid, or at least delay, having to decide between acquiring a landmark by eminent domain and allowing it to be either demolished or—from a historic or aesthetic point of view—fatally mutilated. The spectre of such abuse is raised by the Radio City controversy.

III. THE RADIO CITY MUSIC HALL CONTROVERSY

A. *The Factual Context*

The interior of Radio City Music Hall fully qualifies as an interior landmark under the New York City Landmarks Preservation Law. The statute defines an interior landmark as:

> An interior, or part thereof, any part of which is thirty years old or older, and which is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated as an interior landmark pursuant to the provisions of this chapter.[61]

Opened in December, 1932, Radio City has been called the "showplace of the nation"[62] and an "intergalactic Shangri-La."[63] Its integrated interior is considered to be "among the most impressive spaces in the history of modern theater design,"[64] as well as, according to one prominent professor of fine arts, "the greatest creation of art deco style."[65] In addition, the Music Hall has long been "the symbol of the tourist industry of New York City."[66] During its first forty years, it attracted 230 million people.[67] Thus, in the words of New York State Lieutenant Governor Mary Ann Krupsak, "[i]ts assets demonstrate valid historical, aesthetic and economic significance completely in consonance with the law upon which the Landmarks Commission must base its judgment."[68] Radio City was

61. N.Y.C. ADMIN. CODE ch. 8-A, § 207-1.0(m) (Williams 1976).

62. N.Y. Times, Dec. 15, 1957, § 11, at 7, col. 3.

63. *Id.* Jan. 8, 1978, 4, at 20, col. 1.

64. Landmarks Preservation Commission, Designation List No. 114, LP-0995, at 2 (Mar. 28, 1978).

65. Transcript, Meeting of the Landmarks Preservation Commission, at 104 (Mar. 14, 1978) (testimony of Professor Marvin Trachtenberg of New York University).

66. Statement by Lieutenant Governor Mary Ann Krupsak, N.Y. Times, Jan. 7, 1978, at 1, col. 5.

67. N.Y. Times, July 20, 1976, at 38, col. 1.

68. Transcript, Meeting of the Landmarks Preservation Commission, at 4-5 (Mar. 14, 1978).

fully eligible for interior landmark designation as early as 1965 when the New York City Landmarks Preservation Law was enacted; the actual designation, however, did not occur until March 28, 1978,[69] shortly after R.C.I. announced the Music Hall's imminent demise.

On January 4, 1978, Alton G. Marshall, the president of Rockefeller Center, Inc., informed New York City Mayor Edward I. Koch that Radio City would close at the end of the 1978 Easter show.[70] R.C.I.'s decision was supposedly the result of the Music Hall's long-term financial difficulties. Attendance had declined during the previous decade from an average of five million a year until 1967 to less than two million in 1977.[71] In 1975, the Music Hall had lost $1.3 million.[72] Its losses had increased to $2.3 million in 1977, and the projected deficit for 1978 was $3.5 million.[73]

Immediately after R.C.I.'s announcement, widespread efforts to prevent Radio City's destruction were undertaken.[74] Lieutenant Governor Krupsak organized a "rescue committee" consisting of public officials, labor leaders, and members of the business and cultural communities,[75] and Mayor Koch assigned the Deputy Mayor for Economic Development to coordinate the city's efforts on behalf of Radio City.[76] On January 10, less than a week after the news that Radio City would close had been made public, the Landmarks Commission announced that it was going to consider whether the theater should be designated a landmark.[77] R.C.I., however, vehemently opposed such a development:

> We intend to resist landmark designation for the interior of the hall on the grounds that such action would impair appropriate utilization of this vital structure and that we are prepared to seek recourse in the courts in the event of adverse governmental action.
>
> We are prepared to take this course because we feel so strongly that the City of New York and Rockefeller Center must not be saddled with a dead facility, and that we must be free to

69. N.Y. Times, Mar. 29, 1978, at B3, col. 1.
70. *Id.*, Jan. 5, 1978, at A1, col. 4.
71. *Id.*, Jan. 8, 1978, § 4, at 20, col. 1.
72. *Id.*, July 20, 1976, at 38, col. 1; *id.*, Jan. 5, 1978, at A1, col. 4.
73. *Id.*, Jan. 7, 1978, at 1, col. 5; *id.*, Jan. 8, 1978, § 4, at 20, col. 1; *id.*, Jan. 9, 1978, at A1, col. 1.
74. *Id.*, Jan. 7, 1978, at 1, col. 5; *id.*, Jan. 9, 1978, at A1, col. 1.
75. *Id.*, Jan. 9, 1978, at A1, col. 1.
76. *Id.*, Jan. 7, 1978, at 1, col. 5.
77. *Id.*, Jan. 11, 1978, at B3, col. 1.

> seek solutions which will result in a vital contribution to our great city and to Rockefeller Center.[78]

On March 14, 1978, the Landmarks Commission held a public hearing concerning Radio City. Numerous public figures, community leaders, art historians and architects testified at length in favor of landmark designation, while officers of R.C.I. steadfastly opposed such a measure.[79] Specifically, the latter argued that Radio City could not be economically viable in its existing condition, and that landmark designation would prevent R.C.I. from making potentially necessary alterations in its interior that would prevent the Music Hall's continued operation at a loss.[80]

Two weeks later, the Landmarks Commission, finding that Radio City "is the only surviving Art Deco theater in the country to incorporate so great a variety of architectural, artistic, and decorative features," that these elements "are successfully integrated and create a totality of design," and that its interior "is of unique importance to American architecture and design,"[81] designated it as an interior landmark.[82] The designation covered virtually the entire interior of the Music Hall, from the ground floor ticket lobby and ticket booths to the upper part of the stage house and the skylight.[83] Almost every possible tangible element of Radio City was placed under the protection, or at least the vigilance, of the Landmarks Commission.

On April 12, 1978, R.C.I. entered into an agreement in principle with the New York Urban Development Corporation [hereinafter, U.D.C.] and the Lieutenant Governor of New York.[84] Pursu-

78. *Id.*, Mar. 6, 1978, at C18, col. 5.

79. Transcript, Meeting of the Landmarks Preservation Commission (Mar. 14, 1978). *See also* N.Y. Times, Mar. 14, 1978, at 28, col. 6.

80. Transcript, Meeting of the Landmarks Preservation Commission, at 27, 39 (Mar. 14, 1978).

81. Landmarks Preservation Commission, Designation List No. 114, LP-0995, at 23 (Mar. 28, 1978).

82. *See* note 61 and accompanying text *supra*.

83. Included were the state and stage wings, the auditorium and its seats, the balconies and their seats, the mezzanines, lobbies, lounges, powder rooms, staircases, telephone alcoves, telephone booths, the various men's and ladies' toilets, the drinking fountains, floor coverings, stage curtains, lavatory fixtures, the orchestra pit, and the stage elevator. Landmarks Preservation Commission, Designation List No. 114, LP-0995, at 23-24 (Mar. 28, 1978).

84. The U.D.C. was created by the New York State Legislature in 1968. New York State Urban Development Corporation Act, N.Y. UNCONSOL. LAWS §§ 6251-6285 (McKinney Supp. 1978-1979). Its principal purpose is "to acquire, con-

ant to this agreement, U.D.C. was to provide financial support for Radio City, and R.C.I., in turn, was to lease the Music Hall to a non-profit subsidiary of U.D.C. set up for the express purpose of operating the theater. The agreement was intended to last one year, during which time R.C.I. would undertake to pay taxes, ground rent to Columbia University, its landlord, and $5,000 a week for maintenance.[85] In the meantime, U.D.C. was to spend $200,000 for a feasibility study to explore ways of subsidizing Radio City after April, 1979 when the agreement was to expire.[86] Among the alternatives being considered by U.D.C. was the construction of an office tower atop the Music Hall. Under this proposal, part of the rental income from the tower would go toward paying the operating expenses of Radio City. Another option under consideration was transferring the air rights above Radio City to another Rockefeller Center location, or selling them outright to an independent developer.[87]

On May 3, 1978, R.C.I. applied to the Landmarks Commission for a certificate of appropriateness authorizing it to demolish Radio City on grounds of insufficient return pursuant to section 207-8.0 of the landmarks preservation statute,[88] but it expressed its willingness to have the certificate conditioned on the failure of the U.D.C. feasibility study to arrive at a viable framework for operating the Music Hall.[89] R.C.I.'s goal was to have the period of the U.D.C. study and the period of the statutory process for obtaining a certificate of appropriateness[90] run concurrently.[91] How-

struct, reconstruct, rehabilitate or improve. . . industrial, manufacturing, commercial, educational, recreational and cultural facilities, and housing accommodations for persons and families of low income" in the State's "slum or blighted" urban centers, and "to carry out the clearance, replanning, reconstruction and rehabilitation of such substandard and insanitary areas." N.Y. UNCONSOL. LAWS § 6251 (McKinney Supp. 1978-1979).

85. N.Y. Times, Apr. 13, 1978, at B4, col. 3.

86. *Id. See* note 96 and accompanying text *infra*.

87. N.Y. Times, Dec. 26, 1978, at B10, col. 1.

88. *See* notes 42-43 and accompanying text *supra*.

89. Landmarks Preservation Commission, Determination of Application for a Certificate of Appropriateness, LPC No. 78233, at 1, 4 n.** (July 11, 1978).

90. *See* notes 44-51 and accompanying text *supra*.

91. It is necessary to pursue the Certificate of Appropriateness, since the procedures and provisions of the Landmarks Law require a considerable passage of time before such a certificate can be effective. This time span must run concurrently with our efforts with the UDC and the Lieutenant Governor so that in the event that our objectives are not achieved with UDC and the Lieutenant Governor, that is, to develop an entertainment format which will preserve the inte-

ever, on July 11, 1978, the Landmarks Commission denied R.C.I.'s application on the ground that R.C.I. did not have any "immediate" plans to demolish Radio City as required by section 207-8.0(a)(1)(b)(1) of the statute.[92] Consequently, the Landmarks Commission did not find it necessary to address itself to the principal question of whether in fact Radio City was incapable of earning a reasonable return.[93]

On August 30, 1978, R.C.I. withdrew from the operational arrangement with U.D.C., and shortly thereafter it reassumed full control over Radio City.[94] Several months later, in January, 1979, the feasibility study commissioned pursuant to the April, 1978 agreement in principle[95] was completed. Based on an analysis of the mid-Manhattan office market as well as New York City's overall fiscal condition, the study concluded that utilization of the undeveloped air rights above Radio City to construct an office tower of about thirty-one stories could yield an equity return of between 6.6% and 19.1% a year, while still providing an annual subsidy of $1.5 million to the Music Hall.[96]

Of course, any prediction as to the revenue potential of any building not yet in existence is necessarily speculative. In other words, R.C.I. is not guaranteed by anyone that an office tower on top of Radio City of the type envisaged by the feasibility study *will* be profitable and that its earnings *will* cover the Music Hall's defi-

rior of the Music Hall, then Rockefeller Center will be in a position to replace the present facility with an economically viable facility. No applicant should have the burden of time span(s) running seriatim.

Determination of Application, *supra* note 89, at 10 (statement of Alton G. Marshall, president of R.C.I. as well as chairman and president of the Radio City Music Corporation, a wholly owned subsidiary of R.C.I.).

92. *See* note 43 and accompanying text *supra*.

93. Determination of Application, *supra* note 89, at 14-15.

94. N.Y. Times, Nov. 17, 1978, at C10, col. 4; *id.*, Dec. 26, 1978, at B10, col. 1.

95. *See* notes 84-87 and accompanying text *supra*.

96. Draft, DEVELOPMENT FEASIBILITY ANALYSIS OF RADIO CITY MUSIC HALL, FOR NEW YORK STATE URBAN DEVELOPMENT CORP., ROCKEFELLER CENTER, INC., LIEUTENANT GOVERNOR, STATE OF NEW YORK (Jan. 23, 1979) (prepared by Landauer Associates, Inc., 200 Park Avenue, New York, New York).

The air rights development appears to be feasible based upon projections of construction costs, operating expense, real estate tax, market rent and financing. Calculations assuming a range of optimistic to pessimistic assumptions indicate achievable equity returns of 6.6-19.1% while still providing a $1.5 million annual subsidy to the Music Hall. Anticipated actual equity returns should be in the order of 10%, based upon a mixture of optimistic and pessimistic projections.

Id. at 2. *See also* N.Y. Times, Feb. 11, 1979, § 8, at 1, col. 4.

cit; the study merely suggests that such a tower *probably could* yield a sufficient return to do so. Thus, if R.C.I. were to invest the approximately $120 million required to build the new tower, it would be taking the substantial risk that the study's projections might turn out to be erroneous.[97] At present, therefore, R.C.I. would want to avoid the constraints of the Landmarks Preservation Law which restrict its ability to dispose of Radio City.

B. *The Legal Issues*

1. The Contours of the Taking Argument

Even though the general validity of the New York City Landmarks Preservation Law has been established in *Penn Central*,[98] R.C.I. may nevertheless be able to challenge the statute's validity as applied to Radio City. It is clear that unduly oppressive governmental regulation of private property can result in an unconstitutional taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution. As Justice Holmes observed in 1922 in a by now celebrated aphorism, "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[99]

Regulatory preservation laws in New York have been held to constitute a taking on more than one occasion. In *Lutheran Church v. City of New York*,[100] for instance, the New York Court of Appeals in 1974 declared unconstitutional the landmark designation of a building belonging to a religious corporation organized for charitable purposes where the plaintiff was able to demonstrate economic hardship as the result of the designation. In a 1966 decision,

97. The figure of $120 million as the estimated cost of building the office tower was given in N.Y. Times, Feb. 11, 1979, § 8, at 1, col. 4. In the feasibility study, Landauer Associates clearly pointed out the element of conjecture on which their conclusions had to be based:

> In all of the calculations, attempt has been made to be both realistic and conservative. Notwithstanding, the forecasting of variables such as construction costs, operating expenses, real estate taxes and market rents, some five to six years in the future, is hazardous at best. All the estimates, however, are based upon trends over the past 20 years, giving full consideration to the cyclical trends that have occurred within that period.

Draft, DEVELOPMENT FEASIBILITY ANALYSIS, *supra* note 96, at 25.

98. 438 U.S. 104 (1978).

99. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). *See also* Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

100. 35 N.Y.2d 121 (1974).

Matter of Keystone Associates v. Moerdler,[101] the same Court per Judge Keating held unconstitutional a specially enacted New York State law which empowered the New York City Superintendent of Buildings to refuse a demolition permit for the old Metropolitan Opera House for 180 days while attempts were made to obtain private funds in order to purchase and thus preserve the building:

> The statute here in question constituted an attempt by the Legislature to indulge those citizens—among whom is included the writer of this opinion—who desire the preservation of this grand old building for the staging of opera. However, that purpose may not be achieved by the appropriation of the property of other citizens. If dedication and use for a public purpose is desired, then just compensation must be paid. That is the demand of our Constitution.[102]

In a similar vein, Justice Rehnquist observed in his forceful dissent in *Penn Central* that the benefits "from preservation of the Grand Central Terminal will accrue to all the citizens of New York." Placing the entire burden of maintaining the landmark on Penn Central rather than spreading the cost evenly across the entire population, he argued, was precisely the "sort of discrimination that the Fifth Amendment prohibits."[103]

In the majority opinion in *Penn Central*, however, Justice Brennan held on behalf of six of the Supreme Court justices that the New York City Landmarks Preservation Law was not invalid on its face. As a result of that decision, an affirmative answer has been given to the question "whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a 'taking' requiring the payment of 'just compensation'."[104] Justice Brennan conceded that the law did not affect all landowners alike. He observed, however, that "[l]egislation designed to promote the general welfare commonly bur-

101. 19 N.Y.2d 78 (1966).

102. *Id.* at 90.

103. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 148-49 (1978).

104. *Id.* at 107. *Cf.*, however, N.Y. Court of Appeals Chief Judge Breitel's observation in his *Penn Central* opinion that the New York City landmarks preservation statute "needs improvement. In some cases it protects property owners inadequately." Penn Central Transp. Co. v. City of New York, 42, N.Y.2d 324, 337 (1977), *aff'd*, 438 U.S. 104 (1978).

dens some more than others."[105] The essential question, he concluded, was "whether the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it]'."[106]

It is essential to stress that the Supreme Court's decision in *Penn Central* does not provide a blanket sanction for regulatory landmarks preservation statutes such as New York City's under all conceivable circumstances. Justice Brennan admitted that:

> this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons. See *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the Government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." *United States v. Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958) . . . .[107]

Consequently, it remains true, even after *Penn Central*, that, as Professor Curtis J. Berger of Columbia Law School had written before the resolution of that case:

> [the] balancing process—public benefit versus private detriment —suggests why the taking issue remains so intractable. . . . For balancing depends upon human perceptions and attitudes and intuitions which we cannot reduce to metric measure, even if we could somehow quantify the many technological and economic variables. Thus, unless we turn to the absolutes of either universal compensation or universal socialization, legislatures first and courts second must continue to balance private and public interests. We can ask that the process be intelligent, that it be open, that it be fair, that wherever possible it seek to accommodate. We should not also expect that the balancing itself will become simpler.[108]

The question then arises how this balancing can be achieved in a situation such as that involving Radio City. Among the factors that must be taken into consideration in determining the validity of a

105. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 133 (1978).

106. *Id.* at 136, *citing to* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

107. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

108. Berger, *The Accommodation Power*, *supra* note 59, at 823.

statute which regulates the use of private property in any individual case are "[t]he economic impact of the regulation on the claimant, and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations"; and "the character of the governmental action."[109] In the following pages, therefore, focus centers on the three main aspects of the Radio City situation which are significant to the taking issue: the effect on the economic usefulness of the property, the landowner's expectations, and the nature of the government's regulatory involvement.

2. The Economic Impact of the Regulation

The extent to which the government's regulatory activity constitutes an unlawful taking often depends upon its impact on the economic usefulness of the property. Thus, Justice Brennan observed in *Penn Central* that the Court in *Goldblatt v. Hempstead*[110] had upheld a city safety ordinance which effectively prohibited the claimant from continuing to use his property for his mining business on the grounds that (1) the ordinance did not appear to "prevent the owner's reasonable use of the property since the owner made no showing for an adverse effect on the value of the land"; and (2) "the restriction served a substantial public purpose."[111] Nevertheless, he went on, it was "implicit in *Goldblatt* that a use restriction on real property might constitute a 'taking' . . . if it has an unduly harsh impact on the owner's use of the property."[112]

Even though the preservation of Radio City must be conceded to be "a substantial public purpose" in light of *Penn Central*, it can be argued that the landmark designation of the Music Hall has affected the value of R.C.I.'s property so adversely as to preclude its "reasonable" commercial use. As mentioned above, Penn Central did not challenge the landmark designation of Grand Central Terminal in the course of the litigation, and it intended to continue utilizing the property as a railroad terminal.[113] In contrast, R.C.I. may well wish to cease operating Radio City as a theater. The Landmarks Commission's action at issue in *Penn Central* only prohibited the landowner from increasing its profits from its property by erecting the office tower atop the terminal. In other words, it

109. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
110. 369 U.S. 590 (1962).
111. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).
112. *Id.*
113. *See* notes 19-20 and accompanying text *supra*.

did not place any new affirmative duties or burdens on Penn Central. Radio City's designation as an interior landmark, however, effectively paralyzes the entire commerical enterprise.

This placing of restrictions on the entire interior of a structure is conceptually different from a situation where only a part of a building—*e.g.*, its exterior or its lobby—has been declared a landmark. In the latter case, the landowner still has substantial flexibility as to the utilization of his property. Penn Central, for instance, can replace outdated railway tracks with modern ones, renovate the ticket booths, install additional benches or remove obsolete ones, and incorporate all necessary technological improvements in Grand Central Terminal despite its landmark status. Similarly, the owners of most other buildings that have been declared landmarks are free to conduct any of numerous appropriate businesses within them. The landmark designations of the exterior[114] and the lobby[115] of the Chrysler Building in New York City do not interfere with the leasing of the building's commercial space, which is its principal use.[116] While the landowner in *Goldblatt* was prevented from mining on his property, he presumably could have used it for other economically productive purposes. Radio City, meanwhile, cannot be used as anything other than a theater. As long as it is a landmark, R.C.I. can either operate it as such, without being able to make any substantial changes in its interior, or relinquish it at what is certain to be an absurdly low price.

Radio City's landmark designation has probably deprived the property of any realistic value, leaving R.C.I. in possession of a white elephant. Before the designation, R.C.I. could have demolished the Music Hall and erected a new building in its stead, or sold the parcel. Now, even assuming, for the sake of argument, that Radio City *could* earn a net annual return of six per cent of its assessed value,[117] it is unlikely at best that R.C.I. would be able to find a serious purchaser willing to pay any reasonable amount for the landmark. At present, an investor can obtain a higher rate of return by simply placing his money in a savings bank for a year, or by buying tax-exempt United States Treasury bonds.

114. Landmarks Preservation Commission, Designation List No. 118, LP-0992 (Sept. 12, 1978).

115. Landmarks Preservation Commission, Designation List No. 118, LP-0996 (Sept. 12, 1978).

116. *See also* N.Y. Times, Nov. 14, 1978, at C9, col. 1.

117. *See* note 41 and accompanying text *supra*.

It is true, of course, that in cases involving land use regulations "which, like the New York [Landmarks Preservation] law, are reasonably related to the promotion of the general welfare," the Supreme Court has "uniformly reject[ed] the proposition that diminution in property value, standing alone, can establish a taking."[118] Instead, "the 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit."[119]

For all practical purposes, R.C.I. is forced to remain in the theater business, and to continue operating Radio City in its existing state, regardless of whether it wishes to do so or not. Rather than merely *preventing certain uses* of the property, the landmark designation of the Music Hall's interior has *restricted* the building's utility to a *single use*. Thus, R.C.I. can certainly argue that this particular landmark designation "has an unduly harsh impact on its use of the property";[120] *i.e.*, that under the above circumstances, it is "so onerous as to constitute a taking which constitutionally requires compensation."[121]

Conceivably, the impact of the designation could be mitigated somewhat if R.C.I. were to transfer the unused air rights over Radio City to adjacent properties.[122] The Supreme Court has

118. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978).

119. *Id.*

120. *Id.* at 127.

121. Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

122. This is possible under N.Y.C. ZONING RESOLUTION § 74-79 (1975) which provides that "the City Planning Commission may permit development rights to be transferred to adjacent lots from lots occupied by landmark buildings, [and] may permit the maximum permitted *floor area* on such adjacent lot to be increased on the basis of such transfer of development rights. . . ." In *Penn Central*, Justice Brennan took notice of the fact that New York City's transferable development rights program has been criticized as "far from ideal." Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978). Professor Costonis has observed that:

> the program will prove attractive in the private sector in only two rather unusual situations: when a developer can be found who happens to own a lot across a street or intersection from the landmark, and, even rarer, when a landmark owner who owns a series of lots that connect with the landmark lot desires to build on one or more of those lots.
>
> The adjacency restriction, moreover, severely impairs the marketability of development rights. Their value turns wholly upon the vagaries of construction activity on the small number of transferee lots that happen to adjoin the landmark lot. . . .

J. COSTONIS, SPACE ADRIFT 55 (1974). Instead, Costonis advocates "permitting transfers throughout entire development rights transfer districts." *Id.* at 55-56. *See generally* J. COSTONIS, SPACE ADRIFT 1-167; Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975); Note, *The Disparity Issue: A Context for the Grand*

pointed out in this connection in *Penn Central* that in the case of Grand Central Terminal, "[w]hile these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation."[123] In the Radio City situation, however, the transfer of development rights to other sites appears to be impractical.[124]

The fact that Radio City is a prominent part of the Rockefeller Center complex must also be taken into account in any comprehensive evaluation of the Music Hall's designation as a landmark. In the New York Court of Appeals *Penn Central* decision, Chief Judge Breitel observed that Grand Central Terminal:

> may be capable of producing a reasonable return for its owners even if it can never operate at a profit. For it should be evident that plaintiff's heavy real estate holdings in the Grand Central area, including hotels and office buildings, would lose considerable value and deprive plaintiff of much income, were the terminal not in operation. Some of this income must, realistically, be imputed to the terminal.
>
> The situation is analogous to that of a flagship store in a regional shopping center. The flagship store may not produce enough income to justify its construction or maintenance, but it may draw enough customers into the other, smaller stores to make its operation worthwhile, and to extract concessions from the owners of the remainder of the center . . . .[125]

There exists a far stronger economic nexus between Grand Central Terminal and Penn Central's other properties than between Radio City and the rest of Rockefeller Center. The Music Hall can hardly be considered a "flagship" for Rockefeller Center's other commerical enterprises, most of which do not benefit from Radio City's existence to any significant degree. Nevertheless, it could be argued that Radio City is as integral a part of Rockefeller Center as the Chrysler Building's lobby and exterior[126] are of that entire building. In that case, the Music Hall's deficit would be factored

Central Terminal Decision, 91 HARV. L. REV. 402 (1977). *cf.* Berger, *The Accommodation Power*, note 59 *supra*.

123. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978).

124. *See* Draft, DEVELOPMENT FEASIBILITY ANALYSIS, *supra* note 96, at 2, 26.

125. Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 333-34 (1977), *aff'd*, 438 U.S. 104 (1978).

126. *See* notes 114-16 and accompanying text *supra*.

into Rockefeller Center's overall financial statement, and offset by its considerable income. However, such an argument fails to accord sufficient weight to Radio City's essentially independent economic structure within Rockefeller Center.

To the extent, therefore, that a harsh impact on the economic usefulness of a landmark suggests an unconstitutional taking, several factors must be emphasized in the Radio City situation. First of all, there is the diminution in value resulting from the overall designation which prevents virtually any alteration of the interior of the structure. A related consequence of this type of landmark designation is the restriction to a single use; unlike some other landmark owners, R.C.I. is deprived of any flexibility in its utilization of the building. There is, moreover, little chance that the option of transferring development rights will prove to be of much use to R.C.I. Finally, this crippling economic effect of the designation is not offset by any profitable nexus between the Music Hall and other properties owned by R.C.I.

3. The Parties' Expectations

A further problem with the New York City Landmarks Preservation Law is its failure to recognize the fundamental difference between private and public, or quasi-public landmark properties. In the New York Court of Appeals *Penn Central* opinion, Chief Judge Breitel accurately emphasized Grand Central Terminal's quasi-public character:

> Of primary significance . . . is that society as an organized entity, especially through its government, rather than as a mere conglomerate of individuals, has created much of the value of the terminal property. Although recent financial troubles and consequent governmental assistance make the fact more apparent, railroads have always been a franchised and regulated public utility, favored monopolies at public expense, subsidy, and with limited powers of eminent domain without which their existence and character would not have been possible.[127]

Radio City, on the other hand, has always been a private commercial enterprise to which the public has come as a "conglomerate of individuals." The fact that it is a popular theater and has become a tourist attraction does not give it a quasi-public status. Consequently, it is far less equitable for the state to restrict the use to

127. Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 332 (1977), *aff'd*, 438 U.S. 104 (1978).

which such a privately owned landmark can be put than it is in the case of Grand Central Terminal.

The point is that the statute should have focused on and taken into account the property owner's "distinct investment-backed expectations."[128] The owner of a railroad terminal, a museum, or an educational institution, for example, knows that the economic viability of the property depends on official state support, whether by governmental subsidies, funding for special projects, tax-exemption, or other organized public involvement. As a result, the owner of such a building has an obligation to the community, and the community, in turn, has a stake in its continued existence. Penn Central never intended to cease using Grand Central Terminal as a railroad station. Construction of the office building would have accomplished the subsidiary purpose of increasing Penn Central's profits from the property. Thus, Justice Brennan concluded in *Penn Central* that the Landmarks Preservation Law "does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel."[129]

In contrast, R.C.I. has carried the full burden of operating the Music Hall, and enjoyed the profits from it, for more than forty-five years without expecting or receiving public assistance. Throughout the existence of the building prior to its designation as a landmark, R.C.I. correctly regarded it to be *its* investment which it was able to use productively, and which it could cease to utilize as a theater at any time. Thus, the landmark designation of Radio City in effect penalizes R.C.I., in Justice Rehnquist's words, for having done "*too good* of a job in designing and building it. The city of New York, because of its unadorned admiration for the design, has decided that the owners of the building must preserve it unchanged for the benefit of sightseeing New Yorkers and tourists."[130] While such a determination can be valid as to a quasi-public landmark such as Grand Central Terminal, it remains to be resolved whether government may similarly frustrate the primary expectations of the owners of a private commercial property.

4. The Nature of the Government's Regulatory Activity

Finally, there exists an inherent problem in the New York City Landmarks Preservation Law. According to section 207-8.0(a)(1)(a)

128. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).
129. *Id.* at 136.
130. *Id.* at 146.

of the law, the Landmarks Commission will deny a landowner's application for a certificate of appropriateness to alter or demolish a landmark unless he can establish "to the satisfaction of the commission" that the landmark "as existing at the time of the filing of such request, is *not capable* of earning a reasonable return."[131] Elsewhere in the statute, "[c]apable of earning a reasonable return" is defined as "[h]aving the capacity, *under reasonably efficient and prudent management*, of earning a reasonable return."[132] While the Landmarks Commission was able to avoid this issue in denying R.C.I.'s application concerning Radio City,[133] its implications must be examined here.

Under the statute, the Landmarks Commission—and, if there is a judicial determination as in the *Penn Central* case, the courts—are empowered to evaluate the quality of a private landowner's management of his property, and, presumably, to determine whether he has been exercising proper business judgment. In the New York Court of Appeals *Penn Central* decision, Chief Judge Breitel wrote that "[w]hat is significant . . . is whether the property, managed efficiently, is capable of producing a reasonable return. If the courts were forced to look at the property as it is, rather than as it could be, any inadequacy of managers of property could frustrate any land use restrictions."[134]

The fundamental question in this connection is whether such a broad governmental inquiry into a private landowner's business affairs is a valid use of the police power and constitutionally permissible. Is it a legitimate function of a municipal commission or of a court to determine how the owner of a commercial landmark *should* manage his property? More specifically, can the Landmarks Commission be empowered to deny a certificate of appropriateness on the ground that even though a particular landmark has not previously been profitable, it *could* be if operated in a different manner?

The statute does not define "reasonably efficient and prudent management." Assuming, for instance, that the Landmarks Commission determined that Radio City could be profitable if it were

131. N.Y.C. ADMIN. CODE ch. 8-A, § 207-8.0(a)(1)(a) (Williams 1976) (emphasis added).

132. *Id.* § 207-1.0(c) (emphasis added).

133. *See* note 93 and accompanying text *supra*.

134. Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 333 (1977), *aff'd*, 438 U.S. 104 (1978).

turned into an adult-entertainment theater or if it were to feature hard-rock concerts instead of continuing to provide family-oriented productions, could R.C.I. be denied a certificate of appropriateness on the sole ground that such a change in the operation of the Music Hall might come under the rubric of more "efficient" management? The obvious effect of such a determination, if upheld by the courts, would be to force R.C.I. to choose between the following equally unpalatable alternatives: it could adopt the distasteful but potentially profitable policy or policies recommended by the Landmarks Commission; it could continue to operate Radio City at a loss under its existing policy; or it could close the Music Hall while remaining obligated to keep it in good repair.

R.C.I. may well not be operating Radio City in the most "efficient" manner. Nevertheless, the fact that R.C.I.'s policies and business judgment are questionable should not in and of itself enable the Landmarks Commission to impose *its* policies and judgment on the operation of the Music Hall. R.C.I. may be unwilling, for whatever reasons, to present anything other than a particular type of program in Radio City. While perhaps eccentric, that is still its perogative. To force a private landowner, whether directly or indirectly, to substitute a government-determined policy or judgment for his own in the operation of his business can reasonably be considered an unconstitutional taking of his property.

While the legislative intent behind section 207-8.0(a)(1)(a) of the New York City Landmarks Preservation Law[135] undoubtedly was the prevention of deliberate mismanagement by the landmark owner, the statute is too vaguely drafted for such a narrow purpose and could easily be abused. The provision should be amended to define "prudent and efficient management" so as to limit the Landmark Commission's scope of inquiry to those areas that lend themselves to objective analysis. With regard to highly subjective questions of business judgment and policies, a landmark owner can only be held to a good faith standard. R.C.I.'s bookkeeping methods or its employment policies, for example, can be evaluated objectively. Similarly, the Landmarks Commission might conclude, as has been alleged,[136] that R.C.I. has deliberately turned down films likely to be highly successful, and instead has presented others at Radio

135. *See* note 131 *supra*.

136. *See, e.g.*, Grats, *The Perils of the Music Hall*, The Soho Weekly News, Nov. 2, 1978, at 15.

City that were expected to lose money. R.C.I.'s selection of the *type* of entertainment it wishes to present at the Music Hall, however, must be left exclusively to its own discretion as long as it is expected to remain the owner of the landmark.

IV. CONCLUSION

Primarily because of its paralyzing effect on the commercial utilization of privately owned property, the designation of Radio City as an interior landmark is probably an unduly oppressive exercise of the governmental police power. The designation not only requires R.C.I. to preserve the landmark; it frustrates R.C.I.'s "primary expectation concerning the use of the parcel"[137] by restricting the property to a single, narrowly circumscribed function. Moreover, the statute allows government authorities to have all too heavy a hand in matters of subjective managerial discretion. Thus, the New York City Landmarks Preservation Law as applied to the Music Hall may well be "so onerous as to constitute a taking which constitutionally requires compensation."[138]

Conceivably, a long-term arrangement could be worked out under which Radio City would be operated by a governmentally created or designated entity, while R.C.I. would be freed from the burden of maintaining the landmark and would be guaranteed a fair return from the property for the duration of the arrangement. It is also possible that R.C.I. might agree to construct an office tower on top of the Music Hall in accordance with the U.D.C. feasibility study[139] in the hope that the revenue from the tower would cover Radio City's deficit. Any such solution, however, requires R.C.I.'s acquiescence.[140] Otherwise, there ap-

137. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978).

138. Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

139. *See* notes 96-97 and accompanying text *supra*.

140. On February 27, 1979, R.C.I. announced that Radio City would remain open following the 1979 Easter show, which was scheduled to end on April 25, but that its traditional film and stage-show programming would be replaced by a greater variety of entertainment, possibly including musical and dance productions as well as other special events. In addition, R.C.I. announced that Radio City would henceforth be operated by a new "national entertainment production company" whose primary goal would be the "[d]evelopment of prime entertainment" in the Music Hall, but which would also produce theatrical, motion picture, television and other entertainment programming for general distribution. R.C.I. indicated that Radio City would probably remain open for at least one year under the new plan, but did not make any commitments beyond that. N.Y. Times, Feb. 28, 1979, at B1, col. 6. *See also id.*, Apr. 19, 1979, at C17, col. 1; *id.*, Apr. 22, 1979 § 2, at 33, col. 1.

pears to be no constitutionally valid way to prohibit R.C.I. from demolishing the Music Hall short of governmental acquisition of the landmark under the eminent domain power.

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