No. 98-7209

SCHEDULED FOR ORAL ARGUMENT:
SEPTEMBER 14, 1999
IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

District Intown Properties Limited Partnership, *et al.,*
Plaintiffs-Appellants,
v.
The District of Columbia, *et al.,*
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

AMICUS CURIAE BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION AND D.C. PRESERVATION LEAGUE IN SUPPORT OF THE DISTRICT OF COLUMBIA AND AFFIRMANCE OF THE DISTRICT COURT

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STATEMENT OF INTERESTS OF AMICI CURIAE

The National Trust for Historic Preservation ("National Trust") and D.C. Preservation League ("DCPL") respectfully submit this brief amicus curiae and urge the Court to affirm the decision of the District Court (Oberdorfer, J.) in favor of the District of Columbia in this case.

The interests of the National Trust in this case are set forth in the motion for leave to file brief amicus curiae, which the Court granted on January 12, 1999. The interests of DCPL are set forth in the motion for leave to join the National Trust's *amicus* brief, filed herewith.

In brief, the National Trust was chartered by Congress in 1949 as a private nonprofit organization to facilitate public participation in the preservation of our nation's historic resources and to further the historic preservation policy of the United States. With the support of its 270,000 members nationwide, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government.

The National Trust has an interest in this case because of its interest in ensuring that the takings clause of the Fifth Amendment is interpreted, in accordance with the language of the clause and the framers' original intention, to respect the public's right to adopt and apply reasonable restrictions on the use of property, including laws that protect historic resources. The National Trust has frequently filed briefs amicus curiae in regulatory takings cases involving claims arising from regulatory protections for historic resources of national significance or involving potentially precedent-setting issues of law, including in a number of the U.S. Supreme's Court regulatory takings cases over the last two decades.(1)

DCPL has worked for nearly three decades to preserve, protect, and enhance the historic resources of the nation's capitol, promoting historic preservation through advocacy and education. Through a staff of 20 trustees, 10 operating committees, a network of volunteers, and committed membership, DCPL has helped rescue more than 100 of Washington's historic buildings, completed surveys of more than 22 neighborhoods and building types, and has initiated landmark designation of more than 50 buildings and historic districts.

The National Trust and DCPL share an interest in this case because Cathedral Mansions represents a building complex with substantial architectural and historical significance. As summarized by the District of Columbia Historic Preservation Review Board ("Review Board"), Cathedral Mansions is "sited imaginatively to provide the greatest possible integration of living space with well-landscaped open space;" and Cathedral Mansions "is a significant work of Harry Wardman, one of the most prolific and influential developers in the history of the city." The Review Board concluded that Cathedral Mansions met the requirements for historic designation under three separate criteria for listing in the D.C. Inventory of Historic Sites. Based on the significant threat posed by appellants' proposed townhouse development to the visual character of Cathedral Mansions (as illustrated by Figures 1 and 2 in the Appendix), the Board recommended, and the City affirmed, rejection of this development application.

Equally important in the view of the National Trust and DCPL, Cathedral Mansions occupies a key site on Connecticut Avenue, one of the most beautiful and historically significant avenues in this city and the nation. The intersection of Cathedral and Connecticut Avenues, including the grounds surrounding Cathedral Mansions South, represents a key visual element of Connecticut Avenue considered as a whole. As stated by the Review Board: "Cathedral Mansions is designed in the context of Connecticut Avenue and nearby parkland including the National Zoo and the Rock Creek and Klingle Valley ravines. It contributes significantly to the unique open space character of Connecticut Avenue in which single family and multi-family residences complement each other and are integrated and enhanced through a continuity of designed and natural landscape." As a result, the grounds of Cathedral Mansions South represent a valuable amenity not only for the owners and occupants of this building, but also for other property owners along Connecticut Avenue and for other citizens and visitors who use and enjoy the avenue. By the same token, the owners of Cathedral Mansions South benefit from the protected historic character and visual beauty of other private properties along Connecticut Avenue. (See Figure 3 in the Appendix, illustrating extensive pattern of historic district and landmark designations up and down Connecticut Avenue from Appellants' property.)

(1) *City of Monterey v. Del Monte Dunes at Monterey*, Ltd., 67 U.S.L.W. 4345 (May 25, 1999); *Suitum v. Tahoe Regional Planning Agency*,, 117 S. Ct. 1659 (1997); *Dolan v. City of Tigard*,, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*,, 505 U.S. 1003 (1992); *Yee v. City of Escondido*,, 503 U.S. 519 (1992); *Preseault v. Interstate Commerce Comm'n*,, 494 U.S. 1 (1990);*First English Evangelical Lutheran Church v. County of Los Angeles*,, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*,, 477 U.S. 340 (1986); *San Diego Gas & Elec. Co. v. City of San Diego*,, 450 U.S. 621 (1981); *Agins v. City of Tiburon*,, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

ARGUMENT

I. THE PROPERTY OWNERS IN THIS CASE RETAIN AN ECONOMICALLY BENEFICIAL USE OF THEIR PROPERTY, AND THEREFORE HAVE NOT ESTABLISHED A REGULATORY TAKING UNDER THE FIFTH AMENDMENT

Amici curiae National Trust and the DCPL agree with the District of Columbia that the property owners in this case, District Intown ("Intown" or "the property owners"), failed to demonstrate a taking, and that the judgment below in favor of the District of Columbia should therefore be affirmed. First, amici agree that Intown clearly failed to meet either test of the two-tiered takings

analysis applied by the District Court in this case. Second, amici respectfully submit that the two-tiered takings analysis used by the District Court (and the parties) is actually more generous to the property owners' position than current U.S. Supreme Court takings jurisprudence requires. It is the view of the amici that the District Court's analysis should have ended with its conclusion, in subpart II (B) of the court's opinion, that no taking has occurred because the property owners "retain 'economically viable use of [their] land.'" *District Intown Properties Limited Partnership v. District of Columbia*, 23 F. Supp. 2d 30, 36 (D.D.C. 1998), (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987)).

A. Intown Failed to Meet Either Test of the Two-Tiered Takings Analysis Used by the District Court. The District Court (as well as the parties) assumed that a two-tier type of takings analysis governs this case. According to this view of the law, first, the property owners were entitled to attempt to establish a regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Second, even if they were unsuccessful in that attempt, they were entitled to attempt to demonstrate a "partial" regulatory taking. Specifically, the District Court believed that an ostensible "partial" regulatory taking claim should be evaluated using a three-part analysis, derived from Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), focusing on (1) the "character" of the regulations at issue, (2) the "economic impact" of the regulation, and (3) the owner's "reasonable investment-backed expectations."

Even assuming a two-tier analysis actually governs this case, Intown failed to establish a taking. First, this case plainly does not involve the type of denial of all economically viable use at issue in Lucas. In that case the U.S. Supreme Court affirmed a finding of a taking based on trial court findings that the owner was prevented from making any economic use whatsoever of the property and the value of the property itself had been reduced to zero. Here, by contrast, applying the longstanding "parcel as a whole" rule, it is apparent that the owners have retained a highly valuable economic use for their property.

Second, the District Court was correct in concluding that, applying the three-part "partial" taking test, there was no taking in this case. With respect to the "character" of the government action, this case obviously involves a regulation of use rather than some type of government-mandated physical occupation; thus, this factor weighs against a finding of a taking. Second, the "economic impact" of the regulation is minimal, given that the property owners can continue their longtime, profitable use of Cathedral Mansions South as a rental property, and given the significant " reciprocal" benefits conferred on the property owners by historic district and landmark designation of other properties along Connecticut Avenue, as discussed in greater detail in section II.

Third, the landmark designation of these properties did not frustrate Intown's reasonable investment-backed expectations given that (a) Intown continues to profitably operate its apartment rental business as intended when it originally purchased the property almost 40 years ago, (b) Intown purchased the property subject to the longstanding requirements of the Shipstead-Luce Act of 1930, and (c) Intown continued to manage Cathedral Mansions South for at least a decade following enactment of the D.C. Historic Landmark and Historic District Protection Act. For these reasons alone, the judgment of the District Court should be affirmed.

B. Having Failed to Prove That They Have Been Denied the Economically Beneficial Use of Their Land, the Property Owners Are Not Entitled a Further Right to Prove a "Partial" Regulatory Taking.

Despite the fact that the property owners in this case have failed to establish a taking under the two-tier analysis utilized by the District Court, a fundamental issue presented here is whether the District Court was correct in presuming that takings doctrine includes such a two-tier analysis. More specifically, the question is whether a claimant who fails to prove a takings claim under Lucas (because he or she retains economically viable use of the subject property) should be entitled to a second "bite" of the takings apple under a distinct category of so-called "partial"

regulatory takings. It is the view of amici that, in the regulatory context presented by this case, the Supreme Court's takings jurisprudence establishes one basic standard for review of regulations based on their economic impact: that a regulation effects a taking if it eliminates all or essentially all of a property's economically beneficial use.

This understanding of the takings clause is supported by the language and original understanding of the takings clause itself. Jurists and scholars of virtually all ideological stripes are in agreement that the drafters of the Bill of Rights originally intended the takings clause to apply only to direct physical appropriations, and never intended the takings clause to apply to regulations under any circumstances. See, e.g., Lucas, 505 U.S. at 1028 n. 15 (Scalia, J.) ("early constitutional theorists did not believe the Takings Clause embraced regulations of property at all"). Professor John Hart, based on a comprehensive survey of land use regulatory practices in the colonial era, concluded that the framers consciously and purposefully drafted the takings clause to focus on direct appropriations on private property: "The Framers knew that land use regulation had served broad purposes in their time, and they evidently considered subjecting this sphere of government action to substantive constitutional review to be inappropriate." *"Colonial Land Use Law and its Significance for Modern Takings Doctrine,"* 109 Harvard Law Review 1252, 1292 (1996). See also Treanor, William Michael, *"The Original Understanding of the Takings Clause and the Political Process,"* 95 Columbia Law Review 782 (1995) (available evidence "clearly indicates that the Takings Clause was intended to apply only to physical takings, and the early case law interpreted it and its state counterparts as not extending to government regulations").

Notwithstanding this evidence concerning the founders' original intentions, the Supreme Court has, for many years, interpreted the takings clause to extend to certain regulations outside of the context of physical invasions. See, e.g., *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). But the Court has extended the takings clause to regulatory actions based on their economic impact only when those actions have such a dramatic impact that they are similar in character and effect to direct physical appropriations. See Lucas, 505 U.S. at 1015 -1016 (explaining that a finding of a taking is appropriate when a regulation denies an owner "all economically beneficial or productive use of land" because the "deprivation" is "from the landowner's point of view, the equivalent of a physical appropriation").

Consistent with the original intent of the takings clause, the Supreme Court has articulated the basic test for a regulatory taking in terms of whether the government has denied the owner all or substantially all economic use of property. As the Court said in Keystone, 480 U.S. at 470, a regulation effects a taking if it "denies an owner economically viable use of his land." See also *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance . . .denies an owner economically viable use of his land.").

The vast majority of lower federal and state courts have followed this standard. See, e.g., *Reahard v. Lee County*, 968 F.2d 1131, 1135 (11th Cir. 1992), cert. denied, 514 U.S. 1064 (1995) (overturning a finding of a taking where rezoning permitted construction of only one residence on 40 acres, observing that "the only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of his property"); *Texas Manufactured Housing Association, Inc. v. Nederland*, 101 F.3d 1095 (5th Cir. 1995) (no taking where no showing of deprivation of all beneficial use); *Midnight Sessions Ltd. v. City of Philadelphia*, 945 F.2d 667, 677 (3rd Cir. 1991), cert. denied, 503 U.S. 984 (1992) (no taking where court could not "conclude[] that the alleged diminution in the value of the properties deprived appellees of all economically viable use of them"); *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wisc. 1996) ("the rule emerging from opinions of our state courts and the United States Supreme Court is that a regulation must deny the owner all or substantially all practical use of a property in order to be considered a taking for which compensation is required"). But see *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed.Cir. 1994) (endorsing the "partial taking" theory).

Accordingly, the Supreme Court and lower courts have rejected Fifth Amendment challenges based on even significant "partial" reductions in the economic value of private property. See, e.g., Agins, 447 U.S. 255 (rejecting takings challenge to zoning restrictions which allegedly reduced property value by 85%); *Village of Euclid v. Ambler Co.*, 272 U.S. 365, 384 (1926) (75% reduction in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (92.5% reduction in value); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 286 (4th Cir. 1998) (rejecting takings challenge where regulation caused "only" 50% diminution in value, because "a regulatory deprivation that causes land to have 'less value' does not necessarily make it 'valueless'"); *Jengten v. United States*, 657 F.2d 1210 (Ct.Cl. 1981), cert denied 455 U.S. 1017 (1982) (rejecting takings challenge where regulation prohibited development on 75% of land); *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct.Cl. 1981), cert. denied, 455 U.S. 1017 (1982) (rejecting takings challenge where only one quarter of land could be developed). See generally Keystone, 480 U.S. at 470, 489 n.18 ""[T]he Court has repeatedly upheld regulations that destroy or adversely affect real property interests."); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (regulatory takings occur only in "extreme circumstances").

To the extent the District Court relied upon the Supreme Court's Penn Central decision to support application of a "partial" takings theory as the second tier of its analysis, that reliance is misplaced. As a preliminary matter, of course, the Supreme Court's conclusion in Penn Central-that the application of New York City's Landmarks Law to deny construction of an office tower in the air rights above Grand Central Terminal did not effect a regulatory taking-supports the conclusion in this case that there was no taking. While Justice Brennan's opinion covers much ground (it is, after all, the first major takings analysis presented by the Supreme Court in the 56 years following *Pennsylvania Coal v. Mahon*), its fundamental conclusion, in relevant part, rejects a takings claim similar to that asserted in the present case on grounds that the restrictions imposed by New York City's Landmarks Law "permit reasonable beneficial use of the landmark site . . . ." 438 U.S. at 138. Furthermore, the Court's analysis in Penn Central supports the narrow reading of the takings clause reflected in other Supreme Court decisions preceding and following this decision. See 438 U.S. at 130 (rejecting as "quite simply untenable" the argument that property owners "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").

While the Penn Central opinion notes a number of "factors" relevant to the Court's consideration of a takings claim, there is simply no basis for the District Court's conclusion that this multi-factor analysis forms the basis of a secondary "partial" takings tier. First, one of those factors-the character of the governmental action-essentially describes a separate category of takings that focuses on concerns other than economic impact. As the Court's opinion in Penn Central reveals, what the Court meant by "character of the governmental action" was whether the regulation effected some type of physical occupation of private property, or whether instead it simply regulated the use of private property. 438 U.S. at 124. Thus, in Penn Central, the Court made it clear that regulations effecting physical invasions are more likely to constitute takings (but, it should be noted, never suggested that landmarks laws fall into this category). In the present case, the District Court has turned what is set out in Penn Central as a general principle of takings law into one element of its three-factor "partial" takings test, which it mistakenly ascribes to Penn Central.

The other factors noted in the Penn Central decision-the economic impact of the regulation and the extent to which the regulation interferes with "investment-backed" expectations, were clearly intended to inform the concept that a taking may occur when a regulation bears such a severe economic burden that it cannot be sustained without compensation. Nothing in Penn Central, however, suggests that these factors were intended to have relevance other than to the question of whether the property owner in that case had been denied "reasonable beneficial use of the landmark site," 438 U.S. at 138, and nothing in the decision suggests that they were intended to

serve as an independent basis for a lesser "partial" takings standard, as set forth in the District Court's opinion in the present case.

Subsequent Supreme Court decisions confirm that Penn Central's reference to these two economic factors was not intended to (and has not been read to) lessen the high takings threshold consistently applied by the Court, whether articulated in terms of "denying an owner economically viable use of his land," Agins, 447 U.S. at 260; or "deny[ing] a landowner all use of his property," First English, 482 U.S. at 312; or "den[ying] all economically beneficial or productive use of land," Lucas, 505 U.S. at 1015. See also *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 67 U.S.L.W. 4345, 4355 (May 25, 1999) (affirming a finding of a regulatory taking where the trial court instructed the jury that: "For the purpose of a taking claim, you will find that the plaintiff has been denied all economically viable use of the property, if, as a result of the city's regulatory decision there remains no permissible or beneficial use for that property.").

Thus, as explained at length in the Brief of the District of Columbia, the concept of investment-backed expectations means that owners who purchase with notice of applicable restrictions are, in effect, estopped from challenging the restrictions as a taking. On the other hand, the Supreme Court has been clear in its recent decisions that a lack of advance notice of a particular restriction, i.e., the fact that the legislature has enacted new laws and regulations affecting property subsequent to the owner's purchase, is not itself a sufficient basis for a taking claim. If the law were otherwise, of course, legislatures would be effectively barred from passing new laws affecting existing owners of property. This obviously is not, and cannot be, the law. As Justice Scalia, speaking for the Court, affirmed in Lucas, 505 U.S. at 1027: "[T]he property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police power." See also *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 637 (1993) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) ("legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . even though the effect of the legislation is to impose a new duty or liability based on past acts")).

With respect to the more general economic impact factor, the Supreme Court has affirmed time and again that "mere diminution in value, no matter how severe, cannot effect a taking. See, e.g., Euclid, 272 U.S. at 384 (approximately 75% diminution in value); Hadacheck, 239 U.S. at 405 (92.5% diminution)." Concrete Pipe & Products, 508 U.S. at 645. Indeed, in Penn Central itself, the Court stated that "the 'taking' issue in [the context of land use regulations] is resolved by focusing on the uses the regulations permit," not the "diminution of property value, standing alone. . . ," 438 U.S. at 131 (citing the value diminutions noted supra in Euclid and Hadacheck). Putting these statements together, it is clear that economic impact, by itself, can only result in a taking if it results in the elimination of all or essentially all economically beneficial use of private property. Absent other special circumstances (such as a physical occupation), any lesser economic impact is simply not sufficient to establish a taking.

In sum, the three-factor analytic framework used by the District Court to provide Intown a second opportunity to prove a taking has no validity as a free-standing test for an alleged "partial" taking. Contrary to the assumption by the District Court, the standard that it describes as the Lucas test, rather than representing a separate category of takings analysis applied to use restrictions, represents the application of a single test for regulatory takings based on economic impact: Does a regulation eliminate all or essentially all of a property's economically beneficial use? As applied in this case, the answer clearly is no.

II. THE RECIPROCAL BENEFITS RESULTING FROM HISTORIC DISTRICT AND LANDMARK DESIGNATIONS ALONG CONNECTICUT AVENUE ALSO PRECLUDE A FINDING OF A TAKING IN THIS CASE.

Another consideration supporting the traditionally narrow scope of regulatory takings doctrine-and supporting rejection of the takings claim in this particular case-is the fact that the property owners profit from the reciprocal benefits conferred by the historic district and landmark designations of other private properties along Connecticut Avenue.

The District Court correctly observed that preservation of the grounds of Cathedral Mansions South contributes to the value of Intown's property as a whole, and that this contribution to the value of its property should be taken into account in the takings calculus. In addition, however, the protection of the grounds of Cathedral Mansions South is part of a larger pattern of historic district and landmark designations on Connecticut Avenue. As indicated on Figure 3 in the Appendix, virtually the entire length of Connecticut Avenue from M Street (below Dupont Circle) to Tilden Street (almost a mile north of the National Zoo and Intown's property), is either landmarked or included within a historic district. These restrictions guarantee that the character and beauty of Connecticut Avenue will be protected, helping to make this portion of the city an interesting, attractive, and desirable place to live.

Viewed in this larger context, the protection of Cathedral Mansions against alterations which would degrade the visual and architectural value of this property provides a significant amenity which supports and enhances the values of neighboring properties. At the same time, the value of Cathedral Mansions is enhanced by the historic restrictions which have been imposed on the development or alteration of neighboring properties, conferring distinct economic benefits on the owners of Cathedral Mansions. As a result of these "reciprocal" benefits the property values of all private property owners along Connecticut Avenue are protected and enhanced.

This type of reciprocal effect, which is widespread in the field of land use regulation, supports the conclusion that the takings clause does not protect against mere reductions in the value of private property or guarantee the profitability of a particular investment. Further, it helps explains why it is entirely "fair" to deny financial "compensation" to a landowner who benefits from restrictions imposed on adjacent property owners but who claims a "taking" as a result of having to comply with the restrictions themselves.

The Supreme Court has recognized that the existence of these kinds of "reciprocal" effects supports a narrow reading of the takings clause. Thus, the Court stated in Keystone, 480 U.S. at 490:

Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are properly treated as part of the burden of common citizenship.

Similarly, in Agins, the Court recognized that regulatory takings doctrine must take into account, not only the burdens imposed by regulatory actions, but the reciprocal benefits conferred by regulation. The Court refused in that case to consider the owner's takings challenge to an ordinance restricting development to one residential unit per five acres without also considering how the same regulation also might benefit the owner. The Agins Court said: "there is no indication that the appellants' 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police powers. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer." 447 U.S. at 262 (emphasis added).

This Court, also, has recognized that the existence of "reciprocal" benefits argues strongly against awarding compensation for alleged regulatory taking. As the Court stated in *Colorado Springs Production Credit Association v. Farm Credit Administration*, 967 F.2d 648, 654 (D.C. Cir. 1992) ("The notion of reciprocal benefit, or, in Justice Holmes' words, "average reciprocity of advantage," Pennsylvania Coal[], 260 U.S.[at] 415[], pervades the cases rejecting takings

challenges"); see also *Student Loan Marketing Association v. Riley*, 104 F.3d 397 (D.C. Cir. 1997) (rejecting takings challenge based in part on reciprocal benefits, observing that "while the courts must impose limits on the possible manipulation of benefits and burdens to prevent the unfair singling out that the takings clause is in part aimed to prevent, whatever mismatch exists here is beyond what the judiciary is 'institutionally fitted' to condemn.").

Absent recognition of these important reciprocal effects, regulatory takings claims would force taxpayers to indemnify owners for economic losses claimed to be due to regulatory restrictions without regard to the economic gains conferred on them by their neighbors' compliance with the same restrictions. It would, in effect, confer windfalls on owners by allowing them to demand financial compensation from the public as a result of regulatory restrictions while simultaneously allowing them to enjoy the benefit conferred on them as a result of the enforcement of the same regulations against their neighbors.

Further, ignoring the substantial gains conferred by "reciprocal benefits" would allow landowners, in a very real sense, to "take" public value. The value of Connecticut Avenue as a site for real estate investment, for example, is determined, to use the old real estate adage, by location, location, location. The high value of this site for real estate investment has been created in large part by significant private investments in attractive apartment buildings, hotels, and single family residences. In addition, major public investments in nearby parks and open spaces, notably Rock Creek Park and the National Zoo, as well as public roads and other facilities and services, also have contributed to the value of Connecticut Avenue as a site for investment. When a landowner, such as Intown, demands either compensation or the right to engage in development that would degrade the character of the neighborhood as a whole, he is seeking to "take" value which has been created in large measure by others and the public as a whole. Neither common sense nor basic fairness, much less the Constitution, support a claim for financial compensation in this circumstance.

Finally, substantial economic research documents the validity of the common sense conclusion that landowners are both burdened and benefitted by land use regulations. The positive effects can be of two types. First, regulations often have positive effects on property values because regulations protect services and amenities that directly benefit property owners, including owners who are themselves subject to regulation. Thus, in this case, restrictions imposed on other historic properties up and down Connecticut Avenue benefit Intown by preserving the amenity value of Connecticut Avenue as a whole, thereby increasing the desirability of the Woodley Park section of Connecticut Avenue as an area in which to rent apartments. Second, regulations typically have scarcity effects, limiting owners' ability to use their property, but increasing the value of owners' permitted property uses. In this case, historic restrictions along Connecticut Avenue obviously limit the capacity of Intown and other owners to build new housing units to meet demand, but those restrictions thereby increase the value of already existing apartment buildings, such as the building owned by Intown.

The "reciprocal" economic benefits of regulation have been documented in a number of empirical studies. To cite just a few:

- A study of local land-use controls on housing prices in the San Francisco Bay area concluded that the market value of houses in growth-controlled areas was from 17 to 38 percent higher than the market value of houses in uncontrolled areas.
- A similar study evaluated the effect of land use restrictions on housing prices along the shore of Chesapeake Bay, focusing on critical area limitations on residential and commercial development. These limitations included channeling new development into already developed areas, and requiring new developments to meet landscape requirements, setback restrictions, surface restrictions, and the like. The authors concluded that in one county subject to the restrictions prices of shore front houses increased by 46-62 percent compared with the control area as a result of the restrictions.

Houses without water frontage also increased compared to the control area, by a margin of 14-27 percent, as did houses near but not in the designated critical area, by a margin of 13-21 percent.

- Another study focusing on the Chesapeake Bay designated critical areas looking at the effects of regulation on the value of both developed and vacant properties. In the case of developed residential parcels, there were statistically significant differences in property values in the critical areas as compared to control areas in the years following passage of the law. In the case of vacant parcels, the restrictions increased property values in one county, as compared with the control areas, by 33 percent in 1984, 53 percent in 1985, and 39 percent in 1986.
- A comprehensive study of the effect of land use restrictions in the New Jersey Pinelands, an area of approximately one million acres protected by the 1979 New Jersey Pinelands Protection Act and its Comprehensive Management Plan, reached similar results. The Plan established management districts for Preservation, Forest, Agricultural, Rural Development, Regional Growth and Pineland Villages and Towns, which were subject to a different set of restrictions. The restrictions were most limiting in the Preservation District, but applied in varying degrees in the other districts as well. The study concluded that, when compared with unregulated control areas, prices in regulated districts exceeded those in the control areas to a statistically significant degree in five out of six years.
- Finally, in the specific context of historic preservation regulations, economic studies have demonstrated that these restrictions frequently enhance property values. A 1991 study by Schaeffer and Millerick showed that in a Chicago neighborhood Historic District designation was highly beneficial to property values, with average housing values properties in the distrcit increasing by from 29 to 38 percent. Areas adjacent to the district similarly derived positive benefits, increasing in value by 29 percent. Numerous other economic studies by the National Trust and others show similar results.

In sum, based on both ordinary common sense and sound economic research, the owners of Cathedral Mansions South have benefitted significantly from historic restrictions on the use of neighboring properties up and down Connecticut Avenue. This type of "reciprocal" benefit from government regulation is important and widespread and supports an appropriately narrow reading of the takings clause. For this additional reason, the District Court properly concluded that there was no taking in this case.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the District Court.

Respectfully submitted,

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CERTIFICATE OF LENGTH

Pursuant to Rule 32(a)(7) of the Rules of this Court, the National Trust for Historic Preservation and the D.C. Preservation League hereby submit this certificate of length. The submitted brief amicus curiae contains no more than the permitted 7,000 words.