

A judgment to savour .

GRAND Central was opened in 1913, in the heart of Manhattan, the centre of a complex network of road and rail transport systems. Around the terminal flourished a large slice of the commerce of what was to become one of the major urban conurbations in the world.

Who owns the income inherent in the business that is transacted daily on that site? Society, as well as Penn Central Transportation Co., according to Judge Breitel of the New York Appeals Court. His judgment¹ introduces a sophisticated theory of value and ownership rights which, although not fully elaborated in his verdict, nevertheless provides a new field of debate and litigation for those who believe that private property rights are misaligned with the social imperatives of the 20th century.

The dispute occurred because Penn Central wanted to build an office block above the terminal, which it was not free to do because New York City had designated the building a landmark site. Judge Breitel favoured the city's case, and argued that the property owner was not entitled to compensation; the reasons he gave present reformers with the possibility that the law, as well as politics, offers a fruitful way to change society.

He wrote: "Although government regulation is invalid if it denies a property owner all reasonable return, there is no constitutional imperative that the return embrace all attributes, incidental influences, or contributing external factors derived from the social complex in which the property rests.

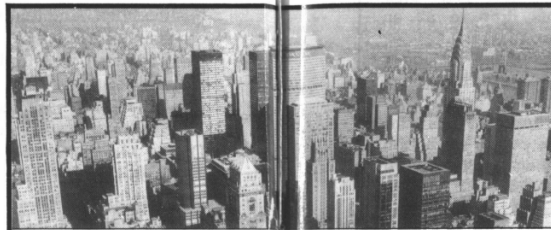
"So many of these attributes are not the result of private effort or investment but of opportunities for the utilization or exploitation which an organized society offers to any private enterprise, especially to a public utility, favored by government and the public. These, too, constitute a background of massive social and governmental investment in the organized community without which the private enterprise could neither exist nor prosper.

"It is enough, for the limited purposes of a landmarking statute, albeit it is also essential, that the privately created ingredient of property receive a reasonable return.

"It is that privately created and privately managed ingredient which is the property on which the reasonable return is to be based. All else is society's contribution by the sweat of its brow and the expenditure of its funds. To that extent society is also entitled to its due."

IN THIS case, Penn Central had already transferred above-the-surface development rights to its neighbouring properties. Even so, Judge Breitel did not rely on the exploitation of this profit for his judgment.

He argued that it was merely necessary to show that the owner was able to enjoy a "reasonable return" on his property. The concept of a reasonable return was, he said, an "elusive concept," which had to be based on the value of the property, "and the value of the property necessarily depends on the return permitted or available." And that is how the judge elaborated what Gideon Kanner, a professor of law at Loyola Law School in Los Angeles, calls the "strange theory that



*Property rights are not set in cement. Rights to land, in particular, are far from absolute - despite popular conceptions about the meaning of ownership. In the first of a series of articles on the state of the law, *Land and Liberty* identifies the principles that make a dispute over Grand Central Terminal in New York a landmark case.

he unleashed." These are the benchmark principles enunciated by Breitel:

- No property has economic value in the absence of the society around it. "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."

It did not matter which came first - the terminal or the people. "For it is the interaction of economic influences in the greatest megalopolis of the western hemisphere ... that has made the property so valuable. Neither factor alone accounts for the increase in the property's value; both, in tandem, have contributed to the increase."

- Penn Central "may not now frustrate legitimate and important social objectives by complaining, in essence, that government regulation deprives them of a return on so much of the investment made not by private interest but by the people of the city and State through their government. Instead, to prevail, [Penn Central] must establish that there was no possibility of earning a reasonable return on the privately contributed ingredient of the property's value."

Breitel perceives that the creation of wealth is a joint enterprise. "To put the matter another way, the massive and indistinguishable public, governmental, and private contributions to a landmark like the Grand Central terminal are inseparably joint ..."

Breitel cites examples. Government arranged for the underground trains to converge on the terminal, and boost the volume of Grand Central's activities - the profits of which it was then able to

REFERENCES

¹ *Penn Central Transportation Co. v. City of New York*, 366 N.E. 2d 1271, 42 N.Y. 2d 324 (1977).

² Centenary edn. 1979, New York: Robert Schalkenbach Foundation.

capitalise into the value of neighbouring real estate. "would lose considerable income, were the terminal must, realistically, be

JUDGE BREITEL, then, incorporates a social distribution of income generated by

For practical purposes, nevertheless, to sort out rights and responsibilities accorded the owner, but the making of a once

He is emphatic in an entitlement to receive a return created by social investment streams of income for

Breitel spells out a way and the distribution of possible to separate purposes of the litigation reach his verdict, which different grounds).

As far as Breitel was income to which it was society was receiving share to be claimed?

The answer, in the eyes of the rights of the individual, George, a 19th century treatise, *Progress and* question. George demands exclusively related to the Society's contribution precisely measured by

We will not seek to arrive at his conclusion, tries like the United States direction. Here, we confront confronting Judge

What would be the short answer is the competitive economy, and equipment in its

Additional revenue beneath the building; create, but which was millions of people in

An accountant would give a precise answer to his