STATE OF MICHIGAN

COURT OF APPEALS

CITY OF YPSILANTI,

Plaintiff-Counterdefendant-Appellee,

v

FIRST PRESBYTERIAN CHURCH,

Defendant-Counterplaintiff-Appellant,

and

JANE SCHMIEDEKE, f/k/a JANE BIRD, YPSILANTI HERITAGE FOUNDATION, YPSILANTI HISTORICAL COMMISSION, and FRIENDS OF THE TOWNER HOUSE CHILDREN'S MUSEUM,

Counterdefendants-Appellees.

UNPUBLISHED

No. 191379
Washtenaw Circuit Court
LC No. 94-002253 CZ

Before: MacKenzie, P.J., and Sawyer and Neff, JJ.

MacKenzie, P.J. (concurring).

I am also of the opinion that this case should be treated as a taking and defendant should prevail. Unfortunately, I must likewise conclude that *Penn Central Transportation Co v City of New York*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978), precludes that result.

As one commentator recently observed:

> …[T]he United States Supreme Court, in its 1978 decision in *Penn Central Transportation Co v City of New York,* conclusively established that state and local governments may enact regulations which further the goals of historic preservation. Over the past fifteen years, the effect of this decision has been to prevent private individuals who own historically designated properties from successfully challenging the

designations as takings under the federal Constitution or the applicable state constitution. In this way, historic designations in the United

> States have become immune from constitutional takings challenges. [Cavarello, *From Penn Central to United Artists' I and II: The rise to immunity of historic preservation designation from successful takings challenges*, 22 B C Envtl Aff L Rev 593, 593-594 (1995).]

In *Penn Central*, the Court stated that "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.'" 438 US 104, 123, quoting *United States v Central Eureka Mining Co*, 357 US 155, 168; 78 S Ct 1097; 2 L Ed 2d 1228 (1958). In my opinion, the circumstances of this case are such that the city's actions constitute a taking, and the church should be compensated by the city. Defendant owned the Towner House property for six years before the city designated it as part of an historic district. Before the designation, the church planned to demolish the building and use the property for parking purposes. Ironically, it could have then done so, but it instead acceded to the wishes of preservationists who were, as it turns out, unable or unwilling to move the building. After the designation, the necessary permits for the planned demolition were not only denied, but the church was required by the city to expend considerable amounts of scarce money to repair the building – a structure for which it had no particular use.

In short, the city has forced the church to spend significant funds to repair a building it does not want. It seems to me that, as stated in *Powderly v Erickson*, 301 NW2d 324, 326 (Minn, 1981), "[t]o permanently deny an owner the beneficial use of his property except by requiring him to make a substantial investment in repairs and renovation, over his objection, would constitute a 'taking' for which the owner has a right to compensation."

Nevertheless, as I read *Penn Central* and its progeny, the city's objective of preserving structures and areas of historic significance is "an entirely permissible governmental goal." *Penn Central*, 438 US 104, 129, and the diminution in property value caused by the historic designation, does not establish a taking, 438 US 104, 131. Accordingly, I must reluctantly concur with the lead opinion and conclude that the church has not established a taking.

/s/ Barbara B. MacKenzie