(c) Its list of specified uses for residential districts precludes a person from boosting a political candidate or protesting taxes with a sign in the front yard. *See* Gibbons v. O'Reilly, 44 Misc.2d 353, 253 N.Y.S.2d 731 (Sup.Ct.1964); *cf.* Linmark Assocs. v. Willingboro Township, 431 U.S. 85, 93–94 (1977); Barrick Realty, Inc. v. City of Gary, 354 F.Supp. 126 (N.D.Ind.1973); People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S. 734 (1963).

(d) It has a design ordinance of the sort upheld in *State* ex rel. *Stoyanoff v. Berkeley*, *supra*, p. S502, frustrating a form of artistic expression important to some individuals. *See* Kolis, *Architectural Expression: Police Power and the First Amendment*, 16 URB.L.ANN. 273 (1979); Note, *Architecture, Aesthetic Zoning, and the First Amendment*, 28 STAN.L.REV. 179 (1975).

(e) Its tight limits on commercial and industrial activity have a direct effect on the amount and types of employment available within the community. [p*1082] *See* Blumrosen, *The Duty to Plan for Fair Employment: Plant Location in White Suburbia*, 25 RUTGERS L.REV. 383 (1971).

## Section 5. IS IT REGULATION OR A TAKING?

When private property is "taken" for a public purpose compensation must be paid. This is required of the federal government by the fifth amendment and of the states by the fourteenth. Legitimate police power regulations impose uncompensated burdens, often of a substantial dollar amount, without offending this principle. But sometimes a property owner succeeds in having a particular regulation voided as it applies to certain land with the argument that it amounts to an attempt to "take" property without compensation. As we noted *supra*, p. S500, state courts proceeded for a long period in this area without the benefit of much, if any, guidance from the Supreme Court. Doctrines varied from state to state, results perhaps even more so. The return of the Supreme Court to this area may serve at least to focus the debate, but before we get to that, it is well to consider a few situations that have given rise to a number of state cases. In all cases one should ask the question whether one can frame the issue in a coherent way. After you have had an opportunity to consider the recent Supreme Court cases, you might want to return to these fact situations and ask what light the recent cases cast on them:

(1) Following unsuccessful negotiations for the purchase of a seventy-five acre tract, the Borough of Middlesex created a new "park, playground, and school" district covering the tract. The ordinance was held unconstitutional by the Superior Court of New Jersey:

> While it is conceivable that [the owner] could find a private school willing to build on the property, as a practical matter the effect of the zoning ordinance is to limit the purchaser to defendant borough . . . . However desirable the property may be for defendant for parks and playgrounds, the defendant cannot use its power to zone as a method of depreciating the value of the property for purposes of purchase.

Joint Meeting of the City of Plainfield v. Borough of Middlesex, 69 N.J.Super. 136, 141, 173 A.2d 785, 787 (1961). The court relied on an earlier New Jersey Supreme Court decision striking down zoning height restrictions that protected the flight path into Newark Airport, quoting this portion of that opinion:

> . . . We conclude that this ordinance undertakes to zone without authority of any statute and is in fact the taking of private property without due process of law, in violation of the

> Fourteenth Amendment of the United States Constitution, and also the taking for public use without just compensation, in violation of article 1, paragraph 16 of the state constitution.
>
> The city is within its rights in acquiring property for airport purposes under the provisions of *R.S.* 40:8–1, and it may acquire private property for such purposes by condemnation if necessary under *R.S.* 40:8–5. To restrict the height or building of any structures or trees, or to interfere electrically with communication or impair visibility by lights, &c., or in any way to use property within two miles of the airport to endanger the landing or taking off, &c., of aircraft, as provided in the questioned ordinance, is an interference with the rights of property ownership, which is not within the contemplation or purpose of the Zoning Law. The city may not under the guise of an ordinance acquire rights in private property which it may only acquire by purchase or by the exercise of its power of eminent domain. [p*1083]

Yara Eng'g Corp. v. City of Newark, 132 N.J.L. 370, 373, 40 A.2d 559, 560–61 (1945).

*Yara* is representative of an interesting group of cases. While height and use restrictions have generally been upheld, there are a number of decisions holding them to be a taking where the restrictions are employed to protect a public airport from incompatible adjacent development. Why should that be? Should it be? *See, e.g.*, Indiana Toll Road Comm'n v. Jankovich, 244 Ind. 574, 193 N.E.2d 237 (1963); Roark v. Caldwell, 87 Idaho 557, 394 P.2d 641 (1964); Jackson Mun. Airport Auth. v. Evans, 191 So.2d 126 (Miss.1966); Annot., 77 A.L.R.2d 1355, 1362 (1961) ("Zoning ordinances purporting to limit the use of land and regulate the height of structures on land near or surrounding an airport . . . have frequently been held unconstitutional as a 'taking' of private property without just compensation, especially since the governing body could procure the land by eminent domain proceedings."); *cf.* Piper v. Ekern, 180 Wis. 586, 194 N.W. 159 (1923) (height limit imposed on buildings around state capitol invalid, being "designed solely for the protection of the Capitol building"). *See also* DKM3, p. 273.

There is also substantial authority supporting such a use of height regulation. *See, e.g.*, Smith v. County of Santa Barbara, 243 Cal.App.2d 126, 52 Cal. Rptr. 292 (1966); Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth., 111 So.2d 439 (Fla.1959); Village of Willoughby Hills v. Corrigan, 29 Ohio St.2d 39, 278 N.E.2d 658 (1972).

(2) In 1952, Mount Vernon, New York amended its zoning ordinance to create a new "Designed Parking District" which was applied to 86,000 square feet adjacent to the railroad station which had since 1922 been operated as a parking lot under private ownership. Before 1952, the lot had been zoned for residential use, but the parking continued as a prior non-conforming use. The surrounding land was zoned and used for business buildings. The New York Court of Appeals held, over a vigorous dissent, that the ordinance was unconstitutional:

> True it is that for a long time the land has been devoted to parking, a nonconforming use, but it does not follow that an ordinance prohibiting any other use is a reasonable exercise of the police power. . . . On this record, the plaintiff, having asserted an invasion of his property rights [citation omitted] has met the burden of proof by establishing that the property is so situated that it has no possibilities for residential use and that the use added by the 1952 amendment does not improve the situation but, in fact, will operate to destroy the greater part of the value of the property since, in authorizing its use for parking and incidental services, it necessarily permanently precludes the use for which it is most readily adapted, i.e., a business use such as permitted and actually carried on by the owners of all the surrounding property. Under such circumstances, the 1927 zoning ordinance and zoning map and the 1952 amendment, as they pertain to the plaintiff's property, are so unreasonable and arbitrary as to constitute an invasion of property rights, contrary to constitutional due process and, as such, are invalid, illegal and void enactments [citation omitted].

Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 493, 499, 121 N.E.2d 517, 520 (1954). Is this decision based upon purpose, effect, or some combination of the two?

(3) In many states there is enabling authority for a form of regulation specifically aimed at preventing development of land slated for eventual condemnation. Typically, such regulation provides for an "official map" on which planned highways, parks, and perhaps other public projects are entered. Building permits are denied for private development on affected [p*1084] land. Under the classic model, an owner can seek a variance if the denial would prevent a reasonable return on his property. In a few states, variances have not been provided for, but the effect of a map entry has been limited in time—three years, one year. Is such designation constitutional? Does it make any difference which form of designation is used? *Cf.* Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 237 A.2d 881 (1968); Miller v. Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951). *See generally* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 270–76 (1971).[1]

(4) Beginning with the heightened environmental concern of the 1960's, a number of states passed statutes designed to preserve "wetlands," marshy areas, the ecological benefits of which seem to be substantial. The statutes typically impose very heavy burdens on owners seeking to fill those lands and to develop them for any purpose other than keeping them in their natural condition. Faced with a case in which it found that the denial of such a permit effectively prevented any development of the defendant's land, the Supreme Judicial Court of Maine held:

> Between the public interest in braking and eventually stopping the insidious despoliation of our natural resources which have for so long been taken for granted, on the one hand, and the protection of appellants' property rights on the other, the issue is cast. . . .
>
> As distinguished from conventional zoning for town protection, the area of Wetlands representing a "valuable natural resource of the State," of which appellants' holdings are but a minute part, is of state-wide concern. The benefits from its preservation extend beyond town limits and are state-wide. The cost of its preservation should be publicly borne. To leave appellants with commercially valueless land in upholding the restriction presently imposed, is to charge them with more than their just share of the cost of this state-wide conservation program, granting fully its commendable purpose. . . . [T]heir compensation by sharing in the benefits with this restriction is intended to secure is so disproportionate to their deprivation of reasonable use that such exercise of the State's police power is unreasonable.

State v. Johnson, 265 A.2d 711, 716 (Me.1971).

After surveying the literature and case law, an article dealing with the issue of *State v. Johnson* reports: "Most cases to date dealing with highly restrictive open space zoning have invalidated the regulations." Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking*, 57 MINN.L.REV. 1, 8 (1972). The cases are not, however, all adverse:

> An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. . . . [W]e think it is not an unreasonable exercise of [the police] power to prevent harm to public rights by limiting the use of private property to its natural uses.

Just v. Marinette County, 56 Wis.2d 7, 17, 201 N.W.2d 761, 768 (1972). Since *Just*, more cases seem to have allowed such regulation. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 9.21 (1984).

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[1] The promised chapter on this topic in the 2d ed., D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW (2d ed.1986), has not yet appeared. *Cf. id.* at 160–61.

Can the holding in the *Johnson* case be explained simply in terms of the severe limitation of use and diminution in value caused by such regulations or are other factors important? Let us assume the state of New Dorset or one of its subdivisions adopts a regulation limiting land use in a certain river [p*1085] valley to agriculture, forestry, parks, and wildlife sanctuaries—accessory structures for these uses are permitted but not permanent residences. Is the constitutionality of this regulation affected by its purpose? Such regulations can serve a wide range of objectives—limiting flood damage, preserving a natural area of financial importance to the state, preventing pollution, maintaining an attractive vista, and so on. Generally the objectives are mixed. Would you expect a higher rate of success for floodplain zoning measures than wetlands preservation?

The *Kusler* article concludes: "Although a variety of tests have been posed by courts and legal commentators for determining whether regulations validly regulate or unconstitutionally 'take' property, no single test appears to be wholly satisfactory." Kusler, *Open Space Zoning*, *supra* at 12. Consider some of the questions which courts and commentators have spoken of as "a test" or "the test," or merely a factor bearing upon the ultimate issue. What degree of importance would you assign each? Bear in mind that it is possible for a question to be a test in one of two ways. It can be a true watershed with one answer indicating "taking" and the opposite answer pointing with equal certainty to valid regulation; or it can furnish a definitive answer on one side only. An example of the latter would be a question for which a "yes" answer indicates "taking" while a "no" does not absolutely rule one out.

(a) Has the government been guilty of a physical invasion of the land in question? *See* Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

(b) Has the regulation substantially (severely, grossly, or some such) diminished the land's value?

(c) Has it severely limited the range of uses possible? Has it effectively blocked "all reasonable use?"

(d) Is the regulation aimed at nuisance—like uses or threats to the public health or safety (or morals?) or some less substantial harm?

(e) Does it prevent harm or require landowners to bestow a public benefit?

(f) Is there reciprocity of benefit, in the sense that the limited property can be viewed as a benefiting from the very regulatory scheme of which the owner is complaining? (*E.g.*, the owner of lot in single-family residence district is prevented from putting in a store but also assured his neighbor won't do the same.)

(g) Is the government operating in a proprietary capacity rather than in its capacity as arbiter of private disputes? *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

(h) Does the harm prevented by the regulation outweigh the hardship it causes?

Are there any of the above which in your view furnish a satisfactory overall framework for dealing with the preceding principal cases, and those noted with them? If you conclude that none individually can do the job, which several would you list as most important?

To the extent that the economic impact of the regulation determines or at least bears upon the question of "taking" some subsidiary questions arise: [p*1086]

(a) What is the unit? Is the case where *A* owns a large parcel encompassing both strictly limited wetlands and upland areas which receive some benefit from the regulation any different from the case of *B* whose parcel is exclusively wetlands? What about the case of a *C* who holds two parcels separate but nearby—one wetlands, one uplands? And then there is *D*, a wealthy recipient of lots of past government favors, for whom the loss in value of a small wetlands lot is insignificant.

(b) Is it relevant that the current owner of the affected parcel bought the land while it was subject to the regulations? Is the price paid relevant?

*See* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV.L.REV. 1165, 1190–93, 1229–34 (1967); *see generally* Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L.REV. 1057 (1980); B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977).

We have resisted the temptation to edit all the references out of the following cases. In an area such as this one, where the future direction is by no means clear, courts build on doctrine by making arguments based on their prior cases. You have already seen many of the cases cited here. Others are sufficiently described in the opinions themselves. The notes between the cases, among other things, fill in what happened in between. If you have only an imperfect recollection of *Goldblatt v. Town of Hempstead*, *supra*, p. S495; *Village of Euclid v. Ambler Realty Co.*, *supra*, p. S489; *Nectow* v. *City of Cambridge*, *supra* p. S495, you might want to review those cases now. Another case frequently referred to is United States v. Causby, 328 U.S. 256 (1946), DKM3, p. 274. In it, the Supreme Court affirmed the holding of the Court of Claims that United States had 'taken' an easement over the plaintiff's chicken farm when it used the airspace above it as a glide path to reach an airport that it was using for military purposes.

## PENN CENTRAL TRANSPORTATION CO. v. NEW YORK CITY

Supreme Court of the United States
438 U.S. 104 (1978)

BRENNAN, J. The question presented is 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." Specifically, we must decide whether the application of New York City's Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has "taken" its owners' property in violation of the Fifth and Fourteenth Amendments. . . .

Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. . . .

New York City, responding to similar concerns and acting pursuant to a New York State enabling Act, adopted its Landmarks Preservation Law in 1965. . . . [p*1087]

The New York City law is typical of many urban landmark laws in that its primary method of achieving its goals is not by acquisitions of historic properties, but rather by involving public entities in land-use decisions affecting these properties and providing services, standards, controls, and incentives that will encourage preservation by private owners and users. While the law does place special restrictions on landmark properties as a necessary feature to the attainment of its larger objectives, the major theme of the law is to ensure the owners of any such properties both a "reasonable return" on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals.

The operation of the law can be briefly summarized. The primary responsibility for administering the law is vested in the Landmarks Preservation Commission (Commission), a broad based, 11–member agency assisted by a technical staff. The Commission first performs the function, critical to any landmark preservation effort, of identifying properties, and areas that have "a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation." [N.Y.C.Admin.Code] § 207–1.0(n); see § 207–1.0(h). If the Commission determines, after giving all interested parties an opportunity to be heard, that a building or area satisfies the ordinance's criteria, it will designate a building to be a "landmark," § 207–1.0(n), situated on a particular "landmark site," 207–1.0(*o*), or will designate an area to be a "historic district," § 207–1.0(h). After the Commission makes a designation, New York City's Board of Estimate, after considering the relationship of the designated property "to the masterplan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved," § 207–2.0(g)(1), may modify or disapprove the designation, and the owner may seek judicial review of the final designation decision. Thus far, 31 historic districts and over 400 individual landmarks have been finally designated, and the process is a continuing one.

Final designation as a landmark results in restrictions upon the property owner's options concerning use of the landmark site. First, the law imposes a duty upon the owner to keep the exterior features of the building "in good repair" to assure that the law's objectives not be defeated by the landmark's falling into a state of irremediable disrepair. See § 207–10.0(a). Second, the Commission must approve in advance any proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site, thus ensuring that decisions concerning construction on the landmark site are made with due consideration of both the public interest in the maintenance of the structure and the landowner's interest in use of the property. See §§ 207–4.0 to 207–9.0.

In the event an owner wishes to alter a landmark site, three separate procedures are available through which administrative approval may be obtained. First, the owner may apply to the Commission for a "certificate of no effect on protected architectural features": that is, for an order approving the improvement or alteration on the ground that it will not change or affect any architectural feature of the landmark and will be in harmony therewith. See § 207–5.0. Denial of the certificate is subject to judicial review.

Second, the owner may apply to the Commission for a certificate of "appropriateness." See § 207–6.0. Such certificates will be granted if the Commission concludes—focusing upon aesthetic, historical, and architectural values that the proposed construction on the landmark site would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark. Again, denial of the certificate is subject to judicial review. [p*1088] Moreover, the owner who is denied either a certificate of no exterior effect or a certificate of appropriateness may submit an alternative or modified plan for approval. The final procedure—seeking a certificate of appropriateness on the ground of "insufficient return," see § 207–8.0—provides special mechanisms, which vary depending on whether or not the landmark enjoys a tax exemption, to ensure that designation does not cause economic hardship.

Although the designation of a landmark and landmark site restricts the owner's control over the parcel, designation also enhances the economic position of the landmark owner in one significant respect. Under New York City's zoning laws, owners of real property who have not developed their property to the full extent permitted by the applicable zoning laws are allowed to transfer development rights to contiguous parcels on the same city block. [Citation omitted.] A 1968 ordinance gave the owners of landmark sites additional opportunities to transfer development rights to other parcels. Subject to a restriction that the floor area of a transferee lot may not be increased by more than 20% above its authorized level, the ordinance permitted

transfers from a landmark parcel to property across the street or across a street intersection. In 1969, the law governing the conditions under which transfers from landmark parcels could occur was liberalized [citation omitted] apparently to ensure that the Landmarks Law would not unduly restrict the development options of the owners of Grand Central Terminal. [Citation omitted.] The class of recipient lots was expanded to include lots "across a street and opposite to another lot or lots which except for the intervention of streets or street intersections f[or]m a series extending to the lot occupied by the landmark building[, provided that] all lots [are] in the same ownership." [Citation omitted.] In addition, the 1969 amendment permits, in highly commercialized areas like midtown Manhattan, the transfer of all unused development rights to a single parcel. . . .

This case involves the application of New York City's Landmarks Preservation Law to Grand Central Terminal (Terminal). The Terminal, which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central), is one of New York City's most famous buildings. Opened in 1913, it is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style.

The Terminal is located in midtown Manhattan. Its south facade faces 42d Street and that street's intersection with Park Avenue. At street level, the Terminal is bounded on the west by Vanderbilt Avenue, on the east by the Commodore Hotel, and on the north by the Pan-American Building. Although a 20–story office tower, to have been located above the Terminal, was part of the original design, the planned tower was never constructed. The Terminal itself is an eight-story structure which Penn Central uses as a railroad station and in which it rents space not needed for railroad purposes to a variety of commercial interests. The Terminal is one of a number of properties owned by appellant Penn Central in this area of midtown Manhattan. The others include the Barclay, Biltmore, Commodore, Roosevelt, and Waldorf-Astoria Hotels, the Pan-American Building and other office buildings along Park Avenue, and the Yale Club. At least eight of these are eligible to be recipients of development rights afforded the Terminal by virtue of landmark designation.

On August 2, 1967, following a public hearing, the Commission designated the Terminal a "landmark" and designated the "city tax block" it occupies a "landmark site." The Board of Estimate confirmed this action on September 21, 1967. Although appellant Penn Central had opposed the designation before the [p*1089] Commission, it did not seek judicial review of the final designation decision.

On January 22, 1968, appellant Penn Central, to increase its income, entered into a renewable 50–year lease and sublease agreement with appellant UGP Properties, Inc. (UGP) a wholly owned subsidiary of Union General Properties, Ltd., a United Kingdom corporation. Under the terms of the agreement, UGP was to construct a multistory office building above the Terminal. UGP promised to pay Penn Central $1 million annually during construction and at least $3 million annually thereafter. The rentals would be offset in part by a loss of some $700,000 to $1 million in net rentals presently received from concessionaires displaced by the new building.

Appellants UGP and Penn Central then applied to the Commission for permission to construct an office building atop the Terminal. Two separate plans, both designed by architect Marcel Breuer and both apparently satisfying the terms of the applicable zoning ordinance, were submitted to the Commission for approval. The first, Breuer I, provided for the construction of a 55–story office building, to be cantilevered above the existing facade and to rest on the roof of the Terminal. The second, Breuer II Revised, called for tearing down a portion of the Terminal that included the 42d Street facade, stripping off some of the remaining features of the Terminal's facade, and constructing a 53–story office building. The Commission denied a certificate of no exterior effect on September 20, 1968. Appellants then applied for a certificate of

"appropriateness" as to both proposals. After four days of hearings at which over 80 witnesses testified, the Commission denied this application as to both proposals. . . .

Appellants did not seek judicial review of the denial of either certificate. Because the Terminal site enjoyed a tax exemption, remained suitable for its present and future uses, and was not the subject of a contract of sale, there were no further administrative remedies available to appellants as to the Breuer I and Breuer II Revised plans. . . . Further, appellants did not avail themselves of the opportunity to develop and submit other plans for the Commission's consideration and approval. Instead, appellants filed suit in New York Supreme Court, Trial Term, claiming, *inter alia*, that the application of the Landmarks Preservation Law had "taken" their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment. Appellants sought a declaratory judgment, injunctive relief barring the city from using the Landmarks Law to impede the construction of any structure that might otherwise lawfully be constructed on the Terminal site, and damages for the "temporary taking" that occurred between August 2, 1967, the designation date, and the date when the restrictions arising from the Landmarks Law would be lifted. The trial court granted the injunctive and declaratory relief, but severed the question of damages for a "temporary taking."

Appellees appealed, and the New York Supreme Court, Appellate Division, reversed. [Citation omitted.]

The New York Court of Appeals affirmed. . . .

The issues presented by appellants are (1) whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a "taking" of appellants' property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment, see Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 239 (1897), and, (2), if so, whether the transferable [p*1090] development rights afforded appellants constitute "just compensation" within the meaning of the Fifth Amendment. We need only address the question whether a "taking" has occurred. . . .

Before considering appellants' specific contentions, it will be useful to review the factors that have shaped the jurisprudence of the Fifth Amendment injunction "nor shall private property be taken for public use, without just compensation." The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee [is] designed to bar 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," *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960), 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." [Citations omitted.]

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. See *Goldblatt v. Hempstead, supra*, at 594. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, see, *e.g.*, *United States* v. *Causby*, 328 U.S. 256 (1946), than when

interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal Co*. v. *Mahon*, 260 U.S. 393, 413 (1922), and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed "taking" challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes. See, *e.g*., *United States* v. *Willow River Power Co*., 324 U.S. 499 (1945) (interest in high-water level of river for runoff for tailwaters to maintain power head is not property) [further citations omitted].

More importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. See *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928). Zoning laws are, of course, the classic example, see *Euclid* v. *Ambler Realty Co*., 272 U.S. 365 (1926) (prohibition of industrial use) [further citations omitted]. [p*1091]

Zoning laws generally do not affect existing uses of real property, but "taking" challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm. . . .

*Goldblatt v. Hempstead*, *supra*, is a recent example. There, a 1958 city safety ordinance banned any excavations below the water table and effectively prohibited the claimant from continuing a sand and gravel mining business that had been operated on the particular parcel since 1927. The Court upheld the ordinance against a "taking" challenge, although the ordinance prohibited the present and presumably most beneficial use of the property and had . . . severely affected a particular owner. The Court assumed that the ordinance did not prevent the owner's reasonable use of the property since the owner made no showing of an adverse effect on the value of the land. Because the restriction served a substantial public purpose, the Court thus held no taking had occurred. It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose, see *Nectow* v. *Cambridge*, *supra*; cf. *Moore* v. *East Cleveland*, 431 U.S. 494, 513–514 (1977) (STEVENS, J. concurring), or perhaps if it has an unduly harsh impact upon the owner's use of the property.

*Pennsylvania Coal Co*. v. *Mahon*, 260 U.S. 393 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a "taking." [Further discussion of this case will be found *infra* p. S539.] . . .

Finally, government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute "takings." *United States* v. *Causby*, 328 U.S. 256 (1946), is illustrative. In holding that direct overflights above the claimant's land, that destroyed the present use of the land as a chicken farm, constituted a "taking," Causby emphasized that Government had not "merely destroyed property [but was] using a part of it for the flight of its planes." . . .

In contending that the New York City law has "taken" their priority in violation of the Fifth and Fourteenth Amendments, appellants make a series of arguments, which, while tailored to the

facts of this case, essentially urge that any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation if it is to be constitutional. Before considering these, we emphasize what is not in dispute. . . . [A]ppellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal. They also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law. Finally, appellants do not challenge any of the specific factual premises of the decision below. They accept for present purposes both that the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return, and that the transferable development rights afforded appellants by virtue of the Terminal's designation as a landmark are valuable, even if not as valuable as the rights to construct above the Terminal. In appellants' view none of these factors derogate from their claim that New York City's law has effected a "taking." [p*1092]

They first observe that the airspace above the Terminal is a valuable property interest, citing *United States* v. *Causby*, *supra*. They urge that the Landmarks Law has deprived them of any gainful use of their "air rights" above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has "taken" their right to this superjacent airspace, thus entitling them to "just compensation" measured by the fair market value of these air rights.

Apart from our own disagreement with appellants' characterization of the effect of the New York City law, . . . the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, see *Welch* v. *Swasey*, [214 U.S. 91 (1900)], but also in approving those prohibiting both the subjacent, see *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962), and the lateral [citation omitted] development of particular parcels. "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."

Secondly, appellants, focusing on the character and impact of the New York City law, argue that it effects at "taking" because it significantly diminished the value of the Terminal site. Appellants concede that the decisions sustaining other land-use regulations, which, like the New, York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a "taking," see *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning law) . . . . Appellants, moreover, also do not dispute that a showing of diminution in property value would not establish a "taking" if the restriction had been imposed as a result of historic-district legislation, see generally *Maher* v. *New Orleans*, 516 F.2d 1051 (CA5 1975), but appellants argue that New York City's regulation of individual landmarks is fundamentally different from zoning or from historic-district legislation because the controls imposed by New York City's law apply only to individuals who own selected properties.

Stated baldly, appellants' position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a "taking" requiring the payment of "just compensation." Agreement with this argument would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation. We find no merit in it.

It is true, as appellants emphasize, that both historic-district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellants' suggestions, landmark laws are not like discriminatory, or "reverse spot," zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. [Citation omitted.] In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of [p*1093] historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.

Equally without merit is the related argument that the decision to designate a structure as a landmark "is inevitably arbitrary or at least subjective, because it is basically a matter of taste," [citation omitted] thus unavoidably singling out individual landowners for disparate and unfair treatment. . . .

[A] landmark owner has a right to judicial review of any Commission decision, and, quite simply, there is no basis whatsoever for a conclusion that courts will have any greater difficulty identifying arbitrary or discriminatory action in the context of landmark regulation than in the context of classic zoning or indeed in any other context.

Next, appellants observe that New York City's law differs from zoning laws and historic-district ordinances in that the Landmarks Law does not impose identical or similar restrictions on all structures located in particular physical communities. It follows, they argue, that New York City's law is inherently incapable of producing the fair and equitable distribution of benefits and burdens of governmental action which is characteristic of zoning laws and historic-district legislation and which they maintain is a constitutional requirement if "just compensation" is not to be afforded. It is of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a "taking." Legislation designed to promote the general welfare commonly burdens some more than others. The owners of . . . the gravel and sand mine in *Goldblatt* v. *Hempstead* were uniquely burdened by the legislation sustained in th[at] case[]. Similarly, zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account. For example, the property owner in *Euclid* who wished to use its property for industrial purposes was affected far more severely by the ordinance than its neighbors who wished to use their land for residences.

In any event, appellants' repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal—all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal. Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless appellants believe they are more burdened than benefited by the law, but that must have been true, too, of the property owners in . . . *Euclid*, and *Goldblatt*.

Appellants' final broad-based attack would have us treat the law as an instance, like that in *United States* v. *Causby*, in which government, acting in an enterprise capacity, has appropriated part of their property for some strictly governmental purpose. Apart from the fact that *Causby* was a case of invasion of airspace that destroyed the use of the farm beneath and this New York City law has in nowise impaired the present use of the Terminal, the Landmarks Law neither exploits appellants' parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city. . . . [p*1094]

Rejection of appellants' broad arguments is not, however, the end of our inquiry, for all we thus far have established is that the New York City law is not rendered invalid by its failure to provide "just compensation" whenever a landmark owner is restricted in the exploitation of property interests, such as air rights, to a greater extent than provided for under applicable zoning laws. We now must consider 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]." *Pennsylvania Coal Co*. v. *Mahon*, 260 U.S., at 413. That inquiry may be narrowed to the question of the severity of the impact of the law on appellants' parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site.

Unlike the governmental acts in *Goldblatt* . . . [and] *Causby* . . . the New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal in two respects. First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying any portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit any construction above the Terminal. The Commission's report emphasized that whether *any* construction would be allowed depended upon whether the proposed addition "would harmonize in scale, material, and character with [the Terminal]." [Citation omitted.] Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.

Second, to the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied all use of even those preexisting air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. . . . While 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. Cf. *Goldblatt* v. *Hempstead*, 369 U.S., at 594 n.3.

On this record, we conclude that the application of New York City's Landmarks Law has not effected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties. [p*1095]

*Affirmed.*

[The dissenting opinion by REHNQUIST, J., joined by BURGER, C.J. and STEVENS, J., is omitted.]

### *Notes and Questions*

1. Is there any good reason for a regulation which requires an owner to maintain and preserve an existing structure to be more suspect than one which stipulates what a new building must be like if and when the owner chooses to build?

2. Does a regulatory program designed to protect historic structures or districts pose again the question of the validity of purely aesthetic controls? *See* p. S505 *supra*. Courts have, with little hesitation, upheld historic district regulation against such an attack. In City of New Orleans v. Levy, 223 La. 14, 64 So.2d 798 (1953), the Louisiana Supreme Court said:

> Perhaps esthetic considerations alone would not warrant an imposition of the several restrictions contained in the Vieux Carre Commission Ordinance. But . . . this legislation is in the interest of and beneficial to the inhabitants of New Orleans generally, the preserving of the Vieux Carre section being not only for its sentimental value but also for its commercial value, and hence it constitutes a valid exercise of the police power.

*Id*. at 28–29, 64 So.2d at 802–03; *cf.* Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir.1975), cited in the principal case. A similar rationale was employed by the Massachusetts Supreme Judicial Court in upholding zoning control over construction on Nantucket. *See* Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 557 (1955). Consider the array of purposes cited for the New York City Law:

> [T]o
>
> (a) effect and accomplish the protection, enhancement, and perpetuation of such improvements and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history;
>
> (b) safeguard the city's historic aesthetic and cultural heritage, as embodied and reflected in such improvements and districts;
>
> (e) stabilize and improve property values in such districts;
>
> (d) foster civic pride in the beauty and noble accomplishments of the past;
>
> (e) protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided;
>
> (f) strengthen the economy of the city; and
>
> (g) promote the use of historic districts and landmarks for the education, pleasure and welfare of the people of the city.

NEW YORK, N.Y., ADMINISTRATIVE CODE ch. 8–A, § 205–1.0(b) (1971). A New York court has held that the constitutionality of regulation for these purposes is beyond dispute. Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1968).

3. In New York there is a specific enabling act to support landmark regulation by a municipality. To what extent is that necessary? Could a community set up a scheme like New York City's under the Standard State Zoning Enabling Act? *See* p. S485 *supra*; *cf.* p. S505 *supra*. [p*1096]

4. Just as commentators have begun to wonder about the exclusionary effects of architectural controls, so too they have begun to ask whether historic zoning has the effect of excluding or displacing low-income and minority people. *See*, *e.g.*, Note *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U.L.REV. 64 (1985). On the general subject of historic property preservation see J. MORRISON, HISTORIC PRESERVATION LAW (2d ed.1965); Comment, *Legal Methods of Historic Preservation*, 19 BUFF.L.REV. 611 (1970); Note, *La Recherche du Temps Perdu: Legal Techniques for Preservation of Historic Property*, 55 VA.L.REV. 302 (1969).

In addition the Summer 1971 issue of *Law and Contemporary Problems* is devoted to the subject. On the New York scheme see Rankin, *Operation and Interpretation of the New York City Landmarks Preservation Law*, 36 LAW & CONTEMP.PROB. 366 (1971); Wolf, *The Landmark Problem in New York*, 22 N.Y.U.INTRAMURAL L.REV. 99 (1967).

5. *The 1987 "Tetralogy."* In 1987, the Supreme Court decided four "takings" cases, the import of which is still debated and which are likely to affect the course of takings law for some time to come. They are treated in some depth in the Note that follows, p. S539 *infra*. In addition to the cases that are adequately described in what follows, the Supreme Court decided the following "takings" cases between *Penn Central* and 1987:

(a) Andrus v. Allard, 444 U.S. 51 (1979). In an action "challenging validity of regulations promulgated by the Secretary of Interior that prohibit commercial transaction in parts of birds legally killed before birds came under protection of Eagle Protection Act and Migratory Bird Treaty Act," the Court held: "(1) both the Eagle Protection Act and the Migratory Bird Treaty Act contemplate regulatory prohibition of commerce in parts of protected birds, without regard to when those birds are originally taken, and (2) prohibition of commercial transactions in preexisting avian artifacts under the Eagle Protection Act and the Migratory Bird Treaty Act do not violate Fifth Amendment property rights." *Id*.

(b) Kaiser Aetna v. United States, 444 U.S. 164 (1979), DKM3, p. 139. Through dredging and filling operations in developing a marina-style subdivision community, petitioners, the owner and lessee of an area which included Kuapa Pond, a shallow lagoon on the island of Oahu, Hawaii, that was contiguous to a navigable bay and the Pacific Ocean but separated from the bay by a barrier beach, converted the pond into a marina and thereby connected it to the bay. The Army Corps of Engineers had advised petitioners that they were not required to obtain permits for the development of and operations in the pond, and petitioners ultimately made improvements that allowed boats access to and from the bay. Petitioner lessee controls access to and use of the pond, which, under Hawaii law, was private property, and fees are charged for maintaining the pond. Thereafter, the United States filed suit in Federal District Court against petitioners to resolve a dispute as to whether petitioners were required to obtain the Corps' authorization, in accordance with § 10 of the Rivers and Harbors Appropriation Act of 1899, for future improvements in the marina, and whether petitioners could deny the public access to the pond because, as a result of the improvements, it had become a navigable water of the United States. In examining the scope of Congress' regulatory authority under the Commerce Clause, the District Court held that the pond was "navigable water of the United States," subject to regulation by the Corps, but further held that the Government lacked authority to open the pond to the public without payment of compensation to the owner. The Court of Appeals agreed that the pond fell within the scope of Congress' regulatory authority, but held, reversing the District Court, that when petitioners converted the pond into a marina and thereby connected it to the bay, it became subject to the "navigational servitude" of the Federal Government, thus giving the public a right of access to what was once petitioners' private pond. The Court, in an opinion by Chief Justice Rehnquist, with Blackmun, Brennan, and Marshall, JJ, dissenting, held that if the Government wished to make what was formerly Kuapa Pond into a public aquatic park after petitioners had proceeded as far as they had, it may not, without invoking its eminent domain power and paying just compensation, require them to allow the public free access to the dredged pond. The opinion affirmed both lower courts on the regulatory issue.

(c) PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). *See* p. 652 *infra*.

(d) Agins v. City of Tiburon, 447 U.S. 255 (1980). In a "complaint against city seeking damages for inverse condemnation and declaration that zoning ordinances were facially unconstitutional," the Court "held, that: (1) city's open-space land zoning ordinances, which restricted previously purchased five-acre tract of land to single-family residences and open-space

use, did not take the property without just compensation, where the zoning permitted construction of one to five residences on the land, advanced legitimate governmental goals, would benefit the landowners as well as the public by assuring careful and orderly development, and neither prevented the best use of the land nor extinguished a fundamental attribute of ownership, and (2) municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, did not so burden landowners' enjoyment of their property as to constitute a taking." *Id*.

(e) San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981). The company brought an action alleging that city had taken its property without just compensation by "downzoning" the property to prevent industrial development. . . . The Court, per Blackmun, J., and over the dissents of Brennan, Stewart, Marshall, and Powell, JJ., "held that where California Court of Appeal decided [p*1097] that monetary compensation was not an appropriate remedy but did not decide whether any other remedy was available and appeared to have contemplated further proceedings in the trial court on remand to resolve disputed factual issues, decision of Court of Appeal was not a final judgment and thus appeal would be dismissed." *Id*.

(f) Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). In an opinion by Marshall, J., with Blackmun, Brennan and White, JJ., dissenting, the Court invalidated a New York law that required that a landlord must allow a cable television company to install cables in rental property. The Court held: "(1) physical occupation of plaintiff's rental property which occurred in connection with cable television company's installation of . . . cables on plaintiff's five-story apartment building constituted a 'taking' notwithstanding that statute might be within state's police power as authorizing rapid development and maximum penetration by means of communication having important educational and community aspects; (2) allegedly minimal size of the physical installation was not determinative; (3) fact that statute applied only to rental property did not make it simply a regulation of use of real property; and (4) statute could not be construed as merely granting a tenant a property right as an appurtenance to his leasehold." *Id*.

(g) Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). "Trustees of landholding estates sought judgment declaring Hawaii Land Reform Act of 1967 unconstitutional." *Id*. The Court held that the Act, which substantially changes the land tenure system in Hawaii by massive condemnation and land redistribution, does not violate the "public use" requirement of the fifth amendment for taking of private property.

(h) Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). "Applicant for registration of pesticide brought suit seeking injunctive and declaratory relief from operation of data-consideration and data-disclosure provisions of Federal Insecticide, Fungicide, and Rodenticide Act alleging that the challenged provisions effected a 'taking' of property without just compensation in violation of Fifth Amendment." The Court "held that: (1) to extent that applicant for registration of pesticides had an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri Law, that property right was protected by taking clause of the Fifth Amendment; (2) Environmental Protection Agency's consideration or disclosure of data submitted by applicant to the agency prior to 1972 amendments to Federal Insecticide, Fungicide, and Rodenticide Act or after effective date of 1978 amendments to the Act did not effect a taking; however, EPA consideration or disclosure of health, safety, and environmental data would constitute a taking if applicant submitted the data to the agency between October 22, 1972, and September 30, 1978, under certain circumstances [because of unclarity of the statute during that period]; and (3) Tucker Act was available as a remedy for any uncompensated taking applicant for registration of pesticide might suffer as result of operation of data-consideration and data-disclosure provisions of Federal Insecticide, Fungicide, and Rodenticide Act." *Id*.

(i) Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). The Bank sued for damages on the ground that the Commission's refusal to allow it to develop in a way that had, it alleged, already been approved constituted a "taking." The Court "held that even assuming that government regulation may effect a taking for which Fifth Amendment requires just compensation and that Fifth Amendment requires payment of money [p*1098] damages to compensate for taking, jury verdict awarding damages for temporary taking of property was premature." *Id*.

(j) MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986). Over the dissent of Burger, C.J., and White, Powell and Rehnquist, JJ., the Court "held that it could not determine whether a 'taking' had occurred as a result of rejection of a subdivision proposal or whether county failed to provide 'just compensation' in absence of the final and authoritative determination by county planning commission as to how it would apply the challenged regulations to the property in question." *Id.*

## *NOTES ON THE 1987 "TETRALOGY" AND TWO* POUSSES-CAFÉ *FROM 1994 AND 1997*

There are three long cases in DKM3 between the introductory material on takings and *Lucas*. I hope that some of you will be sufficiently interested to read the omitted cases, but the only things that you need for the class are the brief introduction to "takings" jurisprudence (pp. 1082–86, 1096–99), this Note, and the *Lucas* case.

1. *Keystone Bituminous Coal Ass'n v. DeBenedictis* involved legislation similar to that which had been struck down in *Pennsylvania Coal Co. v. Mahon* in 1922. In effect, coal companies in Pennsylvania were required to leave sufficient coal in place, so as not to cause the subsidence of any land over which there structures, even if they had already purchased from the landowner the right, known in Pennsylvania as the "support estate", to cause such a subsidence. The Court, in an opinion by Stevens, J., held the statute constitutional:

a. *Mahon* was distinguished. That case involved a single owner of a private house who sold his support estate to the coal company and then sought to escape from the consequences of what he had done by taking advantage of the act. The statements in *Mahon* that the Act went too far and thus constituted a taking were characterized as dicta. The Act in question unlike the Act under consideration in *Mahon* was accompanied by a legislative finding that the public interest, not just the interests of the individual landowners affected, required that subsidence mining cease because of the environmental disasters that it caused.

b. The Court considered the applicability of the *Goldblatt* standard. The majority felt that the cases were close but apparently did not rest entirely on that case.

c. Rather the case goes on to consider the impact of the statute on the mine owners, and finding that it requires only that the mine owners must leave an additional 2% of their coal in place finds that the combination of the purpose of the statute and its impact on the coal owners are not sufficient to prevail in a facial attack on the statute.

d. A strong dissent by Rehnquist, CJ., Powell, O'Connor and Scalia, JJ., focuses first on the craftsmanship of the *Mahon* distinction, second on the "nuisance" exception, and third on the total taking of the support estate.

2. In *Hodel v. Irving*, the Court held unconstitutional the portions of the Indian Land Consolidation Act that provided for the escheat without compensation to the Indian tribe of small fractional shares of land held by deceased members of the tribe that would otherwise pass by devise or descent and become further fractionated. The Court was unanimous in its judgment. The opinion for the Court by O'Connor, J., emphasizes the importance of passage of property at death as one of the "sticks in the bundle of rights" that the property-owner holds. Brennan, Marshall and Blackmun, JJ., in concurrence emphasized that the case did not limit *Andrus v. Allard*, a case which had held constitutional a statute that prohibited the sale of artifacts made with eagle feathers, to its facts, while Scalia, J., Rehnquist, C.J., and Powell, J., emphasized in concurrence that it did. A separate concurring opinion by Stevens and White, JJ., rested on the ground not that the statute had effected a "taking" but that Congress had provided an inadequate grace period for the property owners to preserve their rights.

Congress had, in fact, emended the provision at stake in *Hodel* prior to the case. In 1997, the Court had occasion to consider whether the amendments passed the constitutional barriers established in *Hodel*. Under the amended provision some fractional shares could be devised, the grace-period in which a holder of such a share could save it from escheat was longer, and the tribes were given the power to establish rules about the disposition of fractional shares subject to the approval of the Secretary of the Interior. None of these amendments, in the view of a majority of the Court sufficed to take the statute out of the condemnation of *Hodel*. Only Justice Stevens

dissented. For him the additional time was sufficient to take the statute out of the realm of the unconstitutional. Babbitt v. Youpee, 519 U.S. 234 (1997). Congress is still working on the problem.

3. In *First English Evangelical Lutheran Church v. County of Los Angeles*, in an opinion by Rehnquist, C.J. (but the majority included Marshall and Brennan, JJ.), the Court held that where the County had denied all building permits in a flood-plain area, a property owner had stated a cause of action when he sued for damages for a regulatory taking. The principal issue in the case was whether the claim was ripe, granted that the plaintiff had made no application for a building permit. The Court held that it was, granted that the County had said that it would grant no building permits. That turned the case into a question whether a state could make the sole remedy for invalid regulations an action to declare them invalid. The Court held that it could not, because even if the plaintiff succeeded he would have been deprived of the use of his property during the interim period. Justice Stevens, joined by O'Connor and Blackmun, JJ., dissented on the ripeness question. Justice Stevens alone questioned the wisdom the decision as a matter of policy. In his view, it set the penalty for enacting an invalid regulation too high. Upon remand the California court held that the denial was justified on the "nuisance" exception. (A disasterous flood had occurred in the flood-plain in question.) The Supreme Court denied certiorari.

4. In *Nollan v. California Coastal Commission*, the Court, in an opinion by Scalia, J., held that the Commission could not condition the granting of a building permit on the grant by the landowner of a easement of public access across the beach in question. Even though the Commission could have denied the permit outright, it could not condition the granting of the permit on the grant by the landowner of something that was unrelated to the building they were about to build. Justice Brennan in dissent with Justice Marshall argued that there was a rational nexus here. Justices Blackmun and Stevens basically joined Justice Brennan in separate opinions.

5. In 1994, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court held (5–4), that the *Nollan* test not only required that there be a nexus between the required dedication but that there be "rough proportionality" of the burden on the property owner and the benefit that the city gets. The facts of the case were a required dedication of open space and a bicycle path at the back of a store that was being allowed to pave its parking lot. The Court, per Rehnquist, C.J., held: (1) city's requirement that landowner dedicate a portion of her property lying within flood plain for improvement of storm drainage system and property adjacent to flood plain as bicycle/pedestrian pathway, as condition for building permit allowing expansion of landowner's commercial property, had nexus with legitimate public purposes; (2) findings relied upon by city to require landowner to dedicate portion of her property in flood plain as public greenway, did not show required reasonable relationship necessary to satisfy requirements of Fifth Amendment; and (3) city failed to meet its burden of demonstrating that additional number of vehicle and bicycle trips generated by proposed commercial development reasonably related to city's requirement of dedication of pedestrian/bicycle pathway easement. Justice Stevens in dissent argued that this is a return to *Lochner*; Justice Souter in dissent argued that the Court got the facts wrong.

6. *The paranoid planner's view of all this.* The cases caused quite a stir in the planning community, and the view I would like to pose is that of the "paranoid planner," someone who thinks that as a result of these cases the roof has fallen in. Here's the paranoid planner's view of the 1987 tetralogy:

a. *Five out of six cases go against the government.* Very few Supreme Court cases in the planning area have gone against the government. *Moore* (p. 1078) can explained on the ground that privacy was involved. *Kaiser Aetna* (p. 139) and *Loretto* (p. 1097) can both be regarded as cases involving physical takings. *Ruckleshouse* (p. 1097) didn't have anything to do with planning or even with land use. You really have to back to *Mahon* to find a case in which the Court invalidated a land-use regulation that didn't involve a physical invasion and where there

weren't other constitutional issues involved. *Keystone* looks to me like it overrules *Mahon*. That's all to the good. I never could figure that case out anyway. But then we get five cases that go the other way. That can't be good for the profession.

b. *Another absolute has been added to the right to exclude*. It looks like another absolute has been added to the right to exclude (*Irving, Youpee*). This type of question probably won't come up very often, but I'm concerned about absolutes, particularly when they stand in the way of sensible assembling of parcels of land for development purposes.

c. First English *means that no regulation can now be passed without fear of dire consequences*. It's bad enough to have to run the risk of having a regulation declared invalid. It costs a lot of money to fight these suits, and they involve a lot of delay. If the city has to pay every landowner who wins one these suits, my bosses are going to tell me to stay well within the limits of the tried and true. There's even some language in Justice Stevens's opinion that suggests that I might be sued personally. I'm also worried about the application of the case to moratoria. It's quite common, when development seems to be getting out of hand or the city's ability to provide services is being strained, for the planners to put a moratorium on building permits. Do we have to pay for these now?

d. *Nollan* and *Dolan* mean that Planned Unit Developments are unconstitutional. At least that's the way I read it. We negotiate with developers all the time. They want planning permission, and we need something, assurance that the development won't load a whole bunch of costs on the taxpayers of the city. Or take the case of PUD's. In the old days we insisted on minimum lot sizes. That gave you Levittown. Then came the PUD's. A developer will get permission to build densely in one area in return for dedicating open-space land in another. Everybody comes out ahead. What's so wrong about that?

Here are some possible answers to the parnoid planner (derived, in no small part, from Michelman in *Columbia Law Review* (1988) (pp. 1112–13, 1125–26, 1142–43)):

7. a. Yes, it is true that an unusual number of cases go against the government here but what do they actually hold. *Keystone*, in particular, is most interesting not for its "amazing" reading of *Mahon*, but for its recognition of the "nuisance exception." What it seems to say is that you can go a lot further with regulation when you're trying to stop legislatively-declared harms (which are subject to judicial review to make sure that they are harms) than you can when you're trying to get landowners to confer benefits on the public. I'm not sure that the distinction makes much sense, particularly if we take a Coasean view of nuisance (p. 882), but that's what the Court said. (The "nuisance exception" will become a star player in *Lucas* (p. 1144).)

b. In *Irving* the power to dispose of property at death was totally denied not simply regulated. I'm not sure that analogies to "physical takings" can be drawn here. *Andrus* said that the state could take certain property out of the market in order to conserve the wildlife from which the property came; *Irving* said that a landowner could not be deprived of the power to dispose of property at death, in the highly unusual context of Indian tribal land that was subject to extensive existing rules designed to preserve the tribe's autonomy. One or the other case will probably be confined to its facts, but it is by no means clear that it won't be *Irving*.

c. *First English* does raise the stakes for planners who pass unconstitutional regulations, but the history of the case suggests that even the drastic measure of total denial of building permits may be allowed where there is justification. So far as your argument about bureaucratic caution is concerned, you may be right. Anyone who is afraid of potential liability will tend to stop far short of the permissible line, particularly where the line is as fuzzy as it is in the takings area. On the other hand, there is nothing in the case law so far that suggests that a planner acting in good faith who strays over the constitutional line will be personally liable under the Civil Rights Act. The reported cases applying the Civil Rights Act either involve corruption or racial discrimination. As

to your fears about moratoria, the Court did say: "We . . . do not deal with the quite different questions that would arise in the case of . . . changes in zoning ordinances . . . ." The types of moratoria you are talking about are frequently passed in conjunction with proposed zoning changes. I would think that the Court's caveat would apply even more to the situation where the city was seeking ways to expand its services and needed time to do so.

d. *Nollan* may stand for the proposition that regulations of property will be subjected to a kind of intermediate scrutiny for rationality like that to which statutes that discriminate on the basis of gender are subjected. On balance, however, the citations of *Loretto* and *Kaiser Aetna* suggest that we are dealing here with the "peculiar talismanic force" that the Supreme Court attaches to direct physical invasions. If I am wrong about the latter, I am not sure that we are in any different position from that in which most of the state cases have put us. Most of those cases ask that there be a rational nexus between the exaction and the development. Certainly it should not be objectionable under *Nollan* for a city to condition planning permission on the developer's providing streets in the development, sewer hook-ups, water connections, etc. There may be more serious problems with requirements for the dedication of land for parks and schools, but I doubt it. The most controversial exactions under *Nollan* are likely to be the ones that are already most controversial, "linkage" of development permission to the provision of totally unrelated services, like low-income housing outside of the development. As for PUD's, I don't see anything in the opinion that should cast any doubt on the device as a general matter.

e. The notion that there must be some proportionality between what the regulation requires of the landowner and the public benefits to be obtained (*Dolan*) can hardly be objected to as a matter of principle. Whether the Court went too far in this case in shifting the burden to the city is a closer question. Again, much seems to ride on the "peculiar talismanic force" attached to physical invasions.

## LUCAS v. SOUTH CAROLINA COASTAL COUNCIL

Supreme Court of the United States
505 U.S. 1003 (1992)

SCALIA, J. In 1986, petitioner David H. Lucas paid $975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, S.C. Code § 48–39–250 *et seq*. (Supp. 1990) (Act), which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. See § 48–39–290(A). A state trial court found that this prohibition rendered Lucas's parcels "valueless." . . . This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation." . . .

South Carolina's expressed interest in intensively managing development activities in the so-called "coastal zone" dates from 1977 when, in the aftermath of Congress's passage of the federal Coastal Zone Management Act of 1972 . . . , the legislature enacted a Coastal Zone Management Act of its own. See S.C. Code § 48–39–10 *et seq*. (1987). In its original form, the South Carolina Act required owners of coastal zone land that qualified as a "critical area" . . . to obtain a permit from the newly created South Carolina Coastal Council (respondent here) prior to committing the land to a "use other than the use the critical area was devoted to on [September 28, 1977]." [Citation omitted.]

In the late 1970's, Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the City of Charleston. Toward the close of the development cycle for one residential subdivision known as "Beachwood East," Lucas in 1986 purchased the two lots at issue in this litigation for his own account. No portion of the lots, which